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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERMS, 1881, 1882, 1883, IN

106, 107, 108, 109 U. S.

BOOK 27,

LAWYERS' EDITION,

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

BY

STEPHEN K. WILLIAMS, LLD.

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. MORRISON R. WAITE.

ASSOCIATE JUSTICE,

HON. SAMUEL F. MILLER,
HON. STEPHEN J. FIELD,
HON. JOSEPH P. BRADLEY,
HON. JOHN M. HARLAN,
HON. WILLIAM B. WOODS,
HON. STANLEY MATTHEWS,
HON. HORACE GRAY,
HON. SAMUEL BLATCHFORD.

ATTORNEY-GENERAL,

HON. BENJAMIN HARRIS BREWSTER.

SOLICITOR-GENERAL,

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JAMES H. MCKENNEY, ESQ.

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J. C. BANCROFT DAVIS, ESQ.

MARSHAL,

JOHN G. NICOLAY, ESQ.

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ALLOTMENTS, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

AS THEY STOOD DURING THE TERMS OF 1881–3, TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND TERMS OF SERVICE, RESPECTIVELY.

(Allotment Apr. 3, 1866.)

NAMES OF JUSTICES, AND WHENCE APPOINTED.	BY WHOM APPOINTED.	CIRCUITS. 1881, 1883.	COMMISSIONED.	SWORN IN.
ASSOCIATE JJ. HORACE GRAY, Massachusetts.	President ARTHUR.	FIRST. ME., N. H., MASS., RAODE ISLAND.	1881. (Dec. 20.)	1882. (Jan. 9.)
SAMUEL BLATCHFORD, New York.	President ARTHUR.	SECOND. VERMONT, CONN., NEW YORK.	1882. (Mar. 22.)	1882. (April 3.)
JOSEPH P. BRADLEY, New Jersey.	President GRANT.	THIRD. NEW JERSEY, PENN., DEL.	1870. (Mar. 21.)	1870. (Mar. 23.)
CHIEF JUSTICE MORRISON R. WAITE, Ohio.	President GRANT.	FOURTH. MD., VA., N. C., W. VV., S. C.	1874. (Jan. 21.)	1874. (Mar. 4.)
ASSOCIATE JJ. WILLIAM B. WOODS, Georgia.	President HAYES.	FIFTH. GA., ALA., FLA., MISS., LA., TEX.	1880. (Dec. 21.)	1881. (Jan. 5.)
STANLEY MATTHEWS, Ohio.	President GARFIELD.	SIXTH. KY., TENN., OHIO, MICH.	1881. (May 12.)	1881. (May 17.)
JOHN M. HARLAN, Kentucky.	President HAYES.	SEVENTH. IND., ILL., WIS.	1877. (Nov. 29.)	1877. (Dec. 10.)
SAMUEL F. MILLER, Iowa.	President LINCOLN.	EIGHTH. MINN., IOWA, MO., KAN., ARK., NEB., COL.	1862. (July 16.)	1862. (Dec. 1.)
STEPHEN J. FIELD, California.	President LINCOLN.	NINTH. CALIFORNIA, OREGON, NEVADA.	1863. (Mar. 10.)	1863. (Dec. 7.)

AMENDMENT.

RULE 33.

Supreme Court of the United States.

OCTOBER TERM, 1885.

ORDERED BY THE COURT, That the Thirty-third Rule of this Court be amended so as to read as follows:

33

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this Court, on writ of error or appeal, shall be placed in the custody of the marshal of this Court at least one month before the case is heard or submitted.

2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the Court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

Promulgated November 23, 1885.

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

OCTOBER TERMS, 1881, 1882.

Vol. 106.

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERMS, 1881, 1882.

CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY AND JAMES W. ELWELL, *Appts.*,

v.

WILLIAM R. FOSDICK AND JAMES D. FISH.

CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY, JAMES W. ELWELL AND R. BIDDLE ROBERTS, *Appts.*,

v.

WILLIAM R. FOSDICK, JAMES D. FISH, FREDERICK W. HUIDEKOPER, THOMAS W. SHANNON AND JOHN M. DENNISON.

(See S. C., 16 Otto, 47-60.)

Foreclosure of railroad mortgage—default of interest—material error—right to redeem—when entire debt becomes due—payment of interest—request of bondholders.

1. Where by the terms of a railroad mortgage, the mortgagor's right of possession terminates upon a default in the payment of interest on any of the bonds, the trustees, or on their failure to do so, any bondholder, on non-payment of any installment of interest on any bond may file a bill for the foreclosure of the mortgage and sale of the mortgaged property.

2. But unless the mortgage expressly stipulates that on the failure to pay interest the entire principal sum shall be due, the complainant has a right only to a decree which will ascertain the sum so due and give the company a reasonable time to pay it; and if the company shall pay the sum found due in the decree, no further proceeding can be had until another default of interest or of the principal.

3. The finding of the amount due, for non-payment of which, according to the terms of the decree, the mortgaged property is ordered to be sold, is the foundation of the right of the mortgagee further to proceed, and a substantial error in that finding will on appeal, vitiate all subsequent proceedings.

4. The right to redeem is a favorite equity, and will not be taken away, except upon a strict compliance with the steps necessary to devest it.

5. Where, by the terms of the mortgage, the entire debt does not become absolutely due, on the default to pay interest, except at the election of the trustees, as declared and notified by them to the mortgagor, the right to foreclose for the whole debt must be established by such declaration and notice. The default to pay interest alone is not sufficient.

6. The right of the mortgagee in such case, to redeem and thus prevent the sale, is preserved, on payment, not of the unmatured principle sum of the debt, but merely of the interest then actually due and in arrears.

7. A condition in a mortgage that the trustees, "upon the written request of the holders of a majority of the said bonds then outstanding shall proceed to collect it," makes it necessary to prove that the bill was filed, to foreclose for the whole debt, upon the written request of the holders of a majority of the bonds then outstanding.

[Nos. 83, 178.]

Argued Dec. 8, 9, 1881. Decided Mar. 6, 1882.

[48] APPEALS from the Circuit Court of the United States for the Northern District of Illinois.

The history and facts of the case fully appear in the opinion of the court. See, also, the opinion of this court on granting a rehearing, *post*, 59, and the opinion on the rehearing, *post*, 64.

Messrs. **E. Walker** and *R. Biddle Roberts*, for appellants.

Messrs. **C. B. Lawrence, Henry Crawford** and *J. D. Campbell*, for appellees.

Mr. **Melville W. Fuller**, for Fosdick and Fish, trustees, appellees.

Mr. Justice **Matthews** delivered the opinion of the court:

These appeals bring into review decrees in the same suit. The bill was filed by Fosdick and Fish, as mortgagees in trust for holders of bonds, for the foreclosure of a mortgage given by the Chicago, Danville and Vincennes Railroad Com-

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NOTE.—*Mortgage; effect of agreement in, that all shall become due on failure to pay any part.*

Parties to a mortgage may contract that the whole amount shall become due upon failure to pay any installment. Noell v. Graves, 68 Mo., 549; Whitcher v. Webb, 44 Cal., 127; Ottawa, etc., Road Co. v. Murray, 15 Ill., 336; Cassidy v. Caton, 47 Iowa, 22; Voorhis v. Murphy, 36 N. J. Eq., 434; Ackerson v. Lodi Br. R. R. Co., 31 N. J. Eq., 43; Beisel v. Artman, 19 Neb., 151.

A stipulation in the mortgage that upon failure to pay the interest promptly the principal shall fall due is valid. Chic., etc., R. R. Co. v. Fosdick, *supra*; Ferris v. Ferris, 26 Barb., 29; Rubens v. Prindle, 44 Barb., 336; Jester v. Stirling, 25 Hun, 344; Crane v. Ward, Clarke, Ch., 362; James v. Thomas 5 B. & Ad., 40.

An agreement in the mortgage that, upon a failure to pay taxes upon the mortgaged property, the debt secured by it shall immediately become due and payable is valid. Bldg. Asso. v. Kratz, 55 Md., 304; Stanclift v. Norton, 11 Kan., 218; Harrington v. Christie, 47 Iowa., 319; O'Connor v. Shipman, 48 How. Pr., 128.

The court will give effect to such agreements in the mortgage. O'Connor v. Shipman, 48 How. Pr., 128; Hosie v. Gray, 71 Pa. St., 198; Hale v. Gouver-

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[49] pany upon its railroad, and a sale of the mortgaged premises. A decree in accordance with the prayer of the bill was rendered, and under it a sale was had and confirmed by the court. From these decrees, respectively, the present appeals are prosecuted.

The bonds secured by the mortgage in question were dated March 10, 1869, amounted to $2,500,000 in all, and were made payable on April 1, 1909, with interest at the rate of seven per cent per annum, payable semi-annually on the first day of April and October of each year, on the delivery of annexed interest warrants in the City of New York, at such place as might be designated by the Railroad Company, by advertisement published in said city.

The mortgage bears even date with the bonds, and after reciting the resolutions of the board of directors, authorizing the issue of the bonds and the execution of the mortgage, conveys to Fosdick and Fish, as trustees, and to their successors and assigns, the railroad of the Company, extending from its terminus, in Chicago, southerly through certain named counties to Danville, and thence southeasterly to a point on the state line of Indiana, connecting at that point with the Evansville, Terre Haute and Chicago Railroad, being in length about one hundred and fifty miles, "Including all the property between said terminal points, which said party of the first part now has and possesses, or may hereafter acquire," etc.

The conditions and trusts, upon which the conveyance is made, are expressed in a series of articles, nine in number, of which it is important to notice only the following:

The 5th article provides, in substance, that, in case default shall be made in the payment of any interest, or of the principal of any of said bonds, without the consent of the holder, the Railroad Company shall, within six months thereafter, the same default still continuing, on demand of the trustees, surrender to them possession of the road and mortgaged property; the trustees operating the same shall apply the net profits and income to the payment of the interest so in default until such default shall have been satisfied, when the mortgaged premises shall be surrendered to the mortgagor; but it is provided that no such demand for possession shall be made by the trustees until they shall have been required to take such possession by the holders of at least one half of all of the said [50] issue of bonds then unpaid and outstanding.

The 6th article provides further, that, in case default shall be made as aforesaid and shall continue as aforesaid, it shall be lawful for the trustees, after entry into possession, taken as above authorized, or other entry, or without entry, to sell and dispose of, to the highest bidder, the mortgaged premises, as an entirety, at public auction, in Chicago, at such time as they may appoint, first having demanded of the mortgagor payment of all money then in default, and having given sixty days' notice of the time and place of sale, by advertisement, as specified; and to convey the same, when sold, to the purchaser, on payment of the purchase money, in fee simple, which conveyance, it is declared, shall be a perpetual bar, in law and equity, against the title of the mortgagor, or any other person claiming under it. The net proceeds of such sale are to be applied by the trustees to the payment of the interest on the bonds then outstanding, *pro rata*, until all such interest shall be paid, and afterwards to the payment of the principal, and any surplus, to the mortgagor; the payments to be made on the bonds, whether the same shall then have become due or not.

By the 7th article, it is provided that, at any sale of the mortgaged premises, made under the power contained in the deed or by judicial authority, the trustees may become purchasers of the same in behalf of the bondholders, at a price, in case the sale is of the whole property as an entirety, not exceeding the whole amount of said bonds and interest then outstanding.

The 8th article is as follows:

"8th. If default be made by the party of the first part in the payment of any half year's interest on any of said bonds, and the warrant or coupon for such interest shall have been presented, and its payment demanded, and such default shall have continued six months after such demand, without the consent of the holder of such coupon or bond; then and thereupon, the principal of all of the said bonds hereby secured shall be and become immediately due and payable, anything in such bonds to the contrary notwithstanding; and the said party of the second part may so declare the same, and notify the party of the first part thereof, and upon the written request of the holders of a majority of [51] the said bonds then outstanding, shall proceed to collect both principal and interest of all such bonds outstanding, by foreclosure and sale of said property, or otherwise, as herein provided."

It is averred in the amended bill of Fosdick and Fish, that all the bonds described in the mortgage had been issued and were outstanding.

It is also alleged that on March 4, 1872, the Chicago, Danville and Vincennes Railroad Company became consolidated into one Corporation, by the same name, with the Rossville and Indiana Railroad Company, and on March 9, 1872, a further consolidation was effected, by the same name, with the Western Railroad Company, an Indiana corporation, whereby the consolidated Company was empowered to build and operate a railroad, from the state line in Warren County, to Brazil, in Indiana, and that on March 12, 1872, the consolidated Company, to

neur, 4 Edw. Ch., 207; Magruder v. Eggleston, 41 Miss., 284; Hunt v. Harding, 11 Ind., 245; Mooray v. Leckie, 42 Md., 474; Stillwell v. Adams, 29 Ark., 346; Savannah, etc., R. R. Co. v. Lancaster, 62 Ala., 555.

Where a mortgage authorized the mortgagee upon non-payment of interest for a certain number of days after it became due to declare at his option the whole mortgage due, and the mortgagee exercised his option by declaring the whole due, he cannot afterwards be compelled to accept the interest and waive the stipulation. Malcolm v. Allen, 49 N. Y., 448; Ferris v. Ferris, 28 Barb., 29; Rubens v. Prindle, 44 Barb., 336; Wilson v. Bird, 26 N. J. Eq., 362; Bennett v. Stevenson, 53 N. Y., 508.

Bringing proceedings to foreclose for the full amount is a sufficient election. Kramer v. Rebman, 9 Iowa, 114; Hartley v. Tatham, 2 Abb. Ct. App. Dec., 383.

It has been held, in case of an election being given to the mortgagee to declare all the mortgage due upon default in the payment of an installment, that the mortgagee must give notice of that option before suing for the whole. Basse v. Gallegger, 7 Wis., 442.

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raise means wherewith to construct its Indiana Division, issued its bonds to the amount of $1,500,000, bearing interest at the rate of 7 per cent per annum, and payable forty years after date; to secure which, on the same day, it executed a mortgage to Fosdick and Fish, the complainants, covering its Indiana Division, and a branch road extending from a point three miles south from Covington to the Village of Newburg, being about 80 miles in all. All the bonds secured by this mortgage were issued.

It is further alleged, that, as further security for both these issues of bonds, the Railroad Company, on April, 24, 1872, executed another mortgage to the complainants, conveying the Indiana Division as security for the first issue of bonds on the Illinois Division, and conveying the Illinois Division as security for the bonds issued originally on the Indiana Division. The Railroad Company made a subsequent consolidation on May 6, 1872, under the same name, with the Attica and Terre Haute Railroad Company.

The road as built in Illinois, extends from Dalton about 20 miles south of Chicago to Danville, about 108 miles, with a branch from Bismarck in Vermillion County to the east line of the State of Illinois, about seven miles. It obtains an entrance into Chicago over the roads of other companies. The Company has constructed in Indiana, its line, from a point where [52] the Bismarck branch intersects the state line, a distance of 18 miles, and has done a large proportion of the work required to carry its road to Brazil.

It is further alleged that the Railroad Company paid all coupons on both classes of bonds, maturing on and prior to April 1, 1873, but that "None of the coupons maturing since that time, or any part thereof, have ever been paid, but the said Company, though often requested, has never paid the same, but so to do has made default."

Shortly after the first default on October 1, 1873, to wit: on Nov. 11, 1873, the Railroad Company issued a circular to the holders of its bonds, proposing to fund the coupons maturing from October 1, 1873, to April 1, 1875, in convertible 7 per cent bonds, to be issued for that purpose the coupons to be deposited with Fosdick, one of the complainants, as a trustee, to be held by him until October 1, 1876, when they were to be canceled; but in case of non-payment of any coupons becoming due up to October 1, 1876, the coupons deposited with the trustee were to be returned to the original owners, and the second mortgage or convertible bonds surrendered to the Company.

In response to this proposition, coupons to a considerable amount were deposited with the trustee and convertible bonds received in exchange.

Soon after on November 20, 1873, another proposition was submitted to the bondholders, to exchange these four coupons for certificates of indebtedness payable in five years from February 1, 1874, with interest payable semi-annually, the coupons to be held by the trustee until after that date, when they were to be canceled; but in case of non-payment of the interest or principal of the certificates, or of the coupons on the first mortgage bonds, between October 1, 1875, and February 1, 1879, both inclusive, then the coupons were to be returned by the trustee to their owners, upon surrender of their certificates, with their original rights unimpaired.

It is alleged in the bill, that the holders of $2,801,000 of both classes of bonds accepted one or the other of these propositions and deposited their coupons accordingly.

To secure the convertible bonds referred to in the first proposition, a mortgage was executed by the Company, of which James W. El- [53] well was trustee, to the amount of $1,000,000, payable with interest semi-annually at the rate of 7 per cent per annum, on February 1, 1893, covering the entire line and both divisions of the railroad. It is alleged in the bill that all these bonds, except about $45,000, have been issued.

It is charged in the bill that the Railroad Company failed to pay all the coupons upon the certificates of indebtedness due February 22, 1875, and that it has not paid any that fell due August 1, 1875. It is also charged that the Company has never paid any of the coupons upon any of the $4,000,000 of bonds, which were not funded and which matured subsequent to October 1, 1873, amounting to $1,199,000 and that the coupons thereon are overdue and remain unpaid, the owners thereof never having consented to such default; and it is alleged that the Company is wholly insolvent.

It is further shown in the bill that on June 12, 1875, the Railroad Company made a further issue of bonds to the amount of $1,000,000, due January 12, 1877, and to secure the same executed a chattel mortgage to R. Biddle Roberts, upon its rolling stock, engines, cars, tools and equipment; but it is charged that the same was not executed, acknowledged, and recorded as required by law and is, therefore, null and void; but that, if valid, it is subject to each of the three mortgages of prior date. About $936,000 of these bonds, it is averred, are held as collateral to debts due by the Company, the remainder not having been issued.

It is claimed in the bill, also, that by reason of its insolvency, the Railroad Company will not be able to pay the certificates of indebtedness issued by it, or the interest thereon, and that, in consequence of its failure to pay the interest thereon already accrued, the owners of the unpaid coupons of the $4,000,000 of bonds are entitled to rescind the funding arrangement and to demand and enforce payment of the coupons funded as aforesaid.

It is further alleged that, "By reason of the default of said Company in the payment of the coupons due October 1, 1873, and subsequent thereto, which have never been funded, the principal of all of the said bonds has, by the terms and conditions of the mortgage securing the same, become due and payable; and all of the said Illinois Division bonds and of the said Indiana Division bonds were, by the terms and conditions of the mortgage securing the same, [54] and in consequence of the defaults aforesaid, due and payable prior to the commencement of this suit. Your orators further allege that, of the said Illinois Division bonds, $698,000 thereof have never been funded by the holders thereof, and the holders thereof have never in any way consented to the continuance of the default in the payment of interest thereon. Your or-

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ators allege that they have been requested by the holders of a majority of said Illinois Division, and also by the holders of a large number of the said Indiana bonds, to proceed to collect the principal and interest of said bonds by foreclosure and sale of all of the railroad, franchises, property and appurtenances of said Company within the State of Illinois."

It is also alleged that the Indiana Division of the road is wholly insufficient to secure the payment of the Indiana Division bonds, and that, while the Illinois Division is more than sufficient to secure the payment of the Illinois Division bonds in full, it is not sufficient in addition to pay in full the whole of the Indiana Division bonds.

The original bill was filed February 27, 1875, and made no party defendant except the Railroad Company. It contained the following averments, which are not found in the amended bill:

"Your orators further show to Your Honors that they have been required by the holders of more than one half of the twenty-five hundred bonds to demand possession of the said Railroad property, franchises and appurtenances of and from the said Railroad Company, and have made such demand in pursuance of said requirement, but that said Railroad Company has not delivered the possession thereof to your orators, but so to do have wholly neglected and refused.

Your orators further show unto Your Honors that they are informed and believe and, therefore, charge the fact to be, that at least ninety per cent of the said coupons which matured upon said bonds on the first day of October, 1873, have been duly presented for payment to the said Railroad Company, and payment thereof demanded from said Company, and that the same have never been paid, nor any part thereof; and that the holders of six hundred and ninety-eight of said bonds have never in any way consented to the continuance of said default; and that, in consequence of the continuance of said default, without the consent of said holders of said six hundred and ninety-eight bonds, the principal and interest of all of the said bonds have become due and payable, and that your orators, as trustees as aforesaid, under and by virtue of the provisions of said mortgage, and the authority therein conferred upon them, have declared the principal of all of said bonds to be due and payable, and have notified the said Railroad Company thereof."

[55]

On May 17, 1875, James W. Elwell, acting trustee in the mortgage of December 16, 1872, appeared and filed a cross-bill, setting out the terms of the mortgage, the issue of the bonds secured thereby, and alleging that, while the interest upon about $160,000 of the bonds had been paid by the Company, that upon the remainder was wholly unpaid. The cross-bill proceeds to set out the particulars of the agreements alleged to have been entered into between the Railroad Company and the holders of its first mortgage bonds, and continues with the following averments:

"And your orator, therefore, avers that said Corporation is not in default in the payment of interest upon its said first mortgage bonds to the amount of $1,802,000, but on the contrary your orator avers that said Company has adjusted and settled with the holders of said bonds to the amount as above stated, and received an extension of payment of all such interest coupons now past due and that will mature prior to the first day of October, 1875.

Your orator states that said corporation has paid to the holders of said certificates of indebtedness all interest coupons attached to said certificates as the same matured, and in accordance with the terms thereof, which had been presented before the appointment of the receiver, as hereinafter stated.

And your orator represents, upon information and belief, that the holders of the balance of said issue of twenty-five hundred bonds have acquiesced in said extension of payment of interest and excused such default, and have not demanded the payment of their interest coupons nor attempted to enforce the collection of the same.

And your orator further states that, notwithstanding said agreement of the holders of said first mortgage bonds to extend the payment of said interest warrants as hereinbefore stated, and the payment of the interest at maturity by said Company upon said certificates of indebtedness, yet your orator is informed and believes and so charges the fact to be, that, by reason of divers persons claiming and pretending to be in the interest of a part of said first mortgage bondholders combining and confederating to wrong and injure your orator and the holders of said second or convertible mortgage bonds and other creditors of said Corporation, said Company was, by the action of the Circuit Court of Will County, in said State of Illinois, on the 22d day of February last past, wrongfully and unlawfully dispossessed of all its property so conveyed to your orator by said deed of trust; that all of said property, together with the rights, privileges and franchises of said Company, were on said 22d day of February wrongfully and fraudulently taken from the custody and control of said Company, and without the knowledge or consent of said Corporation, your orator, or of the defendants herein, placed in the charge and under the custody of strangers to said Company, and to each of said deeds of trust; that said parties still wrongfully retain the possession of said property and control the revenue and income thereof, thereby preventing said Company and your orator from providing funds for the payment of the interest warrants to mature upon the bonds secured by said trust-deed so made to your orator, thereby endangering such property and materially depreciating the value of such securities.

[56]

Your orator further states that he is advised and believes, and charges the fact to be, that the property conveyed to the defendants, Fosdick and Fish, by the trust-deed so made to them, greatly exceeds in value the amount of bonds so issued under their said deed of trust; and that the net income or revenue derived from a proper and economical use of said property is and will continue to be more than sufficient to pay all of the interest warrants as they may become due and payable on all the bonds issued under the said deed of trust.

And your orator further states, upon information and belief, that certain holders of bonds issued under the deed of trust so made to the defendants, Fosdick and Fish, trustees as aforesaid, whose names your orator will furnish if

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required by this honorable court, have resolved and determined to demand and require of them that they shall without delay declare the principal of all of their said bonds presently due and payable, and that they shall prosecute said action to a speedy decree of foreclosure of said trust mortgage, and shall enforce sale of all the property and franchises of said Railroad Company under said decree, thereby rendering the security of the bonds issued under the deed to your orator utterly valueless.

And your orator avers that such action will be grossly unjust and inequitable towards the *cestuis que trust* of your orator and other creditors of said Company, especially as about eighty per cent of all of said bondholders have extended the payment of their said interest warrants as hereinbefore stated, and waived and excused the default of said Company in the payment of said interest.

And your orator further represents, upon information and belief, that none of the holders of the bonds issued under the said trust-deed executed to the defendants, except a very inconsiderable number thereof, have presented to and demanded of said Railroad Company payment of any of the past due interest warrants or coupons of said bonds, as required by the 8th article or condition of said trust-deed and, therefore, your orator says that the said trustees, Fosdick and Fish, have no authority under said trust-deed to proceed to collect the principal of said bonds by foreclosure and sale or otherwise."

The amended bill of Fosdick and Fish, of which an abstract has already been given, was filed September 14, 1875. Its prayer for relief is, that the said Chicago, Danville and Vincennes Railroad Company, and the said James W. Elwell, whose appearance has already been entered in this cause as parties defendant thereto, may be required to answer this, your orators', amended bill, but without oath, which is hereby expressly waived, and that the said R. Biddle Roberts may be made party defendant hereto, and summoned to answer this, your orators', bill, but without oath, which is hereby expressly waived; and that the receiver heretofore appointed, upon the prayer of the original bill in this cause, may still hold the said railroad, its equipment and appurtenances, and operate the same under the order and direction of this [58] honorable court; and that an account be taken of the amount due by the said Railroad Company upon the said Illinois Division bonds, and upon the said Indiana Division bonds separately, and that the said Railroad Company be ordered to pay the amount so found due upon said bonds, severally, within a short time, to be limited by this honorable court, and that upon default thereof the said Illinois Division of the said railroad, together with all of the franchises, equipment and appurtenances thereof, may be sold by the master in chancery of this court, for the payment, first, of the said twenty-five hundred (2,500) Illinois Division bonds; and, secondly, of the fifteen hundred (1,500) Indiana Division bonds, which are the first and second liens upon the said Illinois Division of said railroad, its equipments, franchise and property, as hereinbefore set forth, or for such other and further relief as to Your Honors shall seem meet, and to equity shall appertain."

On October 23, 1875, the Chicago, Danville and Vincennes Railroad Company filed a demurrer to so much of the amended bill of Fosdick and Fish as charges that it will be impossible for said Company to fulfill the conditions of the funding agreements, and that the holders of said certificates have the right to rescind said agreements; and to so much of said amended bill as charges that the principal of said bonds has become due and payable.

On the same day it also filed an answer, containing, among others, the following averments:

"Said respondent says, that on the 22d day of February, A. D. 1875, one Stephen Osgood, without any notice whatever to this respondent, upon his *ex parte* application to the Judge of the Circuit Court of Will County, in the said State of Illinois, wrongfully and fraudulently procured the appointment of receivers of all the property, assets and income of the said respondent within the State of Illinois, and that such receivers forcibly took possession of the offices and all the property of said respondent on said 22d day of February, and by the aid of writs of assistance and other process issued by said court, or the Judge thereof, held the possession of all said property of this respondent, its earnings and income, until the first day of June, 1875, at which time said receivers were removed by the order of this honorable court, and a receiver of all such property appointed under the [59] prayer of the complainants in the said original bill of complaint contained.

And this respondent says, that on said 22d day of February it was not in default in the payment of any of said certificate warrants that matured February first, 1875; that all of said warrants were paid as presented to this respondent prior to said 22d day of February, and that such balance of $3, 167.77 was not paid for the reason that the action of said state court had deprived this respondent of the power to meet such payments. But the said respondent denies that the said Corporation was, on said first day of February, 1875, insolvent and unable to meet the payment of said certificate warrants, as charged in said amended bill of complaint; but, on the contrary, avers and charges that at all times after the maturity of said interest, and until said 22d day of February, said respondent had the pecuniary ability and was ready and willing to pay all such interest, and did in fact pay all such interest warrants when presented.

And the said respondent further says and charges the fact to be, that the net earnings of said Company, during the year 1874, and the months of January, February, April and May, of the present year, were more than sufficient to pay all the interest accruing upon the bonds issued under the trust-deed to the complainants, and also the interest upon said certificates of indebtedness, and upon all other mortgage bonds that had been negotiated and sold by said respondent.

And the said respondent says that the said Company is not in default in the payment of any certificate interest coupons, after proper demand; and that, therefore, none of the holders of said certificates are lawfully entitled to the return from the said Fosdick, special trustee as aforesaid, of the bond interest warrants so funded and deposited with the said Fosdick.

Your respondent admits that the contracts

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for funding said interest warrants are substantially set forth in said complainant's amended bill, and that the holders of about four fifths of the said 4,000 first mortgage bonds then, and about three fourths of all now outstanding, entered into said agreement, and so funded their said interest warrants.

* * * * * * * * *

[60] Your respondent, further answering, says that it has no knowledge, information or belief of the number of said bondholders, under said deeds of trust, that have made demand upon said complainants that they should execute their said trust; but respondent says that said Company is not and was not, at the commencement of this action, in default to one half of such interest; and, therefore, respondent says that said bondholders had no right to make such demand, and neither were the complainants nor respondent required to accede to such demands, by the terms of said trust-deed.

And the said respondent, further answering, says that it has no means of knowledge of the per cent of the holders of said interest warrants that matured October first, 1873, that presented such warrants to the Company and demanded payment thereof; but respondent says, if it is true, as charged, that at least ninety per cent made such demand, at least eighty per cent of the entire number afterwards waived such payment, and consented to an extension thereof, as hereinbefore stated, and that as to such eighty per cent said Company is in no default whatever.

And as to the holders of said six hundred and ninety-eight of said bonds who did not fund their interest, the said respondent says, upon information and belief, and so charges, that a large majority thereof have consented to such default in the payment of said interest, and have assented to such extension; that many of the holders of such bonds have expressed to the officers of said Company their assent to such extension, and promised and agreed (but not in writing) that they would, in no manner, interfere with or by their adverse action defeat the plans of said Company for the extension of payment of said interest.

And respondent further says, that it has no knowledge that any holder of said bonds ever elected to declare the principal due on account of a default of said Company, with the exception of the said Osgood, who only claimed to hold nine of said bonds. And as to the said Osgood, the respondent says that, to the best of its knowledge and belief, the said Osgood never has, nor has anyone at his request, ever demanded of said Company or of any of its officers [61] or agents, payment of any of the coupons attached to any of the nine bonds of which he claims to be the owner, and that the only notice the respondent has ever had that the said Osgood had so elected or that he demanded payment of either principal or interest, was derived from his said bill of complaint filed in said Circuit Court of Will County, as aforesaid, on said 22d day of February. And the said respondent further avers that on the 23d day of February, 1875, the said defendant offered and tendered the attorney of record of said Osgood, in open court, in said County of Will, full payment, principal and interest, of all the bonds held by the said Osgood, which was refused by said attorney. And that respondent at the same time offered to deposit in court the full amount of said principal and interest, upon condition that said receivers should be discharged, and said property restored to said respondent, which offer was refused."

On January 6, 1876, a petition was filed by Stephen Osgood, who had commenced the original proceeding in the state court on February 22, 1875, and seven others, claiming to be holders of bonds and coupons secured by the mortgages to Fosdick and Fish, in which they recite the previous proceedings in respect to the bill filed by the latter, and allege, among other things, that on October 1, 1873, the Railroad Company had made default in the payment of interest on its bonds, and that large numbers of coupons maturing on that day were presented at the office of the Corporation in the City of New York, payment thereof duly demanded and refused. It also rehearses the funding arrangements, and charging that they were based on false and fraudulent statements of the Company, the owners of the bonds, who funded their coupons on the faith thereof, are entitled to rescind the agreement and to enforce their claims against the Company. It alleges that Osgood had never funded his coupons. The petition also states that demand was also made at the office of said Corporation in New York in December, 1874, for the payment of sundry coupons due April 1, 1874, and which were never funded or agreed to be so, and that payment thereof was refused and the said presentment and non-payment was duly evidenced by a public instrument of protest by a notary public in and for said County and City of New York, and the said coupons still remain unpaid, [62] and more than six months having expired since the demand of payment of said coupons in October, 1873, and the default thereon, and more than six months having also expired since the demand of payment of such coupons in December, 1874, and the default thereupon, your petitioners claim that by the conditions of said conveyances the said principal of all and singular the said bonds has also become due, and that there is now due and owing by the said corporation the full sum of $4,700,000 upon said first mortgage indebtedness.

The petition prays for an account of the sums due on account of the said bonds and that the mortgaged property be sold to satisfy the same, etc.

An answer was filed by R. Biddle Roberts, setting up his rights as trustee under the chattel mortgage; and Jas. W. Elwell also answers the amended bill, repeating substantially the allegations of his cross-bill. Fosdick and Fish filed an answer to the cross-bill of Elwell on March 10, 1876, and filed general replications to all the answers to their amended bill. Their answer to the cross-bill contains the following averments:

"These respondents, further answering, upon information and belief, admit that certain holders of bonds under the deed of trust to these respondents have determined to demand and require of these respondents that they shall without delay declare the principal of all of said bonds presently due and payable, and will insist that these respondents proceed to prosecute their original bill in this behalf to speedy foreclosure and procure the sale of the property

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and franchises of said Railroad Company to satisfy said bonds.

These respondents, further answering, say that they are also informed and believe and, therefore, charge the fact to be, that other holders of said bonds are in favor of and propose to demand that no such foreclosure and sale shall be had for the present, but what number of bondholders are in the one class or in the other these respondents are not advised and cannot state, but in that regard they say that they will endeavor to faithfully perform all their duties as trustees in this behalf and submit all such questions as may arise to the determination of this honorable court.

[63] Further answering, respondents say that they are not advised and cannot state, what precise number, the holders of past due coupons of bonds issued under the trust-deed to these respondents have presented for payment, but they allege that it is immaterial whether one or more of said coupons have been so presented; that, inasmuch as the said coupons have not been paid and a large amount thereof as hereinbefore stated have long since become due and payable, and these respondents have been by some of the holders of said coupons called upon as trustees to foreclose the said mortgage, they are thereby vested with full authority to proceed to such foreclosure."

An exhibit is filed with the amended bill, being a declaration, signed by Fosdick and Fish, as trustees, which, after reciting the issue of the bonds of March 10, 1869, and the mortgage given to them to secure the payment of the same, and the provision thereof, that the principal should become due, in case of the specified default in the payment of interest, continues as follows:

"And whereas, default has been made by said Company in the payment of the half year's interest on all of said bonds which fell due on the first day of October, A. D. 1873.

And whereas, the coupons for such interest have been presented and payment demanded; and whereas, such default has continued for more than six months after such demand; and whereas, the holders of said bonds have never consented thereto, and in consequence thereof the principal of all of the said bonds has become due and payable.

Now, therefore, the said Chicago, Danville and Vincennes Railroad Company are hereby notified that we, William R. Fosdick and James D. Fish, as trustees as aforesaid, and under and by virtue of the provisions of said trust-deed and the authority conferred upon us thereby, do hereby declare the principal of all of said bonds to be due and payable."

Service of this declaration and notice upon the Railroad Company is acknowledged to have been made February 26, 1875.

Upon the issues thus made by the pleadings, an order of reference was made to a master to take testimony, and report the same with his findings, and a large amount of evidence taken before him is contained in the record.

[64] On June 24, 1876, the master filed his report. In it, he reported, among other findings, that, on October 1, 1873, the said Corporation did not pay any of the interest falling due on that day on the issue of bonds dated March 10, 1869, or upon the issue dated March 12, 1872; nor has the said Corporation paid any of the subsequent installments on any of said $4,000,000 bonds falling due at either of the following named days: April 1, 1874; October 1, 1874; April 1, 1875; October 1, 1875 and April 1, 1876; and that demand was duly made for the payment of divers of such coupons on October 1, 1873, and one of such coupons was protested for such non-payment more than six months prior to the institution of this action, or the written notice of such trustees declaring the principal of such bonds to be due and payable, and there is, consequently, now due to the divers holders of bonds dated March 10, 1869, the sum of $3,505,500. This sum includes the principal of the bonds of the issue of March 10, 1869, the several coupons thereon of the dates mentioned, with interest to July 1, 1876, and the additional sum of $389,500, being 12½ per cent premium on the nominal amount due for payment in gold, according to the stipulation in the bonds and mortgage to that effect.

The master further reported that, as to all matters relating to the funding scheme, referred to in the pleadings, and the effect of the surrender of the funded coupons, and of the failure of the Company to pay the coupons due October 1, 1875, he was not required to examine or report upon and, therefore, made no finding, nor as to any allegations of fraud set up in the pleadings, no testimony having been taken before or submitted to him upon either matter.

The Railroad Company filed exceptions to this report, of which the 6th is as follows:

"For that whereas, the said master has decided, and in his said report stated, that on the 12th day of October, 1873, said Company did not pay any of its interest falling due on that [65] day; that demand was duly made, and that one of said coupons was duly protested for such non-payment more than six months prior to the institution of this action, and to the date of the written notice of the trustees; and, therefore, the said master assumes, and so decides, that the principal and interest of all of said bonds has become due; when the fact is, as shown by the proof offered by the complainants and intervening petitioners, that no coupon was protested until the 19th day of December, A. D. 1874, less than three months prior to the date of said notice, and the commencement of this action, and there is no proof that there was ever any other demand upon said Company for the payment of said coupons."

On the hearing, a decree was rendered, in which, among other findings it is declared:

That the Railroad Company had paid all the coupons, on the bonds both on the Illinois and Indiana Divisions, which fell due April 1, 1873, and that none of the coupons which had matured since that date had been paid;

That, under the two proposals of the Company for funding, there had been deposited coupons due October 1, 1873, to April 1, 1875, inclusive, on all the $2,500,000 of Illinois Division bonds, except $698,500 thereof, which coupons still remained in the hands of Fosdick, as trustee under the agreements; that the semi-annual interest upon the convertible bonds and certificates of indebtedness, issued in exchange therefor, which fell due August 1, 1874, was paid in full and that the installment of interest thereon, which became due February 1, 1875,

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was duly paid by said Company upon all of the same which were presented for payment, which was the great bulk thereof, and that no interest has been paid on any part of the same since that time;

That no payment of interest had been made upon the $698,500 of Illinois Division bonds, which had not been funded, since payment of the coupon due April 1, 1873.

The decree then recites as follows: "That heretofore, and on the 26th day of February, A. D. 1875, the said complainants, as trustees under the said mortgage or trust-deed to them, dated March 10, 1869, did declare the principal of the said twenty-five hundred Illinois Division bonds to be due and payable by reason of the default of said Railroad Company in the payment of certain of the coupons of said bonds which fell due October 1st, 1873, payment of which had been duly demanded, and [66] the continuance of such default for more than six months after such demand."

The decree then proceeds to declare that there is due and owing from the Railroad Company to the complainants, as trustees under the mortgage deed of March 10, 1869, the several sums of $87,500 in gold coin, for the coupons on the $2,500,000 of bonds secured thereby, falling due respectively semi-annually from October 1, 1873, to October 1, 1876, inclusive, less the payments made on account of the four coupons on the convertible bonds and certificates of indebtedness, with interest on said sums at the rate of 6 per cent per annum and, as the decree reads: "In the further sum of two million five hundred thousand dollars in gold coin, for the principal of the said Illinois Division bonds so declared to be due as aforesaid, together with interest thereon from and after the first day of October, A. D. 1876, at the rate of seven per cent per annum in gold."

It was then "Ordered, adjudged and decreed that the said defendant, the Chicago, Danville and Vincennes Railroad Company pay, or cause to be paid, to the said complainants as trustees, for the holders of the said Illinois Division bonds and coupons, the said several sums of money, with interest thereon, as hereinbefore found to be due and owing, within twenty (20) days from and after the entry of this decree, and in default thereof, that all of the said railroad, premises, property and franchises described in the said trust-deed, dated March 10, A. D. 1869, and hereinbefore described as the Illinois Division of said railroad, etc., and all the right, title, interest and equity of redemption of the said Chicago, Danville and Vincennes Railroad Company therein, shall be sold as an entirety by Henry W. Bishop, the master in chancery of this court, at public auction to the highest and best bidder for cash therefor, payable as hereinafter provided, at the west door of the Republic Life Insurance Company Building, in the City of Chicago, in the State of Illinois, after having first given notice of the time and place and terms of sale, and a description of the property to be sold, by advertisement thereof in some public newspaper published in the City of Chicago, for the space of thirty (30) days prior to such day of sale."

The decree also contains the usual declara- [67] tion that a conveyance of the title to the property sold, after confirmation of the sale, should be a perpetual bar, in law and equity, against every claim of the Railroad Company, or other person claiming under it.

Under this decree, a sale was had and reported to the court, and confirmed by a subsequent decree, of the mortgaged property to F. W. Huidekoper, T. W. Shannon and J. M. Denison for $1,450,000, and the purchase money having been paid, $362,500 in cash and by the surrender of $2,328,000 of the Illinois Division bonds, with the coupons and certificates of indebtedness or convertible bonds thereto attached and belonging, a conveyance of the title to the mortgaged property was made to the purchasers.

It is assigned for error upon the decree of foreclosure and sale:

First. That the court below required from the mortgagor, payment of the principal of the debt secured by the mortgage, as then due, and on non-payment thereof, within twenty days, that the mortgaged property should be sold; and,

Second. That it decreed foreclosure and sale on this condition, without proof of the written request of the holders of the majority of the bonds.

It is undeniable that at the date of the filing of the bill which was February 27, 1875, the defendant, the Chicago, Danville and Vincennes Railroad Company, was in default for non-payment of the coupons on $698,500 of the issue of $2,500,000 of the Illinois Division bonds, which matured October 1, 1873. The holders of that amount of these bonds did not fund their coupons and none of them were paid. This failure on the part of the mortgagor constituted a breach of one of the conditions of the mortgage; and continuing for six months, entitled the trustees under the fifth article to take possession of the mortgaged premises, on being so required by the holders of not less than one half the outstanding bonds, and collect the net income, until the default should have been satisfied; or, to sell the mortgaged premises under the power conferred by the sixth article of the conditions. In the latter event, the mortgaged premises would have to be sold as an entirety, free from the incumbrance of the mortgage, and the proceeds of the sale would be applied, first, to the payment of the amount due and in [68] arrears, and then to the mortgage debt, not then due, and any surplus to the mortgagor. But, inasmuch as by the terms of the first article the conveyance is declared to be for the purpose of securing the payment of the interest as well as the principal of the bonds, and by the fourth article, the mortgagor's right of possession terminates upon a default in the payment of interest as well as principal, on any of the bonds, we are of opinion, independent of the provisions of the other articles, that the trustees, or on their failure to do so, any bondholder, on non-payment of any installment of interest on any bond, might file a bill for the enforcement of the security, by a foreclosure of the mortgage and sale of the mortgaged property. This right belongs to each bondholder separately, and its exercise is not dependent upon the co-operation or consent of any others, or of the trustees. It is properly and strictly enforceable by and in the name of the latter, but, if necessary, may be prosecuted without and

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even against them. It follows, from the nature of the security, and arises upon its face, unless restrained by its terms. And in case the proceeding results finally in a sale of the mortgaged premises, the sale is made free from the equity of redemption of the mortgagor, and all holders of junior incumbrances, if made parties to the suit, and is of the whole premises, when necessary to the payment of the amount due, or when the property is not properly divisible; it conveys a clear and absolute title, as against all parties to the suit or their privies, and the proceeds of the sale are distributed, after payment of the amount due, for non-payment of which the sale was ordered, in satisfaction of the unpaid debt remaining, whether due or not. *Olcott* v. *Bynum*, 17 Wall., 63 [84 U. S., XXI., 575]; *Burrows* v. *Malloy*, 2 Jones & L., 526. This doctrine is stated by this court in *Howell* v. *R. R. Co.*, 94 U. S., 466 [*Howell* v. *McAden*, XXIV., 256], where an authoritative rule of practice in such cases is prescribed. "We are of opinion, then," say the court, speaking by *Mr. Justice* Miller, "that there is due from the Railroad Company to plaintiff the amount of his overdue and unpaid coupons. For this sum, whatever it may be, he has a right to a decree *nisi*, according to the chancery practice; a decree which will ascertain the sum so due and give the company a reasonable time to pay it, say ninety [69] days or six months, or until the next Term of the court, in the discretion of that court. If this sum is not paid, the court must then order a sale of the mortgaged property, with a foreclosure of all rights subordinate to the mortgage, with directions to bring the purchase money into court. If the case proceeds thus far, the plaintiff will have a lien on the money thus paid into court, not only for his overdue coupons, but for his principal debt, and it must be provided for in the order distributing the proceeds of the sale. If, however, the company shall pay the sum found due in the decree *nisi*, no further proceeding can be had until another default of interest or of the principal."

The decree *nisi*, mentioned in this extract, like that in suits against infants, in which a day is given to the infant to show cause against it, after he attains full age, and that, where the bill is ordered to be taken *pro confesso*, is preliminary in its nature, requiring a further order to complete it. According to the practice of the English chancery, decrees of this nature in foreclosure suits, after directing an account to be taken of the principal and interest due to the plaintiff upon the mortgage, ordered, that upon the defendant's paying to the plaintiff the amount ascertained and certified or found to be due, within six months, at such time and place as were appointed, the plaintiff should reconvey the mortgaged premises; but that in default of such payment, the defendant should thenceforth be absolutely debarred and foreclosed of his equity of redemption. It was necessary, however, for the plaintiff, in order to complete his title, to procure a final order confirming it; otherwise the decree of foreclosure would not be pleadable. This order of confirmation he procured on proof to the court of non-payment according to the terms of the decree. 2 Dan. Ch. Pr., 997.

The time usually allowed by the decree to pay the mortgage debt, whether on a bill to redeem or to foreclose, was six months. But that was not regarded as an absolutely fixed period, but might be varied so as to be reasonable, according to the discretion of the court and the particular circumstances of the case. The courts, however, were very liberal in cases of foreclosure, in extending and enlarging, from time to time, this period of redemption, though not in cases of bills to redeem, where the mortgagor [70] came into court professing his readiness to pay the amount due, when ascertained, nor in cases of sales, where the mortgagor was not subjected to the severe and absolute forfeiture of his right. *Perine* v. *Dunn*, 4 Johns. Ch., 140; *Harkins* v. *Forsyth*, 11 Leigh, 294.

Where, according to the English practice, a sale instead of foreclosure was ordered, the form of the decree was the same, directing the sale, in the event of a default being made in payment of the amount found due, within the usual time of six months, or within a shorter period, or even immediately, if by consent, or where it was considered to be for the benefit of all parties. 2 Dan. Ch. Pr., 1266.

In the early practice in Kentucky, the preliminary decree finding the amount due and giving day for payment, was interlocutory merely and separate from the subsequent decree, finding the default in not performing the former decree and directing a sale in consequence thereof. *Downing* v. *Palmateer*, 1 Mon., 64; *Oldham* v. *Halley*, 2 J. J. Marsh, 118; *Hanks* v. *Greenwade*, 5 J. J. Marsh, 250; *Champlin* v. *Foster*, 7 B. Mon., 104. The ground of this practice seems to have been, that the mortgagor had the right to have the record show that he had failed to pay according to the decree *nisi* before a sale of his property was ordered. But there seems to us to be no sufficient reason why, as it was according to the English practice, and generally in this country, all these matters may not be embraced in a single decree. What is indispensable in such a decree is, that there should be declared the fact, nature and extent of the default which constituted the breach of the condition of the mortgage, and which justified the complainant in filing his bill to foreclose it, and the amount due on account thereof, which, with any further sums subsequently accruing and having become due, according to the terms of the security, the mortgagor is required to pay, within a reasonable time, to be fixed by the court, and which, if not paid, a sale of the mortgaged premises is directed. *Woodard* v. *Fitzpatrick*, 2 B. Mon., 62.

This is that final decree of foreclosure and sale, which determines and fixes the rights of the parties, and from which, on that account, an appeal lies. *Ray* v. *Law*, 3 Cranch, 179; *Whiting* v. *Bank*, 13 Pet., 15; *Forgay* v. *Conrad*, 6 How., 204; *R. R. Co.* v. *Swasey*, 23 Wall., [71] 409 [90 U. S., XXIII., 137].

But as in cases of strict foreclosure, so in case of sale; the equity of the mortgagor as against the mortgagee is not exhausted until sale actually confirmed; for if at any time prior he should bring into court, for the mortgagee, the amount of the debt, interest and costs, he will be allowed to redeem.

It is the deed made to the purchaser, actually transferring the title of the parties to the suit,

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that terminates the mortgagor's equity of redemption. *Brine* v. *Ins. Co.*, 96 U. S., 632 [XXIV., 860].

It is obvious that the finding of the amount due, for non-payment of which, according to the terms of the decree, the mortgaged property is ordered to be sold, is the foundation of the right of the mortgagee further to proceed, and a substantial error in that finding must, on appeal, vitiate all subsequent proceedings. Unlike a calculable error in the amount of a personal judgment which may be cured by a *remittitur*, it is otherwise incurable; for, as it is an illegal exaction, made as a condition for preserving the rights of the mortgagor in his estate and, if executed, depriving him wrongfully of them, it propagates itself through all subsequent stages of the cause. The right to redeem is a favorite equity, and will not be taken away, except upon a strict compliance with the steps necessary to divest it. *Bigler* v. *Waller*, 14 Wall., 297 [81 U. S., XX., 891]; *Shillaber* v. *Robinson*, 97 U. S., 68 [XXIV., 967]. In *Clark* v. *Reyburn*, 8 Wall., 318 [75 U. S., XIX., 354], a decree of strict foreclosure, which contained no finding, either of the fact or amount of the alleged indebtedness, and gave no time within which to pay or redeem, was reversed on these grounds, although the bill was taken *pro confesso* as to the parties having the entire beneficial interest, and contained an averment of the precise amount of the mortgage debt then due. The same consequences, undoubtedly, would have followed, if it had been a decree of foreclosure and sale, instead of a strict foreclosure; and the error is as vital, where a larger amount than is actually due is ordered to be paid, as where there is a failure to find what amount is due.

It becomes, then, of the first importance to [72] ascertain whether the decree of foreclosure and sale, in the present case, found due and required to be paid, as the condition of exercising the right to redeem, a larger sum than was then due.

The errors alleged in the amount are two. The first is, that there was declared to be payable $252,220, the amount of the several coupons, maturing from October 1, 1873, to April 1, 1875, both inclusive, the payment of which, it is claimed, as to all the bonds of the Illinois Division, except $698,500 thereof, had been, by the funding agreements, extended until February 1, 1879. The second is, that the principal sum of $2,500,000 of these bonds, contrary to the agreement between the parties, was also declared to be due and payable. The appellants insist that the only indebtedness of the Railroad Company to the bondholders, represented by the complainants at the time of the filing of their bill, was the past due interest on 699 bonds, the interest warrants of which had not been funded, amounting to about the sum of $147,000.

It appears from a statement in the record, admitted to be correct, that there had been deposited and exchanged for convertible bonds the four coupons maturing on and from October 1, 1873, to April 1, 1875, on $271,500 of the Illinois Division bonds, and that by the terms of the agreement under which that exchange was effected, dated November 11, 1873, it was not to be binding unless assented to in writing by a majority in interest of the bondholders. In point of fact, such majority did not assent to it; but under the second proposition, dated November 20, 1873, the four corresponding coupons on $1,530,000 of the bonds were deposited and exchanged for certificates of indebtedness.

It appears further, that the Railroad Company paid the accruing interest on the convertible bonds and certificates of indebtedness, issued under these arrangements, which became due prior to the filing of the bill, except $3,167.77, which was not presented. The default in respect to the coupons surrendered was, by the terms of the funding agreements, waived as long as the interest upon the securities substituted for them was punctually paid, so that at the date of the filing of the bill there was no subsisting default in the payment of interest, except upon the $698,500 of bonds which had not been funded.

The master finds, and his report in that re- [73] spect is the predicate of the decree, that divers coupons falling due October 1, 1873, were presented on that day, and that payment thereof was demanded and refused; and that one of such coupons was protested for such non-payment more than six months prior to the institution of the suit and the written declaration of the trustees, that the principal of the bonds had thereby become due.

There are some statements in the answers, and in the testimony of some of the witnesses, that coupons due October 1, 1873, were presented for payment and were not paid; but there is no proof of the fact as to any particular coupon identified for that purpose, and we have carefully searched the record in vain for any evidence whatever that any coupon, not afterwards funded, was presented and payment thereof refused. The master himself does not report any such. It is entirely consistent with his finding, and with the evidence on which it professes to be founded, that the payment of every coupon falling due October 1, 1873, presented for payment on or after that day, and payment whereof was refused, was extended by the subsequent agreements to fund them. The intervening petition of Osgood and others, if it be considered as a pleading whereby they were allowed to become co-complainants, does not allege that any one of the coupons held by them was presented for payment. It is averred that large numbers of the coupons maturing on October 1, 1873, were presented and payment thereof was demanded and refused on that day, but the allegation that any such coupon was held by either of the petitioners seems to have been studiously avoided; and stress is laid on averments of fraudulent misrepresentations which induced bondholders to fund their coupons, in support of which the master reported that no testimony was offered, and upon the insolvency of the Company, which is entirely immaterial upon the question of an actual default. It is averred in the petition that coupons were presented and payment demanded in December, 1874, which had become due the previous April, and the master so reports as to one; but the only evidence that appears in the record is an admission of the Railroad Company in its sixth exception to the master's report, where it is accompanied by the statement that such demand and refusal was less than six months be- [74] fore the filing of the bill, and could not, therefore, have been the foundation of the declaration that the principal of the mortgage debt had

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become payable, which, in fact, was not predicated upon that default, but rested solely on the non-payment of the coupons due October 1, 1873.

There is nothing in the record to show that any one of the bondholders, who had funded his coupons, claimed the right to rescind the funding agreements, or that any step to do so had been taken or authorized.

It is true that, after the filing of the bill and the appointment of a receiver, the Railroad Company ceased to pay interest upon its securities. That was but the natural consequence of the litigation; and in taking a decree for foreclosure and sale, it might have been in strict accordance with the equitable rights of bondholders who had funded their coupons, to have rescinded the funding agreements, as incapable of execution. But the legal effect of this would have been merely to find as the true amount of the mortgage debt then due, necessary to be paid to avoid a sale, the whole amount of interest unpaid on all the coupons. It would not, however, have put the Company in default as to the funded coupons from the beginning, nor deprived it of the benefit of the waiver of that default, arising from the fact of funding. It would have canceled the arrangement only as and from the date of the decree itself, without impairing its antecedent effect by retroaction. It is true, that where a mortgage has been given to secure a debt payable in installments, and a bill has been filed for foreclosure and sale, upon a default as to one, the decree may require payment of all installments then due, though maturing since the institution of the suit; but that principle does not suffice to bring the case of the appellees within the meaning of the 8th article of the conditions of the mortgage, so as to justify the decree requiring payment of the principal of the debt, as presently due. For by the terms of that provision, the entire debt does not become absolutely due, on the default of the Company, continued for six months, without the consent of the holder, to pay an interest coupon; but only at the election of the trustees, as declared by them and notified [75] to the mortgagor. And the forfeiture of the time of payment to be established in a given case, must stand or fall upon the fact of such declaration and notice, as it may be justified or not by the circumstances existing when they were made. It cannot be supported by subsequent occurrences. It follows, therefore, that the claim in support of the finding that the whole debt had become due, must rest exclusively upon the alleged default of October 1, 1873, and that, as we have seen, is not sufficient.

It does not affect this conclusion, that by the terms of the 6th article of the conditions of the mortgage, it is provided that upon the exercise of the power thereby conferred, resulting in a sale of the mortgaged premises, for a single default in the payment of interest, it may be one coupon merely, the property is to be sold as an entirety and free of the incumbrance of the mortgage, so as to pass all the title, both of mortgagor and mortgagee; and that the proceeds of the sale are to be applied, after payment of overdue interest, to the payment of the principal of the debt, though not yet due. This provision does not, either in terms or in effect, make the whole debt due before the stipulated day of payment. It is simply the application to the case of a sale by the trustees under the power of the practice of courts of equity in cases of judicial sales upon foreclosure. In either case the right of the mortgagee to redeem, and thus prevent the sale, is preserved, on payment, not of the unmatured principal sum of the debt, but merely of the interest then actually due and in arrears; the very right which, by the decree now in question, was denied. If authority is needed on such a proposition, it will be found in *Holden* v. *Gilbert*, 7 Paige Ch., 208, and *Olcott* v. *Bynum*, 17 Wall., 62 [84 U. S., XXI., 575].

This right cannot be regarded as other than important and valuable. Its denial in the present case was a substantial and serious wrong. This is manifest from the bare statement that the decree required payment, within twenty days, of $2,500,000, which we find was not due, as a condition of preventing the sale of property, which, it is admitted, was worth more than this debt, and which, according to the testimony in the case, was earning more than enough to pay the current interest on this mortgage. The receiver states the net earnings for the year 1874 at $330,615.75, and adds, speaking July 31, 1875, that "The present year, like the pre- [76] ceding, is of almost unexampled depression in most branches of business upon which the consumption of coal depends," the transportation of which was the main traffic of the road; and adds that he believes, on the reasons he states, that "It is practicable, in a year of fair prosperity, to increase the earnings from fifty to eighty per cent over those of 1874." Upon such a showing, it is immaterial to say that the Railroad Company was commercially insolvent, not being able to pay all its obligations as they matured; for the fact, if admitted, would not affect its legal or equitable rights, much less be allowed to deprive its other creditors, junior incumbrancers and lienholders, of their right to prevent a sale and sacrifice of the property by paying the comparatively small amount of the interest, justly due, upon the first mortgage bonds, and thus preserving their own estates and interests as well as those of the mortgagor.

The second assignment of error which we have noted, is, in our opinion, also well founded.

The 8th article of the conditions of the mortgage, which relates to this subject, contains the provision that, after the principal of the bonds has been declared by the trustees to have become due, by reason of the default therein described, and the mortgagor notified thereof, the trustees, "Upon the written request of the holders of a majority of the said bonds then outstanding, shall proceed to collect both principal and interest of all such bonds outstanding, by foreclosure and sale of said property, or otherwise, as herein provided."

It is contended on behalf of the appellees, that without the last clause the trustees have the sole right to act according to their discretion and upon their own motion, in declaring the principal sum due on account of the default; and that upon such declaration and notice by the trustees, the whole sum becomes due irrevocably for all the purposes of the mortgage; so that thereafter the trustees, at their option, may file a bill for foreclosure and sale, or may intervene, in case such a bill is filed by

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any bondholder, and thereupon the amount decreed must be the amount thus declared to be, and hence, actually due; and that the office of [77] the clause in reference to the written request of a majority of the bondholders, is merely to make the obligation of the trustees imperative, instead of optional.

We cannot agree to that construction of the provision. The whole article must be taken together. It is, in fact, a unit, and is directed to a single end. And the nature of the provision and the character of its object must be taken into consideration as furnishing the rule of its interpretation. It is an agreement which the parties were at liberty to make. There is nothing in it illegal or contrary to public policy. And while it is in the nature of a forfeiture, it is one against which, when it has taken place according to the fair meaning of the parties, courts of equity will not relieve. It was so held in *Noyes* v. *Clark*, 7 Paige, Ch., 179; *Noonan* v. *Lee*, 2 Black, 509 [67 U. S., XVII., 281]; *Olcott* v. *Bynum* [*supra*].

The stipulation, nevertheless, is in the nature of a penalty, and may be regarded as *stricti juris*, to be construed fairly and reasonably, according to the meaning of the parties, but leaning, if need be, in any case of ambiguity, in favor of the debtor. And the construction, in the present instance at least, which favors him, does not discriminate against the bondholders as a class, but rather between the interests of the whole number, represented by the trustees and controlled by a majority, and those of a single creditor, or a minority, associated in the like case, pursuing their remedy, as individuals. For while, as we have seen, one or any number of bondholders may prosecute a bill to foreclose a mortgage, upon default as to payment of a single coupon, or the trustees may intervene on behalf of all for the same purpose, because the failure to pay a single installment of interest is made a breach of the condition of the mortgage; yet it is apparent, that one purpose at least of the clause in question was to protect the bondholders as a class against the views of individuals and combinations of individuals, being a minority, pursuing separate interests.

In declaring the principal sum due before the date fixed by the credit, upon a default in the payment of interest, the trustee is acting for the whole number of bondholders, and the provision that subjects his action in enforcing the [78] stipulation to the wishes of a majority, is meant, as we think, for the protection of the class. Many cases may be mentioned to illustrate the importance in their interests of such a control, rather than to put it in the power of one or a minority to require all to accept what the majority might consider to be a premature and less valuable satisfaction for their existing security. The larger number might think it to their advantage even to defer the collection of their overdue interest, much less not to anticipate the payment of the principal, even when the security was ample to meet both; for they might esteem the ultimate investment higher than present payment. While they could not and ought not to prevent others, even a single individual, from exacting the promptest payment of what is due and may be important as current income, by legal process, they may, nevertheless, rightfully object to an anticipation of payment that may, in their opinion, prove to be a sacrifice; and this becomes especially important when the present value of the security is insufficient to prepay the incumbrance, but contains the solid promise of future indemnity as an investment. It is that interest, we think, that dictated the clause in question, and can be satisfied only by the construction which secures to the majority of the bondholders the right to veto the proceeding of the trustees.

Indeed, the other construction contended for, which gives to the majority only the right to make the obligation of the trustees to proceed, imperative, renders it nugatory. For, upon that supposition, the debt having become fully due, by the declaration and notice of the trustees, for all the purposes of the mortgage, if they should delay or refuse to file a bill for foreclosure and sale, it would still be in the power of a single bondholder to proceed for himself and associates directly for the same object, and to procure the same relief.

It is, therefore, our opinion that even had the trustees rightfully declared the principal sum of the mortgage debt due, and given the proper notice thereof, nevertheless, the foundation for proceeding to foreclose for that cause, and of the decree requiring payment of that amount would fail, without proof that the bill had been filed for that purpose, upon the written request of the holders of a majority of the bonds then outstanding. It is not disputed that no such proof is to be found in this record. [79]

Other errors than those already discussed have been assigned upon both appeals, which, as in the further progress of the cause they may not arise again, we have not considered and do not therefore pass upon.

For the reasons already given, we reverse both decrees appealed from and remand the cause, with instructions to proceed in conformity with this opinion.

Mr. Chief Justice **Waite** dissenting:

I am unable to agree to the judgment in this case. In my opinion default had been made in the payment of the interest on some of the bonds within the meaning of the 8th clause of the mortgage. The Company having given notice that the coupons due October 1, 1873, would not be paid if presented, no presentation was necessary in order to create the default. This notice was a waiver of a presentation in form. Coupon-holders were in effect told it was useless to make a demand, because if made it would not be met. Confessedly, this default as to the coupons on $698,000 of the bonds continued more than six months. Holders of bonds to this amount declined to enter into the scheme for extension. They kept their coupons, hoping some plan might be devised for payment, but retaining all their rights under the mortgage, if their hopes were not realized.

This default having happened, and having continued more than six months without the consent of the holders of the coupons, by the express terms of the 8th clause, the principal of all the bonds secured by the mortgage became immediately due and payable. If after that, the holders of a majority of the outstanding bonds had requested the trustees in writing to foreclose the mortgage, it would have become the imperative duty of the trustees to institute the

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necessary proceedings for that purpose. But if no such request was made, it seems to me that the trustees were not precluded from commencing such proceedings on their own motion, in [80] case the safety of the trust made it necessary. It is possible, if a majority of the bondholders had, in an appropriate way, interfered to prevent the trustees from going on, some relief might have been afforded them, but when all came in and availed themselves of what had been done, the Corporation was in no position to defend, because a request had not been formally made in advance. As to the Corporation, the principal of the bonds became due and payable when a default occurred which continued the requisite length of time. Whether a foreclosure should be had because of the default, rested alone with the bondholders and trustees. The provision in the mortgage for the written request was, as it seems to me, not for the protection of the Company, but the bondholders. If the bondholders are satisfied with what the trustees have done, the Corporation is in no condition to complain.

That the trustees were justified in commencing proceedings on their own motion, seems to me clear. Some of the bondholders, having coupons and bonds, as to which default had been made, began a suit for foreclosure in a state court, and secured the appointment of a receiver. The Company was very much embarrassed financially, and so long as the receivership continued, could do nothing to extricate itself from its difficulties. It was a necessity, therefore, for the trustees to interfere. When they did, the Company did not relieve itself from the consequences of its default in the payment of coupons on the $698,000 of bonds. All the bondholders seem to have been satisfied with what was done, and they united with the trustees in pressing the foreclosure.

Under these circumstances, in my opinion, the court properly treated the principal of all the bonds as due, and decreed accordingly.

I am authorized to say that *Mr. Justice* **Harlan** concurs in this dissent.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—33 Hun, 518.

CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY, JAMES W. ELWELL AND R. BIDDLE ROBERTS, *Appts.*,

v.

WILLIAM R. FOSDICK, JAMES D. FISH, FREDERICK W. HUIDEKOPER, THOMAS W. SHANNON AND JOHN M. DENNISON

(See S. C., 16 Otto, 80-82.)

Rehearing, when granted.

Upon a petition for rehearing made on the ground that the decree brought up by the appeal is not what it is recited to be in the prayer for appeal, but one rendered subsequent thereto and merely in execution of it, this court, to enable the parties to present whatever questions arise upon the record as it is, or upon a complete record when supplied, may grant a rehearing.

[No. 173.]
Decided May 3, 1882.

APPEALS from the Circuit Court of the United States for the Northern District of Illinois.

Petition for rehearing.

The history and facts of the case appear in the opinion of the court. See, also, the opinion of this court on the first hearing of the case, *ante*, 47, and the opinion on the rehearing, *post*, 64.

Messrs. Edwin Walker and *R. Biddle Roberts*, for appellants.

Messrs. **Charles B. Lawrence**, *Henry Crawford* and *J. D. Campbell*, for appellees.

Mr. Melville W. Fuller, for Fosdick and Fish, trustees, appellees.

Mr. Justice **Matthews** delivered the opinion of the court:

Since the announcement of our former opinion, the appellees, having filed a petition for rehearing, have suggested that the decree brought up by this appeal is not what it is recited to be [81] in the prayer for appeal in the circuit court, *viz.*: the decree confirming the sale of the mortgaged property under that of foreclosure and sale, but one rendered subsequently thereto, and merely in execution of it; and that it is, therefore, not the subject of an appeal, and claim that the present appeal should be dismissed for want of jurisdiction.

The appeal prayed for and allowed in the circuit court is recited in the petition therefor filed March 26, 1879, to be as follows:

"From the decree entered April 12, 1877, confirming the report of the sale of the property of the defendant Railroad Company;

From the decree of April 16, 1877, ordering the delivery of the deed and possession of the property to the purchasers, Frederick W. Huidekoper, Thomas W. Shannon and John M. Dennison;

From the decree entered in said cause on the 19th day of November, 1877, in favor of Frederick W. Huidekoper, Thomas W. Shannon and John M. Dennison, and against the said Chicago, Danville and Vincennes Railroad Company, for the sum of $1,808,646.46."

The two decrees last named, of April 16, 1877, and of November 19, 1877, do not appear in the record.

An examination of the terms of the decree of April 12, 1877, shows that it is a decree, confirming the report of the master, upon a petition of the purchasers, Huidekoper, Shannon and Dennison, asking that their bid may be satisfied by a surrender of bonds and coupons without further cash payment and, upon that surrender, for a conveyance of the title to the property, and to be let into possession. What prior action of the court, upon a report of the sale, had taken place, the transcript of the record before us does not disclose. Counsel for the appellees state that there was, in fact, a prior decree, confirming the sale, rendered on February 26, 1877, from which no appeal was perfected; and produce in support of their statement what is called a supplemental transcript of the record, containing such a decree. This, however, we cannot at present consider or act upon, further than to say that, in view of the suggestions made and to enable the [82] parties to present whatever questions arise upon the record as it is now before us, or upon a complete record, when supplied, upon the appeal

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prayed for and perfected on March 26, 1879, *the application for a rehearing is granted; and the decree of this court rendered at the present Term, so far only as it reverses any of the decrees embraced in this appeal, is to that extent and for that purpose set aside.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

HENRY SEYMOUR KING, *Appt.*,
v.
FRANKLIN C. CORNELL, Admr. of EZRA CORNELL, Deceased, UTICA, ITHACA AND ELMIRA RAILROAD COMPANY ET AL.

(See S. C., 16 Otto, 395-399.)

Removal of cause—separate petition of alien.

1. The second subdivision of section 639 of the Revised Statutes, as to removal of causes, was repealed by the Act of 1875.
2. When a citizen of a State sues in its court a citizen of the same State and an alien, the cause is not removable on the separate petition of the alien.

[No. 962.]

Motion to advance filed Oct. 4, 1882. Granted, Oct. 9, 1882.
Submitted Oct. 31, 1882. Decided Dec. 4, 1882.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

The history and facts of the case appear in the opinion of the court:

Messrs. **William M. Evarts, C. F. Southmayd** and **Joseph H. Choate,** for appellant.

Mr. **Samuel H. Wilcox,** for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit begun in the Supreme Court of New York by a citizen of that State against other citizens of the same State and Henry Seymour King, an alien, and a subject of the Queen of the United Kingdom of Great Britain and Ireland. King, the alien, claiming that there could be a final determination of the controversy, so far as it concerned him, without the presence of the other defendants, as parties in the cause, filed in the state court his petition for a removal to the Circuit Court of the United States. In the circuit court a motion was made to remand the cause, which was granted and from an order to that effect, this appeal has been taken.

[396] It is conceded that the case was not removed under the 2d section of the Act of March 3, 1875, ch. 137 [18 Stat. at L., 470], 1 Sup. R. S., 174, and that the jurisdiction of the circuit court rests solely on the second subdivision of section 639 of the Revised Statutes. It was said at the last Term, in *Hyde* v. *Ruble*, 104 U. S., 407 [XXVI., 828], that this subdivision was repealed by the Act of 1875; but as that was a case between citizens of different States, and no question arose as to the right of alien defendants to a removal when there could be a final determination of the controversy, so far as it concerned them, without the presence of the other defendants, we have now considered the matter in that aspect.

While repeals by implication are not favored, it is well settled that where two Acts are not in all respects repugnant, if the later Act covers the whole subject of the earlier, and embraces new provisions which plainly show that the last was intended as a substitute for the first, it will operate as a repeal. This subject was fully considered in *U. S.* v. *Tynen*, 11 Wall., 92 [78 U. S., XX., 154], where the early authorities are cited and reviewed at considerable length. This rule, we think, is decisive of the present case. Section 639, in its 1st subdivision, provided for a removal by the defendant, where the suit is against an alien, or is by a citizen of the State in which the suit is brought against a citizen of another State. The petition for removal was to be filed by the defendant at the time of entering his appearance in the state court. This is a reproduction of the provisions of section 12 of the Judiciary Act of 1789, ch. 20, 1 Stat. at L., 79.

The 2d subdivision related to suits against an alien and a citizen of the State in which the suit was brought, and to suits by citizens of such State against a citizen of the same and a citizen of another State. In such suits the defendant, who was an alien, or a citizen of another State, might have a removal, if the suit, so far as it related to him, was brought for the purpose of restraining or enjoining him, or was one where there could be a final determination of the controversy, so far as it concerned him, without the presence of the other defendants as parties in the cause. The petition for such a removal could be filed at any time before trial or final hearing, and the removal did not take away or prejudice the right of the plaintiff to proceed at the same time with the suit in the state court, as against [397] the other defendants. This subdivision is a substantial reproduction of the Act of July 27, 1866, ch. 288, 14 Stat. at L., 306. The Act of 1866 was amended by the Act of March 2, 1867, ch. 196, 14 Stat. at L., 558, so that in a suit between a citizen of the State in which the suit was brought and a citizen of another State, the citizen of the other State, whether plaintiff or defendant, might obtain a removal if he had reason to and did believe that from prejudice or local influence he would not be able to obtain justice in the state court. Here, too, the petition for removal could be filed at any time before trial or final hearing. This Act of 1867 appears as the 3d subdivision of section 639.

The 12th section of the Act of 1789 remained in force, without amendment or material alteration, except by the Acts of 1866 and 1867, until the revision of the Statutes in 1873. Then the whole legislation was embodied in section 639 of the Revised Statutes, which was subdivided so as to present the different grounds of removal, depending on citizenship, separately.

In this condition of the law, only aliens and citizens of States other than that in which the suit was brought could obtain a removal in any case. Save in cases of local prejudice, only defendants could petition, and in cases of local prejudice no provision was made for aliens. No provision was made in any law for the removal of cases arising under the Constitution or laws

NOTE.—*Removal of causes under Act of 1875; citizenship.* See, *note* to Removal Cases, 100 U. S., XXV., 593.

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of the United States, if the necessary citizenship of the parties did not exist. In 1875 the subject of removals seems to have been brought specially to the attention of Congress, and the Act [18 Stat. at L., 470], of that year passed. Many important new provisions were introduced, and the new Act was evidently intended as a substitute for much that had been enacted before. Removals of suits arising under the Constitution and laws of the United States were authorized without regard to the citizenship of the parties, and instead of confining the privileges of removal to defendants or citizens of States other than that in which the suit was brought, either party was allowed to move in that behalf. Instead of requiring the petition for removal to be filed in some cases when the defendant entered his appearance, and in others at any time before trial or final hearing, all petitions to which that Act applied were to be presented at or before the term at which the cause [398] could be first tried. Provision for citizens and subjects of foreign States must have been in the mind of Congress at the time, because in the 1st clause of the 2d section, which relates to the removal of a controversy that is not separable, they are specially named. In the 2d clause, which relates to separable controversies, they are not and, as in the local prejudice subdivision of section 639, that privilege is confined to citizens of the United States. In the Law of 1866 an alien defendant, having a separable controversy, could remove. When that law was extended in 1867 to cases of local prejudice, only citizens were included in the extension. In the Act of 1875 the removal in cases of separable controversies was not confined to defendants, but either party could apply. Congress then, as it seems to us, manifested its intention to exclude aliens from the privileges of such a removal, just as it did in 1867, in cases of local prejudice. The whole subject was evidently up for consideration. The 1st and 2d subdivisions of section 639 were thoroughly revised and radically modified. There cannot be a shadow of doubt that, except as to aliens in the 2d subdivision, both these subdivisions were repealed, and we cannot believe, if Congress had intended to continue in force that part of the 2d subdivision which allowed an alien defendant to remove a cause, so far as it related to him, and gave his adversary no corresponding right, it would have been left to inference alone. So thorough a revision implies, as we think, an intention to make the new law a substitute for all that those subdivisions contained. The last clause relating to separate controversies needed only the addition of the word alien to make it cover everything in the 2d subdivision. Had it been added, the law would have been uniform, and allowed removals by both parties in all cases where the right was dependent on citizenship. With it out, if we hold that the old law is unrepealed, an alien defendant will be allowed to remove his separate controversy as against a citizen, while the citizen will not have the same privilege against him. This, we are satisfied, it was not the intention of Congress to do. It follows that the whole of the 2d subdivision of section 639 was repealed by the Act of 1875, and that the cause was not removable on the separate petition of the alien. [399] This makes it unnecessary to consider whether there was in the suit such a separate controversy as would have entitled him to a removal if the law had been otherwise.

The order of the Circuit Court, remanding the cause to the State Court, is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 601; 107 U. S., 538; 110 U. S., 60; 18 N. W. Rep., 644; 20 N. W. Rep., 785, 786; 112 U. S., 597.

ASA C. CALL, *Appt.*, [39]
v
HENRY H. PALMER.

(See S. C., 16 Otto, 39.)

Construction of Rule 32—motions under.

1. Rule 32 applies only to cases which have been remanded by a circuit court to a state court, or dismissed under the authority of section 5 of the Act of March 3, 1875, ch. 137.

2. Motions under this rule should be accompanied by an agreed statement of the case, or by such extracts from the record as will show that the case is one to which the rule is applicable.

[No. 1009.]

Motion submitted Oct. 11, 1882. Decided Oct. 16, 1882.

APPEAL from the Circuit Court of the United States for the District of Iowa.

Motion to advance under Rule 32.

Mr. J. H. Call, for appellant.

No counsel appeared for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied. Rule 32 applies only to cases which have been remanded by a circuit court to a state court, or dismissed, under the authority of section 5 of the Act of March 3, 1875 [18 Stat. at L., 470]. This is an appeal from a decree on the merits in a suit removed from a state court to the circuit court. The record shows that a motion to remand was denied, and that the cause was regularly heard and decided.

Motions under this rule should be accompanied by an agreed statement of the case, or by such extracts from the record as will show that the case is one to which the rule is applicable.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN W. GOSLING, *Appt.*,
v.
JOHN ROBERTS.

(See S. C., 16 Otto, 39–47.)

Void letters patent—infringement.

*The first claim of re-issued letters patent No. 5644, granted to John W. Gosling, November 4, 1873, for an "Improvement in step covers and wheel fenders for carriages," the original patent having been granted to him February 25, 1867, and the re-issue applied for June 24, 1873, namely, "In combination with the step D and the door C, the plate E, attached to the door, to operate as a step cover when the door

*Head notes by *Mr. Justice* BLATCHFORD.

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is closed, and a wheel fender when the door is open, substantially as and for the purpose specified," was alleged to have been infringed by a structure made in accordance with the description contained in letters patent No. 90584, granted to John Roberts, May 25, 1869, for an "improvement in step covers and wheel fenders for carriages." It was held that said claim, if construed so as to cover the defendant's structure, was void for want of novelty, and also invalid as being for a different invention from any found in the original patent; and that if it was so limited as to be no broader than the single claim of the original patent, there had been no infringement of it.

The specification of the original patent described a plate attached at its top to the bottom part of the door of the carriage, and attached at its bottom, by a pivotal connection, to the step of the carriage, and flexible and yielding, so as by its elasticity to hold the door either closed or open. In the specification of the re-issue, the connection of the plate to the step was made optional, and the flexibility of the plate was made only preferential. The single claim of the original patent was: "A combined step cover and wheel fender for carriages, consisting of the flexible plate E, whose upper end is attached to the carriage door, and whose lower end is connected, *d h*, to the step or other fixed object, the whole being arranged to operate substantially as herein described and for the purpose set forth." The specification of the re-issue stated that the important feature of the invention was "The plate E, attached to the door of the carriage, and operating, by reason of such attachment, as a step cover when the door is closed, and as a wheel fender when the door is open." This statement was not in the specification of the original patent. The object of the changes in the specification was to arrive at the claim for a plate not held at its bottom to the step. The plate in the defendant's structure was not flexible and was not held at its bottom to the step, and did not infringe the single claim of the original patent. The invention covered by that claim was, so far as appears, new, and the original patent was adequate to secure it.

[No. 23.]

Argued Oct. 12, 1882. Decided Oct. 23, 1882.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The bill in this case was filed in the court below by the appellant, to recover damages for the alleged infringement of certain re-issued letters patent, and for an injunction.

The defendant denies the alleged infringement, claims that the complainant is not the original inventor of the improvement, that it is not useful, and that the re-issued letters patent are too broad and, therefore, void.

The court below found for the defendant and entered a decree dismissing the bill. Whereupon the complainant appealed to this court.

The facts of the case are stated by the court.

Messrs. **Charles L. Mitchell** and *D. H. I. Holmes, James H. Perkins* and *C. D. Coffin*, for appellant.

Mr. **William H. Fisher,** for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

In this case the plaintiff appeals from a decree dismissing his bill of complaint. The suit is brought for the infringement of re-issued letters patent No. 5644, granted to John W. Gosling, the appellant, November 4, 1873, for an "improvement in step covers and wheel fenders for carriages," the original patent having been granted to him February 26, 1867, and the re-issue applied for June 24, 1873. As a material question in the case arises on the difference between the specifications and claims of the original and the re-issued patents, they are subjoined in parallel columns, the portions in each which are not found in the other being in *italics*.

[42]

ORIGINAL.

"*This* invention *relates to* a cheap and simple device for preventing the accumulation of mud and dust on the steps of carriages, etc., and, also, for guarding the clothes of the rider from coming in contact with the wheels on entering or leaving the vehicle.

In the accompanying drawings Fig. 1 shows the position of my fender when the carriage door is open, *and* Fig. 2 represents it when the door is closed. A represents the body of *a* carriage, B the rear wheel, C the door, and D the step; E is a *yielding* plate, which may be made of sheet *steel* or other suitable material, and the upper end of said plate is hinged or otherwise secured to the door C, *whilst its* lower end *is* connected to *a* bar H, having an eye *h*, which engages with a suitable aperture in the flange *d* of the step. This provision of the perforated flange *d* and eye *h enables* the *plate* E to turn in either direction as the door C is opened or closed. The *flexibility of the plate* E *enables it to* bend *up* in the act of opening *or* closing the door (see dotted lines in Fig. 1), and its elasticity enables it to hold the door firmly in either closed or wide open position. When the door is shut, the plate E closes up over the step D, and *this* prevents the wheel from throwing dirt *upon said* step, as clearly shown in Fig. 2, but as soon as the door is opened, the *plate* E *turns on the pivot device, d h, at its lower end, thus uncovering the step and serving* as a fender to prevent the *occupant's* clothes from coming in contact with the hind wheel of the carriage, as represented in Fig. 1. *The yielding plate* E *acts as a spring to hold the door either open or shut, and also prevents said door from striking against the wheel when opened.* The said plate E may be covered with leather or painted, or may consist wholly of leather.

I have selected for illustration the preferred form of my invention, but reserve the right to vary the same, it being susceptible of various modifications. For example, instead of being pivoted to the step D, the lower end of the plate E may be hinged or otherwise coupled to a frame projecting from the carriage body and passing under the step. In some

RE-ISSUE.

"*My* invention *consists of* a cheap and simple device for preventing the accumulation of mud and dust on the steps of carriages, etc., and, also, for guarding the clothes of the rider from coming in contact with the wheels on entering or leaving the vehicle.

In the accompanying drawings, Fig. 1 shows the position of my fender when the carriage door is open. Fig. 2 represents it when the door is closed. A represents the body of *the* carriage, B the rear wheel, C the door, and D the step. E is a plate which may be made of sheet *metal* or other suitable material, and the upper end of said plate is hinged or otherwise secured to the door C. *The* lower end *of the combined cover and fender* E *may be* connected to *the* bar H, having an eye *h*, which engages with a suitable aperture in the flange *d* of the step. This provision of the perforated flange *d* and eye *h, by reason of its loose character, permits* the *cover and fender* E to turn *freely* in either direction as the door C is opened or closed. The *cover and fender* E *I prefer to make of flexible material, so that it may* bend in the act of opening *and* closing the door (see dotted lines in Fig. 1), and its elasticity enables it to hold the door firmly in either the closed or wide open position, *when the cover and fender are connected, as shown, to the step* D. When the door C is shut the plate E closes up over the step D and prevents the wheel from throwing dirt *over the* step, as clearly shown in Fig. 2, but, as soon as the door is opened, the *cover and fender* E, *being attached to the door* C, *is, of course, carried with the door, and thus the step is uncovered, and the plate* E *then occupies such a position as to enable it to serve* as a fender to prevent the *rider's* clothes, *on entering or leaving the carriage*, from coming in contact with the hind wheel of the carriage, as represented in Fig. 1. The said plate E may be covered with leather or painted, or may consist wholly of leather.

[43]

I have selected for illustration the preferred form of my invention, but reserve the right to vary the same, it being susceptible of *being made to assume* various *forms and* modifications. For example, instead of being pivoted to the step D, the lower end of the plate E may be hinged or otherwise coupled to a frame projecting from the carriage body and

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cases, *for example*, when the distance from the wheel to the body is short, I provide slots on both step and fender, or one of them, to partially [44] or wholly relieve the plate of the flexion incident to opening or closing the door.

passing under the step. In some cases, when the distance from the wheel to the body is short, I provide slots on both step and fender, or one of them, to partially or wholly relieve the plate of the flexion incident to opening or closing the door.

The important feature of my invention is the plate E *attached to the door of the carriage and operating, by reason of such attachment, as a step-cover when the door is closed, and as a wheel fender when the door is open.*

I claim: 1. *In combination with the step* D *and the door* C, *the plate* E *attached to the door, to operate as a step cover when the door is closed, and a wheel fender when the door is open, substantially as and for the purpose specified.*

2. A combined step-cover and wheel fender for carriages, consisting of the flexible plate E, *the* upper end *of which* is attached to the carriage door, and *the* lower end to the step, *all being combined to operate as a step-cover, wheel fender, and a spring connection to retain the door in the opened and closed positions, all* substantially as set forth."

I claim *herein as new and of my invention* a combined step cover and wheel fender for carriages, consisting of the flexible plate E, *whose* upper end is attached to the carriage door, and *whose* lower end *is connected, d h*, to the step *or other fixed object, the whole being arranged to operate* substantially as *herein described and for the purpose* set forth."

Attention is at once arrested by certain marked differences between the two specifications. The drawings are alike. In the original specification, the plate E is described as a yielding plate, while in the re-issue it is merely a plate. In the original, it is said that the lower end of the plate E *is* connected to the step through a bar with an eye in it which engages with an aperture in a flange on the step. In the re-issue, it is said that the lower end of the plate E *may be* so connected. [45] In the original, the plate E is described as being flexible. In the re-issue, the inventor says that he prefers to make it of flexible material. In the original it is said that the elasticity of the plate E enables it to hold the door firmly either closed or open. In the re-issue, it is said that such elasticity will produce that effect when the plate E is connected to the step as shown in the drawings. In the original, the description is, that, as the door is opened, the plate E turns on the pivot device at its lower end, which connects it to the step. This is omitted in the re-issue. In the original, the plate is said to act as a spring to hold the door either open or shut. This is omitted in the re-issue. The object of these changes is apparent. Unless the plate E is connected at the bottom with the step, the door cannot be kept open or closed by the operation of elasticity in the plate, for no elasticity can be developed unless the plate is held at its bottom. In the original, the holding of the plate at its bottom to the step is made the rule; in the re-issue it is made the exception. In the original, the plate is said to be flexible and is not said to be ever other than flexible. In the re-issue, only a preference for flexibility is asserted. The object of these changes is to arrive at a claim for a plate not held at its bottom to the step. Accordingly, the re-issue makes the statement, not found in the original, that the important feature of the invention is to have the plate attached to the door, and thus operate as a step cover and a wheel fender. The first claim of the re-issue is not found in the original, and grows out of the changes above mentioned. It is a broad claim to a combination with the step and the door of the plate E attached to the door, to operate as a step cover and a wheel fender, substantially as and for the purpose specified. The second claim in the re-issue is substantially the same as the single claim of the original. It combines the features of the attachment of the plate, at its bottom, to the step; and, at its top, to the door; and of elasticity in the plate to hold the door open or closed.

The defendant's apparatus is a piece of material rigidly attached at its top to the door, and not attached at its bottom to the step, and operating as a combined step cover and wheel fender. It is plain that this construction did not infringe the claim of the original patent. It is alleged that it infringes the first claim of the re-issue. The defendant obtained a patent, No. 90584, [46] May 25, 1869, for an "improvement in step covers and wheel fenders for carriages." It was granted more than four years before the plaintiff applied for his re-issue. The defendant's apparatus is constructed substantially in accordance with the description in that patent. That apparatus has on the rear part of the door elastic guards, which come against the wheel when the door is open. The claim of the patent is to the combined arrangement.

It is shown by the evidence that prior to the plaintiff's invention a combined wheel fender and step cover was in use in several forms, the step cover being attached by a vertical arm or vertical arms to the bottom of the door by a rigid connection, and swinging back by the opening of the door, the vertical arm or arms then serving as a wheel fender. In those structures, the step cover was a horizontal plate, projecting from the lower end of the vertical arm, and overlapping and covering, when the door was shut, the horizontal step, and being parallel with it. The defendant's structure differs from these old forms solely in having the vertical arm, which is rigidly attached to the lower part of the door, so extended in width as to itself cover the step and permit the horizontal part of the step cover to be dispensed with. There is no difference in principle or mode of operation between the old structures and the defendant's structure. The difference is merely in form and shape. The plaintiff departed, in his original patent, from the principle of the old structures by joining his step cover to the step and having the vertical plate yielding and flexible, so that its elasticity may keep the door open or closed. This, so far as appears, was a new invention, and he was entitled to claim it. He did claim it, and the original patent was adequate to secure it to him. The first claim of the re-issue, if construed so as to cover the defendant's structure, must equally cover the old structures referred to. They had combined a step and a door and a plate attached to the door, the plate operating as a step cover when the door was closed, and as a wheel fender when the door was open. Extending the vertical arm in width, so as to dispense with the horizontal projection from it, and make the vertical

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arm wide enough to cover the step, or contracting the vertical arm in width and putting on the [47] lower end of it a horizontal piece parallel with the step and overlying it, involved no new principle of structure or operation.

There is no suggestion in the specification of the original patent that the plate E is to be used disconnected at its lower end from the step, or to be any other than a yielding plate, so arranged as to keep the door open and shut, in addition to acting as a step cover and wheel fender. The first claim of the re-issue, if construed so as to cover the defendant's structure, is void for want of novelty, being anticipated by the old structures referred to. Moreover, if so construed, it is invalid as being for a different invention from any invention found in the original patent. And if it is so limited as to be no broader than the claim of the original patent, there has been no infringement of it. *Under any view, the decree of the court below was correct, and it is affirmed.*

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY, JAMES W. ELWELL AND R. BIDDLE ROBERTS, *Appts.*,

v.

WILLIAM R. FOSDICK, JAMES D. FISH, FREDERICK W. HUIDEKOPER, THOMAS W. SHANNON AND JOHN M. DENNISON.

(See S. C., 16 Otto, 82-85.)

Appeal from decree for deficiency—falls with reversal of foreclosure decree.

*1. An appeal may lie from a decree in an equity cause, notwithstanding it is merely in execution of a prior decree in the same suit, for the purpose of correcting errors which originate in it; but when such decrees are dependent upon the decree, to execute which they have been rendered, they are vacated by its reversal; in which case, the appeal which brings them into review will be dismissed for want of a subject-matter on which to operate.

2. A personal decree for a deficiency, due upon a mortgage debt, remaining after execution of a decree of foreclosure and sale, is of this description; but when rendered in favor of other parties than the complainant, will be reversed for the same error that required the reversal of the decree of foreclosure and sale.

[No. 21.]

Argued Dec. 8, 9, 1881. Decided Mar. 6, 1882. Petition for rehearing granted and decree of Mar. 6, rescinded May 8, 1882. Argued Oct. 11, 12, 1882. Decided Oct. 23, 1882.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The history and facts of the case appear in the opinion of the court. See, also, the opinion of this court on the first hearing, *ante*, 47, and the opinion granting this rehearing, *ante*, 59.

Messrs. **Edwin Walker** and **R. Biddle Roberts**, for appellants.

Messrs. **Charles B. Lawrence, Henry Crawford** and *J. D. Campbell*, for appellees.

Mr. **Melville W. Fuller**, for Fosdick and Fish, trustees, appellees.

Mr. Justice **Matthews** delivered the opinion of the court:

*Head notes by *Mr. Justice* MATTHEWS.

This appeal was heard during the last Term, with the appeal from the decree of foreclosure and sale in the same case, having been taken from three decrees rendered after the sale in the same suit. Huidekoper, Shannon and Dennison, the purchasers of the mortgaged property sold under the decree of foreclosure, who are appellees in this appeal, were not parties to the former appeal. All the decrees appealed from, including those now in question, were included in the order of reversal made at the former hearing; but on a petition for rehearing, it was called to the attention of the court that the transcript of the record was imperfect and imcomplete, having omitted the decree confirming the sale, and that the petition for the present appeal contained a misrecital, that the decree entered April 12, 1877, was the decree "Confirming the report of the sale of the property of the defendant Railroad Company." The order of reversal was, therefore, set aside as to the decrees embraced in the present appeal, and a rehearing granted. The cause, on that rehearing, has now been heard at the present Term upon the whole record, as amended and perfected.

From that it now appears that, on February 17, 1877, the master filed his report of the sale and the purchasers their petition for its confirmation and for other relief, and it was on that day, on motion of the complainants' solicitors, ordered that the report and sale be confirmed, [83] unless objections thereto should be filed on or before the Friday next following, for which day it was set for hearing. And exceptions having been in the meantime filed by one Slaughter, on February 26, 1877, the court overruled the exceptions, and as the order reads, "Does in all things confirm the sale" to the purchasers. From this decree an appeal was prayed by Slaughter, but was not perfected or prosecuted. The petition of the purchasers, filed February 17, 1877, in which they also asked for the immediate discharge and payment of their bid, had been referred to the master, whose report subsequently filed was confirmed by the decretal order of April 12, 1877, by which he was directed, on the surrender to him of two thousand three hundred and twenty-eight first mortgage Illinois Division bonds of the defendant Railroad Company, to execute and deliver to the purchasers a deed of the property sold, and thereupon the receiver was directed to let them into possession. On April 16, 1877, the master having reported the execution of the decree of April 12 by the delivery of the deed and the acceptance of the bonds, a further decree was entered approving and confirming the same. These are the two decrees first named in the prayer for the present appeal.

It is now contended by the appellees that these decrees are merely orders in execution of the previous decrees of the court; are, therefore, not final in the sense necessary to authorize an appeal; and that, consequently, as to them, the present appeal must be dismissed for want of jurisdiction.

But according to the rule sanctioned and adopted in *Forgay* v. *Conrad*, 6 How., 201, and *Blossom* v. *R. R. Co.*, 1 Wall., 657 [68 U. S., XVII., 674], an appeal will lie from such decrees according to the nature of their subject-matter and the rights of the parties affected.

In the present case the decree of April 12, 1877,

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in effect, distributes the proceeds of the sale upon the basis of the finding and declaration in the decree for foreclosure, that the principal of the bonds had become overdue; for it authorized the purchasers, to the extent of the proportion in which the bid, if treated as cash, would, when applied, extinguish the bonds held by them to use their bonds as cash in payment of their bid. It is manifest that a substantial error, to the prejudice of one of the parties, may origi-
[84] nate in a decree distributing the proceeds of a sale under a decree of foreclosure; and no question can be successfully raised against the right to appeal from such a decree. We cannot, therefore, dismiss the present appeal upon the ground alleged.

It is then urged by the appellees that the decrees in question, having simply followed the directions of previous decrees, originated no error, and that the only alternative is to affirm them. But the decrees involved in this appeal now under consideration are dependent upon the decree of foreclosure and sale; and the latter having been reversed, the decrees in question are left without support, and fall of themselves, by reason of that reversal, vitiated by the common error. As they are already annulled by operation of law, the subject-matter of the appeal is withdrawn, and the appeal itself must be dismissed for lack of anything on which it can operate.

The other decree involved in this appeal was entered November 19, 1877, and is a personal judgment in favor of Huidekoper, Shannon and Dennison, as trustees for themselves and other bondholders, for the deficiency arising from the excess of the amount found due by the decree of foreclosure and sale over the credit given of the proceeds of the sale of the mortgaged property. This deficiency is ascertained to be $1,823,578.84, and execution is awarded therefor, against the Railroad Company, in favor of the above named parties.

It would seem that the reasons given for dismissing the appeal as to the other decrees apply with equal force to the one now under consideration; and such, we think, would be the rule in ordinary cases; for the existence and amount of the deficiency must usually be dependent on the findings of the decree of foreclosure and sale, as to the amount due and the extent to which that may have been reduced by the proceeds of the sale. But the present judgment is not in the customary form. Instead of finding the amount due to the complainants in whose behalf the sale was decreed, the judgment is rendered in favor of Huidekoper, Shannon and Dennison, as trustees for the bondholders. They claim not to have been parties to the suit at the time the decree of foreclosure and sale was rendered; and as we do not consider it proper
[85] to investigate or pass upon that claim in the present proceeding, we entertain the appeal, as to the deficiency decree, and reverse it, for the error which required the reversal of the decree of foreclosure and sale.

The argument of the present appeal, on both sides, seems to have been influenced by the consideration, that it possibly involved a present adjudication of the effect its determination might have upon the rights of the purchasers at the sale and the present title of the property sold. But no question of that character is involved. Whether the purchasers were parties to the litigation, either by name upon the record or in interest and by representation, so as to be affected by the error in the proceeding for which the decrees have been reversed, or whether they or their assigns are protected by the principle and policy that uphold the titles of *bona fide* purchasers without notice, at judicial sales, and any other that may be mooted touching the point, are questions which do not arise upon the present appeal, and are left for further consideration in case they should be presented in a subsequent stage of this, or by virtue of proceedings in some other suit.

For the reasons announced, *it is, therefore, ordered that the appeal from the decrees of April 12, 1877, and of April 16, 1877, respectively, be dismissed, upon the ground that the decrees were vacated by the reversal of the prior decree of foreclosure and sale, rendered December 5, 1876, and that the decree entered November 19, 1877, in favor of Frederick W. Huidekoper, Thomas W. Shannon and John M. Dennison, trustees, be reversed and that the cause be remanded, with directions to proceed therein as may be just and equitable.*

The appellants are entitled to their costs on this appeal.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY of HARTFORD, CONN., *Plff. in Err.*, [30]

v.

CAROLINE R. DOSTER, MARY J. RIDDLE AND TAYLOR RIDDLE; AND LEON H. RIDDLE, IRMA M. RIDDLE AND FRANK RIDDLE, by their Next Friend, CAROLINE R. DOSTER.

(See S. C., 16 Otto, 30-33.)

Case, when withdrawn from jury—cases approved—forfeiture of policy—notice to insured.

*1. A case, which fairly depends upon the effect or weight of testimony, should not be withdrawn from the jury, unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it.

2. Ins. Co. v. Norton, 96 U. S., 239, and Ins. Co. v. Eggleston, *Ib.*, 577, XXIV., approved.

3. Circumstances stated which estop a mutual life insurance company from setting up that the policy sued on was forfeited by the failure of the assured to pay, at the day, the stipulated annual premium.

4. Where that premium was, by the contract, subject to a variation, dependent upon the dividends to which the insured was entitled, it was the duty of the company to give him seasonable notice of the amount of his dividends, in order that he might be enabled, in due time, to pay or tender the balance remaining unpaid upon the premium.

[No. 28.]

Argued Mar. 17, 20, 1882. Decided Oct. 23, 1882.

IN ERROR to the Circuit Court of the United States for the District of Kansas.

*Head notes by *Mr. Justice* HARLAN.

NOTE.—*When a verdict may be directed by the court.* See, *note* to Grand Chute v. Winegar, 82 U. S., XXI., 174.

Life insurance; forfeiture of policy for non-payment of premium; waiver. See *note* to Thompson v. Ins. Co., 104 U. S., XXVI., 765.

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This action was brought in the court below, by the defendants in error, to recover the amount of a policy of insurance on the life of Jackson Riddle, deceased.

The trial having resulted in a verdict and judgment in favor of the plaintiffs for $5,077.06, the defendant sued out this writ of error.

The facts of the case appear in the opinion of the court.

Messrs. **H. E. Barnard** and *Richard D. Hubbard*, for plaintiff in error.

Messrs. **Frank Doster, John W. Lynn,** *W. W. Scott, S. Shellabarger* and *J. M. Wilson*, for defendants in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This is a writ of error from a judgment for the amount of a policy of insurance upon the life of Jackson Riddle, issued on the 20th day of September, 1871, by the Phœnix Mutual Life Insurance Company of Hartford, Connecticut.

The policy purports to have been issued in consideration as well of the representations made in the application for insurance, as of the payment by the wife and children of the insured, the payees named in the policy, of the sum of $215, and the annual payment of a like amount on or before the 20th day of September in every year during its continuance. It contains a stipulation that if the premium be not paid at the office of the Company in Hartford, or to some agent of the Company producing a receipt signed by the president or secretary, on or before the day of its maturity, then, in every such case, the Company shall not be liable for any part of the sum insured, and the policy shall cease and determine, all previous payments being forfeited to the Company. The policy is upon the half note plan, and it is part of the contract that the dividends set apart to the insured be applied in the discharge, *pro tanto*, of [31] annual premiums. The secretary of the Company, in his evidence, states that under the half note plan the insured is permitted to discharge one half of the first four premiums by notes (the interest thereon to be paid in advance) and upon the fifth and subsequent payments, to have his dividends, if any, applied in reduction of the premium. It was in proof that, prior to the maturity of the respective premiums, payable on the 20th days of September, 1872, 1873 and 1874, the Company's general agent sent to the insured at his residence in Monticello, Illinois, printed notices showing when the premium became due, the amount of cash to be paid, the interest on the notes given under the half note plan, and the amount for which an additional note, under that plan, was required. Prior to the 20th of September, 1875, when the fifth annual premium was due, the notice to the insured stated the amount of dividends to be applied in reduction of that premium, the interest to be paid in advance upon the notes previously executed, and the sum to be paid in cash.

The amounts due in the years 1872, 1873, 1874 and 1875 were paid, but not until the expiration of several, in some instances, ten or more days after the time fixed by the policy. They were received, in each instance, so far as the record discloses, without objection upon the part of the Company or its agents.

On the 6th day of October, 1876, the insured lost his life in a railroad collision, leaving unpaid the premium due on the 20th day of September of that year. His residence and postoffice, for more than a year prior to his death had been at Oxford, Indiana. Of his removal to that place, the general agent of the Company at Chicago was distinctly informed, as the evidence tended to show, as early as October, 1875. The letter from that office acknowledging the receipt of the premium due on 20th September, 1875, but not paid until about October 9, of that year, was addressed to the insured, at his new residence in Oxford, Indiana. On the 4th day of October, 1876, fourteen days after the premium for that year was due, there was sent from the office of the Company's general agent at Chicago, addressed by mistake, to the insured at Fowler, Indiana, a notice similar to that given in 1875. This notice, the evidence tended [32] to show, was received from the postoffice, at Fowler, Indiana, where the father never resided, by a son of the insured, on the day the latter was killed, and a few hours only before his death. There was also proof that the insured before leaving his home, at Oxford, Indiana, made arrangements to pay the amount required in that year as soon as the customary notice, showing the sum to be paid, was received. On the 9th day of October, 1876, the amount due was, in behalf of the payees, tendered to the Company's general agent at Chicago. He declined to receive it, upon the ground that the policy lapsed by reason of the non-payment of the premium, at maturity, in the lifetime of the insured.

Upon the part of the payees, it is contended that the Company waived strict compliance with the provision making the continuance of the policy dependent upon the payment of the annual premium on the day named therein; and that, in view of the settled course of business between the Company and its agents on one side and the insured on the other, it is estopped to rely upon the non-payment of the last premium, at the day, as working a forfeiture of the policy.

The facts and circumstances established by the testimony are sufficiently indicated in the charge of the court, to certain parts of which, to be presently examined, the Company objected. It is enough to say, that the testimony was ample to enable each party to go to the jury upon the substantial issues in the case. The motion, at the close of the plaintiff's evidence, for a peremptory instruction for the Company was properly denied. It could not have been allowed, without usurpation, upon the part of the court, of the functions of the jury. Where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved. It should never be withdrawn from them, unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it. [*Greenleaf* v. *Birth*], 9 Pet., 299; [*U. S.* v. *Laub*], 12 Pet., 5; [*Weightman* v. *Washington*], 1 Black, 49 [66 U. S., XVII., 57]; [*Bank* v. *Guttschlick*], 14 Pet., 31; [*Bevans* v. *U. S.*], 13 Wall., 62 [80 U. S., XX., 533]; [*Hendrick* v. *Lindsay*], 93 U. S., 146 [XXIII., 856].

We now proceed to an examination of those [33]

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parts of the charge which were made the subject of exceptions by the Company.

After saying that the policy, with the application, contained the agreement of the parties; that the clause providing for a forfeiture for non payment of the premium at maturity, and declaring the want of authority in agents either to receive premiums after the time fixed for their payment, or to waive forfeiture, constituted a part of the contract, binding upon both parties unless waived or modified by the Company or by its agent thereunto authorized; also, that strict performance of the forfeiture provision could be waived by the Company, either expressly or by implication, the court proceeded to lay down the rules by which the jury should be guided in determining whether there was such waiver. It said, in substance, that if the conduct of the Company in its dealings with the insured and others similarly situated had been such as to induce a belief on his part that so much of the contract as provides for a forfeiture, if the premium be not paid at the day, would not be enforced if payment were made within a reasonable period thereafter, the Company ought not, in common justice, to be permitted to allege such forfeiture against one who acted upon that belief, and subsequently made or tendered the payment; and that if the acts creating such belief were done by the agent and were subsequently approved by the Company, either expressly or by receiving and retaining the premiums, with full knowledge of the circumstances, the same consequences should follow.

The court further told the jury, in substance, that if they found, from the evidence, that the Company were in the habit of sending renewal receipts for the premium on this policy to its local agent, at the place of residence of the insured, duly signed by the president and secretary of the Company, leaving their use subject entirely to the judgment of that agent, and the latter was accustomed to receive the premiums from the insured, without objection, several days after the same became due, and to issue the receipt therefor, and the home Company or the managing agents or officers had full knowledge of such practice, and received from its agent, and retained, the premiums so paid, the insured [34] had a right to believe that the Company waived a strict compliance, and they might find that there was a waiver by the Company of the forfeiting clause of the policy; and if the insured, relying on such practice, within a reasonable or the usual time, paid or offered to pay the premium after the day the same was due, the policy remained in full force and effect, and the Company was liable thereon, notwithstanding the insured had in the meantime died.

The objection of the Company to these parts of the charge was overruled, and an exception taken. The objection would have more weight had the charge ended with these remarks, because in such a presentation of the case the court would have placed before the jury only one side of the issues to which it directed attention. But the charge is not liable to such criticism, since the court, in the same connection, instructed the jury that if the Company had not authorized its local agent, to whom the renewal receipts were sent, to extend the time for payment of the premium beyond the day named in the policy, nor had habitually accepted from the insured through its agent the premiums on the policy after the same became due, with full knowledge that the same were so paid after due and the receipt issued by its agent, then that they could not find that the Company had, either expressly or by implication, waived a strict compliance with the terms of the policy in reference to payment of the premiums, and the policy became forfeited according to its terms.

It seems to the court that the charge was as favorable to the Company as it could have demanded. It was, as to its essential parts, in substantial harmony with recent decisions of this court. In *Ins. Co.* v. *Norton*, 96 U. S., 239 [XXIV., 691], we said, in reference to a policy, similar to the one here in suit, that the company was not bound to act upon the declaration that its agents had no power to make agreements or waive forfeitures, but might, at any time, at its option, give them such power; that the declaration was tantamount to a notice to the insured, which the company could waive and disregard at pleasure. "In either case," said the court, "both with regard to the forfeiture and to the powers of its agents, a waiver of the stipulation or notice would not be repugnant to the written agreement, because it would [35] only be the exercise of an option which the agreement left in it. And whether it did exercise such option or not, was a fact provable by parol evidence, as well as by writing, for the obvious reason that it could be done without writing. In the same case it was said that, although in life insurance time of payment was material, and could not be extended against the assent of the company, where such assent was given, the court should be liberal in construing the transaction in favor of avoiding a forfeiture. And in *Ins. Co.* v. *Eggleston*, 96 U. S., 577 [XXIV., 843], it was said, that the courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Consequently, said the court, speaking by *Mr. Justice* Bradley: "Any agreement, declaration or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture. The representations, declaration or acts of an agent, contrary to the terms of the policy, of course, will not be sufficient, unless sanctioned by the company itself. *Ins. Co.* v. *Mowry*, 96 U. S., 544 [XXIV., 674]. But when the latter has, by its course of action, ratified such declarations, representations or acts, the case is very different." These authorities abundantly sustain the rulings in this case to which reference has been made.

The court below then passed to an examination of the remaining ground relied on as to excusing the non-payment of the last premium on the day it fell due, *viz.*: the failure of the Company to give the insured seasonable notice of the amount of dividends to be applied in reduction of the premium.

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After stating that, by the terms of the policy, the premiums could be paid either at the home office or to an agent of the Company, producing the proper receipt, and that, by the terms of the application, which was the basis of the contract of insurance, the annual dividends due the insured could be applied in discharge of premiums, the court instructed the jury that if [36] they found, from the evidence, that it had been the invariable custom of the Company to transmit to the insured, by mail or by its local agent, a statement of the amount of the premium due, after deducting the dividend, with a notice of the time when, the place where and the person to whom the premium could be paid, then the insured had good reason to expect and rely on such statement and notice being sent to him; and that if the Insurance Company, by its managing agent, had notice of the postoffice address of the insured before the usual time of sending out notice, but failed and neglected to transmit such statement and notice to the insured at his postoffice address until the 4th day of October, and the same did not reach him or the payees in the policy until October 6; and that the insured or payees were ready and waiting to pay said premium when the notice and statement should be received, and by reason of such failure of the Company to send the notice and statement, and by reason of that alone, the premium due in September, 1876, was not promptly paid; and that in a reasonable time thereafter, to wit: on Monday, the 9th day of October, 1876, the payees tendered the Company at Chicago the full amount of the premium due, then the policy did not lapse or become forfeited, notwithstanding the premium was not paid on the day named in the policy, and in the lifetime of the insured.

To that part of the charge, the Company excepted. In the same immediate connection the court below, it may be observed, further instructed the jury that if it had not been the uniform custom of the Company to send the insured such notice and statement at or about the time the premium became due, or if the Company or managing agent had not been notified of the change of the postoffice address of the insured until about the 4th day of October, or that the Company had in reality sent the notice, by mail or otherwise, at a prior date, properly addressed to the insured, then it was not the fault of the Company that the insured was not notified, and the want of such notice would not excuse him from making payment at the day, and the policy would, consequently, become forfeited.

We are of opinion that these propositions are substantially correct. Nor do we perceive that the rulings of the court below are in conflict [37] with our decision in *Thompson* v. *Ins. Co.*, 104 U. S., 258 [XXVI., 767]. In that case it appeared that the insured, for a part of an annual premium, had given a note containing the special provision that in the event of the non-payment of the note at maturity, the policy should be void. The note was not paid at maturity, nor was payment ever tendered while the insured was alive nor at any time after his death, by or in behalf of the payees in the policy. To pleas setting up these facts, replications were filed, in which it was attempted to excuse the failure to make due tender of the amount of the note upon the ground that it was the usage and custom of the company, practiced with the insured and others, as well before as after the making of the note, not to demand punctual payment at the day, but to give thirty days of grace; further, that it had been its uniform custom and usage, in advance of the maturity of notes, to give notice of the day of payment; whereas, no such notice was given to Thompson, and thereby, it was alleged, he was put off his guard and misled as to the time of payment. It was held that the failure to tender the amount due, within the period named in the replication, was, in every view, fatal to the entire case set up by the payees in the policy. "A valid excuse for not paying promptly on the day is," said the court, "a different thing from an excuse for not paying at all." Touching the alleged failure of the company, in conformity with its uniform practice, to give notice of the day of payment, it was said that the insured knew or was bound to know when his premiums became due, and that the company was under no obligation to give him notice, nor did it assume any responsibility by giving notice on previous occasions.

The present case has features which plainly distinguish it from the *Thompson Case*. In the former, there was a tender of the premium within a few days after the death of the insured, and as soon as the payees ascertained the sum required to be paid. In the latter, the amount to be paid was fixed. It was not liable to be reduced on account of dividends or for any other reason, and the insured, therefore, knew the exact amount to be paid in order to prevent a forfeiture of the policy. Now, although the policy issued upon Riddle's life required payment annually of a specific sum as a premium, that stipulation must be construed in connection with [38] the agreement set out in the application, that the premium might be discharged *pro tanto* by such dividends as were allowed to the insured from time to time. Whether the Company, in any particular year, declared dividends, and what amount was available in reduction of the premium, were facts known, in the first instance, only to the Company, which had full control of the matter of dividends. It certainly was not contemplated that the insured should every year make application, either at the home office or at the office of its general agent in Chicago, in order to ascertain the amount of dividends. The understanding between the parties upon this subject is, in part, shown by the practice of the Company. Independently of that circumstance, and waiving any determination of the question, whether the forfeiture was not absolutely waived by the act of the general agent, in sending notice to the insured after the day fixed for the payment of the premium due September 20, 1876, it was, we think, the Company's duty, under any fair interpretation of its contract, having received information as to the postoffice of the insured, to give seasonable notice of the amount of dividends, and thereby inform him as to the cash to be paid in order to keep alive the policy. It did, as we have seen, give such notice in 1875, and received payment of the amount due after the date fixed in the policy. Within a reasonable time after the notice for 1876 came, in due course of mail, to the hands of one of the payees, a tender of the amount was made to the general agent at Chicago. No such features were disclosed in the *Thompson*

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Case, and they are, as we think, sufficient not only to distinguish the present case from that one, but to authorize the instructions of which the Company complains.

The assignments of error bring to our attention numerous exceptions taken by the Company to the admission of evidence, and to the refusal to give instructions asked in its behalf. We deem it unnecessary to consider them in detail. So far as they affect the substantial rights of the parties, they are disposed of by what has been said touching the charge of the court upon the essential questions in the case.

The judgment must, therefore, be affirmed. It is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 168; 111 U. S., 615.

JOHN L. BACON AND H. E. C BASKERVILLE, Partners, as BACON & BASKERVILLE, ET AL., *Appts.*,

v.

GEORGE C. RIVES ET AL

(See S. C., 16 Otto, 99-108.)

Removal of cause—limitation, as to suits on foreign contracts—in favor of trustee—demurrer.

1. Where the necessary parties, on the respective sides of the controversy which is the foundation of a suit in a state court, are citizens of different States, it may be removed to the U. S. Circuit Court, although some defendants, who are mere formal parties, are citizens of the same State as the plaintiff.
2. By the Code of Virginia, no action can be maintained upon a contract which was made and was to be performed in another State or country, by a person who then resided therein, after the right of action thereon is barred by the laws of such State or country.
3. Unless otherwise declared by statute, a limitation does not commence running in favor of the trustees of an express trust, until the trust is closed, or until the trustee, with the knowledge of the *cestis que trust*, disavows the trust, or holds adversely to their claim.
4. Where it does not distinctly appear from the bill that the suit is barred by limitation, a demurrer setting up such bar should be overruled, although the facts, when fully developed on the trial may establish such defense.

[No. 29.]

Argued Mar. 21, 1882. Decided Oct. 23, 1882.

APPEAL from the Circuit Court of the United States for the Western District of Virginia.

The history and facts of the case appear in the opinion of the court.

Messrs. Joseph Bryan and **William L. Royall**, for appellants.

Mr. **Egbert R. Watson**, for appellees.

Mr. Justice **Harlan** delivered the opinion of [100] the court:

This is a suit in equity. The complainants and appellants are John L. Bacon and H. E. C. Baskerville, partners as Bacon & Baskerville; John Stewart, Robert Ould, Robert H. Maury and Isaac H. Carrington, trustees for the benefit of the creditors of Wm. H. Macfarland, deceased, by virtue of a deed dated October 20, 1870; John W. Wright, sheriff of the City of Richmond and, as such administrator of Wm. H. Macfarland, all citizens of Virginia.

The defendants are Geo. C. Rives, a citizen of Texas, in his own right and as administrator with the will annexed of Geo. Rives, deceased; J. Henry Rives, a citizen of Virginia, executor of Geo. Rives, deceased, and Alfred L. Rives, a citizen of Alabama, and executor of Wm. C. Rives, deceased.

The suit was commenced, on the 22d day of July, 1875, in the Circuit Court of Albemarle County, Virginia, and was thence removed, upon the petition of defendant, Geo. C. Rives (in which the defendant, Alfred L. Rives, executor of Wm. C. Rives, united), into the Circuit Court of the United States for the Western District of Virginia. In the latter court a demurrer to the bill upon the part of the principal defendant, Geo. C. Rives, was interposed, upon the ground that the suit was barred by the Statute of Limitations, both of Texas and Virginia, The demurrer was sustained and the bill dismissed.

The case made by the bill is, substantially, as follows:

In the summer of the year 1863, Bacon & Baskerville, John Stewart, Robt. H. Maury, Wm. H. Macfarland and Wm. C. Rives, uncle of the defendant, Geo. C. Rives, sent the sum of $131,000 in "Confederate States treasury notes"—the currency, at that time, of Virginia, Louisiana and Texas—to Col. James H. Stevens, then in Monroe, Louisiana, with instructions to invest or expend the same in the purchase of cotton on plantations in Louisiana and Texas, to remain thereon until the civil war was ended. Of that sum Bacon & Baskerville owned $48,000; Stewart $48,000; Maury $10,000; Macfarland, $5,000; and W. C. Rives $20,000. Subsequently, however, Bacon & Baskerville became the owner of $80,000, and Stewart $16,000, of the $131,000, the interest of the other parties remaining the same as at the outset. The funds were sent to Stevens, by Bacon & Baskerville, by whom all instructions were given and nego- [101] tiations conducted. The proceeds of the investment, it was understood, were to be divided among the parties in proportion to their respective interests.

About the 3d day of September, 1863, Stevens died in Louisiana, *en route* to Texas, and without having invested any of the funds transmitted to him. Shortly thereafter, complainants were notified by the widow of Stevens that she held the $131,000 subject to their order. The defendant, Geo. C. Rives, wrote to the same effect to his cousin, Alfred L. Rives, son and executor of W. C. Rives. Moved by the advice and solicitation of W. C. Rives, as well as by the encouraging character of certain letters written by Geo. C. Rives to Alfred L. Rives (and which letters were exhibited to complainants), and influenced especially by the declaration of the former in his letter, that if the funds were turned over to him he would act for the parties under their instructions, and would save it by investing it in city property in Austin, Texas, or in property which he represented would pay well, and could be readily sold at any time, the complainants made and appointed Geo. C. Rives their agent in the room and stead of Stevens. Complainants, consequently, ordered and directed the funds, in the hands of Mrs. Stevens, to be paid to Geo. C. Rives, and towards the close of the year 1863, or early in 1864, they were received by the latter.

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Geo. C. Rives received the funds as agent and for the benefit of complainants, to be invested in conformity with specific instructions given by Bacon & Baskerville, the managers and business negotiators of the enterprise, with the concurrence of the joint owners of the funds, *viz.:* 1. That the funds should be invested in cotton on plantations in Texas, to remain thereon until the war ended, that being the first and chief object of the whole venture. If that could not be done, then: 2. To invest them in ranch property; meaning lands in Texas with cattle and horses thereon. If that could not be done, then: 3. To invest them in town lots in Austin.

Nothing was heard from Geo. C. Rives upon the subject of the proposed investment until, in response to a letter from Bacon & Baskerville, under date of January 27, 1865, he wrote a letter, under date of April 5, 1865, stating that he had invested the funds in the transportation of cotton, under articles of partnership to continue during the war, and that the business was under the management of an active partner, who gave his whole time and attention to it; but he did not state who the active partner was, nor how much of the funds he had so invested, nor what property he had purchased therewith, nor what proceeds, if any, had accrued to him from the investment. These departures from the instructions given to the agent were not approved by complainants, and they hoped, notwithstanding their orders had been disregarded, that a fair and honest return would be made by their agent. After the war ended, and after the expiration of eighteen months without any report or statement from their agent, Bacon & Baskerville, in November, 1866, wrote to Geo. C. Rives, at Austin, Texas, asking an account of his agency, to which letter no reply was made. On the 26th day of January, 1867, they again wrote to him at Austin, asking such account, but no reply to that letter was received. Complainants, consequently, "almost reached the conclusion that Rives had either died or left the country." But, in March, 1875, learning accidentally, that he was not only living, but for several years then past had visited Virginia each summer, they again wrote to him asking an account of his agency. No reply came to that letter. At the same time they wrote, as they had before done, to Alfred L. Rives, asking information as to Geo. C. Rives, but no reply was received, nor were the letters written to the latter ever returned to the writers through the dead letter office.

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As soon as possible after learning the whereabouts of Geo. C. Rives, complainants instituted this suit. They charge that the retention by Geo. C. Rives in his own possession, of the whole proceeds of the funds intrusted to him, his silence for nearly ten years, and his failure to render any account, arose from an intention to defraud complainants out of the funds, or the proceeds of their investment.

The bill further shows that Geo. Rives, father of Geo. C. Rives, died in Virginia in 1874, possessed of a large estate, real and personal, in which, by the will of his father, he had a large interest, and that J. Henry Rives and Charles Edward Rives qualified as his executors. The complainants ask that the interest of Geo. C. Rives in that estate, in whatever form, be attached in the hands of the executors to pay whatever may be shown to be due them. Attachments were issued and served upon the executors, and were levied upon that interest. It is also averred that W. C. Rives has died and that Alfred L. Rives is his executor; that Macfarland died in 1873, but before his death he executed, on the 29th day of October, 1870, a deed conveying all his property of every kind, in possession or in action, to Robert Ould and Isaac H. Carrington, trustees, for the benefit of his creditors, and as no administration was had upon his estate, the same was committed to the defendant [complainant] Wright, Sheriff of the City of Richmond. It may be stated, in this connection, that after the cause was removed from the state court, Charles Edward Rives, an original defendant, died, and Geo. C. Rives became administrator *de bonis non*, with the will annexed, of Geo. Rives.

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The prayer of the bill is:

That the defendants be required to make, upon oath, full, true and complete answers to all the allegations of the bill;

That George C. Rives be required to render a full and complete account of all his actings and doings as agent of complainants, and show what disposition or investment he made of the funds intrusted to him, and what the proceeds of such investment have been; and, if no investment was made according to the instructions given, nor any other investment of which complainants may choose to avail themselves, that he be required to pay the value of the funds intrusted to him as agent, with lawful interest thereon.

Without waiving a full answer under oath to the bill, the complainants ask that defendant, Geo. C. Rives, be required to answer the several special interrogatories embodied therein, the object of which is to obtain from him information as to whether he had received the $131,000 under an engagement, as agent, to invest in the mode set out in the bill; whether he had so invested it or not; if not, why not; if so, in what kind of property he had invested, and what disposition had been made of it or of its proceeds; and whether, after the close of the war, he did not have in his possession property purchased, in whole or in part, with the proceeds of the investment; if so, of what did it consist, and what has been done with it.

There was also a prayer for such other and further relief as equity and justice required. Thus stood the suit when removed from the state court.

J. Henry Rives, a citizen of Virginia, having been made a defendant, in his capacity as one of the executors of George Rives, it is contended that the suit was not removable into the Circuit Court of the United States. This position cannot be successfully maintained. Without giving all of the reasons which may be assigned in support of the right of removal, it is sufficient to say that he and Charles Edward Rives, executors of George Rives, had no interest in the question whether complainants have or not a cause of action against George C. Rives on account of the matters set out in the pleadings. They were neither necessary nor indispensable parties to the issue between the complainants and the principal defendant. It was

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of no moment to them whether the one or the other side in that controversy succeeded. It is true that the attachment (sued out by complainants before the removal of the suit) against George C. Rives, was served upon the executors, and was levied upon his interest in the estate of his father. But they were made defendants, not because of any connection they had with the main controversy, but to the end that George C. Rives' interest in his father's estate might be reached and held, subject to such final decree as complainants might obtain against him. Though made, formally, defendants, the executors of George Rives occupied, substantially, the position of mere garnishees. Their citizenship was, consequently, immaterial. The necessary parties, on the respective sides of the controversy which is the foundation of the litigation, being citizens of different States, the relation of the executors to the suit was properly regarded as merely incidental, arising from the necessity of preserving the means whereby complainants might, if successful in this suit, obtain satisfaction of their demands against George C. Rives.

The remaining question to be considered relates to the defense of the Statute of Limitations presented by the demurrer to the bill. The contention of defendant is that the cause of action, if any, existed as far back as the close of the late civil war; that in Virginia and Texas the running of limitation was suspended by statute, in the former from sometime in April, 1861, until January 1, 1869, and in the latter from sometime in 1861 until March 30, 1870; that, by the laws of Texas, two years was the limitation to suits on oral, and four years to suits on written contracts, while the limitation, in Virginia, to such suits as the present one was five years; consequently, excluding from the computation of time the periods of the suspension of the Statute in the respective States, the plaintiffs' cause of action was barred. The defendant further insists that the law of Texas governs by reason of that provision in the Code of Virginia which declares that "Upon a contract which was made and was to be performed in another State or country, by a person who then resided therein, no action shall be maintained after the right of action thereon is barred by the laws of such State or country." Code of Va., ed., 1873, sec. 20, p. 1002.

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In the view which the court takes of the case, it is unnecessary now to determine whether reference must be had to the law of the State where the suit is pending, or to that of the State where the alleged contract was to be performed. We are not satisfied that the cause of action, as set out in the bill, was, at the commencement of the suit, barred by limitation as prescribed in either Texas or Virginia. The case, as now presented, discloses (not, perhaps, one of those technical trusts, of which a court of equity has peculiar and exclusive jurisdiction, but yet) a trust arising out of express agreement, under which the defendant, Geo. C. Rives, received from complainants certain funds, which he undertook to invest in particular kinds of property, in conformity with specific instructions given by those whom he represented. His duty, under the law, although the agreement did not, in terms, so declare, was, from time to time, as the circumstances required, to inform those whom he represented of his acts and, upon completion of the trust, to render an account of all he had done in the premises; or, if he elected not to execute the trust, to surrender the property or its proceeds. He received the funds, as has been seen, in the latter part of the year 1863 or early in 1864. He undertook to invest them, if practicable, in cotton on plantations in Texas, to remain thereon until the civil war was concluded. Failing in that, he was to invest in ranch property, or lands in Texas with cattle and horses thereon; failing in the latter, he was to invest in town lots in Austin in that State. He gave, so the bill avers, no information whatever of his acts until the spring of 1865, when, in response to a letter from his principals, he wrote that he had invested the funds, received by him, in the transportation of cotton, under articles of copartnership to continue during the war, and that the business was under the management of an active partner, who gave his whole time and attention to it. Whether that arrangement involved a violation of the laws of the United States, in reference to the shipment of cotton from the insurrectionary districts, does not now appear. But he withheld the name of that partner, and did not inform his principals of the result of that investment. From that time forward, the defendant failed to communicate with complainants or with any of them, as to what, if anything, had been accomplished in the execution of his trust. To letters making inquiries, and which, in the present attitude of the case, we may assume were received, no response was made.

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Taking, then, the allegations of the bill to be true, as upon demurrer we must do, the existence of the trust is clearly established; it is still open, or not wholly executed; it has never been disclaimed by clear and unequivocal acts or words, brought to the notice or knowledge of complainants or either of them; there has been no adverse holding of the original fund or of its proceeds; consequently, the possession by the defendant, Geo. C. Rives, of the proceeds of the original funds, if invested at all, may be deemed the possession of those whom he undertook to represent. But it is suggested that while the agreement did not prescribe any period within which he was to make the investment, it was necessarily implied that it was to be performed within a reasonable time; consequently, it is argued, the Statute would commence running after the lapse of such reasonable time, or from the moment when complainants were entitled to enforce an accounting. *Phillips* v. *Holman*, 26 Texas, 280. To this it may be replied that, whether the trustee was derelict in duty in not making the investment within any particular period, depends upon the special facts of the case. Having regard to all the circumstances, particularly such as were connected with the disturbed condition of the country for many years after the war closed, we cannot, upon the case made by the bill, fix the date when the defendant should, with reasonable diligence, have executed his trust, or say that there has been, upon the part of complainants, such delay as prevents them from applying to a court of equity for relief. Being called upon to execute what, consistently with the facts as disclosed in the bill,

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appears to be a subsisting trust, or if it has been, in whole or in part, executed, to disclose when and how it was so executed, he should not be permitted to take shelter behind a demurrer, which relies simply upon the statutory limitation and confesses that he has kept his *cestuis que trust* in ignorance of what it was his duty to communicate. The complainants, it seems to the court, are entitled, upon well established principles of equity, to a discovery as to the disposition, if any, which has been made of their property. Inquiry in that direction should not be cut off, since, upon the showing made, it does not clearly appear that the suit is barred by the statutes of limitation. Unless otherwise distinctly declared by the Statute prescribing fixed periods for the commencement of suits, the cause of action is not, ordinarily, deemed to have accrued against, nor limitation to commence running in favor of, the trustee of such a trust as the bill describes, until the trust is closed, or until the trustee, with the knowledge of the *cestuis que trust* disavows the trust, or holds adversely to the claim of those he represented.

And such seems to be the doctrine of the Supreme Court of Texas, by the laws of which State, the defendants insist, this case is to be determined as to the question of limitation. *White* v. *Leavitt*, 20 Texas, 705; *Grumbles* v. *Grumbles*, 17 Texas, 477. In the first of these cases, a recovery was sought by the plaintiff for the recovery of the value of certain goods consigned for sale to the defendants therein, and which had never been accounted for. The suit was not commenced until four years after the goods came to the hands of the consignees for sale. It was said by the court: "The proof shows that the goods were held and disposed of by White & Co. in trust for Leavitt, and there being no evidence that the trust was ever repudiated, the Statute of Limitations [two years] did not run upon the cause of action, as it has often been decided by this court."

It is, also, suggested that the bill concedes that the complainants were informed by defendant in the year 1865 that he had invested the funds placed in his hands in a way not author- [108] ized by the instructions given him and, consequently, it is argued, the complainants had then a cause of action to recover such damages as they had sustained by reason of the disregard of their instructions. It may be that, upon final hearing, when the facts are fully disclosed, the court may be bound to hold the complainants estopped to complain of the defendant's departure from the instructions under which he received the funds in question. Even then, so far as can be now determined from the allegations in the bill, the defendant would be liable to account for the proceeds, if any, of his investment "in the transportation of cotton under articles of partnership," in the same way that he would be required to account for the proceeds of investments made in conformity to his instructions. It does not appear from the bill that the defendant intended, by investing in the particular mode stated in his letter, to assume a position of hostility to his principles, or to hold the proceeds, if any, of that investment, in his own right.

As, therefore, it does not clearly or distinctly appear from the bill that the suit was barred by limitation, the demurrer should have been overruled. The facts, when fully developed, may present an altogether different case from that now disclosed. We can only consider the question of limitation in the light of the facts as alleged in the bill.

The decree is reversed and the cause remanded for further proceedings in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WILLARD PARKER, Jr., *Appt.*, [1]
v.
LOT M. MORRILL.

(See S. C., 16 Otto, 1, 2.)

Jurisdiction as to amount.

An appeal in an action for partition, will be dismissed for want of jurisdiction, where the appellant claims only one twentieth of the lands, and the value of the property is nowhere stated, and no attempt has been made to supply the defect by affidavits, as this court cannot say that the value of appellant's share exceeds $5,000.

[No. 295.]

Motion submitted Oct. 16, 1882. Decided Oct. 23, 1882.

APPEAL from the Circuit Court of the United States for the District of West Virginia.

On motion to dismiss.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **Gideon D. Camden**, for appellee, in support of motion.

Mr. **D. D. Lord**, for appellant, in opposition to motion.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a motion to dismiss, for the reason that it does not appear in the record or by affidavits that the value of the matter in dispute exceeds $5,000. The record shows that Willard Parker, Jr., the appellant, as the owner of one undivided twentieth part of a large tract of land in West Virginia, embracing within its boundaries several hundred thousand acres, filed his bill in equity against Willard Parker, Sr., as the owner of the remaining nineteen twentieths, and Morrill, the appellee, for a partition as between himself and Parker, Sr., and to remove a cloud upon the title to a part of the tract caused by a claim set up by Morrill. Upon the hearing, the court below dismissed the bill as to Morrill, and from a decree to that effect Parker, [2] Jr., took this appeal. Parker, Sr., did not appear as an actor in the court below, and has not united in the appeal.

The lands claimed by Morrill are not described either in the bill or in the answer of Morrill, otherwise than by reference to certain patents under which he assumed to hold. These patents covered between fifty and sixty thousand acres. In one of the depositions it is shown that, when the suit was begun, Morrill claimed about twenty-five thousand acres. The value of the property is nowhere stated. The whole

NOTE.—*Jurisdiction of U. S. Supreme Court depends on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

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tract, in which Parker, Jr., claimed his undivided interest, included very much more than the Morrill lands. On the 11th of January, 1854, this whole tract was conveyed to Peter Clark by deed reciting a consideration of $3,090. Clark, on the 29th of March, 1854, conveyed it to William W. Campbell by deed in which the consideration is stated to have been $8,000. On the 5th of May, 1858, Campbell conveyed to Parker, Sr., for a nominal consideration, and, on the 2d of November, 1872, Parker, Sr., conveyed the one undivided twentieth to Parker, Jr., for $2,000. In his petition for this appeal, filed September 8, 1880, Parker, Jr., states the value of the lands claimed by Morrill to be over $2,000. Notice of the present motion was served on the counsel for the appellant in May last. The brief in support of the motion was filed here on the 6th of May. That of the appellant was filed on the 7th of October. Notwithstanding the dismissal was claimed on account of the value of the matter in dispute, no attempt has been made by the appellant to supply the defect in the record by affidavits, as under our practice might have been done, but to defeat the motion he relies entirely on the evidence of value to be found in the record.

As the case stands, only the interest of Parker, Jr., in the lands, is in question here. This is one undivided twentieth part only. As Parker, Sr., has not appealed, the value of his interest in the property cannot be taken into the account. The claim of Morrill is only for 25,000 acres. One twentieth of this would be 1,250 acres and, certainly, in the light of the facts appearing all through the record, we cannot say that their value exceeds $5,000.

The motion to dismiss is granted.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 582.

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[3] HENRY BOSTWICK, as Receiver of the NATIONAL BANK OF FISHKILL, NATIONAL BANK OF FISHKILL, LEWIS H. WHITE, HENRY BOSTWICK, JACOB G. VAN WYCK, HENRY D. SHERWOOD ET AL., Directors of the NATIONAL BANK OF FISHKILL, *Plffs. in Err.*,

v.

THEODORE BRINKERHOFF, Suing in His Own Behalf and for the Benefit of the Other STOCKHOLDERS of the NATIONAL BANK OF FISHKILL.

(See S. C., 16 Otto, 3, 4.)

Review of state judgment—final judgment.

1. A State judgment or decree, to be final, so as to give this court jurisdiction on appeal or writ of error, must terminate the litigation between the parties on the merits of the case.
2. A judgment of reversal, with leave for further proceedings in the court below, cannot be brought here on writ of error, as it does not terminate the litigation in the suit.

[No. 837.]

NOTE.—*What is final decree or judgment of state or other court from which appeal lies.* See *note* to Gibbons v. Ogden, 19 U. S. (6 Wheat.), 448.

Submitted Oct. 10, 1882. Decided Oct. 23, 1882.

IN ERROR to the Court of Appeals of the State of New York.

The history and facts of the case sufficiently appear in the opinion of the court.

On motion to dismiss.

Mr. **J. Hervey Cook,** for defendant in error, in support of motion:

The judgment of the Court of Appeals is not a "final judgment," within the meaning of the statute concerning the review of judgments and decrees of State Courts on writ of error. U.S. R. S., sec. 709.

A judgment, to be final, must finally decide and dispose of the whole merits of the cause, so that it will not be necessary to bring the cause again before the court.

Beebe v. *Russell*, 19 How., 283 (60 U. S., XV., 668); *Farrelly* v. *Woodfolk*, 19 How., 288 (60 U. S., XV., 670); *Mordecai* v. *Lindsay*, 19 How., 199 (60 U. S., XV., 624).

A decree overruling a plea and directing the defendant to answer, is not a final judgment.

Rutherford v. *Fisher*, 4 Dall., 22.

A judgment of the highest court of a State, reversing the judgment of an inferior court and ordering a new trial or remanding the case for further proceedings, is not a "final judgment" in the sense in which the term is used in the statute concerning writs of error.

Houston v. *Moore*, 3 Wheat., 433; *Brown* v. *Bank of Florida*, 4 How., 465; *Pepper* v. *Dunlap*, 5 How., 51; *Tracy* v. *Holcombe*, 24 How., 426 (65 U. S., XVI., 742); *Parcels* v. *Johnson*, 20 Wall., 658 (87 U. S., XXII., 410); *Davis* v. *Crouch*, 94 U. S., 514 (XXIV., 281); *McComl* v. *Comrs. of Knox Co.*, 91 U.S., 1 (XXIII., 185).

Mr. **E. L. Fancher,** for plaintiffs in error, *contra:*

By the demurrer the plaintiffs in error claimed the right, privilege and immunity, under the National Currency Act, of having the question of their liability under that Act decided by a Federal Court.

Act of Congress of Feb. 1867; *Murdock* v. *Memphis*, 20 Wall., 591, 632 (87 U. S., XXII., 429, 443); U. S. R. S., sec. 709.

That claim was denied by the highest court in the State of New York, and the decision was final.

Field, *J.*, in *Williams* v. *Bruffy*, said (102 U. S., 255, XXVI., 137): "Whenever the highest court of a State, by any form of decision, affirms or denies the validity of a judgment of an inferior court, over which it, by law, can exercise appellate authority, the jurisdiction of this court to review such decision, if it involves a federal question, will, upon proper proceedings, attach."

See, also, *Atherton* v. *Fowler*, 91 U. S., 143 (XXIII., 265).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was a suit begun in the Supreme Court of the State of New York by a stockholder in a National Bank against the directors, to recover damages for their negligence in the performance of their official duties. A demurrer was filed to the complaint, which raised, among others, the question whether such an action

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could be brought in a State Court. The Supreme Court at Special Term sustained the demurrer and dismissed the complaint. This judgment was affirmed at General Term. An appeal was then taken to the Court of Appeals, where it was ordered and adjudged "That the judgment of the General Term * * * be * * * reversed and judgment rendered for plaintiff on demurrer with costs, with leave to the defendants to withdraw the demurrer within thirty days, on payment of costs * * * and to answer the complaint." It was also further ordered that the record and the proceedings in the Court of Appeals be remitted to the Supreme Court, "There to be proceeded upon according to law." From this judgment of the Court of Appeals a writ of error was taken to this court, which the defendant in error now moves to dismiss because the judgment to be reviewed is not a final judgment.

The rule is well settled and of long standing, that a judgment or decree, to be final, within the meaning of that term as used in the Acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it [4] had already rendered. *Whiting* v. *Bank*, 13 Pet., 15; *Forgay* v. *Conrad*, 6 How., 204; *Craighead* v. *Wilson*, 18 How., 201 [59 U. S., XV., 333]; *Beebe* v. *Russell*, 19 How., 285 [60 U. S., XV., 669]; *Bronson* v. *R. R. Co.*, 2 Black, 531 [67 U. S., XVII., 360]; *Thomson* v. *Dean*, 7 Wall., 345 [74 U. S., XIX. 95]; *St. Clair Co.* v. *Lovingston*, 18 Wall., 628 [85 U. S., XXI., 813]; *Parcels* v. *Johnson*, 20 Wall., 654 [87 U. S., XXII., 410]; *R. R. Co.* v. *Swasey*, 23 Wall., 409 [90 U. S., XXIII., 137]; *Crosby* v. *Buchanan*, 23 Wall., 453 [90 U. S., XXIII., 142]; *Comrs.* v. *Lucas*, 93 U. S., 113 [XXIII., 824]. It has not always been easy to decide when decrees in equity are final within this rule, and there may be some apparent conflict in the cases on that subject, but in the common law courts the question has never been a difficult one. If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently, it has been uniformly held that a judgment of reversal, with leave for further proceedings in the court below, cannot be brought here on writ of error. *Brown* v. *Bank*, 4 How., 466; *Pepper* v. *Dunlap*, 5 How., 51; *Tracy* v. *Holcombe*, 24 How., 426 [65 U. S., XVI., 742]; *Moore* v. *Robbins*, 18 Wall., 588 [85 U. S., XXI., 758]; *M'Comb* v. *Knox Co.*, 91 U. S., 1 [XXIII., 185]; *Baker* v. *White*, 92 U. S., 179 [XXIII., 481]; *Davis* v. *Crouch*, 94 U. S., 514 [XXIV., 281]. This clearly is a judgment of that kind. The highest court of the State has decided that the suit may be maintained in the courts of the State. To that extent, the litigation between the parties has been terminated, so far as the State Courts are concerned, but it still remains to decide whether the directors have in fact been guilty of the negligence complained of and, if so, what damages the stockholders have sustained in consequence of their neglect. The Court of Appeals has given the defendants leave to answer the complaint, and the trial court has been directed to proceed with the suit accordingly. Such being the case, it can in no sense be said that the judgment we are now called on to review terminates the litigation in the suit.

The motion to dismiss is granted.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 11, 43; 108 U. S., 28, 242; 109 U. S., 183; 114 U. S., 128.

JOHN D. COUGHLAN, Admr. of FRANCIS X. DANT, Deceased, *Plff. in Err.*,

v.

DISTRICT OF COLUMBIA.

(See S. C., 16 Otto, 7-11.)

Case for new trial, when to be filed—bill of exceptions—death of party.

*1. After a term in which a final judgment on a verdict has been rendered by one Justice of the Supreme Court of the District of Columbia, has been adjourned without day, and an appeal taken from his judgment to the General Term, but no bill of exceptions or case stated filed, a new trial cannot be granted upon a case stated filed by the judge at a subsequent term.

2. When a verdict and judgment for a plaintiff have been wrongly set aside, and the error appears of record, he may, without any bill of exceptions, avail himself of it upon a writ of error to reverse a final judgment afterwards rendered against him.

3. When a judgment for a plaintiff in a personal action has been erroneously set aside, and a subsequent final judgment against him is brought up by writ of error, pending which he dies, this court will affirm the judgment in his favor *nunc pro tunc.*

[No. 29.]

Argued Oct. 11, 1882. Decided Oct. 30, 1882.

IN ERROR to the Supreme Court of the District of Columbia.

The history and facts of the case appear in the opinion of the court.

Messrs. Reginald Fendall and **Walter D. Davidge,** for plaintiff in error.

Mr. **Albert G. Riddle,** for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

This is an action to recover damages for a personal injury sustained by reason of a defect in a highway. The Supreme Court of the District of Columbia originally held that the action could not be maintained against the de- [8] fendant, and gave judgment in its favor. But this court, on writ of error, reversed that judgment and ordered a new trial. *Dant* v. *District of Columbia*, 91 U. S., 557 [XXIII., 446]. Upon the present record that decision of this court must, as was assumed by both counsel at the argument, be considered as settling the law of the case on the question then decided.

This record shows the following proceedings: at October Term 1876 of the Supreme Court of the District of Columbia, held by one Justice, a new trial was had pursuant to the mandate of this court. On the 18th of November a verdict was returned for the plaintiff in the sum of $5,000 and judgment rendered thereon, and the defendant moved the Judge for a new trial, because the verdict was contrary to law and the instructions of the court and to the evidence in the case, and because the damages were excessive. On the 26th of December that motion

*Head notes by *Mr. Justice* GRAY.

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was overruled. On the 5th of January, 1877, the defendant filed this appeal: "And now comes the defendant by its attorney, and appeals from the judgment rendered against it at this Term to the General Term of said court, having first filed in said cause a statement of the case;" and on the same day, October Term 1876, was adjourned without day.

No statement of the case was filed until the next Term, at which, on the 9th of March, 1877, a transcript of the pleadings and of the instructions to the jury and an abstract of all the testimony given in the cause were filed, with a certificate, under the hand and seal of the Judge who presided at the trial, to their correctness, and "That, for the purpose of making a case stated on appeal by the defendant from the verdict of the jury and the order of the Justice refusing a new trial, I sign and seal this paper, and order it to be filed as of the day of appeal, January 5, 1877, the defendant not having been guilty of laches in the case; that to my signing and sealing this paper the plaintiff objects, which objection is overruled by me, and to the overruling of which objection the plaintiff excepts."

At September Term 1877, there was a "Motion for a new trial on case stated filed in General Term October 8, 1877;" and on the 8th of December, 1877, the court in General Term reversed the judgment below, and remanded the [9] case to be tried anew. At the third trial, the jury returned a verdict for the defendant, under an instruction that the plaintiff could not recover because the evidence showed contributory negligence on his part. To this instruction he tendered a bill of exceptions, which was allowed and made part of the record and, after judgment on this verdict for the defendant, was entered at a General Term of the court, which, on the 11th of November, 1878, affirmed the judgment; and on the next day the plaintiff sued out this writ of error.

Since the entry of the case in this court the plaintiff has died, and the action is prosecuted by his administrator.

The Revised Statutes of the United States relating to the District of Columbia contain the following provisions: an exception taken at the trial of a cause may be reduced to writing at the time, or "May be entered on the minutes of the justice, and afterwards settled in such manner as may be provided by the rules of the court, and then stated in writing in a case or bill of exceptions, with so much of the evidence as may be material to the questions to be raised." Sec. 803. The justice who tries the cause may, in his discretion, entertain a motion, entered on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence or for excessive damages; "but such motion shall be made at the same term at which the trial was had." Sec. 804. "When such motion is made and heard upon the minutes, an appeal to the General Term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner." Sec. 805. "A motion for a new trial on a case or bill of exceptions, and an application for judgment on a special verdict or a verdict taken subject to the opinion of the court, shall be heard in the first instance at a General Term." Sec. 806.

By the rules of the Supreme Court of the District of Columbia, which are made part of the record, every motion for a new trial must be in writing, and state the grounds upon which it is based, and be made within four days after verdict, and be entered on the minutes of the court on the day on which it is presented; Rule 61; "The bill of exceptions must be settled before the close of the term, which may be pro- [10] longed by adjournment in order to prepare it;" Rule 65; and "In every case, the fact of the settling and filing of the bill of exceptions and that it is made part of the record shall be noted on the minutes of the court." Rule 68.

By the statutes above quoted, although a motion for a new trial on a case or bill of exceptions may "be heard in the first instance at a General Term," any exception stated in the case or bill must either have been reduced to writing at the trial, or have been then entered on the minutes of the Justice and "afterwards settled in such manner as may be provided by the rules of the court," and those rules require it to be "settled before the close of the Term."

The record in this case shows that October Term, 1876, was adjourned without day on the 5th of January, 1877, and does not show, otherwise than by the certificate afterwards filed by the Judge, what were his rulings in matter of law, or that any exceptions to such rulings was taken by the defendant. The only motion for a new trial made within four days after verdict, as required by the 61st Rule, was the motion filed at that Term. Even if the court in General Term could dispense with its rules so far as to entertain an original motion for a new trial after the time therein prescribed, and if the "motion for a new trial upon case stated filed in General Term, October 8, 1877," can be deemed a distinct motion filed for the first time in the General Term, the difficulty remains that the only case stated which appears of record is the case stated by the Judge two months after the final adjournment of the Term at which he had overruled the motion made before him for a new trial on the ground, among others, that the verdict for the plaintiff was contrary to law, and had rendered judgment on that verdict, and an appeal from his judgment had been taken to the General Term. At that stage of the case, the Judge could not, without contravening the express provisions of the statutes and the decisions of this court, present for consideration in an appellate court questions of law which had not been made part of the record at the Term at which his judgment was rendered. *Generes* v. *Bonnemer*, 7 Wall., 564 [74 U. S., XIX., 227]. The judgment setting aside the verdict for the plaintiff and ordering a new trial was, therefore, erroneous, whether it is to be treated as [11] proceeding upon a distinct motion filed at the General Term, or upon an appeal from the decision of the Judge on the original motion filed before him.

As the error appears on the record, no bill of exceptions was necessary to secure the rights of the party aggrieved. *Bennett* v. *Butterworth*, 11 How., 669. As the erroneous order directed further proceedings in the court below, he could not bring the case to this court until after such proceedings had been had and a final judgment rendered against him. *Baker* v. *White*, 92 U. S., 176 [XXIII., 480]; *Bostwick* v. *Brinkerhoff ante*, [73]. As without that error the

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final judgment could not have gone against him, the question is open on his writ of error upon the final judgment.

The judgment rendered upon the verdict in favor of the plaintiff having been erroneously set aside, the subsequent final judgment for the defendant must be reversed, and the former judgment for the plaintiff affirmed as of the date when it was rendered, in order to prevent the action from being abated by the subsequent death of the plaintiff. *Mitchell* v. *Overman*, 108 U. S., 62 [XXVI., 369].

Ordered accordingly.

Mr. Justice **Field** was not present at the argument and took no part in the decision of this case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[423] JOHN R. MOFFITT, *Appt.*,
v.
SAMUEL B. ROGERS, STEPHEN MOORE AND HOMER ROGERS.

(See S. C., 16 Otto, 423–428.)

Void patent.

The first claim of Moffitt's re-issued patent for an improvement in heel stiffeners for boots and shoes is broader than any claim of his original patent and is, therefore, void.

[No. 37.]

Argued Oct. 13, 16, 1882. Decided Oct. 30, 1882.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

Statement of the case by *Mr. Justice* **Woods:**

This is a suit in equity brought for the infringement of re-issued letters patent, dated December 8, 1874, granted to the complainant, John R. Moffitt, for an improvement in the manufacture of heel stiffeners for boots and shoes. The original patent bore date May 21, 1872.

Heel stiffeners or counters, as they are sometimes called, were formerly made by hand, the leather being shaped upon the last while wet, by the blows of the shoemaker's hammer. Previous, however, to the date of the complainant's original letters patent, ready-made molded counters were manufactured by placing the counter blank across the opening of the mold and forcing it into the mold by a plunger or former, or by placing the blank upon the back of the stationary former, and forcing it around the former by the pressure of the mold. Counters had also been shaped on machines by which a rolling pressure was applied. As early as 1853 machines known as the Nichols were employed. This machine had a rotating "former" circular in cross section, which was applied by pressure to another circular roller, conforming to this "former" longitudinally, the object being to set leather into the proper shape either for soles or heel stiffeners.

In the specification of his original patent, Moffitt declared: "In molding to shape, ready-made counters or stiffeners for heels of boots and shoes made of various materials, but usually of waste bits of leather, a difficulty exists, by reason of the peculiar shape, in getting an equal or sufficient pressure upon all parts of such counter so as to get uniform hardness throughout, and also another difficulty in getting a true and proper permanent form throughout all parts of the same counter, some of it, especially in leather, being of a more spongy nature than other parts. This difference or lack of homogeneity prevents a uniform solidity, and precludes the true preservation of the shape which a mold may impart. [424]

The object of my invention is, not only to make more perfect ready-made counters than can be made by any molding process, but also to make a new article of manufacture, *viz.*: a 'rolled' counter, prepared, solidified and uniformly hardened and set to shape by rolling pressure, such rolling action producing a new as well as better article, and admitting of producing the same from material hitherto found too intractable, such as leather board, sheet metal, etc. Instead, therefore, of shaping the stiffener in mold, I employ no mold of any kind, but use a moving former, A, devised by me, of a shape adapted to give the desired shape to the counters, and set eccentrically on a shaft, B, the shaft being arranged to have a continuous or reciprocating rotary movement, either by hand or by power as described. Beneath this former I place a roller, C, having a profile as shown, the converse of and conforming to that of the 'former,' the shaft of the roller having its bearings in the main frame, D. The shaft of the former has its bearings in a swing frame, E. F is a treadle strap, whereby the swing frame may be pulled down to give any required degree of pressure, and which also permits the eccentric former to rise and fall, as in its movements it rides and rolls over the surface of the counter, the counter piece being placed centrally upon the 'former' and being rubbed and rolled as well as squeezed between them while being brought into shape.

The 'former,' as will be seen, projects further from its axis on one side than on the other, so as to conform nearly to the general form of the curves of the inside of a shaped counter. This gives a rolling action in addition to the squeezing over the whole body of the counter."

The cross section of the "former," as shown by the drawings and model, was elongated, with one or both ends semi-circular.

The specification proceeds: "The end *g* of the 'former' need not be a plane, as shown in Fig. 1, but instead may be rounded at its opposite end, as shown in Fig. 3, so that it may be continuously revolved and in either direction. In such case I prefer to place the shaft in its center or equally distant from both ends. [425]

Instead of a single roll, a pair of auxiliary rolls may be used, as shown in Fig. 4, one on each side of the single one."

The claims were thus stated:

"I claim: 1. The described apparatus for rolling to shape heel stiffeners or counters.

2. I also claim as a new article of manufacture heel stiffeners or counters shaped and compacted by a rolling action, as described.

3. I also claim the process herein described of shaping and setting to shape heel stiffeners or counters by rolling as distinguished from molding."

The specification of the re-issued patent is

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substantially the same as that of the original patent, with the following exceptions:

For the term "rollers" in the original specification, the words "supports or rollers" are substituted in the re-issued specification, and the word "mechanism" in the first claim of the re-issue.

In the re-issued specification the requirement that the "former" should be set eccentrically on a shaft, and the statement that the former projects further from the axis on one side than the other, are omitted.

The claims of the re-issued patent are as follows:

1. In a machine for making counters or stiffeners for boots and shoes, a turning or revolving former in combination with mechanism for holding and shaping the blank over it.

2. The revolving or turning counter former A, in combination with a supporting roll or rolls for rolling or for rolling and flanging blank stock into heel stiffeners, substantially as shown and described.

3. The process described of forming the heel seat of a counter by means of a former having a motion about a center, and which gives to the heel seat a drawing or rubbing action against a flange or bearing surface in addition to the rolling action.

[426] The infringement charged against the defendants was in the use by them of the device described in the re-issued letters patent of Louis Coté, dated June 2, 1874.

The specification of this patent declares: "The invention or machine consists of a rotary head of a spherical, spheroidal or sphero-cylindrical shape, fixed upon and concentrically with a rotary shaft, in combination with a stationary mold correspondingly or approximately so concaved, whereby, by the revolution of the said rotary head within the mold, a piece of leather of suitable form introduced between them may be drawn into and through the concavity of the mold, and receive a curved form lengthwise and withdrawn, and thereby be adapted for use as a stiffening for a boot or shoe."

A clear idea of the contrivance covered by the Coté patent may be derived from the drawings which illustrated the specification.

On final hearing of the cause the circuit court dismissed the bill and the complainant appealed.

Messrs. **George Harding**, *William A. Macleod* and *J. E. Maynadier*, for appellant.

Messrs. **Chauncey Smith** and **Thomas L. Wakefield**, for appellees.

Mr. Justice **Woods** delivered the opinion of the court:

The evidence leaves no doubt in our minds that the first claim of Moffitt's re-issued patent is broader than any claim of his original patent. The original patent covered an elongated heel shaped former, set eccentrically upon its shaft. This was an essential part of the invention described in the original patent. The specification declares: "I use a 'former,' A, of a shape adapted to give the desired shape to the counter, and set eccentrically on the shaft B." The "former" shown by the drawings is elongated and heel shaped in cross section. The specification further declares: "The 'former,' as will be seen, projects further from its axis on one side than on the other, so as to conform nearly to the general form of the curves of the inside of the shaped counter. This gives a rolling action in addition to the squeezing over the whole body of the [427] counter."

The specification of the re-issued patent omits both of these statements, and thus allows a "former" to be made, if desired, with a circular cross section, and to be set concentrically on its shaft. It is, therefore, clear that it covers a contrivance essentially different from that described in the original specification and claim.

The first claim of Moffitt's re-issued patent differs materially from the specification and first claim of the original patent in another particular. The original specification thus describes the means by which the blank stock is pressed against the "former"; "Beneath the former I place a roller, C, having a profile, as shown, the converse of and conforming to that of the former, the shaft of the roller having its bearings in the main frame, D." It is also stated that "Instead of a single roll, a pair of auxiliary rolls may be used, as in Fig. 4, one on each side of the single one." In the first claim of the re-issued patent the device of one or three rolls is expanded to cover "any mechanism for holding and shaping the blank over" the "former."

It, therefore, appears that the specification and first claim of the original patent was intended to cover an elongated heel shaped former, eccentrically set upon its shaft, against which the material of which the counter was to be made was pressed by a revolving roller or rollers, and that the first claim of the re-issued patent was expanded so that it might cover a "former" circular in cross section, concentrically set, and revolving in the semi-circular groove of a stationary mold, by which the material was pressed against the former.

The difference between the device covered by the specification and first claim of the original patent, and the device which might be embraced by the specification and first claim of the re-issued patent, is essential and palpable.

If the evidence proves any infringement, it is of the first claim only of complainant's re-issued letters patent, and that such infringement is by the use of the machine covered by the Coté patent.

The purpose of the complainant to cover by his re-issued patent the invention described in [428] the Coté patent is clear and is not denied. It is evident that the Coté machine does not infringe the original patent of Moffit. The "former" described in the original specification of Moffitt being elongated in cross section and eccentrically set upon its shaft, could not have either a rotating or reciprocating movement in the semi-circular grooved mold of the Coté patent, and by no stretch of construction could the stationary grooved mold of the latter patent be considered the equivalent of the cylindrical revolving rollers of Moffitt's original patent.

The specification and first claim of the re-issued patent is a plain attempt to include a device which was not and could not be fairly covered by the original patent. That claim is, therefore, for that reason void. *Gill* v. *Wells*, 22 Wall., 1 [89 U. S., XXII., 699]; *The Wood Paper Patent*, 23 Wall., 566 [90 U.S., XXIII., 31]; *Powder Co.* v. *Powder Works*, 98 U. S., 126

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[XXV., 77]; *Ball* v. *Langles*, 102 U. S., 128 [XXVI., 104]; *Miller* v. *Brass Co.*, 104 U. S., 350 [XXVI., 783]; *James* v. *Campbell*, 104 U. S., 356 [XXVI., 786]; *Heald* v. *Rice*, 104 U. S., 737 [XXVI., 910]; *Bantz* v. *Frantz*, 105 U. S., 160 [XXVI., 1013]; *Johnson* v. *R. R. Co.*, 105 U. S., 589 [XXVI., 1162]. And the evidence shows no infringement of any other claim of the re-issued patent.

The decree of the Circuit Court dismissing the bill was, therefore, right and must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 646.

Ex Parte:

[5] IN THE MATTER OF THE BALTIMORE OHIO RAILROAD COMPANY,
Petitioner.

(See S. C., 16 Otto, 5-7.)

Jurisdiction as to amount.

When, in admiralty, distinct causes of action in favor of distinct parties, growing out of the same transaction, are united in one suit, distinct decrees in favor of or against distinct parties cannot be joined to give this court jurisdiction on appeal.

[No. 4, Orig.]

Argued Oct. 16, 17, 1882. Decided Oct. 30, 1882.

PETITION for *mandamus*.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **Eben J. D. Cross,** *John H. B. Latrobe* and *J. K. Cowan*, for petitioner.

Messrs. **John H. Thomas** and *G. L. Thomas*, *contra*.

Mr. Chief Justice **Waite** delivered the opinion of the court:

A collision occurred in the harbor of Baltimore, Maryland, between the steamer Knickerbocker, owned by the Baltimore & Ohio Railroad Company, and the barge J. J. Munger, owned by Jeannette Maxon. The barge was loaded with grain belonging to the partnership firm of J. & C. Moore & Company. Both the barge and her cargo were injured in the collision, and the owners of the barge united with the owners of the cargo in a libel against the steamer to recover the damages they had respectively sustained. The suit thus begun terminated in a decree in the Circuit Court for the District of Maryland in favor of the owner of the barge for $1,471.20, and in favor of the owners of the cargo for $3,709.18. The Railroad Company, as the claimant of the steamer, prayed an appeal to this court, which was refused by the circuit court on the ground that the value of the matter in dispute between the steamer and the respective libelants was less than five thousand dollars. The Company now asks a *mandamus* from this court requiring the circuit court to allow an appeal.

NOTE.—*Jurisdiction of U. S. Supreme Court depends on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

It is impossible to distinguish this case in principle from *Oliver* v. *Alexander*, 6 Pet., 143; *Stratton* v. *Jarvis*, 8 Pet., 4; *Spear* v. *Place*, 11 How., 522, and *Rich* v. *Lambert*, 12 How., 347, under which, for half a century, it has been held that when in admiralty distinct causes of action in favor of distinct parties, growing out of the same transaction, are united in one suit, according to the practice of the courts of that jurisdiction, distinct decrees in favor of or against distinct parties cannot be joined to give this court jurisdiction on appeal. In *Seaver* v. [6] *Bigelow*, 5 Wall., 208 [72 U. S., XVIII., 595]; *Paving Co.* v. *Mulford*, 100 U. S., 147 [XXV., 591], and *Russell* v. *Stansell*, 105 U. S., 303 [XXVI., 989], this rule was applied to analogous cases in equity.

The cases of *Shields* v. *Thomas*, 17 How. 4 [58 U. S., XV., 94]; *Market Co.* v. *Hoffman*, 101 U. S., 112 [XXV., 782], and *The Connemara*, 103 U. S., 754 [XXVI., 822], relied on in support of the present application, stand on an entirely different principle. There the controversies were about matters in which the several claimants were interested collectively under a common title. They each had an undivided interest in the claim, and it was perfectly immaterial to their adversaries how the recovery was shared among them. If a dispute arose about the division, it would be between the claimants themselves and not with those against whom the claim was made. The distinction between the two classes of cases was clearly stated by *Ch. J.* Taney in *Shields* v. *Thomas*, and that case was held to be within the latter class. It may not always be easy to determine the class to which a particular case belongs, but the rule recognizing the existence of the two classes has long been established.

Neither is the case of *The Mamie*, 105 U. S., 773 [XXVI., 937], an authority in support of this application. That was a suit by the owners of the pleasure yacht Mamie, to obtain the benefit of the Act of Congress limiting the liability of vessel owners. Rev. Stat., secs. 4283-4289. The aggregate of the claims against the yacht was $65,000, but no single claim exceeded $5,000. The theory of the proceeding authorized by this Act of Congress is, that the owner brings into court the fund which he says belongs to all who have claims against him or his vessel growing out of the loss, and surrenders it to them collectively in satisfaction of their demands. If he succeeds, all the claimants have a common interest in the fund thus created, and are entitled to have it divided between them in proportion to the amount of their respective claims. With this division the owner of the vessel has nothing to do. He surrenders the fund and calls on all who have claims against him growing out of the loss to come in and divide it among themselves. The controversy in the suit is not in respect to his liability to the different parties in interest, but as to his right to surrender the fund and be discharged of all [7] further liability. His dispute is not with any one claimant separately, but with all collectively. He insists that his liability in the aggregate does not exceed the value of his interest in the vessel; that they must pay all their several demands amount to. He does not seek to have it determined how much he owes each one of them, but to what extent he is liable to them collectively. The difference between what he

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admits his liability to be, and the aggregate amount of the demands against him, is the amount in dispute. In the case of *The Mamie* this difference was more than $5,000 and we, consequently, took jurisdiction.

It follows that the Circuit Court properly refused to allow the appeal, and the petition for a mandamus *is, therefore, denied.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 155, 190, 270, 577, 582; 108 U. S., 548.

AMERICAN COTTON TIE COMPANY (Limited), JAMES J. McCOMB, Admr. of MARY F. McCOMB, Deceased, ET AL., *Appts.*, v. SIMEON W. SIMMONS ET AL.

(See S. C., 16 Otto, 89-95.)

Patent for cotton bale ties.

Where a corporation, owner of three patents for making iron ties for cotton bales, consisting of a buckle and a band, sold such ties for use with the words indorsed, "Licensed to use once only," stamped into the body of the metal, and after use once, the ties are sold for old iron; held, that defendant who bought them as scrap iron, and straightened and welded and used them as ties for cotton bales, infringed the patents.

[No. 47.]

Submitted Oct. 24, 1882. Decided Nov. 6, 1882.

APPEAL from the Circuit Court of the United States for the District of Rhode Island.

The history and facts of the case further appear in the opinion of the court.

The plaintiffs were the owners of patents for improvements in metallic cotton bale ties, each tie consisting of a buckle and a band. They granted no licenses to make the ties, but themselves made them and supplied the market. They stamped in the metal of the buckle the words, "Licensed to use once only." The defendants bought as scrap iron the buckles and bands at the cotton mills, after the bands had been severed to release the bale, and rolled and straightened the pieces of the bands, and riveted together their ends, and cut them into proper lengths for ties, and sold them, with the buckles, to be used as ties, nothing being done to the buckles.

It was not decided that they were liable as infringers merely because they had sold the buckle considered apart from the band or from the entire structure as a tie.

Mr. **Samuel A. Duncan,** for appellants.

Mr. **Benjamin F. Thurston,** for appellees.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an appeal by the plaintiffs in a suit in equity from a decree dismissing the bill of complaint. The suit was brought for the infringement of three several letters patent: No. 19,490, granted to Frederic Cook, March 2, 1858, for an "improvement in metallic ties for cotton bales," and extended for seven years from March 2, 1872; re-issued letters patent No. 5,333, granted to James J. McComb, as assignee of George Brodie, March 25, 1873, for an "improvement in cotton bale ties" (the original patent having been granted to Brodie, as inventor, March 22, 1859, and re-issued to him April 27, 1869, and extended for seven years from March 22, 1873); and No. 31,252, granted to J. J. McComb, January 29, 1861, for an "improvement in iron ties for cotton bales," and [90] extended for seven years from January 29, 1875. They are severally known as the Cook, the Brodie, and the McComb patents. The Cook patent expired March 2, 1879; the Brodie patent, March 22, 1880; and the McComb patent, January 29, 1882. The plaintiffs are the American Cotton Tie Company, Limited, a British Corporation; James J. McComb, administrator of Mary F. McComb, deceased; and the said James J. McComb, Charles G. Johnsen and Emerson Foote, each in his own behalf and as a copartner in a firm called the American Cotton Tie Company. The defendants are Simeon W. Simmons and two other persons, doing business as the Providence Cotton Tie Company. The Cook patent was assigned to McComb March 21, 1872. The Brodie re-issue of 1869, with all rights to re-issue, renewal, and extension, was assigned to McComb March 19, 1873. On the 22d of June, 1874, McComb assigned to himself, Johnsen and Foote, who composed the firm called the American Cotton Tie Company, the Cook patent as extended, and the Brodie patent as re-issued in 1869 and as extended. Mary F. McComb became, in 1861, the owner of the McComb patent. She died in 1874 intestate, and McComb was appointed her administrator. On the first of March, 1876, the firm called the American Cotton Tie Company assigned to the Corporation called the American Cotton Tie Company, Limited, the Cook patent as extended, and the Brodie patent as extended and as re-issued in 1873. On the same day McComb, individually and as administrator, assigned to the said corporation the McComb patent and its extension.

The bill is in the usual form, and was filed in November, 1876. It alleges that the defendants have made, used and sold to others to be used, the patented inventions and, also, metallic ties for cotton bales containing the patented inventions. No defense affecting the validity of the patents sued on is set up in the answer. The only defense pleaded or made is as to infringement.

The Corporation plaintiff, since it acquired title to the three patents, in March, 1876, has carried on the business of making cotton bale ties under the patents. The form of tie it has principally made is the form of the McComb patent, which is called the "arrow tie," from the shape of the five sided hole, cut in the plate of the buckle. It has not granted any licenses [91] to make the ties, but has itself supplied the demand for them. The tie consists of a buckle and a band, all made of metal. The band goes around the bale and the two ends of it are confined by means of the buckle. On each of the buckles which the Corporation has made and put upon the market it has placed the words "Licensed to use once only," stamped into the body of the metal. This practice was also observed by its predecessor, the copartnership

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firm. The tie, consisting of buckle and band, is purchased by the person who desires to use it to confine the cotton in the bale, and is placed around the bale on the plantation or at the cotton press. It remains on the bale until the bale reaches the cotton-mill, and the band of the tie, which is of hoop iron, is then cut. The buckle and the band, thus free, become scrap iron, and are sold as such. The hoop is too short for the length required for bailing, if it were to be mended by lapping and riveting the two ends at the place of severance, and to bale with it requires that there should be a free end which may be confined at the buckle in the process of baling. The defendants buy the buckles and severed hoops at the cotton-mills, as scrap iron, the hoops, when bought, being in bundles, bent, and being pieces of unequal lengths, some cut at one distance from the buckle and some at another. The defendants straighten the old pieces of hoop and roll them by cold rolling, and punch the ends with holes and rivet the pieces together, and form a band by cutting it to the proper length, which band, with the buckle accompanying it, makes a tie ready for use. In using the tie, one end of the band is attached to one end of the buckle by a loop in that end of the band, and then the band is passed around the bale, and its free end is slipped, by a loop made in it, through a slit in the buckle, around the other end of the buckle, while the bale is under pressure. When the pressure is removed, the expansive force of the compressed cotton holds the looped ends of the bands in place in the buckle, the looped ends being confined between the bale and the body of the band. The use of the arrow tie has been very extensive. The defendants sell to others to be used the ties which they so prepare, and do not themselves bale cotton with them. Baled [92] cotton is sold in the United States without tare; that is, the iron of the buckle and the hoop is weighed with the cotton and the bagging, and the whole is sold by weight at the price of the cotton per pound. The scrap iron consisting of the buckles and cut hoops is sold at 1¼ cents per pound, while the Corporation sells its ties at 6 cents per pound.

The specification of the Cook patent describes a buckle with a slot cut through one of its end bars, so that the end of the band may be slipped through sidewise instead of being pushed through endwise. The 3d claim is to "The herein described 'slot,' cut through one bar of clasp, which enables the end of the tie or hoop to be slipped sidewise underneath the bar in clasp, so as to effect the fastening with greater rapidity than by passing the end of the tie through endwise."

The specification of the Brodie re-issue states that his invention "Relates to the combination with open slot ties of metallic bands having their ends free, and held in position by the expansion of the bale." Some of the drawings show an open slotted link or buckle in connection with a band, and the specification states that the ends of the band are "Turned under the link and held in position by the pressure exerted by the expansion of the bale." It adds: "In the latter mode of use, the slack may be readily taken up by forming the loop in the iron at the moment of making the fastening, and passing the end thus looped through the opening in the side of the link. The band is thus slipped sidewise through the opening into the slot instead of thrusting it through endwise." The 3d, 4th and 5th claims of the Brodie re-issue are in these words: "3. The combination of an open slot for introducing the band sidewise, with a link having a single rectangular opening for holding both ends of a metallic band and the band. 4. An open slotted link, when combined with metallic bands, the ends of which are turned under the link and held in position by the expansion of the bale. 5. The method of baling cotton with metallic bands, and taking up the slack of the band by bending the same at any desired point into the form of a loop, and passing such loop sidewise through an open slit into the slot intended to receive it and over the bar of the clasp intended to hold it."

The specification of the McComb patent states [93] that the nature of his invention "Consists in the use of a peculiarly shaped buckle as a fastening or tie for the ends of the iron hoops." It says that the "buckle is a piece of wrought iron or other metallic substance, about the eighth of an inch thick, an inch and three quarters wide, and two inches long (the size being modified to suit the width of the hoop used), with an oblong hole or aperture cut or punched through the center;" that the five sides of the plate of the buckle are equal and parallel; and that the two largest of the five sides of the oblong hole are of equal length, and are equal in length to the width of the hoop. The drawings show the two sides forming the arrow part as of equal length. The slit or slot is cut through one of the sides of the plate opposite one of the two longest sides of the central hole, so that one of the loops of the hoop stretches across and covers the slit. The claim of the patent is this: "Forming a link or tie with an oblong aperture, one end of which is arrow shaped, or rather presents two sides of an equilateral triangle, the design of this arrow shaped end being not only to force the loop or bend of the hoop over the slot, which it does with unerring precision when the bale expands after being released from the press, but, also, to secure an equal bearing upon the separated parts of the slotted side of the tie."

A buckle without a band will not confine a bale of cotton. Although the defendants use a second time buckles originally made by those owning the patents and put by them on the market, they do not use a second time the original bands in the condition in which those bands were originally put forth with such buckles. They use bands made by piecing together several pieces of the old bands. The band in a condition fit for use with the buckle is an element in the 3d claim of the Brodie re-issue. That claim is for a combination of the open slot arranged to allow of the sidewise introduction of the band, the link or buckle with the single rectangular opening arranged so as to hold both ends of the band, and the band. The old buckle which the defendants sell has the slot of Cook, and the slot and rectangular opening of Brodie, and the slot and arrow shaped opening of McComb. Whatever right the defendants could acquire to the use of the old buckle, they acquired no right to combine it with a substantially new band, to make a cotton [94]

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bale tie. They so combined it when they combined it with a band made of the pieces of the old band in the way described. What the defendants did in piecing together the pieces of the old band was not a repair of the band or the tie, in any proper sense. The band was voluntarily severed by the consumer at the cotton-mill, because the tie had performed its function of confining the bale of cotton in its transit from the plantation or the press to the mill. Its capacity for use as a tie was voluntarily destroyed. As it left the bale it could not be used again as a tie. As a tie the defendants reconstructed it, although they used the old buckle without repairing that. The case is not like putting new cutters into a planing-machine, as in *Wilson* v. *Simpson*, 9 How., 109, in place of cutters worn out by use. The principle of that case was, that temporary parts wearing out in a machine might be replaced to preserve the machine, in accordance with the intention of the vendor, without amounting to a reconstruction of the machine.

The defendants contend that they do not combine the band with the buckle, and do not infringe the 8d claim of the Cook patent, or the 3d, 4th and 5th claims of the Brodie re-issue, or the claim of the McComb patent, because they do not bale cotton with the tie. But they participate in combining the open slot, the buckle and the band, the whole being so arranged that the ends of the band can be turned under the buckle and held in position by the expansion of the bale, and that the slack of the band can be taken up by bending the band into the form of a loop, and passing the loop sidewise through the open slit into the hole and over the holding bar of the plate. They sell the tie having the capacity of use in the manner described, and intended to be so used. Only the bale of cotton and the press are needed to produce the result set forth in the specifications of the patents, and without the bale of cotton and the press the tie would not be made or sold. The slot through the end bar of the buckle in the Cook patent is of no practical use apart from the band and the bale of cotton, and the same thing is true of the link of the McComb patent with its arrow shaped aperture; and, although a [95] person who merely makes and sells the buckle or link in each case may be liable for infringing those patents, he is so liable only as he is regarded as doing what he does with the purpose of having the buckle or link combined with a band and used to bale cotton. Because the defendants prepare and sell the arrow tie, composed of the buckle or link and the band, intending to have it used to bale cotton and to produce the results set forth in the Cook and the McComb patents, they infringe those patents. *Saxe* v. *Hammond*, 1 Holmes, 456; *Bowker* v. *Dows*, 3 Bann. & Arden, 518. We do not decide that they are liable as infringers of either of the three patents merely because they have sold the buckle considered, apart from the band or from the entire structure as a tie.

We are, therefore, of opinion that the defendants have infringed the 8d claim of the Cook patent, the 3d, 4th and 5th claims of the Brodie re-issue, and the claim of the McComb patent. *The decree of the Circuit Court is reversed, with costs, with directions to enter a decree for the plaintiffs, in respect to those claims, for an account of profits and damages, as prayed in the bill, and to take such further proceedings in the suit as may be in conformity with the opinion of this court.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN M. BAILEY, Late Collector of INTERNAL REVENUE, *Plff. in Err.*, [109]
v.
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

(See S. C., 16 Otto, 109-118.)

Scrip dividend—tax thereon.

The certificates of the New York Central R. R., Co., dated December 19, 1868 (form given), constituted a scrip dividend, which justified the assessment of an internal revenue tax and constituted a complete *prima facie* defense to an action to recover back the same; nevertheless, it was competent for the Company to show in such action what amount of the earnings of the Company accruing from September 1, 1862, to December 19, 1868, was represented by, and included in, the certificates; and this amount alone being subject to the tax, the plaintiff was entitled to recover all which in excess thereof had been exacted and paid.

[No. 27.]

Argued Oct. 20, 1882. Decided Nov. 6, 1882.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

This action was brought on May 23, 1873, in the Supreme Court of the State of New York, by the defendant in error, to recover certain assessments amounting to $550,173.36, alleged to have been illegally exacted under the Act of July 1, 1862, by the defendant as Collector of Internal Revenue. On petition of the defendant the cause was removed into the court below. The trial resulted in a verdict in favor of the plaintiff for the full amount claimed, with interest and costs, by direction of the court. The judgment entered on that verdict was reversed on error by this court, and the cause remanded with directions to issue a new *venire*. *Bailey* v. *R.R. Co.*, 89 U. S., 604, XXII., 840.

The second trial resulted in a verdict and judgment in favor of the plaintiff for $499,432.68 with costs, amounting in all to $518,940.99; whereupon the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **Samuel F. Phillips,** *Solicitor-Gen.*, and *Richard Crowley*, for plaintiff in error.

Messrs. **Joseph H. Choate** and *Sidney T. Fairchild*, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

On December 19, 1868, the New York Central Railroad Company, afterwards merged by consolidation into a new corporation, the defendant in error, adopted a preamble, resolutions and certificate, of which the following is a copy:

"Whereas, this Company has hitherto expended of its earnings for the purpose of constructing and equipping its road, and in the purchase of real estate and other properties,

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with a view to the increase of its traffic, moneys equal in amount to eighty per cent of the capital stock of the Company; and whereas, the several stockholders of the Company are entitled to evidence of such expenditure, and to re-imbursement of the same at some convenient future period: Now, therefore,

Resolved, That a certificate, signed by the president and treasurer of this Company, be issued to the stockholders severally, declaring that such stockholder is entitled to eighty per [110] cent of the amount of the capital stock held by him, payable ratably with the other certificates issued under this resolution, at the option of the Company, out of its future earnings, with dividends thereon at the same rates and times as dividends shall be paid on the shares of the capital stock of the Company, and that such certificates may be, at the option of the Company, convertible into stock of the Company, whenever the Company shall be authorized to increase its capital stock to an amount sufficient for such conversion.

Resolved, That such certificates be delivered to the stockholders of this Company at the Union Trust Company, in the City of New York, on the presentation of their several certificates of stock, and that the receipt of the certificate provided for in these resolutions shall be indorsed on the stock certificate."

The certificate issued under this authority read as follows:

"Under a resolution of the board of directors of this Company, passed December 19, 1868, of which the above is a copy, the New York Central Railroad Company hereby certifies that , being the holder of shares of the capital stock of said Company, is entitled to dollars, payable ratably with the other certificates issued under said resolution, at the pleasure of the Company, out of its future earnings, with dividends thereon at the same rates and times as dividends shall be paid upon the shares of the capital stock of said Company.

This certificate may be transferred on the books of the Company on the surrender of this certificate.

In witness whereof, the said Company has caused this certificate to be signed by its president and treasurer, this 19th day of December, 1868."

The resolution was carried into effect by an issue of the contemplated certificates to the amount of $28,036,000, being 80 per cent of its authorized capital of $28,795,000.

Dividends were regularly paid to the holders of these certificates, equal to those declared and paid upon the capital stock, until the certificates were redeemed at par in the stock of the consolidated Corporation, as then authorized by law. This consolidation took place in 1872.

On March 3, 1870, an assessment was made by the proper officer of the internal revenue, of a tax of 5 per cent upon the amount of these certificates, being $1,151,800, with a penalty of [111] $1,000 added, under section 122 of the Internal Revenue Act of 1864. 13 Stat. at L., 284.

From this assessment, the Railroad Company appealed successively to the Commissioner of Internal Revenue and the Secretary of the Treasury, upon which appeal a decision was rendered reducing the assessment to the sum of $460,720.

This decision was based upon the ground that the issue of the certificates was a scrip dividend within the meaning of the 122d section of the Internal Revenue Act of 1864; but that as it had been made to appear that the earnings stated in the resolution to have been expended, accrued during the entire period of fifteen years, from 1853 to 1868, of which only six years were covered by the income tax law, which first took effect in September, 1862, the tax should be apportioned *pro rata*, by remitting nine fifteenths, and assessing the tax upon the sum of $9,214,400, the amount of earnings assumed to have accrued during the period when they were subject to the tax. The assessment upon this sum being $460,720, with a penalty of 5 per cent, being $23,036, and interest at the rate of one per cent per month, amounting to $64,153.48, were exacted by the Collector and paid under protest.

To recover back these sums as illegally exacted, the defendant in error brought this action against the Collector of Internal Revenue who had collected them.

On the first trial of the case, the circuit court charged the jury that the assessment was wholly illegal and void, the certificates not being a scrip dividend within the meaning of the law, and furnishing no basis for the assessment of any tax whatever, and that, consequently, their verdict must be for the plaintiff. There was a verdict accordingly, and the judgment thereon was reversed, and a new trial awarded, upon a writ of error, by this court, in a decision reported in *Bailey* v. *R. R. Co.*, 22 Wall., 604 [89 U. S., XXII., 840]. The second trial, in the circuit court resulted in a verdict and judgment for the plaintiff below, for $499,432.68. To reverse that judgment is the object of the present writ of error.

The principal questions presented arise upon exceptions of the plaintiff in error to the charge of the Circuit Judge to the jury, and to his refusal to give certain instructions as requested.

The substance of the charge upon the main point was, that while the certificates constituted [112] a scrip dividend, which justified the assessment and constituted a complete *prima facie* defense to the action, nevertheless it was competent for the plaintiff to show what amount of the earnings of the Company, accruing from September 1, 1862, to December 19, 1868, was represented by and included in the certificates; and that this amount alone being subject to the tax, the plaintiff was entitled to recover all in excess of that which had been exacted and paid. The opposing proposition of the defendant below, the request to give which as a charge to the jury was refused, was, that the certificates were conclusive upon the Railroad Company of the amount of a scrip dividend subject to taxation without deduction.

The counsel for the plaintiff in error now contend that their position is established by the former decision of this court in this cause, already referred to, as reported in *Bailey* v. *R. R. Co.* [*supra*].

The actual and precise judgment of the court upon the former writ of error is, however, completely satisfied by the charge of the circuit court now in question; for the ruling on the first trial, held to be erroneous, was, that the certificates constituted no basis whatever for taxation

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as a scrip dividend, and were not to be admitted or considered even as a *prima facie* defense to the action. The reversal at that time did not and could not upon the record then presented, anticipate and prejudge the question now raised, whether those certificates were conclusive as to the amount of the taxable earnings represented by them.

And there is nothing in the opinion of the court then pronounced which, properly understood, requires any conclusion to the contrary.

In that opinion the nature of these certificates is described, and their character as scrip dividends defined. It is there stated that "Interest certificates of the kind were issued as evidence to the stockholders that an equal amount of the earnings of the Company beyond current expenses had been expended for the objects stated in the preamble of the certificates, and to show that the respective stockholders were entitled to re-imbursement of such expenditure at some convenient future period, and also to show that the stockholders were entitled to dividends on the same whenever dividends were paid on the shares of the capital stock; and that the certificates were to be paid out of the future earnings of the Company, or to be converted, at the option of the Company, into stock, if thereafter authorized to exercise that function. [113]

Such a paper, therefore, by whatever name it may be called, is, upon its face, evidence for each stockholder, to persons with whom he may have dealings, of the amount of the previous net earnings of the Company; that such net earnings have been expended in constructing and equipping the railroad and in the purchase of real estate and other properties appertaining to the same, and that the holders of the certificates will be entitled to dividends whenever dividends are paid upon the capital stock."

These certificates were considered to be a dividend declared, as of profits which had been, at some previous time, earned and converted into capital by an investment in permanent improvements of the railroad, and it was as representing such earnings that they were considered the subject of a tax. Whether those profits had been earned since or before the passage of the Act of Congress imposing such a tax does not appear from any recital in the certificates, and they were dealt with by the government itself upon the footing of not being taxable beyond the amount represented by them which had actually been earned after the taking effect of the law. The Treasury Department, as has already been stated, reduced the assessment to six fifteenths of the face of the certificates, upon the hypothesis that an equal proportion of the whole amount had accrued during each of the fifteen years, since the organization of the Company, in 1853; and in view of this reduction, *Mr. Justice* Clifford, in the opinion referred to, added: "Whether or not they are liable for the whole amount is not a question in this case."

The question having thus been left open, it is now contended by the counsel for the plaintiff in error that, by the reason and terms of the law, the certificates are taxable as a scrip dividend upon the full nominal amount thereof.

The 122d section of the Internal Revenue Act of 1864, 13 Stat. at L., 284, under which the question arises, is as follows:

"Sec. 122. *And be it further enacted*, That any railroad, canal, turnpike, canal navigation or slack-water company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid or coupons representing interest, or any such company that may have declared any dividend in scrip or money due or payable to its stockholders as part of the earnings, profits, income or gains of such company, and all profits of such company carried to the account of any fund or used for construction, shall be subject to and pay a duty of five *per centum* on the amount of all such interest, or coupons, dividends or profits whenever the same shall be payable," etc. [114]

It is now urged in argument by the counsel for the plaintiff in error, that, upon the express terms of this section, the certificates in question being a declaration of a dividend as part of the earnings, profits, income or gains of the Railroad Company, are taxable upon the amount thereof without deduction; that the policy as well as the language of the Act fixes the charge upon the declaration itself when made effectual as between the Company and its stockholders, and, for the purposes of taxation, concludes both as to the amount subject to the tax; and that the rule is reasonable as furnishing an obvious standard and the only safe criterion for the assessment of the tax to prevent fraudulent evasions. And, consequently, that when such a dividend has once been declared, and ascertained to come within the description of the law as a subject of taxation, all the rest follows, and the amount declared is necessarily established as the amount to be taxed.

The soundness of this mode of interpretation, and its application to ordinary cases, may well be admitted; but it cannot be applied to every case without a careful regard to its necessary limitations.

It should be borne in mind, in the first place, that the tax provided for in this section of the Act, is an annual income tax, and its subject is the interest paid and profits earned by the Company for each year, and year by year; and that both by the express letter of the law, and its necessary implications, the tax is not laid on any of these funds which came into being before the time prescribed in the Act. And in the ordinary execution of the law, it was contemplated, that the funds to be taxed and the tax imposed upon them, would be concurrent, as to each fiscal year; the scheme of the statute being to levy the tax upon the income for the year ending on the 31st of December next preceding the assessment; and, while it would be altogether admissible to go back, for the purpose of assessing a tax upon a proper fund which had accrued during a previous year and escaped taxation, nevertheless the tax imposed would be for the omitted year. But no tax, in contemplation of the law, accrues upon the fund, except for the year in which the fund itself accrued. [115]

It is also to be remembered, that the subject-matter of the tax is the net earnings of the Company for the year for which they are taxed, which have been actually realized by it, or which the law assumes to have been. We repeat here, what was said by *Mr. Justice* Miller, speaking for the court in *R. R. Co.* v. *Collector*, 100 U. S., 596 [XXV, 647]: "The corporations men-

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tioned in this section are those engaged in furnishing roadways and waterways for the transportation of persons and property, and the manifest purpose of the law was to levy the tax on the net earnings of such companies. How were these 'earnings, profits, incomes or gains' to be most certainly ascertained? In every well conducted corporation of this character, these profits were disposed of in one of four methods, namely: distributed to its stockholders as dividends, used in construction of its roads or canals, paid out for interest on its funded debt, or carried to a reserve or other fund remaining in its hands. Looking to these modes of distribution as the surest evidence of the earnings which Congress intended to tax, and as less liable to evasion than any other, the tax is imposed upon all of them. The books and records of the company are thus made evidence of the profits they have made, and the corporation itself is made responsible for the payment of the tax."

It is true, indeed, that, by the terms of the law, the amount paid as interest on bonds, is charged with a tax as part of the earnings, although there may have been no net earnings out of which to pay it; but the law proceeds upon a presumption which disregards what is merely exceptional. And we have no hesitation in saying, that in reference to a dividend declared as of earnings for the current year and paid as such to stockholders, whether in money or in scrip, no proof would be admissible, for the purpose of avoiding the tax, that no earnings had in fact been made. The law conclusively assumes in [116] such a case that a dividend declared and paid is a dividend earned.

It follows, also, from this view of the purpose of the law, that a fund taxed in one year, as the profits of a railroad company, used for construction or carried to the account of any fund, has been taxed once for all and cannot, as part of the earnings of the company, be assessed a second time. The tax for the year is upon the whole amount of the net earnings, distributed and enumerated under the heads pointed out in the statute; and when the tax has been imposed and collected upon them or any specific part of them, there is no authority to levy any further or additional tax. The profits that this year have been taxed as undivided, and invested in any corporate asset, if in the succeeding year, it is embraced in a dividend declared and payable to stockholders, has already borne all the burden imposed by the law, and cannot again be subjected to an assessment for a new tax. There has been a difference of opinion upon the point, whether the tax imposed by this section is upon the corporation, on account of its net profits, or upon the income of the stockholder or bondholder; although in the present case, it is immaterial which of these alternatives is adopted. We are not aware, however, that it has ever been suggested until now, that it might be both, in succession; one year a tax upon the income of the corporation, and the next, upon the same fund as the income of the individual. We do not think this an admissible construction.

It is necessary, in the application of these principles to the circumstances of the present case, to regard the special character of the certificates in question. It will be seen that they do not purport to be a declaration of a dividend as of the earnings of the Company during the year in which the tax was assessed, or, indeed, for any particular year or series of years. The recital is, that the Company "Has *hitherto* expended of its earnings, for the purpose of constructing and equipping its road and in the purchase of real estate and other properties, with a view to the increase of its traffic, moneys equal in amount to eighty per cent of the capital stock of the Company." It was quite legitimate for the assessor to treat this as evidence of an amount of earnings which had never been taxed, and [117] make the assessment accordingly. It was equally legitimate for the Secretary of the Treasury, upon proof that the accumulation had been going on from the organization of the Company, in 1858, to apportion the amount in equal proportions for each year and to deduct nine fifteenths thereof for the years which had elapsed before the taking effect of the Act taxing incomes. And it is entirely consistent with the declaration itself to show in point of fact what was the amount of earnings accrued during the period while the Income Tax Act was in force which had not been assessed for taxation as profits carried to construction or other account. The declaration in the certificates could not be conclusive of anything not inconsistent with it, for an estoppel only prohibits contrary allegations. The proof admitted on the trial below did not contradict the certificates, but only served to rebut a presumption, which, as matter of law, was not conclusive. Its tendency and effect were to exact from the Company the full tax upon every dollar of its earnings, which had not previously paid its proper assessment, and which, in any form, was subject to taxation, and to relieve it only to the extent to which otherwise it would have been subjected to the payment of a second tax upon the same fund. This result and the process by which it was reached seem to us strictly to conform both to the letter and spirit of the law governing the subject.

This conclusion disposes of the substance of the case, as it sustains the rulings of the circuit court upon the main question. There were other exceptions to the charge, and to the refusal of the court to give instructions asked for by the plaintiff in error; but they are either covered by what has already been said, or seem to us not necessary to be specially mentioned. A point was raised as to certain items claimed to be included in the sum for which these certificates were issued, which, in the view we have taken, becomes immaterial; for as we have decided that the jury could only consider the earnings realized in fact during the operation of the law from 1862 to 1869, it was immaterial what items existing prior to that period were also included in the aggregate sum for which the certificates were issued. Some exception also was taken to some comment on the part of the Circuit Judge as to the state of the evidence, but, in our opinion, the question which the [118] jury had to decide was left to them fairly.

We find no error in the record, and the judgment is accordingly affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Dissenting, *Mr. Justice* **Harlan.**

Cited—92 N. Y., 462.

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WILLIAM HENRY JESSUP ET AL., *Plfs. in Err.*,
v.
UNITED STATES.

(See S. C., 16 Otto, 147-154.)

Facts, when reviewable—form of bond for revenue stamps—validity of—evidence—extent of bond.

1. The facts found by the circuit court are not open to review in this court, which can only consider questions of law arising upon the trial, and duly presented by bill of exceptions, and errors of law apparent on the face of the pleadings.
2. A bond given under section 161 of the Act of June 30, 1864, ch. 173, by a manufacturer of matches to secure the payment to the Treasurer of the United States for revenue stamps delivered to him, is not required to be made payable to the Treasurer. It may be payable directly to the United States.
3. But even if said section means that the bond shall be payable to the Treasurer, still a bond in which the United States is the obligee, and which is conditioned that payment for stamps advanced shall be made to the Treasurer for the use of the United States, is a valid and binding obligation, and the United States may maintain a suit upon it.
4. In such a suit, any evidence which tends to show that the obligor is indebted to the United States for stamps is competent, and it is quite immaterial whether the stamps were furnished by the Assistant Treasurer or by the Commissioner of Internal Revenue.
5. Such section 161, does not require a new security for each and every advance of stamps; the payment for stamps purchased at different times may be secured in the condition of the same bond.

[No. 43.]

Argued Oct. 23, 24, 1882. Decided Nov. 6, 1882.

IN ERROR to the Circuit Court of the United States for the District of Columbia.

Statement of the case by *Mr. Justice* **Woods:**

This was an action at law brought by the United States in the Circuit Court for the District of California against William H. Jessup, as principal, and Jabez Howes and others, sureties on the bond of Jessup, to secure payment for revenue stamps advanced to him.

Section 161 of the "Act to Provide Internal [148] Revenue to Support the Government, to Pay Interest on the Public Debt, and for Other Purposes," approved June 30, 1864, 13 Stat. at L., pp. 294, 295, provides as follows: "That the Commissioner of Internal Revenue may, from time to time, furnish, supply and deliver to any manufacturer of friction or other matches, cigar lights, or wax tapers, a suitable quantity of adhesive or other stamps, such as may be prescribed for use in such cases, without prepayment therefor, on a credit not exceeding sixty days, requiring in advance such security as he may judge necessary to secure payment therefor to the Treasurer of the United States with- [149] in the time prescribed for such payment. And upon all bonds or other securities taken by said Commissioner, under the provisions of this Act, suits may be maintained by said treasurer in the Circuit or District Court of the United States, in the several districts where any persons giving said bonds or other securities reside or may be found, in any appropriate form of action."

While these provisions of the law were in force, Jessup, a manufacturer of friction matches in San Francisco, California, desiring to avail himself of the privilege of obtaining internal revenue stamps on a credit of sixty days, gave to the United States the bond in suit, in a penalty of $10,000, and dated November 8, 1869.

The condition of the bond was as follows:

"The condition of the foregoing obligation is such that, whereas, the said William Henry Jessup is a manufacturer of friction or other matches, cigar lights, or wax tapers; and whereas, under the provisions of the 161st section of an Act entitled 'An Act to Provide Internal Revenue to Support the Government, to Pay Interest on the Public Debt, and for Other Purposes', approved June 30, 1864, the Commissioner of Internal Revenue is authorized, from time to time, to furnish, supply and deliver to any manufacturer of friction or other matches, cigar lights or wax tapers, a suitable quantity of adhesive or other stamps, such as may be prescribed for use in such cases, without prepayment therefor, on a credit not exceeding sixty days, requiring in advance such security as he may judge necessary to secure payment therefor to the Treasury of the United States within the time prescribed for such payment; and whereas, adhesive stamps have been delivered, or hereafter may be delivered, to said William Henry Jessup by virtue of said authority; Now, therefore, if the said William Henry Jessup shall make a faithful return, whenever so required, of the moneys received by him for such adhesive stamps as have been or may hereafter be delivered to him, and of all quantities or amounts thereof undisposed of, whenever required so to do, and shall do and perform all other acts of him required to be done in the premises according to law and regulations, shall well and truly pay or cause to be paid to the Treasurer of the United States, for the use of the United States, all and every such sum or sums of money as the said William Henry Jessup may owe to the United States for adhesive stamps which have been or shall be delivered to him, or which have been or shall be forwarded to him, according to his request or order, within the time prescribed for payment for the same according to law, and shall and will pay or cause to be paid to the said Treasurer for the use aforesaid, each and every sum of money as shall become due or payable to the United States, at the time and on the days each sum shall respectively become due or payable, then the above obligation to be void and of no effect; otherwise, to be and remain in full force and virtue."

The declaration assigned for breach of the bond, that Jessup had received from the United States adhesive stamps amounting to the sum of $8,000, which he had neither accounted for nor paid.

The defendants answered, admitting the execution of the bond, but denying generally the other averments of the complaint and averring performance, and set up, by way of separate answer and defense, that, under the law and regulations and the condition of the bond mentioned in the complaint, all stamps, of whatsoever kind or denomination, delivered to Jessup were to be so delivered to him upon a credit not exceeding sixty days; that after the delivery and execution of said bond, and before the pretended liability mentioned in said complaint had accrued, to wit: on the 18th day of April, A.D. 1870, the said United States, or some of its officers, made a new contract with the said Jessup, without the knowledge or consent of the defendants Jabez Howes, Robert Henry Elam and Edward Kallerain Howes, the sureties on said bond, or either of them, whereby the credits for stamps

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supplied and delivered to Jessup were extended indefinitely and beyond said term of sixty days.

And defendants further averred that if Jessup has become indebted to the United States for stamps furnished, supplied, or delivered to him, such indebtedness had accrued since the making of and under said new contract, and not otherwise.

The parties waived a jury and submitted the cause to the court upon the issues of fact as well as of law. The court found all the issues of fact for the United States and rendered judgment in their favor for the sum of $7,272, with interest.

To reverse that judgment this writ of error is brought.

Messrs. **John E. Ward** and *William W. Morrow*, for plaintiffs in error.

Mr. **William A. Maury**, *Asst. Atty-Gen.*, for defendant in error.

[150] *Mr. Justice* **Woods** delivered the opinion of the court:

The answer of the defendants admits the execution of the bond which is the basis of the suit, The finding by the court below in favor of the United States, of all the issues of fact raised by the pleadings, establishes, beyond the reach of controversy, that Jessup did not perform the condition of his bond; that he did not pay to the United States the sum due for revenue stamps advanced to him; and that the United States, or some of its officers, did not make a new contract with him, without the knowledge or consent of his sureties, whereby credits for stamps furnished him were extended indefinitely and beyond the said term of sixty days.

The findings of the court also show, that Jessup was indebted to the United States for stamps received by him, the payment of which was secured by his bond, in the sum for which judgment was rendered against his sureties.

The findings have eliminated from the case some of the questions discussed by the counsel for plaintiffs in error. The facts found by the circuit court are not open to review in this court, and we can only consider questions of law arising upon the trial and duly presented by bill of exceptions or errors of law apparent on the face of the pleadings. *Ins. Co.* v. *Folsom*, 18 Wall., 237 [85 U. S., XXI., 827]; *Cooper* v. *Omolundro*, 19 Wall., 65 [86 U. S., XXII., 47].

These questions we shall now consider. It appears, from the bill of exceptions, that counsel for defendants moved to dismiss the action on the ground that the bond in suit was given to the United States, and not to the Treasurer of the United States, as provided by section 161 of the Act of June 30, 1864, as amended, and on the ground that the suit was brought in the name of the United States as plaintiff, and not in the name of the Treasurer of the United States, as provided in the same section.

The first of these grounds is based on the assumption that the section referred to requires the bond to be given to the Treasurer of the United States and not to the United States, and as the bond in suit is payable to the United [151] States that it is absolutely void; the contention of the plaintiff in error being that the United States cannot take a valid bond except when and in the terms directed by the statute.

But section 161 does not expressly require the bond to be made payable to the treasurer. It may be payable directly to the United States, and conditioned that payment for stamps advanced shall be made to the treasurer, and not depart from any express provision of the law.

But conceding the section to mean that the bond shall be payable to the Treasurer; still we are of opinion that a bond in which the United States is the obligee, and which is conditioned that payment for stamps advanced shall be made to the Treasurer, is a valid and binding obligation.

In the case of *U. S.* v. *Tingey*, 5 Pet., 115, the question was made, how far a bond voluntarily given to the United States and not prescribed by law, is a valid instrument and binding upon the parties; in other words, whether the United States have, in their political capacity, a right to enter into a contract or to take a bond in cases not previously provided for by some law. And the court declared: "Upon full consideration of this subject, we are of opinion that the United States have such a capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty, and the United States being a body politic may, within the sphere of the constitutional powers embodied in it, enter into contracts not prohibited by law and appropriate to the just exercise of these powers."

To the same effect is the case of *U. S.* v. *Bradley*, 10 Pet., 343.

In the case of the *U. S.* v. *Hodson*, 10 Wall., 395 [77 U. S., XIX., 937], it was held, in substance that when a distiller's bond, was given under section 58 of the Act of June 30, 1864, 13 Stat. at L., 242, which required the bond to be conditioned for the performance of several particular acts which it specifically stated, and the agent of the Government took the bond conditioned, not in the specific way directed by the statute, but for the parties' compliance with all the provisions of the Act and such other Acts as were then or might thereafter be in that behalf enacted, the bond was binding on the parties.

The case of *U. S.* v. *Linn* [15 Pet., 290] was an action against a receiver of public moneys and his sureties. The statute required the receiver to give bond for the faithful discharge of his trust. The instrument given and sued on was without seal and, therefore, not the security [152] required by the statute. The court, nevertheless, held it to be a valid and binding obligation.

These authorities show that the United States can, without the authority of any statute, make a valid contract, and that when the form of a contract is prescribed by the statute a departure from its directions will not render the contract invalid. The bond is a good bond at common law.

The circuit court was, therefore, right in overruling the motion of the defendants to dismiss the suit on the ground that the bond was given to the United States and not to the Treasurer of the United States.

This conclusion disposes also of the second ground upon which the motion to dismiss was based. For if the United States can, without the authority of any statute, take a valid bond payable to the United States, they can maintain a suit upon it in their own name. It would be absurd to hold a bond to be valid on which a

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suit in the name of the obligee could not be maintained.

The objection to the admissibility of the bond in evidence, which the bill of exceptions shows was taken, on the ground that the condition of the bond did not conform strictly to the condition prescribed by the statute, falls for the same reasons and upon the same authorities.

It further appeared from the bill of exceptions that, on the trial of the case, the United States, to prove the breach of the condition of the bond by Jessup, offered in evidence the account kept by the Treasurer of the United States at San Francisco, from which it appeared that on January 1, 1876, there was due from Jessup to the United States, for adhesive stamps advanced to him by the Treasurer, the sum of $8,000. The court admitted the account in evidence, notwithstanding the objection of defendants, and this is now assigned for error.

The first ground of objection urged to the admissibility of this evidence was, that the account appeared to be for stamps supplied by the Assistant Treasurer; and the law under which the bond was given contemplated that the stamps should be furnished by the Commissioner of Internal Revenue.

But the penalty of the bond was payable directly to the United States, and its condition was [153] that Jessup should pay or cause to be paid to the Treasurer of the United States, for the use of the United States, all and every such sum or sums as he might owe the United States for adhesive stamps. This being a valid bond, any evidence which tended to show that Jessup was indebted to the United States for adhesive stamps was competent, and it was quite immaterial whether the stamps were furnished by the Assistant Treasurer or by the Commissioner of Internal Revenue.

The account was objected to on the further ground that it appeared, on its face, that the credits were continuously for a greater period than sixty days and, therefore, that the account was not within the statute, and was incompetent and irrelevant to the issue in the action. The contention of the plaintiffs in error is, that the operation of the bond extended to but one credit of sixty days; that, by the security for stamps advanced on credit required by section 161, is meant a new security for each and every advance of stamps, and that manufacturers needing stamps from time to time must give security as often as a lot of stamps is advanced and, consequently, that the bond in suit was security only for the first advance of stamps, and that all subsequent advances were made entirely without security. But the language of the condition of the bond clearly excludes any such construction. The condition is, that Jessup shall pay such sum or sums of money as he may owe to the United States for adhesive stamps which have been or shall be delivered to him, or which have been or shall be forwarded to him, according to his request or order, within the time prescribed for payment for the same, and shall and will pay or cause to be paid to the said Treasurer, for the use aforesaid each and every such sum of money as shall become due or payable to the United States at the time and on the days such sums shall respectively become due and payable. The idea that the bond secured the payment of but one sum of money due for stamps purchased at one time on a single credit of sixty days, finds no support in the language of the bond. The payment of sums due at different times, for stamps purchased at different times, is expressly secured in the condition of the bond.

The bond in this respect conforms to the statute, which authorizes the Commissioner of Internal Revenue, from to time, to supply and deliver to any manufacturer of friction matches a suitable quantity of adhesive or other stamps, without prepayment therefor, on a credit not exceeding sixty days. What we have said covers all the errors assigned. [154]

We find no error in the record. *The judgment of the Circuit Court must, therefore, be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

NATIONAL STEAMSHIP COMPANY, *Plff. in Err.*,

v.

CHARLES H. TUGMAN.

(See S. C., 16 Otto, 118-123.)

Citizenship of corporation—jurisdiction—removal of cause—failure to file transcript—effect of—proceeding in State Court.

*1. The individual members of a corporation, created by the laws of a foreign State, are, for purposes of suit by or against it in the courts of the Union, conclusively presumed to be citizens or subjects of such foreign State.

2. It is sufficient, in a suit in which the jurisdiction of a Circuit Court of the United States depends upon the character of the parties, if their citizenship is shown, affirmatively by the record. Such citizenship need not, necessarily, be set out in the petition for the removal of the suit from the State Court.

3. Upon the filing of the petition and bond required by the statute, the suit being removable, the jurisdiction of the State Court absolutely ceases, and that of the Circuit Court immediately attaches, in advance of the filing in the latter of the transcript from the former. All orders thereafter made in the State Court are *coram non judice*, unless its jurisdiction is, in some form, actually restored.

4. A failure to file the transcript within the time prescribed by the statute does not have the effect to restore the jurisdiction of the State Court.

5. Whether, in the absence of a complete transcript, or when one has not been filed in proper time, the Circuit Court will retain jurisdiction, or dismiss or remand the suit to the State Court, is for the former to determine.

6. After the filing of a petition and bond for the removal of a suit, pending in one of the courts of New York, and after that court had ruled that the suit was not removable, and that the cause should there proceed, the party seeking the removal consented to an order requiring the issues to be heard and determined by a referee selected by the parties,

*Head notes by *Mr. Justice* HARLAN.

NOTE.—*Citizenship of corporations with reference to jurisdiction of courts over them.*

Citizenship as to jurisdiction means only residence. Gassies v. Ballou, 31 U. S. (6 Pet.), 761; Shelton v. Tiffin, 47 U. S. (6 How.), 162; Cooper v. Galbraith, 3 Wash., 546; Butler v. Farnsworth, 4 Wash., 101.

So far as regards the jurisdiction of courts over corporations, they are regarded as citizens of the States which granted their charters, without regard to the citizenship of the individuals composing them. Bk. of U. S. v. Deveaux, 9 U. S. (5 Cranch), 61; Hope Ins. Co. v. Boardman, 9 U. S. (5 Cranch), 57; U. S. v. Planter's Bk., 22 U. S. (9 Wheat.), 410; Bk. v. Slocomb, 39 U. S. (14 Pet.), 60; Louisville, etc., R. R. Co. v. Letson, 43 U. S. (2 How.), 314; Rundle v. Del. & R. Can. Co., 55 U. S. (14 How.), 80; Marshall v. Balt. & O. R. R. Co., 57 U. S. (16 How.), 314; Lafayette Ins. Co. v. French, 59 U. S., X V., 451; Covington Draw-

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and thenceforward contested the case as well before the referee as in the courts of the State up to final judgment. Held, that the jurisdiction of the State Court was not thereby restored, and that the consent to the order of reference was to be deemed as only an expression of preference for that one of the several modes of trial authorised by the laws of the State. Held, also, that the objections interposed by the removing party to the exercise of jurisdiction by the referee and the State Court, subsequent to the filing of the petition and bond added nothing to the legal strength of its position on the question of removal.

[No. 54.]

Argued Oct. 26, 27, 1882. Decided Nov. 6, 1882.

IN ERROR to the Supreme Court of the State of New York.

This action was brought in the Supreme Court of New York, by the defendant in error, a citizen of the State of Illinois, against the plaintiff in error, an English Corporation.

The defendant appeared and filed a petition and bond for the removal of the cause into the Circuit Court of the United States for the Eastern District of New York. This petition was denied and removal refused. The defendant then answered and the cause was referred.

The referee found for the plaintiff, and judgment was entered in his favor for $4,992.21.

This judgment was affirmed on appeal, by the General Term of said court, *Tugman* v. *Nat. S. Ship Co.*, 13 Hun, 382, and subsequently by the Court of Appeals, and the cause remitted to the court below. *Tugman* v. *Nat. S. Ship Co.*, 76 N. Y., 207. Thereupon the defendant sued out this writ of error.

The question of the right of removal and the jurisdiction of the State Courts, was contested at every step in the courts below, and is the only question at issue in this court.

Messrs. **B. C. Chetwood** and *John Chetwood*, for plaintiff in error:

The old leading case, *Gordon* v. *Longest*, 16 Pet., 97, disposes not only of the contention of the plaintiff in error, that by litigation in the State Courts plaintiff in error waived its right to remove, but also that it so waived its right by not taking proceedings to force removal.

To the same effect:

Stanley v. *Chicago, etc., R.R. Co.*, 62 Mo., 508; *Stevens* v. *Phœnix Ins. Co.*, 41 N. Y., 149; *Hadley* v. *Dunlap*, 10 Ohio St., 1.

The error committed in the State Courts was jurisdictional and cannot be cured.

Kanouse v. *Martin*, 14 How., 23; *S. C.*, 15 How., 198; *Ins. Co.* v. *Dunn*, 19 Wall., 214 (86 U. S., XXII., 65); *Removal Cases*, 100 U. S., 475 (XXV., 593)

Mr. **F. J. Fithian**, for defendant in error:

When the plaintiff in error interposed its sworn answer in the State Court, consented to a reference, and gave notice that it would bring the issues to trial before the Supreme Court, it thereby waived its right to removal under its former petition and bond.

Bac. Abr., tit. Courts, A, sec. B; *Overstreet* v. *Brown*, 4 McCord, 79; *Cleveland* v. *Walsh*, 4 Mass., 591; *Harrison* v. *Rowan*, Pet. (C. C.), 489; *Campbell* v. *Cowden*, Wright, Ohio, 484; *Brown* v. *Crow*, Hardin (Ky.), 448; *Bogle* v. *Fitshue*, 2 Wash., Va., 214; *Hogan* v. *Baker*, 2 E. D. Smith, 22; *Smith* v. *Dipeer*, 2 Code R., 70.

Mr. Justice **Harlan** delivered the opinion of the court:

The underlying question in this case is, whether, within the meaning of the Constitution and of the statutes determining the jurisdiction of the Circuit Courts of the United States, and regulating the removal of causes from State Courts, a corporation created by the laws of a foreign State, may, for the purposes of suing and being sued in the courts of the Union, be treated as a "citizen" or "subject" of such foreign State.

In *R. R. Co.* v. *Wheeler*, 1 Black, 296 [66 U. S., XVII., 133], the court speaking by *Ch. J.* Taney, said, that in the previous case of *R. R. Co.* v. *Letson*, 2 How., 497, it had been decided upon full consideration, "That where a corporation is created by the laws of a State, the legal presumption is, that its members are citizens of the State in which alone the corporate body has a legal existence; and that a suit by or [121] against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate

bridge Co. v. Shepherd, 61 U. S., XV., 896; O. & M. R. R. Co. v. Wheeler, 66 U. S., XVII., 130; Chic. & N. W. Ry. Co. v. Whitton, 80 U. S., XX., 571; Bliven v. N. E. Screw Co., 3 Blatchf., 111; Pomeroy v. N. Y. & N. H. R. R. Co., 4 Blatchf., 120; Barney v. Globe Bk., 5 Blatchf., 107; Hatch v. Chic., R. I. & P. R. R. Co., 6 Blatchf., 105; Monnett v. Mil., etc., R. R. Co., 3 Dill., 460; Trust Co. v. Maquillan, 3 Dill., 379; Bonaparte v. Camden & A. R. R. Co., Bald., 205; Greeley v. Smith, 3 Story, 76; Barclay v. Comrs., 1 Woods, 254; Wheedon v. Camden & A. R. R. Co., 4 Am. L. Reg., 296; Quigley v. Cent. R. Co., 11 Nev., 350; Holden v. Putnam F. Ins. Co., 46 N. Y., 1; Shaft v. Phœnix L. Ins. Co., 67 N. Y., 514; Fargo v. McVicker, 38 How. Pr., 1; Shelby v. Hoffman, 7 Ohio St., 50; Balt. & O. R. R. Co. v. Cary, 28 Ohio St., 208; Stanley v. Chic. etc., R. R. Co. 62 Mo., 508; Oakey v. Bk., 14 La., 515; Rosenfeld v. Adams Exp. Co., 21 La. Ann., 223; West. Un. Tel. Co. v. Dickinson, 40 Ind., 444.

Where railroad corporations created by the laws of different States operate, through such States, one connected line, and consolidate, the consolidated corporation is to be considered a citizen of either State. Chic. & N. W. Ry. Co. v. Whitton, 80 U. S., XX., 571; Muller v. Dows, 94 U. S., XXIV., 207; St. L. A. & T. R. R. Co. v. Ind. & St. L. R. R. Co., 12 Ch. L. N., 73.

A railway corporation merely leasing a road in another State to operate, does not thereby become a citizen of such State. Brownell v. Troy & B. R. R. Co., 3 Fed. Rep., 761; Balt. & O. R. R. Co. v. Cary, 28 Ohio St., 208; Balt. & O. R. R. Co. v. Koontz, 3 Morr. Trans., 34; Erie Ry. Co. v. Stringer, 32 Ohio St., 468; Balt. & O. R. R. Co. v. Wightman, 29 Gratt., 431.

The appointment by a foreign corporation of an agent on whom process may be served, does not of itself make the corporation a citizen. Ins. Co. v. Francis, 78 U. S., XX., 77; Hatch v. Chic., R. I. & P. R. R. Co., 6 Blatch., 105; Owen v. N. Y. L. Ins. Co., 1 Hughes, 322; Hunter v. Royal Can. Ins. Co., 3 Hughes, 234; Ellerman v. N. O., M. & T. R. R. Co., 2 Woods, 120; Huder v. Ins. Co., 25 Wis., 143; Stevens v. Phœnix Ins. Co., 41 N. Y., 149; Fisk v. Chic., R. I. & P. R. R. Co., 53 Barb., 472; De Camp v. N. J. Mut. L. Ins. Co., 2 Sweeny, 481; West. U. Tel. Co. v. Dickinson, 40 Ind., 444; Atlas Mut. Ins. Co. v. Byrnes, 45 Ind., 133; Morton v. Mut. Ins. Co., 105 Mass., 141; Hobbs v. Manhattan Ins. Co., 56 Me., 417; *contra*: N. Y. Piano Co. v. N. H. S. Co., 2 Abb. Pr. N. S., 357; People v. Judge, 21 Mich., 577; Home Ins. Co. v. Davis, 29 Mich., 238; Continental Ins. Co. v. Casey, 27 Gratt., 216.

The general rule as to citizenship applies to municipal corporations. Mercer Co. v. Cowles, 74 U. S., XIX., 86; Barclay v. Levee Comrs., 1 Woods, 254; Tanstall v. Madison, 30 La. Ann., 471.

Merely conferring on a corporation of another State the privilege of building a road and holding real estate does not make it a citizen. Balt. & O. R. R. Co. v. Cary, 28 Ohio St., 208; Williams v. Mo., K. & T. R. R. Co., 3 Dill., 267; Dennistoun v. N. Y. & N. H. R. R. Co., 1 Hilt., 62.

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body; and that no averment or evidence to the contrary is admissible, for the purposes of withdrawing the suit from the jurisdiction of a court of the United States." *Marshall* v. *R.R. Co.*, 16 How., 314; *Drawbridge Co.* v. *Shepherd*, 20 How., 232 [61 U. S., XV., 898]; *Ins. Co.* v. *Ritchie*, 5 Wall., 542 [72 U. S., XVIII., 542]; *Paul* v. *Virginia*, 8 Wall., 178 [75 U. S., XIX., 359]; *R. R. Co.* v. *Harris*, 12 Wall., 82 [79 U. S., XX., 358].

To the rule, thus established by numerous decisions, the court adheres. Upon this branch of the case it is, therefore, only necessary to say, that if the individual members of a corporation, created by the laws of one of the United States, are, for purposes of suit by or against it in the courts of the Union, conclusively presumed to be citizens of the State by whose laws that corporation is created and exists, it would seem to follow, logically, that the members of a corporation, created by the laws of a foreign State, should, for like purposes, be conclusively presumed to be citizens or subjects of such foreign State. Consequently, a corporation of a foreign State is, for purposes of jurisdiction in the courts of the United States, to be deemed constructively, a citizen or subject of such State.

But it is suggested that the petition for the removal of the action into the Circuit Court of the United States is radically defective in that it does not show that the National Steamship Company was a Corporation of a foreign State at the commencement of the action; that the allegation, upon that point, refers only to the time when the removal was sought. If, in suits in which the jurisdiction of the courts of the United States depends upon the character of the parties, it is material, under the Act of March 3, 1875, to show what the citizenship of the parties was at the commencement of the action, it is sufficient to say that the averment in the original complaint, that the Company is a foreign Corporation, supplemented by the averment in the petition for removal, that it is a Corporation created by, and existing under, the laws of the United Kingdom of Great Britain and Ireland, covers the whole period from the commencement of the action to the [122] application for removal. It is not, always, necessary that the citizenship of the parties be set out in the petition for removal. The requirements of the law are met if the citizenship of the parties to the controversy sought to be removed, is shown, affirmatively, by the record of the case. *R. Co.* v. *Ramsey*, 22 Wall., 322 [89 U. S., XXII., 823]; *Robertson* v. *Cease*, 97 U. S., 648 [XXIV., 1058].

The only remaining question which need be considered is, whether the jurisdiction of the State Court was, in any form, restored after the Company filed its petition and bond for removal. The defendant in error insists that it was. The petition was accompanied by a bond which, it is conceded, conformed to the statute, and was ample as to security. Upon the filing, therefore, of the petition and bond—the suit being removable under the statute—the jurisdiction of the State Court absolutely ceased, and that of the Circuit Court of the United States immediately attached. The duty of the State Court was to proceed no further in the cause. Every order thereafter made in that court was *coram non judice*, unless its jurisdiction was actually restored. It could not be restored by the mere failure of the Company to file a transcript of the record in the Circuit Court of the United States within the time prescribed by the statute. The jurisdiction of the latter court attached, in advance of the filing of the transcript, from the moment it became the duty of the State Court to accept the bond and proceed no further; and whether the Circuit Court of the United States should retain jurisdiction, or dismiss or remand the action because of the failure to file the necessary transcript, was for it, not the State Court, to determine.

Nor was the jurisdiction of the State Court restored when the Company, subsequently, consented to the order requiring the issues to be heard and determined by a referee selected by the parties, or when it appeared and contested the case, as well before the referee as in the State Courts, up to final judgment. The right of the Company to have a trial in the Circuit Court of the United States became fixed, upon the filing of the petition and bond. But the inferior State Court having ruled that the right of removal did not exist, and that it had jurisdiction to proceed, the Company was not bound to desert the case, and leave the opposite party to take judgment by default. It was at liberty, its right to removal being ignored by the State [123] Court, to make defense in that tribunal in every mode recognized by the laws of the State, without forfeiting or impairing, in the slightest degree, its right to a trial in the court to which the action had been transferred, or without affecting, to any extent, the authority of the latter court to proceed. The consent, by the Company, to a trial by referee was nothing more than an expression of its preference (being compelled to make defense in the State Court) for that one of the several modes of trial permitted by the laws of the State. It is true that when the cause was taken up by the referee, as well as when heard in the Supreme Court of the State and in the Court of Appeals, the Company protested that the Circuit Court of the United States alone had jurisdiction after the petition and bond for removal were filed. But no such protests were necessary, and they added nothing whatever to the legal strength of its position. When the State Court adjudged that it had authority to proceed, the Company was entitled to regard the decision as final, so far as that tribunal was concerned, and was not bound, in order to maintain the right of removal, to protest, at subsequent stages of the trial, against its exercise of jurisdiction. Indeed, such a course would scarcely have been respectful to the State Court after its ruling upon the point of jurisdiction had been made.

What we have said upon this subject is fully sustained by our former decisions, particularly *R. R. Co.* v. *Koontz*, 104 U. S., 5 [XXVI., 643]; *R. R. Co.* v. *Mississippi*, 102 U.S., 135 [XXVI., 96]; *Kern* v. *Huidekoper*, 103 U.S., 485 [XXVI., 354]; and *Ins. Co.* v. *Dunn*, 19 Wall., 214 [86 U. S., XXII., 63].

The judgments herein, of the Court of Appeals of New York and of the Supreme Court of New York, are reversed and the cause is remanded, with directions that the latter court accept the bond, tendered by plaintiff in error, for the removal of the cause to the Circuit Court of the

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United States for the Eastern District of that State, and proceed no further in the cause.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 216.

INDEPENDENT SCHOOL DISTRICT of STEAMBOAT ROCK, HARDIN CO., IA., *Plf. in Err.*,

v.

JOEL STONE.

(See S. C., 16 Otto, 183-187.)

Recitals in bonds—effect of.

*Bonds issued in the name of an independent school district, in the State of Iowa, contained these recitals: "This bond is issued by the Board of School Directors by authority of an election of the voters of said School District, held on the thirty-first day of July, 1869, in conformity with the provisions of chapter 98 of Acts 12th General Assembly of the State of Iowa." Held, that these recitals implied as well that the bonds were issued by authority of the election, as that the election was held in conformity with the statute, but did not, necessarily or clearly import a compliance with those provisions of the statute which, following substantially the words of the State Constitution, prohibited independent school districts from incurring indebtedness to an amount in the aggregate exceeding five *per centum* on the value of its taxable property, to be ascertained by the last state and county tax lists previous to the incurring of such indebtedness. Consequently, the district, in a suit on the bonds, is not estopped by the recitals from showing that the bonds were not enforceable obligations, by reason of the fact that the indebtedness, of which they were evidence, exceeded the amount limited by the Constitution and laws of the State.

[No. 759.]

Submitted Oct. 12, 1882. Decided Nov. 6, 1882.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

This action was brought in the court below, by the defendant in error, to enforce the payment of certain bonds and interest coupons.

The trial below having resulted in a verdict and judgment for $13,611.88 in favor of the plaintiff, the defendant sued out this writ of error.

Messrs. **George G. Wright** and *E. W. Eastman*, for plaintiff in error.

Messrs. **C. C. Nourse** and **R. F. Kauffman**, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of
[184] the court:

On the first day of July, 1880, the board of school directors of independent School District of Steamboat Rock, Hardin County, Iowa, issued, in its name, thirty bonds, each for $500, and bearing interest at the rate of 10 per cent per annum. Each bond recited that it "Is issued by the board of school directors by authority of an election of the voters of said School District, held on the thirty-first day of July, 1869, in conformity with the provisions of chapter 98 of Acts 12th General Assembly of the State of Iowa." The statute, referred to in the bonds, authorized independent school districts to borrow money, within a prescribed limit as to amount, for the purpose of erecting and completing school-houses, by issuing negotiable bonds; provided the loan was previously sanctioned by a majority of all the votes cast at an annual or special meeting of the electors, of which meeting the same notice should be given as required by law in case of the election of officers of such districts, and which notice should state the amount proposed to be raised by a sale of bonds.

When the bonds were issued, the assessed value of the property of the District, as shown by the last assessment immediately preceding the issue of the bonds, was $47,986, and the indebtedness of the District was $425, with no money in its treasury.

The Constitution of Iowa declares that "No county, or other political or municipal corporation, shall be allowed to become indebted, in any manner or for any purpose, to an amount in the aggregate exceeding five *per centum* on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists, previous to the [185]
incurring of such indebtedness." The largest indebtedness, therefore, which the plaintiff in error, consistently with the fundamental law of the State, could have had when these bonds were issued, was 5 per cent on $47,986. Consequently, the bonds now in suit, constituting one issue, and aggregating $15,000, must be held to have been made without authority of law and, upon well established principles, are not enforceable obligations against the District, unless it is estopped by recitals in the bonds from showing, as against a *bona fide* purchaser, the value of its taxable property as disclosed by the last state and county tax lists previous to the creation of the debt.

The argument on behalf of defendants in error, briefly stated, is this: that the law invested the school board with authority to execute bonds for the purposes for which those in suit were issued, within the limit, as to amount, prescribed by the Constitution and the statute passed in conformity therewith; that that board when issuing the bonds, were under a duty to determine, and necessarily did determine, whether the aggregate indebtedness of the District thus increased, was in excess of 5 *per centum* upon the value of the taxable property of the District, as shown by the last state and county tax lists; consequently, it is contended, the recitals in the bonds should be regarded as a declaration by the board, upon which *bona fide* purchasers could rely, of its determination that the taxable property of the District, as thus ascertained, was of value sufficient to justify the proposed indebtedness of $15,000.

Waiving any discussion of the question, whether the constitutional provision that the amount of the taxable property should be "ascertained by the last state and county tax lists," did not compel every purchaser, at his peril, to obtain from that source the necessary information, and did not preclude him from relying upon the representations of district officers as to what those lists disclosed, we are of opinion that the recitals in the bond do not, necessarily nor distinctly, import any determination of that

*Head note by *Mr. Justice* HARLAN.

NOTE.—*Recitals in negotiable bonds or securities; estoppel by; evidence of the facts recited.* See *note* to Mercer County v. Hackett, 66 U. S., XVII., 548.

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question by the district officers invested with authority, under certain circumstances, to issue the bonds. Had the bonds recited that they were issued by authority of the election of July 31, 1869, *and* in conformity with the provisions of the statute referred to, there would, in view of [186] some of the decisions of this court, be more force in the argument in behalf of the defendant in error. *Town of Coloma* v. *Eaves*, 92 U. S., 484 [XXIII., 579]; *Town of Venice* v. *Murdock*, 92 U. S., 494 [XXIII., 583;] *Converse* v. *Fort Scott*, 92 U. S., 504 [XXIII., 621]; *Marcy* v. *Oswego*, 92 U. S., 638 [XXIII., 748]; *Comrs.* v. *Bolles*, 94 U. S., 104 [XXIV., 46]; *Comrs.* v. *January*, 94 U. S., 204 [XXIV., 111]; *Buchanan* v. *Litchfield*, 102 U. S., 278 [XXVI., 138]. And we should, then, be obliged to decide whether, in view of the constitutional provision, a false recital by the school board as to the value of the taxable property, would conclude the District as between it and a *bona fide* purchaser for value; for, in such case, since the statute itself contains, substantially, the same limitation upon indebtedness by independent school districts as is prescribed by the State Constitution for county, or other political or municipal corporations, a distinct recital that the bonds were issued in conformity with the statute, would fairly import a compliance with the Constitution. But the recitals do not, as we have said, necessarily import a compliance with the statute or the fundamental law of the State upon that subject. They necessarily imply nothing more than that the bonds were issued by authority of the electors, and that the election was held in conformity with the statute. The statute may have been pursued as to the notice required to be given of the time and place of the election, and as to the manner in which the will of the voters was to be ascertained, and yet it may have been disregarded in respect of the limit it imposed upon district indebtedness. The declaration, therefore, that the election was held in conformity with the statute, does not, with sufficient distinctness, imply that the indebtedness voted was less than 5 per cent on the value of the taxable property of the District, as shown by the state and county tax lists.

This construction of the words employed in the bonds is pronounced by counsel for the defendant in error to be too narrow and technical. It may be a strict construction, and such, it seems to the court, ought to be the rule when it is proposed by mere recitals upon the part of the officers of a municipal corporation, to exclude inquiry as to whether bonds, issued in its name, were made in violation of the Constitution and of the statute, of the provisions of which all [187] must take notice. Numerous cases have been determined in this court, in which we have said that where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers—invested with authority to determine whether such conditions have been performed—the responsibility of issuing them when such conditions have been complied with, recitals, by such officers, that the bonds have been issued "in pursuance of" or "in conformity with" or "by virtue of" or "by authority of" the statute, have been held, in favor of *bona fide* purchasers of value, to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions were performed before the bonds were issued. But in all such cases, as a careful examination will show, the recitals fairly imported a compliance, in all substantial respects with the statute giving authority to issue the bonds. We are unwilling to enlarge or extend the rule, now established by a long line of decisions. Sound public policy forbids that we should do so. Where the holder relies for protection upon mere recitals, they should, at least, be clear and unambiguous, in order to estop a municipal corporation, in whose name such bonds have been made, from showing that they were issued in violation or without authority of law.

For the reasons given we are of opinion that, in the present action on the bonds, judgment should have been entered upon the special verdict for the District. To what extent, if any, the District may be held responsible, in some other form of proceeding, is a question not now before us, and as to which we express no opinion. *The judgment is reversed, with directions to render judgment, upon the special verdict, for the District.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 562; 113 U. S., 140.

WILLIAM H. REYNOLDS ET AL., *Appts.*, [17]
v.
WILLIAM H. VANDERBILT ET AL., EXRS. of CORNELIUS VANDERBILT, Deceased, Claimants of the Steamship NORTH STAR, Her Engine, etc.

WILLIAM H. VANDERBILT ET AL., EXRS. of CORNELIUS VANDERBILT, Deceased, Claimants of the Steamship NORTH STAR, Her Engine, etc., *Appts.*,
v.
WILLIAM H. REYNOLDS ET AL.

(See S. C., "*The North Star*," 16 Otto, 17-29.)

Collision—division of damages—English rule—recoupment—consolidation of actions—limited liability—decree in cross-actions—appeal—pleadings.

*1. In cases of collision of vessels, where both parties are in fault, the maritime rule is to divide the entire damage equally between them, and to make a decree for half the difference between their respective losses in favor of the one that suffered most, so as to equalize the burden.

2. The obligation to pay the said difference is the legal liability growing out of the transaction.

3. The practice, which obtains in England, of decreeing to each party half his damage against the other party, thus necessitating two decrees, is only an indirect way of getting at the true result, growing out of the technical formalities of the pleadings, and the supposed incongruity of giving affirmative relief to a respondent.

*Head notes by *Mr. Justice* BRADLEY.

NOTE.—*Collision; damages where two vessels are at fault for injury to a third.* See *note* to The City of Hartford v. Rideout, 97 U. S., XXIV., 990.

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4. *Semble*: there is no good reason why the respondent, in such cases, should not have the benefit of a set-off or recoupment of his damage, at least to the extent of the damage done to the libelants, provided that, in his answer, he pleads such set-off or recoupment.

5. At all events, if both parties file libels, the courts of the United States have the power to consolidate the actions, and prescribe one proceeding, and pronounce one decree; which decree will be for one half of the difference of damage suffered by the two vessels, as before stated.

6. The statute of limited liability is not to be applied in such a case, until the balance of damage has been struck; and then the party against whom the decree passes, may have the benefit of the statute (if he is otherwise entitled to it), in respect of the balance which he is decreed to pay. The decision to the contrary in Chapman v. Netherlands Co., L. R. 4 Prob. Div., 157, examined and disapproved.

7. A collision occurred at sea, in the night, between the steamers W. and N., pursuing nearly opposite courses, and both were held in fault. The W. was sunk, and the N. much damaged. Cross-actions were brought and heard together, and one decree was made, being in favor of the owners of the W. for one half the difference of damage sustained by the two vessels, that of the W. being the greatest. This decree was affirmed.

8. From the above decree both parties appealed, and now the owners of the W. claimed under the Limited Liability Act entire exoneration from liability, and a decree for half of their damage without deducting the damage of the N.; which claim was disallowed, because the law of limited liability can only be applied to the balance decreed to be paid, and that was not against the owners of the W., but in their favor.

9. Query: whether, if there was any ground for such a claim, it could be set up without any allegations or prayer for that purpose in the pleadings.

[Nos. 34, 35.]

Argued Oct. 12, 13, 1882. Decided Nov. 6, 1882.

APPEALS from the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the opinion of the court.

Mr. **Robert D. Benedict,** for Reynolds, *et al.*

Messrs. W. A. Beach and **William Allen Butler,** for Vanderbilt, *et al.*

[18] *Mr. Justice* **Bradley** delivered the opinion of the court:

This case arose out of a collision off the Jersey shore, south of Sandy Hook, on the evening of the 9th of February, 1863, between two steamships, The Ella Warley, bound from New York to New Orleans, and The North Star, bound from Key West to New York. The former was struck about midships, and was sunk and lost; and the North Star was considerably damaged. The owners of The Ella Warley libeled The North Star, and the owners of the latter filed a cross libel *in personam* against the owners of The Ella Warley. The suits were tried together, and the district court held The Ella Warley alone in fault, and rendered a decree accordingly. The circuit court held both vessels in fault, and rendered a decree in favor of the owners of The Ella Warley for so much of their damage as exceeded one half of the aggregate damage sustained by both vessels. This was the proper decree to make if the conclusion reached, as to both vessels being in fault, was correct, unless the question arising on the Limited Liability Act, hereafter discussed, required a different decree. Each vessel being liable for half the damage done to both, if one suffered more than the other, the difference should be equally divided, and the one which suffered least should be decreed to pay one half of such difference to the one which suffered most, so as to equalize the burden.

Since both of the courts below held The Ella Warley to be in fault, we would not disturb this decision without preponderating evidence to the contrary; and such evidence we do not find. On the contrary, we think that the whole evidence taken together sustains the conclusion reached.

The vessels were approaching each other in contrary directions, nearly head on, one going down the coast, the other coming up, and saw each other's mast-head lights when eight or ten miles apart. The Ella Warley, instead of porting her helm according to the rule, starboarded it in order to pass outside. This was evidently the first cause of the disaster; for, as The North Star obeyed the rule, it brought the vessels directly together. It is also obvious that the persons in charge of The Ella Warley did not keep a sufficient lookout; for they allege that they only saw the green light of The North Star until the instant before the collision; whilst it is [19] demonstrable, both from the diagram produced on the part of The Ella Warley, and from the courses which the two vessels must have pursued, that after they were near enough to discern their respective side lights, the red light of The North Star was exposed to the view of The Ella Warley during the entire approach, and must have been seen by her men if they had exercised the least diligence. One of the grounds of complaint against The North Star is, that her lights were not properly screened and could be seen across her bow. This only makes it the more certain that, from the relative position of the vessels, her red light must have been visible. It is impossible that it was hidden from view up to the time immediately preceding the collision.

As to the question, whether The North Star was also in fault, we agree with the circuit court that she was. The rules of navigation in force at the time required that the side lights of steamers navigating the sea, bays, etc., should be fitted with in-board screens of at least six feet in length (clear of the lantern) to prevent them from being seen across the bow; and to be placed in a fore and aft line with the inner edge of the side lights, and in contact therewith. 1 Parson, Maritime Law, 679, ed. 1859. In flat defiance of this rule, the screens of The North Star did not project two inches forward of the bull's-eye of the lights, so that the lights could be seen two or three points across the bow. This was undoubtedly one reason why the green light of The North Star caught the eye of the mate and others on board of The Ella Warley so readily as it did and, indeed, goes to some extent, to mitigate their negligence in not discerning the red light. This was clearly a fault on the part of The North Star, and one that probably contributed to the accident. We think, therefore, that both parties were in fault.

The counsel for the owners of The Ella Warley now, for the first time, raise a question upon the statute limiting the liability of shipowners. They contend that, as The Ella Warley was a total loss, the owners are not liable to the owners of The North Star at all, not even

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to have the balance of damage struck between the two vessels; but that the half of their dam-
[20] age must be paid in full, without any deduction for the half of the damage sustained by The North Star. This proposition is so startling that the reasoning employed to support it should be scrutinized with some care before yielding to its force.

The rule of admiralty in collision cases, as we understand it, is, that, where both vessels are in fault, they must bear the damage in equal parts, the one suffering least being decreed to pay to the other the amount necessary to make them equal, which amount of course, is one half of the difference between the respective losses sustained. When this resulting liability of one party to the other has been ascertained, then, and not before, would seem to be the proper time to apply the rule of limited responsibility, if the party decreed to pay is entitled to it. It will enable him to avoid payment *pro tanto* of the balance found against him. In this case, the duty of payment fell upon The North Star, the owners of which have not set up any claim to a limit of responsibility. This, as it seems to us, ends the matter. There is no room for the operation of the rule.

The contrary view is based on the idea that, theoretically, supposing both vessels in fault, the owners of the one are liable to the owners of the other for one half of the damage sustained by the latter; and, *vice versa*, that the owners of the latter are liable to those of the former for one half of the damage sustained by her. This, it seems to us, is not a true account of the legal relations of the parties. It is never so expressed in the books on maritime law. On the contrary, the almost invariable mode of statement is, that the joint damage is equally divided between the parties; or, as in some authorities, it is spoken of as a case of average. Thus, *Lord* Stowell says: "A misfortune of this kind may arise where both parties are to blame, where there has been want of due diligence or of skill on both sides; in such a case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them." *The Woodrop Sims*, 2 Dods., 83. This statement of the law was adopted in the text of Abbott on Shipping, p. III., ch. 1, sec. 2. It is also adopted by Mr. Bell in his Commentaries on the Laws of Scotland, Vol. I., 580, 581, who
[21] remarks: "By the maritime law, this is a case of average loss or contribution, in which both ships are to be taken into the reckoning, so as to divide the loss." It is also adopted in the later text writers. See, Maclachlan, Merch. Ship., 274. In Hopkins on Average, p. 189, it is stated thus: "If as the result of cross-actions in admiralty, both vessels be found in fault, the rule of the court is, to add the damages, losses and costs of the two ships together, and to divide the joint sum in moieties and decree each vessel to bear an equal portion."

If we go back to the text of the law, in the Rules of Oleron, followed in the laws of Wisbuy and other laws, we find it expressed in substantially the same manner. The case is supposed, of a ship coming into port negligently managed and striking a vessel at anchor in an improper position, so that both are in fault and both are damaged. The Rule says, "The damage ought to be appraised and divided half and half between the two ships, and the wines that are in the two ships ought to divide the damage between the merchants." 1 Pardessus, *Collection de lois Maritime*, 334; Cleirac, *Us et Coutume de la Mer*, 55; Sea Laws, 141; 1 Peters, Admiralty Decisions, App. xxiii.

In Jacobsen's Laws of the Sea it is said: "If the damage is done reciprocally, such damage is apportioned in common between the parties." The French Ordinance of 1681 expresses the rule in exactly the same way: "The damage shall be paid equally by the ships which have caused it and suffered it." Valin, l. III., tit. VII., art. 10. On this, Valin remarks: "Whenever damage by collision is adjudged common average between the two ships, the decree is that the costs of suit and the appraisement of the damage shall be equally borne in common, to effect which they are made into one mass with a calculation of the average." Emerigon, who had great experience as an admiralty lawyer and Judge, says, upon the same article: "The damages sustained by both ships are appraised and made into one mass, which is equally divided. Assurances, ch. 12, sec. 14, sec. 3. Boulay-Paty, commenting on the *Code de Commerce*, art. 407, which relates to the same subject, says: "We conclude, then, that, after due regard is had to the character of the damaged parts of
each ship, the injury and damage which they [22]
have sustained and the appraisal thereof, being added together in a single mass, must be divided so as to be equally borne by each of the ships which have been struck. *Droit Commercial*, Vol. IV., 497.

In this country, the same mode of expressing the law has always prevailed. The first case in which the question came before this court was that of *The Catharine* v. *Dickinson*, 17 How., 170 [58 U. S., XV., 233] in which both vessels were adjudged to have been in fault; and the court, by *Justice* Nelson, adopted the admiralty rule as it had been administered in the district and circuit courts. *Justice* Nelson said: "The question, we believe, has never until now come distinctly before this court for decision. The rule that prevails in the district and circuit courts, we understand, has been to divide the loss;" and he cites the case of *The Rival*, decided by *Judge* Sprague (Sprague, Decisions, 160), and the leading English decisions on the subject. Subsequent decisions have invariably used the same language. [*The J. Gray* v. *The J. Fraser*] 21 How., 184 [62 U. S., XVI., 106]; [*The Washington and The Gregory*], 9 Wall., 513 [76 U. S., XIX., 787]; [*The Sapphire*], 11 Wall., 164 [78 U. S., XX., 127]; *S. C.*, 18 Wall., 51, 56 [85 U. S., XXI., 814, 816]; [*The Alabama and The Gamecock*], 92 U. S., 695 [XXIII., 763]; [*The Atlas*], 93 U. S., 313 [XXIII., 865]; 3 Kent, 231.

These authorities conclusively show that, according to the general maritime law, in cases of collision occurring by the fault of both parties, the entire damage to both ships is added together in one common mass and equally divided between them, and thereupon arises a liability of one party to pay to the other such sum as is necessary to equalize the burden. This is the rule of mutual liability between the parties.

But when claims are prosecuted judicially, the courts regard the pleadings, and the English courts are very strict in holding the parties to their allegations, and in refusing relief, unless

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it is sought in a direct mode. If only one party sues, and the other merely defends the suit, and upon the proofs it appears that both parties are in fault, the court declares this fact in the decree, and decrees to the libelant one half of the damage sustained by him; the damage sustained by the respondent not being regarded as the subject of investigation determinable in that [23] suit. This technical result of the form of proceeding and pleadings, in which the respondent suffers himself to be placed in a position of disadvantage, has led to the erroneous notion that each party is entitled by the law to be paid one half of his damage by the other party; and that each claim is independent of the other. But where both parties file libels, as they are entitled to do although, to conform to the pleadings, a decree may be rendered in each suit in favor of the libelant for one half of his damage, even the English courts will not allow two executions, but will grant a monition in favor of that party who has sustained most damage for the balance necessary to make the division of damages equal. This is an awkward way of arriving at the result contemplated by the law. It may have its conveniences in some cases, as where the innocent owners of cargo are the libelants, for they are not responsible for any part of the loss. But as between the ship-owners themselves it involves an apparatus of two distinct suits to get at one result, when one suit or two suits consolidated together, would be in every respect more convenient. The difficulty is obviated in England, to a certain extent, where, each party has brought suit, by directing, with the assent of the parties, that the proceedings shall be conducted together, so as to save the expense of a double investigation.

To show the difficulties under which the English admiralty courts have labored in seeking to do complete justice, one or two cases may be referred to. In the case of *The Seringapatam*, reported in 2 W. Robinson, 506, and 3 W. Robinson, 38, a collision had occurred between that ship and the Danish ship Harriet, by which the latter was sunk with a loss of ship and cargo A libel was filed by the owners of The Harriet and cargo against The Seringapatam, and an appearance was entered. A cross libel was also filed, but as the owners of The Harriet resided abroad, no process could be served, and no appearance was entered, and the suit was discontinued. A decree was made in the original suit, declaring that both parties were in fault and that the damage should be equally borne by them, and condemning the respondents to pay a moiety of the damages suffered by The Harriet and her cargo. After an appeal and affirmance of the decree, motion was made in behalf of the owners of The Seringapatam, praying [24] that the court, in estimating the compensation due to the owners of The Harriet, would direct the registrar to ascertain and deduct therefrom a moiety of the damage sustained by The Seringapatam. But, it was objected that the owners of the latter were only defendants, and no prayer for compensation was made in their behalf, and none could be allowed. Dr. Lushington said: "If the two actions had been going on according to the ordinary usage and practice in these cases, the sentence of the court would have attached to both vessels, and the court would have decreed a joint reference to ascertain the amount of the total damage and would have directed the said damage, with the costs, to be equally divided between the respective owners. The cross-action, however, having been abandoned, the court made its decree for a moiety of the damage done to The Harriet, and this decree has been affirmed by the Privy Council." Then, after showing that the appeal and affirmance would not stand in the way of doing justice, he adds: "I do not exactly see how I can deal with the second suit, which has been abandoned, as an existing suit, and say to the owners of The Seringapatam: You shall have the benefit of a decree which, in point of fact, has never been pronounced in their favor. The difficulty, it is true, is created by the peculiar circumstances of the case itself; and if I could have foreseen the result of the proceedings before the Trinity Masters, I would certainly have made some arrangements at the time to meet the circumstances of the case; for I never will be induced, unless compelled by law, to further the commission of an injustice towards either party upon a mere matter of form. Taking all the circumstances of the case into my consideration, the course I shall adopt is this: I shall not depart from my original decree, but shall confine the reference to the amount of the compensation to which the owners of The Harriet are entitled. At the same time I shall not permit the full amount of that compensation to be paid to them, unless they submit to the deduction of a moiety of the damages sustained by the owners of The Seringapatam."

In the case of *The Calypso*, Swabey, 28, a collision had occurred with The Equivalent. The owners of The Calypso brought suit, and the decree was, that both parties were in fault, and [25] pronounced for half The Calypso's damage. Then the owners of The Equivalent sued, and the owners of The Calypso presented a petition that the suit should be dismissed because of the former adjudication. Dr. Lushington declined to dismiss, but without deciding whether the matter might not be set up as a defense, and intimated that it was not commendable to wait the result of one action before bringing a cross-action, and he refused costs. He said: "The usual practice is, that when one vessel has been proceeded against in a cause of collision, and the owners of the other think they have any chance of obtaining a decree in their favor, to enter a cross-action; and it is generally agreed between the practitioners that the decision in the one case shall govern the decision in the other. I am not aware that it is in the power of the court, if the proctors were not consenting to such an agreement, to say that both actions should be governed by the one as a matter of right."

These cases serve to show how, by reason of the technicalities of procedure, and the clumsiness of the process used for attaining the correct result, the original maritime rule, though in itself simple and easy of application, became involved and obscured.

Thus, where the Merchant Shipping Act declared that if certain rules of navigation were infringed the owner should not recover for any damage sustained in a collision, it was held that he should not have the benefit of average; *The Aurora*, Lush. Adm., 327, and where the same Act exempted the owner from responsibility

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for the acts of a compulsory pilot, it was held that he should not be subject to average, though entitled to recover half of his own loss from the other vessel in fault. *The Montreal*, 17 Jurist, 588; *S. C.*, 24 Eng. L. & E., 580. These decisions were contrary to the maritime rule, though perhaps, in the former case, the words of the statute required the construction given to it. See, 1 Parson, Ship. & Adm., 596; 2 do., 115–117.

A like departure from the maritime rule, we think, was made in the late case of *Chapman* v. *Steam Nav. Co.*, L. R., 4 Prob. Div., 157, which is much relied on by the counsel of The Ella Warley. In that case, a collision occurred between The Savernake, owned by Chapman & [26] Co., and The Vesuvius, owned by the Netherlands Co., by which The Vesuvius was sunk with a total loss of ship and cargo, valued at £23,000, and The Savernake was damaged £4,000. The owners of The Vesuvius brought suit, and the owners of The Savernake put in a counterclaim, the substitute created by the late Judicature Act, for the old cross-action. Both parties being declared in fault, a reference was made to the registrar to ascertain the damages of the various parties. At this point, the owners of The Savernake filed a bill in equity to obtain the benefit of limited liability, proffering £5,064 as the value of their ship at £8 per ton; and obtained a decree for paying into court that fund with interest. The question then arose as to the disposition of this fund, and for what amount each party in interest should be permitted to prove for dividend. Sir Geo. Jessel, Master of the Rolls, decided that the owners of the cargo of The Vesuvius and her master and crew were entitled to prove for half of their loss. As to the owners of the ship, his decision was that the proper amount to be proved was the half of her value less the half of the loss sustained by The Savernake, according to the maritime rule as before explained. The owners of The Savernake appealed, and contended that their claim for a moiety (of damage sustained by them), which was £2,000, should stand good against the owners of The Vesuvius absolutely, and should not be deducted from the moiety of loss sustained by The Vesuvius, but that the owners of the latter should prove against the fund for their entire moiety of loss without deduction. This would have the effect of enabling them to set off the £2,000 against any dividend which might be awarded to the owners of The Vesuvius, and would enable them to get back so much of the amount paid into court. The Master of the Rolls had considered this a preposterous claim, and contrary to the meaning of the maritime rule. But the majority of the *Lords Justices*, Bagallay and Cotton, against the opinion of *Lord Justice* Brett, reversed the decision, and decreed in the manner contended for by the appellants. We have carefully considered the reasons given by the various Judges, and are unable to avoid the conclusion that the Master of the Rolls and *Lord Justice* Brett took the proper view of the subject.

In this country the courts of the United States are not subject to the same disabilities which [27] embarrass the proceedings of the English courts. By the Act of Congress of July 22, 1813, Rev. Stat., sec. 921, it is enacted that "Where causes of a like nature, or relative to the same question, are pending before a court of the United States, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so." The power of consolidation here given enables the district courts sitting in admiralty to provide for cases of the kind under consideration in a manner adapted to the ends of justice and the exact rights of the parties. We understand that it is freely exercised by them. At all events, it clothes them with the necessary authority, in cases of collision, to combine the suits arising thereon, into a single proceeding, and where both parties are found to be in fault, to make a single decree (as was done in this case), in accordance with their rights and obligations as resulting from the law. And even where no cross libel is filed, if the respondents in their answer allege damage sustained by them in the collision, and charge fault against the vessel of the libelants, and pray a set-off or recoupment, in case they should themselves be held to be in fault, we see no good reason why they should not have the benefit of average afforded by the law, at least to the extent of the claim of the libelants. This would be more in accord with the liberal spirit in which the rules of pleading are administered in this country, than a rigid adherence to the English practice would admit of. In the case of *The Sapphire*, 18 Wall., 56 [85 U. S., XXI., 816], *Mr. Justice* Strong, delivering the opinion of this court, observed: "We do not say that a cross libel is always necessary in a case of collision, in order to enable claimants of an offending vessel to set off or recoup the damages sustained by such vessels, if both be found in fault. It may, however, well be questioned whether it ought not to appear in the answer that there were such damages." As it nowhere appeared by the pleadings in that case that the respondents had sustained any damage, it was held that they had waived any claim for such damage. The suggestion of *Justice* Strong, however, as to the non-necessity of a cross libel, is a very pregnant one.

But waiving further discussion as to the proper or admissible mode of pleading—for the re- [28] spondents in this case did file a cross libel—it is sufficient to say, that the forms and modes of proceeding in the courts of the United States are not such as to interpose any serious difficulties in the way of carrying out the simple rule of the maritime law with regard to averaging the damages occasioned by a collision where both vessels are in fault. And if they were, it would not alter the relative rights of the parties as settled by that law. We have referred to the embarrassments caused by the technical rules of procedure in the English courts for the purpose of accounting for their apparent departure from the maritime rule of liability in some cases.

In conclusion, it is proper to remark that the British Statutes on the subject of limited responsibility of ship-owners, as well as those which regulate the forms of proceeding, are different from ours. The rule of limitation as administered by us is much more liberal to the ship-owners than the English rule. We only make them liable, when free from personal

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fault, for the value of their ship after the collision, so that if the ship is lost, their further liability is extinguished; whilst in England it is maintained to the extent of £8 per ton, and in some cases £15 per ton, of their ship's measurement. To apply to our law the rule of construction which was given by the *Lords Justices* in the case of *Chapman* v. *Netherlands Co.*, would often result, and would in this case result, in positive injustice. It would enable the owners of The Ella Warley to obtain full compensation for a moiety of their loss, whilst the owners of The North Star would have to sustain both their own entire loss and half of that of the owners of The Ella Warley, whilst both vessels were alike to blame for the collision. A rule which leads to such results cannot be a sound one.

Applying to the present case the maritime rule as we understand it, it being ascertained that both parties were in fault, the damage done to both vessels should have been added together in one mass or sum and equally divided, and a decree should have been pronounced in favor of the owners of The Ella Warley, which suffered most, against those of The North Star, which suffered least, for half the difference between the amounts of their respective losses; for The [29] Ella Warley, by her loss, discharged her portion of the common burden, and so much more as the amount that would thus be decreed in her favor. Her delivery to the waves was tantamount to her surrender into court in case she had survived. It extinguished the personal liability of her owners by the mere operation of the maritime rule itself. As there was no decree against her owners for the payment of money, there was no room for the application in their favor of the statute of limited liability. The owners of The North Star do not claim the benefit of the law, and probably could not, because the fault of that ship lay in her original construction, and was attributable to the owners themselves. So that, in fact, the question of limited liability had no application to the case. At the same time it is proper to say, that it is at least questionable whether the benefit of the statute can be accorded to any ship-owner or owners, in the absence of any claim therefor in the pleadings. Such claim must always be based on the collateral fact that the loss or damage was "occasioned or incurred without the privity or knowledge of such owner or owners." R. S., sec. 4283, and it would seem that an allegation of that fact should somewhere appear in the pleadings. As no such allegation is made and no claim of the kind is set up by the owners of The Ella Warley, it would be exercising a greater latitude of indulgence to allow it to be set up now, than has ever been asked of this court before. Nevertheless, as the time within which a party may be allowed to institute supplemental proceedings for obtaining the benefit of the law has never been precisely defined, we have deemed it best to decide the case upon the rights of the parties on the merits, in order to save further litigation and expense.

Since, therefore, the decree of the Circuit Court was made in precise conformity with the views which we have expressed, it must be affirmed with interest from its date; and inasmuch as both parties have appealed from said decree upon grounds which have not been sustained, each party should pay their own costs on this appeal; and the cause must be remitted to the Circuit Court for such further proceedings as may be in accordance with law.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 591.

JOHN H. CLARK ET AL., Claimants of the Steamer NEW ORLEANS, Her Tackle, etc. *Appts.*,

v.

JOHN S. WEEKS, JAMES W. FITCH ET AL.

(See S. C., "*The New Orleans*," 16 Otto, 13-16.)

Findings of fact—admissions of part owner.

1. The findings of the circuit court that a steamer was wholly in fault for its collision with a schooner are conclusive here.
2. The testimony given in one suit by one of the part owners of a schooner as to the extent and value of its repairs is not evidence in another suit against his co-owners, who are merely tenants in common with him and not partners.

[No. 53.]

Argued Oct. 26, 1882. Decided Nov. 6, 1882.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The libel in this case was filed in the district court, by the appellees, to recover damages resulting from a collision.

The district court entered a decree in favor of the libelants for $15,682.37, with interest and costs. Both parties having appealed, the court below found the following facts and conclusions of law:

Findings of Facts.

1. A little after five o'clock in the morning of the 6th of September, 1874, a collision occurred between the schooner Allie Bickmore, owned by the libelants, and the steamer New Orleans, in the Atlantic Ocean, about forty [14] miles southeasterly from Cape Henlopen.

2. The schooner had a carrying capacity of over six hundred tons, though she registered only three hundred and ninety or thereabouts. She was less than a year old, and bound on a voyage from Fernandina, Florida, to New York, with a full load of pine lumber, stowed below and on deck.

3. The steamship was 245 feet long and of 1448 tons burden. She was on one of her regular trips between New York and New Orleans.

4. When the collision occurred it was broad daylight, and a vessel without lights might have been seen at least two miles away. The wind was very light from the southward and eastward, but a considerable swell was rolling from the southeast.

5. The course of the schooner was about NE. by N. She had all sails set, but there was not wind enough to keep them full, and she was not making more than a mile and a half or two miles an hour. Her lights were properly set and burning, and she was, in all respects, well equipped and manned.

NOTE.—*Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting.* See, *note* to St. John v. Paine, 51 U. S. (10 How.), 557.

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6. The course of the steamer was about S. by W. ½ W., and her speed eleven miles, or a little more, an hour. This was full speed. About twenty minutes before the collision, her lookout was withdrawn from his station on the forecastle and set to work, with all the other men then on watch, washing decks. The second officer, whose watch it was, was with his men superintending their work. From the time the lookout was withdrawn, there was no one who could, in any respect, perform that duty except the man at the wheel, and he did not discover the schooner until his attention was called to her by the mate, at the time and in the manner hereinafter stated.

7. When the vessels were two or three miles apart, the steamer was discovered and duly reported by the lookout on the schooner. From that time she was closely watched. The schooner was kept steadily on her course until the steamer was not more than seven or eight hundred feet away, when, the danger of collision being imminent, the second mate who was on deck, gave an order to luff, and at the same [15] time called out an alarm to the steamer; but before any material change in her course had been made the vessels came together.

8. The schooner was not seen at all from the steamer until the second mate, hearing the cry of alarm which came from her, stepped from where he was standing on the main deck to the starboard side, and saw her close upon him. He immediately ran up from the main deck into the wheel-house, where he ordered the wheel to port, at the same time assisting to port it over himself. The order to port aroused the captain who was in a room opening out of the wheel-house, and he, without stopping to put anything on, opened his door, and, seeing the schooner, rang the proper bells to slow and stop. Before the course of the steamer was materially changed by the porting of the wheel, or her headway was sensibly affected, she struck the schooner on the port bow, between the stern and the cat-head, and cut into her about twenty feet on a line but slightly angling across the keel. The wound extended very nearly to the foremast, and to within four feet of the keel.

9. In a short time the steamer took the schooner in tow and carried her to the Delaware breakwater. From there she was taken by a tug to Philadelphia, where she was unloaded and her cargo taken on to New York. She was also put in repair and refitted at that port.

10. The account of damages, as stated by the commissioner in his report, is sustained by the evidence, except the item of $1,000 for damages to the starboard side. As to that, the evidence shows that when the repairs were completed, the vessel was in as good general condition as she was before the collision, and that if the bill of Bisely, Hillman & Streaker is paid in full without the deduction of $600 for increase of value, full compensation will be made for any injury to the starboard side.

Conclusions of Law.

1. That the collision was caused solely by the fault of The New Orleans in not keeping a sufficient lookout, and in not seeing the schooner in time to keep out of her way.

2. That the libelants are entitled to recover for the amount of the decree below, with interest on $14,026.92 from the date of that decree, at the rate of 6 per cent per annum.

As both parties have appealed and the decree below is sustained, the costs of this court must be equally divided between the parties. [16]

Whereupon the claimants appealed to this court.

Mr. **John E. Parsons,** for appellants.

Mr. **Henry J. Scudder,** for appellees

Mr. Justice **Field** delivered the opinion of the court:

The findings of the circuit court, which are conclusive here, show that the steamer was wholly in fault for its collision with the schooner; and she was, therefore, justly condemned to pay all the damages inflicted.

The only question open for our consideration arises upon the exception to the exclusion, by the commissioner, of the testimony given in another suit by one of the part owners of the schooner, as to the extent and value of its repairs. The exclusion, we think, was correct. The statements of the part owner, expressing his judgment as to the matters upon which he was examined, could, at most, bind only himself. They were not evidence against his co-owners, who were merely tenants in common with him, not partners. Story, Part., sec. 458.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

GEORGE M. BAYLY, Individually and as Exr. of R. H. BAYLY, Deceased, *Plff. in Err.*,

v.

WASHINGTON AND LEE UNIVERSITY.

(See S. C., 16 Otto, 11-13.)

Composition in bankruptcy—statute.

1. A composition in a bankruptcy case, ratified by order of the district court, does not operate as a discharge of the bankrupt from debts arising from fraud or growing out of a fiduciary relation.
2. Section 17 of the Act of June 22, 1874, ch. 390, which declares such a composition to be binding, does not repeal section 5117 of the Revised Statutes.

[No. 10.]

Submitted Oct. 10, 1882. Decided Nov. 6, 1882.

IN ERROR to the Supreme Court of the State of Louisiana.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **John H. Kennard,** *James Lowndes* and **William W. Howe,** for plaintiff in error.

Messrs. J. R. Tucker and **H. J. Leovy,** for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court: [12]

In the Second District Court of the Parish of Orleans, in the matter of the succession of R.

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H. Bayly, there was an opposition to the homologation of the account presented by George M. Bayly, executor of said R. H. Bayly, by the Washington and Lee University, which was a legatee under the will of the deceased.

This opposition, so far as the case before us is concerned, was to an item of $18,021.79, which that court decided to be a debt from the firm of Bayly & Pond, the members of which had been declared bankrupt, and in regard to whom a resolution of composition by the creditors had been confirmed by the District Court of the United States.

The plaintiff in error here relied upon this composition as discharging him, both as executor of the estate of his brother, and as a member of the partnership of Bayly & Pond, from liability for the item, and the inferior court, accepting this view of the matter, made an order that it should only be paid in due course of administration.

On appeal of the Washington and Lee University, the Supreme Court of Louisiana decided that the item represented a debt by the executor, of a fiduciary character, which was not barred by the composition order, and directed a judgment against Bayly in cash for the amount of it, to which judgment this writ of error is prosecuted.

The proposition argued here, namely: that a composition in a bankruptcy case, ratified by order of the district court, operates as a discharge of the bankrupt from all his debts, including those arising from fraud or growing out of a fiduciary relation, as well as others, was decided adversely by this court some two years after the present writ of error was sued out, in the case of *Wilmot* v. *Mudge*, 103 U. S., 217 [XXVI., 536].

It is there held that, notwithstanding the comprehensive terms in which the Act of 1874 [18 Stat. at L., 182], in its 17th section declares such a composition to be binding, it was not intended [13] to repeal section 5117 of the Revised Statutes, which enacts that "No debt created by fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy."

This decision disposes of the only question in the record of which this court has jurisdiction.

It decides that whatever may be due by plaintiff in error to the succession as executor is not discharged by the proceeding in bankruptcy, and he is left to account with the court in that character, as though no composition in bankruptcy had been made. Whether in that accounting he was executor or not, and whether as such executor he had so dealt with the item in question as to be relieved of liability as executor or to be bound for it, are matters depending on the application of the law of Louisiana to the facts of the case, and involve no question under the bankrupt law.

The judgment of the Supreme Court of Louisiana is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

THE SHIP STERLING, E. & A. SEWALL ET AL., Owners, and the TOW-BOAT EQUATOR, S. & J. M. FLANNIGAN, Owners, ET AL., *Appts.*, [647]

v.

R. M. PETERSEN ET AL.

(See S. C., "*The Sterling and The Equator*," 16 Otto, 647, 648.)

Collision by two vessels—damages—costs on appeal.

1. Where the owners of a vessel are entitled to a decree against two other vessels for a collision, it should not be against both vessels for the full amount of the loss, but the damages should be apportioned equally between the two offending vessels, the right being reserved to the libelant to collect the entire amount from either of them to the extent of her stipulated value, in case of the inability of the other to respond for her portion.

2. Where the attention of the court below was not called to an objection to the form of its decree, on account of which it is reversed here, each party will be required to pay his own costs in this court.

[No. 49.]

Argued Oct. 24, 1882. Decided Nov. 6, 1882.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The libel in this case was filed in the District Court of the United States for the District of Louisiana, by the appellees, to recover damages resulting from a collision. The trial resulted in a decree in favor of the libelants for $8,265.35, with costs. This decree having been affirmed, on appeal, by the court below, at each of two trials in said court, the owners appealed to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **J. Warren Coulston**, *C. B. Singleton*, *R. H. Browne* and *William L. Putnam*, for appellants.

Messrs. **Joseph P. Hornor** and *William S. Benedict*, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was a suit in admiralty against the ship Sterling and tow-boat Equator, for damages sustained by the barque Sif, in a collision. Both the ship and tow-boat were found to be in fault, and they were condemned *in solido* for the whole amount of the loss. From a decree to that effect, this appeal was taken.

It is conceded that, upon the facts found, the owners of The Sif are entitled to a decree against the ship and the tow-boat, as both were in fault. The well established rule in such cases is to apportion the damages equally between the two offending vessels, the right being reserved to the libelant to collect the entire amount from either of them in case of the inability of the other to respond for her portion. *The Washington and The Gregory*, 9 Wall., 516 [76 U. S., XIX., 788]; *The Alabama and The Gamecock*, 92 U. S., 695 [XXIII., 763]; *The Virginia Ehrman and The Agnese*, 97 U. S., 317 [XXIV., 898]; *The City of Hartford and The Unit*, 97 U. S., 323 [XXIV., 980]. As in this case the de-

NOTE.—*Collision; damages where two vessels are at fault for injury to a third.* See, note to The City of Hartford v. Rideout, 97 U. S., XXIV., 980.

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cree was against both vessels for the full amount of the loss, it should be modified so as to be [648] against The Sterling and The Equator, and their respective stipulators, severally, each for one half of the entire damage and costs, any balance of such half which the libelant shall not be able to enforce against either vessel, to be paid by the other vessel or her stipulators. As it does not appear from the record that the attention of the court below was called to this objection to the form of the decree, each party will be required to pay his own costs in this court.

The decree of the Circuit Court is reversed and the cause remanded, with instructions to enter a new decree in accordance with this opinion, adding interest to the date of such entry.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

A. G. ADAMS, Trustee, AND C. C. HARRIS, Assignee in Bankruptcy of W. T. WEAVER, a Bankrupt, *Appts.*,

v.

THOMAS J. CRITTENDEN ET AL.

(See S. C., 16 Otto, 576, 577.)

Jurisdiction as to amount—federal question.

1. Distinct decrees, in favor of or against distinct parties, cannot be joined to give this court jurisdiction as to amount.
2. Except in certain cases, the mere fact that the matter in dispute arises under the Constitution or laws of the United States, or treaties made, does not give this court jurisdiction for the review of the judgments or decrees of the circuit or district courts, if the value of the matter in dispute, exclusive of costs, does not exceed $5,000.

[No. 806.]

Submitted Oct. 26, 1882. Decided Nov. 6, 1882.

APPEAL from the Circuit Court of the United States for the Northern District of Alabama.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **William K. McAllister, Jr., James L. Pugh,** and *H. E. Jones*, for appellants.

Messrs. **David P. Lewis** and *J. B. Moore*, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This case was submitted under Rule 20, but on looking into the record we find that we have no jurisdiction. The suit was begun in equity [577] by an assignee in bankruptcy and a purchaser of certain lands sold under an order of the bankrupt court, to restrain the defendant Crittenden from enforcing a decree in his favor against the property for $1,828.98, and the defendant, Weaver, from enforcing another decree in her favor for $2,848.10. The decrees to be enjoined were entirely separate and distinct from each other, one having been rendered in a suit instituted by the defendant, Crittenden, alone, and the other in a suit by the defendant, Weaver. The two suits presented substantially the same questions for adjudication, but they were in all other respects distinct. The two decrees were rendered on the same day, and draw interest from March 6, 1879. The circuit court, in the present suit, on the 24th of October 1881, dismissed the bill, and from a decree to that effect this appeal was taken.

The case comes clearly within the rule stated at the present Term in *Ex parte R. R. Co.* [*ante.*, 78], to the effect that distinct decrees in favor of or against distinct parties cannot be joined to give this court jurisdiction, but if they could, these appellants would be in no better condition, because the aggregate of the two decrees, with interest added to the date of the dismissal of the bill, is less than $5,000.

The mere fact that the matter in dispute arises under the Constitution or laws of the United States, or treaties made, does not give us jurisdiction for the review of the judgments or decrees of the circuit or district courts. If the value of the matter in dispute in such cases does not exceed $5,000, we cannot consider them any more than others in which the amount in value is less than our jurisdictional limit.

Dismissed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 582; 108 U. S., 548. 110 U. S., 399.

GEORGE WEETH ET AL. *Appts.*,

v.

NEW ENGLAND MORTGAGE SECURITY COMPANY.

(See S. C., 16 Otto, 605, 606.)

Jurisdiction on division of opinion.

This court has no jurisdiction on a certificate of division of opinion, unless the questions certified are of law and not of fact; nor where the whole case is certified up for adjudication, instead of single points.

[No. 887.]

Submitted Oct. 26, 1882. Decided Nov. 6, 1882.

APPEAL from the Circuit Court of the United States for the District of Nebraska.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **John M. Thurston** and *C. A. Baldwin*, for appellants.

Messrs. **J. D. Campbell** and *S. E. Brown*, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This case comes here by appeal on a certificate of division after a decree in accordance with the opinion of the presiding Judge, as required by section 650 of the Revised Statutes. The value of the matter in dispute is less than $5,000, and we have, consequently, no juris-

NOTE.—*Jurisdiction of U. S. Supreme Court depends on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See, *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

NOTE.—*Cases certified on division of Circuit Court; jurisdiction of U. S. Supreme Court in; on what division should be.* See *note* to Webster v. Cooper, 51 U. S. (10 How.) 54.

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diction unless the questions certified are such as we can consider.

The controversy is as to whether certain notes sued on are usurious. In the progress of the cause a reference was made to one of the masters of the court "To report on the law and the facts as shown by the pleadings and the proofs herein." The master reported, stating the facts he found and his conclusions of law thereon. To this report exceptions were filed by both parties, on the ground, among others, that the facts [606] found and stated were not sustained by the evidence. Upon the hearing of the cause by the court, the Judges were divided in opinion on the following questions:

1. Whether the notes sued on were usurious.
2. Whether the master's report should in all things be affirmed.

These are the questions certified to us.

The rule is well settled that, to give us jurisdiction on a certificate of division of opinion the questions certified must be of law and not of fact. *Wilson* v. *Barnum*, 8 How., 262; *Dennistoun* v. *Stewart*, 18 How., 568 [59 U. S., XV., 490]; *Silliman* v. *Bridge Co.*, 1 Black, 584 [66 U. S., XVII., 84]; *Daniels* v. *R. R. Co.*, 3 Wall., 254 [70 U. S., XVIII., 225]; *Brobst* v. *Brobst*, 4 Wall., 2 [71 U. S., XVIII., 387]. We cannot in this way be called on to consider the weight or effect of evidence. It is equally well settled that we cannot take jurisdiction where the whole case is certified up for adjudication instead of single points. *U. S. Bailey*, 9 Pet., 273; *Nesmith* v. *Sheldon*, 6 How., 43.

The certificate in this case is manifestly subject to both these objections. The counsel for the appellants opens his argument with the candid statement that "The first question submitted depends on the solution and determination of the second, to wit: whether the master's report should in all things be sustained:" that is to say, whether the evidence supports the findings, and if it does, whether the master was right in his conclusions of law. This certainly presents the whole case for adjudication, and involves a finding of the facts by this court.

The appeal is dismissed for want of jurisdiction.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

OAKES A. AMES ET AL., Survivors of Themselves and OAKES AMES and OLIVER AMES, Deceased, Copartners, under the Firm Name of OLIVER AMES & SONS, *Plffs. in Err.*,

v.

ICHABOD L. QUIMBY

(See S. C., 16 Otto, 342-349.)

Michigan practice—proof of execution of instrument—evidence of quality of goods—charge to jury—second writ of error, practice on.

*1. A rule of court governing the pleadings and practice in Michigan provides, that where a defendant insists on a claim by way of set-off, founded on a written instrument, he cannot "be put to the proof of the execution of the instrument or the handwriting" of the opposite party, unless an affidavit is filed "denying the same." Held, that the want of such affidavit does not prevent the plaintiff from showing that such an instrument, dated January 2, was executed on Sunday, January 1. Held, also, that the want of such affidavit does not prevent the plaintiff from showing that his duplicate of an instrument executed in duplicate by him and the defendant differed in its contents from the one retained by the defendant.

2. The quality of goods furnished at a given time by the plaintiff to the defendant being in question, it is competent for the plaintiff to show that the quality of like articles furnished at the same time by him to another party was good, if such evidence be followed by evidence that the goods furnished by him at that time to such other party and the goods furnished by him at that time to the defendant were of the same kind and quality.

3. Where the state of the evidence is such that there is no question for the jury as to a given matter, a charge and a refusal to charge in regard to such matter are not erroneous, because they work no injury to the party excepting.

4. A charge, that while the plaintiff could not recover for any more goods than his bill of particulars sets forth, he was not bound by a mistake in carrying out the rate or price, but could show what he was actually to have, it not appearing by the record what were the contents of the bill of particulars, but it appearing that the plaintiff claimed there was a mistake in it in that respect, held not to have been erroneous.

5. After this court has reversed a judgment and ordered a new trial, and the new trial has been had, with a second judgment, this court cannot, on a writ of error to review the second judgment, review its own judgment on the first writ of error.

[No. 68.]

Argued Nov. 1, 2, 1882. Decided Nov. 13, 1882.

IN ERROR to the Circuit Court of the United States for the Western District of Michigan.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **Michael J. Smiley,** *D. D. Hughes and T. J. O'Brien*, for plaintiffs in error.

Mr. **Lyman D. Norris,** for defendant in error.

Mr. Justice **Blatchford** delivered the opin- [343] ion of the court:

The defendant in error brought this suit against the plaintiffs in error in July, 1872, in a court of the State of Michigan. It was removed into the Circuit Court for the Western District of Michigan, in August, 1872, before the declaration was filed. The action is *assumpsit*. The declaration claims $25,000 for goods sold and delivered, and a like amount for money had and received, and $15,000 for interest. The plea was *non assumpsit* with a notice of set-off to the amount of $25,000, and a notice that the goods alleged, to have been furnished by the plaintiff were furnished under a special contract that they were to be of first-class quality, and that they were not. A further notice under the plea, alleged that the goods furnished were furnished under three several contracts, made January 2, 1865, January 27, 1866, and December 25, 1866, for the furnishing by the plaintiff, to the defendants, of shovel handles; and that the plaintiff did not fulfill the contracts as to the quality of the handles. In April, 1875, the suit was tried by the court without a jury. On the findings of the court, a judgment was rendered for the plaintiff for $7,325.62. The defendants brought the case to this court by a writ of error, and the judgment was reversed and the cause was remanded to the circuit court, with

*Head notes by *Mr. Justice* BLATCHFORD.

NOTE.—*When a verdict may be directed by the court.* See, *note* to Grand Chute v. Winegar, 82 U. S., XXI., 174.

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directions to award a new trial. The decision of this court is reported in 96 U.S., 824 [XXIV., 635]. The only question there presented and determined was as to the proper construction of a written contract made between the parties January 2, 1865, in a particular not now important. The construction put by the court below upon that contract was held to have been erroneous. The case was tried a second time before a jury in April, 1879. The jury found a verdict for the plaintiff for $12,816.53, and a judgment thereon was rendered against the defendants. To review and reverse this judgment, the present writ of error has been brought.

The plaintiff, to maintain the issues on his part, read in evidence a stipulation signed by the respective attorneys, whereby the defendants admitted the sale and delivery of shovel handles shipped to the defendants' firm and received by it at North Easton, Massachusetts, at [344] the dates and in the quantities therein set forth, being, in 1865, 15,607 dozen, in 6 items, in May and July; in 1866, 10,188 dozen, in 13 items, in June, July, August and September; and 2,852 dozen, in 3 items, in November and December, up to the 20th; in 1867, 33,814 dozen, in 37 items, in every month but January, November and December; and, in 1868, 11,113 dozen, in 11 items, in April, May, July, September and October. The stipulation stated that the dates given were the dates of the shipment by rail from Michigan and Canada; that the dates of the receipt by the defendants at North Easton were fifteen days later than the several dates of shipment; and that the plaintiff admitted payments on account of said handles, at the dates and in the sums specified thereafter in the stipulation, the payments amounting to $83,153.48. The stipulation concluded with this clause: "The question of the quality of the handles delivered as aforesaid, and all other questions of fact not stipulated, are left open to the jury and for other and further evidence." The plaintiff was then examined as a witness on his own behalf. On his cross-examination he testified that there was a contract, signed by the parties for 1865, for handles. The contract being shown to him, he "identified" it, as the bill of exceptions states, and it was read in evidence by the defendants. It bore the date of January 2, 1865. The plaintiff rested his case, and the defendants introduced testimony and rested their defense. One of the defendants testified that he made the contract of 1865, and it was made in the evening, and he stated who were present. Then the plaintiff, being recalled, testified, without objection, that the contract dated January 2, 1865, was not signed on that day—on the evening of that day. He was then asked: "When was that contract signed?" The defendants objected to the question on the ground that "It was irrelevant and immaterial, and there had been no previous denial by affidavit or otherwise of the execution of the contract, and it was incompetent." The plaintiff replied that the fact of the execution of the contract was not denied, "but he proposes to show the time of the execution of the contract was on Sunday, which avoids the contract." The court overruled the objection, and the defendants excepted. The witness then answered that the contract was signed and delivered on Sunday, [345] January 1, 1865, stating the hour and the place, and giving particulars as to who were present and what was done. The defendants then gave testimony by three witnesses to contradict the plaintiff. The defendants now contend that the court erred in permitting the plaintiff to testify that the contract was executed on Sunday, in view of the then situation of the case and what had transpired on the trial; that he had given evidence as to its execution and allowed it to be put in evidence without suggesting any infirmity in it; and that the defendants would, necessarily be surprised by such testimony. The defendants also claim that, under a rule of court governing the pleadings and practice in Michigan, where a defendant insists on a claim by way of set-off, founded on a written instrument, he cannot "be put to the proof of the execution of the instrument or the handwriting" of the opposite party, unless an affidavit is filed "denying the same;" that the failure of the plaintiff to file such affidavit was an admission of the execution of the instrument in manner and form as set up, and as being of the date of January 2; and that the testimony went to show that the contract set up was not executed.

The only ground alleged at the trial for the incompetency of the evidence was, that the execution of the contract had not been denied by affidavit. Assuming that the rule of court referred to can be taken notice of by this court, it not being set forth in the record, and there being no statement in the record that the affidavit referred to was required by any rule of court, and assuming that it is to be inferred that there was not any such affidavit, it not being set forth in the bill of exceptions that there was not, we are of opinion that the rule cited refers only to proof of the genuineness of a seal or of handwriting, and does not refer to any matter which goes to show the invalidity otherwise of an instrument. Such a provision in a rule of court or in a statute is not uncommon and, whenever it is expressed in language such as that now presented, it has never, that we are aware, received any other construction. In the case of *Pegg* v. *Bidleman*, 5 Mich., 26, Pegg and another were sued on a note signed "S. Pegg & Co." They appeared and pleaded the general issue, but did not deny on oath the execution of the note. Judgment was given against them without proof that they "composed the firm of [346] S. Pegg & Co. and executed the note." It was held, that, as the defendants had appeared, and the declaration was against them as individuals and did not allege they were partners, the question was simply whether they executed the note by the name subscribed to it; and that they must be taken to have admitted that the note was executed by the parties declared against. The decision was that the admission covered the fact that the signature was that of the parties sued. If the parties be sued as partners, the admission that the signature is their signature as partners necessarily admits that they were partners. This was the principle applied in *Thomas* v. *Clark*, 2 McLean, 194, and *Pratt* v. *Willard*, 6 Id., 27. In *Curran* v. *Rogers*, 35 Mich., 222, a written contract was signed in the name of a firm, the two partners in which were sued on the contract. The general issue was pleaded without any affidavit. One of the firm sought to prove that the other, who had signed the firm name, had no authority to do so. It was held

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that, as the declaration set out the contract *verbatim*, and alleged it to have been jointly executed, its execution was admitted as to both defendants. There is nothing in these decisions which goes to show that the plaintiff, notwithstanding anything in the language of the rule of court invoked, could not prove that the contract was, in fact, signed at a date different from that appearing on its face. The evidence did not go to show that it was not dated January 2, when it was signed, but went to show that, though dated January 2, it was signed on January 1. It admitted the execution of the contract, but tended to avoid it by proving a fact in regard to it which did not appear on its face, and which went to the merits. This was competent evidence and was not irrelevant or immaterial. All questions as to surprise, or as to reopening the case, or as to the order of proof, were matters of discretion, not reviewable here.

Another written contract was shown to the plaintiff, and "identified by him," and put in evidence by the defendants, dated December 25, 1866. It provided for advances by the defendants to the plaintiff, and for their acceptance of his drafts, and for his payment to them of "2½ per cent commission for accepting his [347] drafts." On the language of the contract, so put in evidence, a question was raised as to whether the commission was to be paid on all drafts accepted, or only on those which were in excess of shipments of handles. On his re-direct examination, when first called, the plaintiff stated, without objection, that he had had a duplicate of the contract, which was destroyed by fire; that the copy so introduced was not an exact copy of the one he had, in its reference to the 2½ per cent commission; that the one he had was made by one of the defendants; that drafts for handles shipped he was to pay no commissions on; and that those for advances before shipments he was to pay commissions on. He was then asked: "What change was made in the duplicate which you had?" This question was objected to by the defendants on the ground that it was incompetent and irrelevant, "and, there having been no denial of the execution of this contract as pleaded and given notice of by the defendants, it is incompetent to vary it by parol." The objection was overruled, and the defendants excepted. The witness answered that the word "advanced" was inserted after the word "drafts," so as to read "2½ per cent commission for accepting his drafts advanced." The defendants contend that the evidence went to a denial of the execution of the contract and was, therefore, incompetent under the rule of court before referred to. The remarks before made apply to this point also. The evidence went to show what the actual written contract between the parties was. It did not go to show that the defendants' copy was not actually signed by the parties. The one copy was as competent evidence of the real contract as the other was. What the plaintiff had testified to in regard to the contents of his original of the contract, was admitted without objection and permitted to stand, and no motion was made to strike it out. The evidence sought by the question objected to only went to explain the previous evidence.

A question having arisen as to the quality of the handles furnished to the defendants by the plaintiff in 1867 and 1868, a witness for the plaintiff was asked as to the quality of the handles furnished by the plaintiff to the Old Colony Company in 1867 and 1868. The defendants objected to the question, on the ground that it was irrelevant and incompetent, and not admissible to show the quality of the handles fur- [348] nished to the defendants. The plaintiff's counsel then stated that he proposed to show, in connection with the offered testimony, that the handles were of the same general quality as those furnished to the defendants. Thereupon the objection was overruled and the defendants excepted, and the witness answered that the quality of the handles sent to the Old Colony Company in 1867 and 1868 was good. Evidence had been given for the defendants that the quality of the handles furnished by the plaintiff to the defendants in 1867 and 1868 was inferior to the quality of those he had furnished in previous years. The plaintiff subsequently gave evidence tending to show that the handles furnished by him to the defendants in 1867 and 1868, and the handles furnished by him to the Old Colony Company in 1867 and 1868, were of the same kind and quality. After this evidence was given there was no motion to strike out the evidence so objected to, or to rule upon its admissibility. The evidence objected to was admissible.

Alleged errors in the charge to the jury, and in refusals to charge as requested, are urged by the defendants. As to the request to charge respecting the right of the defendants, under the contract of January 27, 1866, to charge the plaintiff back with the full value of such handles as broke in the process of bending, it is sufficient to say that the record discloses that there was a settlement between the parties respecting the 172 dozen handles charged back in 1866 under that contract, and that there was really no question for the jury as to those handles. If the charge given, and the refusal to charge as requested, had the effect to withdraw from the jury the consideration of the 172 dozen, it only effected the result required by the settlement, and worked no injury to the defendants.

In regard to the refusal to charge that the plaintiff could recover $1.37½ per dozen for only such handles delivered between October 8, 1866, and April 20, 1867, as he had carried out at that price in his bill of particulars, and to the charge to the contrary, it is sufficient to say that the bill of particulars is not in the record, and there is no statement in the bill of exceptions as to its contents; and that when, in the course of the evidence, the claim was made by the plaint- [349] iff for $1.37½ per dozen for the handles delivered between those dates, the defendants objected that there were three items in April, 1867, carried out in the bill of particulars at $1.25 per dozen, and the plaintiff then and there claimed that the bill of particulars contained a mistake in that respect. The charge of the court was, that while the plaintiff could not recover for any more handles than his bill of particulars set forth, he was not bound by a mistake in carrying out the rate or price, but could show what he was actually to have. We see no error in this, under the circumstances.

The request made to charge as to the operations of 1868 was granted, and the instruction

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given is not open to the objection that the price for 1868 was fixed by the court and was not left to the jury to determine.

Although this court reversed the first judgment and remanded the cause for a new trial, and a new trial has been had, with a new judgment, the plaintiffs in error now urge, without having raised the point before, that this court, instead of having awarded a new trial, should have rendered a judgment for the defendants below on the findings made by the circuit court at the first trial, and that it should now do so. The question is not open for this court to review on this writ of error the judgment it rendered on the former writ of error. That judgment has been carried into effect, and the parties who procured it have enjoyed the benefit of it in the new trial they have had.

The judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[320] SILAS SEYMOUR ET AL., Surviving Partners of S. SEYMOUR & COMPANY, *Plffs. in Err.*,
v.
WESTERN RAILROAD COMPANY.

(See S. C., 16 Otto, 320-322.)

Partners, when to join in action.

*In an action upon a covenant—contained in an agreement between the covenantor and "S. and such other parties as he may associate with him under the name of S. & Company," signed and sealed by the covenantor, and signed "S. & Co." by the hand of S., acting in behalf and by authority of the partnership—to pay to "the said S. & Company, parties of the second part," for work to be done by them, all those who are partners at the time of the signing of the agreement may join.

[No. 60.]

Argued Oct. 31, 1882. Decided Nov. 13, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of North Carolina.

The case is sufficiently stated by the court.

Messrs. **John W. Hinsdale** and **Samuel P. Phillips**, for plaintiffs in error.

Messrs. James C. McRae, **Augustus S. Merrimon** and *Thomas C. Fuller*, for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

This is an action of covenant, brought by Silas Seymour and three other persons, describing themselves as copartners trading in the name and style of S. Seymour & Company, and prosecuted since the death of one of them by the survivors, against the Western Railroad Company, upon an agreement purporting to be made between the defendant of the first part, "And Silas Seymour and such other parties as he may associate with him under the name of S. Seymour & Company of the City of New York, of the second part;" by which "the said S. Seymour & Company, parties of the second part," agree to construct a railroad as therein specified; and, "for and in consideration of the faithful performance by the said S. Seymour & Company, parties of the second part, of all and singular the conditions herein contemplated or contained on their part proper for them to do, the Western Railroad Company of the first part" agrees to pay "unto the said S. Seymour & Company, parties of the second part," certain sums in money, stock and bonds. The agreement states that "the parties hereto have interchangeably set their hands," is duly signed and sealed in behalf of the defendant, and is also signed "S. Seymour & Co.," but is not otherwise signed nor sealed in behalf of the plaintiffs or either of them. [321]

At the trial, the plaintiffs proved the execution of the agreement declared on, and offered evidence tending to show that Seymour executed it in behalf and by authority of the firm of S. Seymour & Company; that at its date, and until the subsequent stoppage of work under it, the plaintiffs composed that firm; that Seymour and the three others, as the persons whom he associated with himself under the name of S. Seymour & Company, immediately began and afterwards performed work upon the railroad under the agreement, the results of which had ever since been enjoyed by the defendant; and that the defendant knew that the plaintiffs composed the firm of S. Seymour & Company and were working upon its road under the agreement as contractors. But the Judge excluded the evidence, ruled that there was a variance, directed a verdict for the defendant, and rendered judgment thereon; and the plaintiffs alleged exceptions.

The court is of opinion that these rulings were erroneous. In an action upon a covenant made with two or more persons, all the covenantees must join, although only one of them seals the agreement. *Petrie* v. *Bury*, 5 Dowl. & R., 152; *S. C.*, 3 B. & C., 353; *R. R. Co.* v. *Howard*, 13 How., 307, 337. It is not necessary that all of them should be named in the contract; it is sufficient that they are so described therein that they can be identified. Shep. Touch., 236; *Gresty* v. *Gibson*, L. R., 1 Exch., 112; *Reeves* v. *Watts*, L. R., 1 Q. B., 412; *S. C.*, 7 B. & S., 523; *M'Laren* v. *Baxter*, L. R., 2 C. P., 559. And upon a covenant with a partnership by its partnership name only, all who are partners at the time of its execution may sue. *Hoffman* v. *Porter*, 2 Brock., 156; *Brown* v. *Bostian*, 6 Jones (N.C.), 1; 1 Lindley, Part. 4th ed., 476.

The agreement declared on—by the recital that it is made between the defendant and "Silas Seymour and such other parties as he may associate with him under the name of S. Seymour & Company," by the repeated mention of "the said S. Seymour & Company, parties of the second part," and by the signature of "S. Seymour & Co."—appears to the court to manifest the intention of both parties to the agreement to be that all the persons associated together, [322] under the name of S. Seymour & Company, at the time of the signing of the agreement, should do the work and receive the compensation therein stipulated.

It follows that the plaintiffs, upon proving to the satisfaction of a jury the facts above stated, which they offered to prove, would be entitled to maintain their action. *The judgment for the defendant must, therefore, be reversed and the case remanded, with directions to set aside the verdict and order a new trial.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

*Head note by *Mr. Justice* GRAY.

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[124] ELIZA D. PRITCHARD, EXRX. of RICHARD PRITCHARD, Deceased. *Plff. in Err.*,

v.

EX NORTON.

(See S. C., 16 Otto, 124-141.)

Bond of indemnity—New York law—lex loci contractus—*intention of parties*—lex fori.

* The defendant in error, also defendant below, executed and delivered in New York, a bond of indemnity, conditioned to hold harmless and fully indemnify the obligee against all loss or damage arising from the liability of the latter on an appeal bond which he had entered into in Louisiana, as surety for a certain railroad company, defendant in a judgment rendered against it in the courts of that State, and which, being affirmed, he was compelled to pay.

By the law of New York, any written instrument, although under seal, was subject to impeachment for want of consideration; and a pre-existing liability, entered into without request, which was the sole consideration of the bond of indemnity sued on, was insufficient. It was otherwise in Louisiana.

A suit on the bond having been brought in the Circuit Court of the United States for the District of Louisiana, it is held:

1. That the question of the validity of the bond, as dependent upon the sufficiency of its consideration, is not a matter of procedure and remedy, to be governed by the *lex fori*, but belongs to the substance of the contract, and must be determined by the law of the seat of the obligation.

2. In every forum a contract is governed by the law with a view to which it is made, because, by the consent of the parties, that law becomes a part of their agreement; and it is, therefore, to be presumed, in the absence of any express declaration or controlling circumstances to the contrary, that the parties had in contemplation a law according to which their contract would be upheld, rather than one by which it would be defeated.

3. The obligation of the bond of indemnity was, either to place funds in the hands of the obligee, wherewith to discharge his liability when it became fixed by judgment, or to refund to him his necessary advances in discharging it, in the place where his liability was legally solvable; and as this obligation could only be fulfilled in Louisiana, it must be governed by the law of that State as the *lex loci solutionis*.

[No. 42.]

Submitted Apr. 28, 1882. Decided Nov. 13, 1882.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The petition in this case was filed in the court below, to recover on a certain bond of indemnity.

The trial having resulted in a verdict and judgment for the defendant, the petitioner sued out this writ of error.

The case is fully stated by the court.

Mr. **Henry C. Miller,** for plaintiff in error:

The defendant's obligation was to indemnify a Louisiana surety, against a Louisiana obligation, to be enforced in Louisiana.

The idemnity must be deemed to be due, where Pritchard resided, and where the loss was sustained, which the defendant was bound to repair. Where an obligation is executed in one place, expressly or tacitly to be performed in another, then the contract as to its validity, nature and obligation is to be governed by the law of the place of performance.

Story, Confl. L., secs. 280, 304, 318; 2 Kent, Com., S. P., 459; *Beirne* v. *Patton*, 17 La., 592; *Mouton* v. *Noble*, 1 La. Ann., 192.

It is accordingly held by the Louisiana Courts that the debt of another is a sufficient consideration to sustain an obligation.

All that the Louisiana law requires is, that the promise to pay the debt of another shall be freely made, and that it shall be in writing.

Rev. Stat. of Louisiana, sec. 1443.

Mouton v. *Noble*, 1 La. Ann., 192; *Flood* v. *Thomas*, 5 Mart. (N. S.), 562; *N. O. Gas Co.* v. *Paulding*, 12 Rob., 378; *N. O. & C. R. R. Co.* v. *Chapman*, 8 La. Ann., 98; *Keane* v. *Goldsmith*, 12 La. Ann., 560.

The Code provides that surety may be given for the principal not only, but for the surety.

Civil Code of La., art. 3007; *McKerall* v. *McMillan*, 9 Rob. (La.), 19.

Messrs. **Cephas Brainard** and **George H. Bates,** for defendant in error.

The *lex loci contractus* governs the nature, validity, construction and effect of contracts.

Story, Cont., sec. 653; Pars. Cont., 5th ed., Vol. 2, p. 570-1; Add. Cont., 861; Story, Confl. L., 4th ed., sec. 242; Whart. Confl. L., 2d ed., sec. 454, and cases cited; Phil. Int. L., Vol. 4, p. 616; Savigny, Guthrie's 2d ed., 205, 227, 229; *In re Glyn*, 15 Bk. Reg., 497, 501.

This principle has been laid down by this court with so much definiteness as to render a citation of other authorities hardly excusable.

Scudder v. *Union Nat. Bk.*, 91 U. S., 406 (XXIII., 245).

Even when a contract is by its terms to be performed partly in one State and partly in another, it has been held proper to construe it according to the law of New York where it was made.

Morgan v. *N. O. M. & T. R. R. Co.*, 2 Woods, 244; *King* v. *Harman*, 6 La., 607.

Where a person assumes an obligation at his own domicil the law of that domicil controls the contract.

Whart. Confl. L., 2d ed., sec. 410; *Lloyd* v. *Guibert*, L. R., 1 Q. B., 115, 122.

The present case is not within the exception to this general rule.

Whart. Confl. L., 2d ed., sec. 426.

A much stronger case than the present is that of the indorser of a promissory note, whose liability is fixed by the place of indorsement.

Aymar v. *Sheldon*, 12 Wend., 439. [See *note* in same, 1.]

Mr. Justice **Matthews** delivered the opinion of the court:

This action was brought by the plaintiff in error, a citizen of Louisiana, against the defendant, a citizen of New York, in the Circuit Court for the District of Louisiana, upon a writing obligatory, of which the following is a copy:

"STATE OF NEW YORK,

County of New York.

Know all men by these presents that we, Henry S. McComb, of Wilmington, State of Delaware, and Ex Norton, of the City of New York, State of New York, are held and firmly bound, jointly and severally unto Richard Pritchard, of New Orleans, his executors, administrators and assigns, in the sum of fifty-five thousand ($55,000) dollars, lawful money of the United States, for the payment whereof, we bind ourselves, our heirs, executors and admin-

* Head notes by *Mr. Justice* MATTHEWS.

NOTE.—Lex loci *and* lex fori *as to contracts, including notes and bills, as to drawer, acceptor, indorser, usury, etc.* See *note* to Slacum v. Pomery, 10 U. S. (6 Cranch), 221.

Contracts; their interpretation and validity. See *note* to Bell v. Bruen, 42 U. S. (1 How.), 169.

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istrators firmly by these presents. Sealed with [125] our seals, and dated this thirtieth day of June, A. D. eighteen hundred and seventy-four.

Whereas, the aforesaid Richard Pritchard has signed an appeal bond as one of the sureties thereon, jointly and severally, on behalf of the defendant, appellant in the suit of *J. P. Harrison, Jr.* v. *The New Orleans, Jackson and Great Northern Railroad Co.*, No. 9261 on the docket of the Seventh District Court for the Parish of Orleans.

Now, the condition of the above obligation is such that if the aforesaid obligors shall hold harmless and fully indemnify the said Richard Pritchard against all loss or damage arising from his liability as surety on the said appeal bond, then this obligation shall be null and void; otherwise, shall remain in full force and effect.

H. S. McCOMB. [L. S.]
EX NORTON. [L. S.]"

Richard Pritchard, of whom the plaintiff in error is executrix, had, on November 20, 1872, joined in a bond as surety for the New Orleans, Jackson and Great Northern Railroad Company, in a suspensive appeal taken by the latter, from a judgment rendered against it in favor of Harrison, in the Seventh District Court for the Parish of Orleans. A judgment was rendered on that appeal in the Supreme Court of the State, May 30, 1876, against the railroad company, in satisfaction of which Pritchard became liable to pay and did pay the amount, to recover which his executrix brought this action. The condition of this appeal bond was, that the railroad company "Shall prosecute its said appeal and shall satisfy whatever judgment may be rendered against it, or that the same shall be satisfied by the proceeds of the sale of its estate, real or personal, if it be cast in the appeal; otherwise that the said Pritchard *et al.*, sureties, shall be liable in its place."

The defendant set up, by way of defense, that the bond of indemnity sued on was executed and delivered by him to Pritchard in the State of New York, and without any consideration therefor, and that by the laws of that State it was void by reason thereof.

There was evidence on the trial tending to prove that the appeal bond was not signed by Pritchard at the instance or request of McComb or Norton, and that there was no consideration for their signing and executing the bond of indemnity passing at the time, and that the latter was executed and delivered in New York. There was also put in evidence the provisions of the Revised Statutes of that State, 2 Rev. Stat., 406, as follows:

[126] "Sec. 77. In every action upon a sealed instrument, and when a set-off is founded upon any sealed instrument, the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner and to the same extent as if the instrument were not sealed.

Sec. 78. The defense allowed by the last section shall not be made unless the defendant shall have pleaded the same, or shall have given notice thereof at the time of pleading the general issue, or some other plea denying the contract on which the action is brought."

At the request of the defendant, the circuit court charged the jury that the indemnifying bond, in respect to its validity and the consideration requisite to support it, was to be governed by the law of New York, and not of Louisiana; and that if they believed from the evidence that the appeal bond signed by Richard Pritchard as surety, was not signed by him at the instance or request of McComb and Norton, or either of them, and that no consideration passed between Pritchard and McComb and Norton for the signing and execution of the indemnifying bond by them, then that said bond was void for want and absence of any consideration valid in law to sustain it, and no recovery could be had upon it.

The plaintiff requested the court to charge the jury, that if they found from the evidence that the consideration for the indemnifying bond was the obligation contracted by Pritchard as surety on the appeal bond, and that the object of the indemnifying bond was to hold harmless and indemnify Pritchard from loss or damage by reason of or growing out of said appeal bond, then that the consideration for said indemnifying bond was good and valid and is competent to support the action upon the bond for the recovery of any such loss or damage sustained by Pritchard. This request the court refused. Exceptions were duly taken to these rulings, which are now assigned for error, there having been a verdict and judgment for the defendant, now sought to be reversed.

It is claimed on behalf of the plaintiff in error, that by the law of Louisiana the pre-existing liability of Pritchard as surety for the railroad company would be a valid consideration to support the promise of indemnity, notwithstanding Pritchard's liability had been incurred without any previous request from the defendant below. This claim is not controverted, and is fully supported by the citations from the Civil Code of Louisiana of 1870, articles 1893–1960, and the decisions of the Supreme Court of that State. *Flood* v. *Thomas*, 5 Mart. (N. S.), 562; *Gas Co.* v. *Paulding*, 12 Rob. (La.), 378; *R. R. Co.* v. *Chapman*, 8 La. Ann., 98; *Keane* v. *Goldsmith*, 12 La. Ann., 560. In the case last mentioned it is said that "The contract is, in its nature, one of personal warranty, recognized by articles 878 and 879 of the Code of Practice." And it was there held that a right of action upon the bond of indemnity accrued to the obligee, when his liability became fixed as surety by a final judgment, without payment on his part, it being the obligation of the defendants upon the bond of indemnity to pay the judgment rendered against the surety, or to furnish him the money with which to pay it.

The single question presented by the record, therefore, is, whether the law of New York or that of Louisiana defines and fixes the rights and obligations of the parties. If the former applies, the judgment of the court below is correct; if the latter, it is erroneous.

The argument in support of the judgment is simple and may be briefly stated. It is, that New York is the place of the contract, both because it was executed and delivered there, and because, no other place of performance being either designated or necessarily implied, it was to be performed there; wherefore, the law of New York, as the *lex loci contractus*, in both senses, being *lex loci celebrationis* and *lex loci solutionis*, must apply to determine not only the form of the contract, but also its validity. [129]

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On the other hand, the application of the law of Louisiana may be considered in two aspects, as the *lex fori*, the suit having been brought in a court exercising jurisdiction within its territory and administering its laws, and as the *lex loci solutionis*, the obligation of the bond of indemnity being to place the fund for payment in the hands of the surety, or to repay him the amount of his advance, in the place where he was bound to discharge his own liability.

It will be convenient to consider the applicability of the law of Louisiana, first, as the *lex fori*, and then as the *lex loci solutionis*.

1. The *lex fori*.

The Circuit Court of the United States sitting in the District of Louisiana, in a cause like the present, in which its jurisdiction depends on the citizenship of the parties, adjudicates their rights precisely as would a tribunal of the State, according to the laws of the State; so that, in that sense, there is no question as to what law must be administered. But in case of contract, the foreign law may, by the act and will of the parties, have become part of their agreement, and in enforcing this, the law of the forum may find it necessary to give effect to a foreign law, which, without such adoption, would have no force beyond its own territory.

This, upon the principle of comity, for the purpose of promoting and facilitating international intercourse, and within limits fixed by its own public policy, a civilized State is accustomed and considers itself bound to do; but, in doing so, nevertheless adheres to its own system of formal judicial procedure and remedies. And thus the distinction is at once established between the law of the contract, which may be foreign, and the law of the procedure and remedy, which must be domestic and local. In respect to the latter, the foreign law is rejected; but how and where to draw the line of precise classification it is not always easy to determine.

The principle is, that whatever relates merely to the remedy and constitutes part of the procedure, is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation and affects the rights of the parties, as growing out of the contract itself or inhering in it or attaching to it, is governed by the law of the contract. [130]

The rule deduced by Mr. Wharton, Confl. L., sec. 401, as best harmonizing the authorities and effecting the most judicious result, and which was cited approvingly by *Mr. Justice* Hunt in *Scudder* v. *Bank*, 91 U. S., 411 [XXIII., 248], is, that "Obligations in respect to the mode of their solemnization are subject to the rule *locus regit actum;* in respect to their interpretation, to the *lex loci contractus;* in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and, in all cases not specified above, supplies the applicatory law." This, it will be observed, extends the operation of the *lex fori* beyond the process and remedy, so as to embrace the whole of that residuum which cannot be referred to other laws. And this conclusion is obviously just, for whatever cannot, from the nature of the case, be referred to any other law, must be determined by the tribunal having jurisdiction of the litigation, according to the law of its own locality.

Whether an assignee of a chose in action shall sue in his own name or that of his assignor, is a technical question of mere process, and determinable by the law of the forum; but whether the foreign assignment, on which the plaintiff claims, is valid at all, or whether it is valid against the defendant, goes to the merits and must be decided by the law in which the case has its legal seat. Whart. Confl. L., secs. 725, 736. Upon that point *Judge* Kent, in the case of *Lodge* v. *Phelps*, 1 Johns. Cas., 139; 2 Cai. Cas., 321, said: "If the defendant has any defense authorized by the law of Connecticut, let him show it, and he will be heard in one form of action as well as in the other."

It is to be noted, however, as an important circumstance, that the same claim may sometimes be a mere matter of process, and so determinable by the law of the forum, and sometimes a matter of substance going to the merits, and therefore determinable by the law of the contract. That is illustrated in the application of the defense arising upon the Statute of Limitations. In the courts of England and America, that defense is governed by the law of the forum, as being a matter of mere procedure; [131] while in continental Europe, the defense of prescription is regarded as going to the substance of the contract and, therefore, as governed by the law of the seat of the obligation. "According to the true doctrine," says Savigny, Private Inter. Law by Guthrie, 201, "the local law of the obligation must determine as to the term of prescription, not that of the place of the action; and this rule, which has just been laid down in respect to exceptions in general, is further confirmed, in the case of prescription, by the fact that the various grounds on which it rests stand in connection with the substance of the obligation itself." In this view, Westlake concurs, Private Inter. Law, ed. 1858, sec. 250, who puts it, together with the case of a merger in another cause of action, the occurrence of which will be determined by the law of the former cause, *Bryans* v. *Dunseth*, 1 Mart. (N. S.), 412, as equal instances of the liability to termination inherent by the *lex contractus*. But, notwithstanding the contrary doctrine of the courts of England and this country, when the statute of limitations of a particular country, not only extinguishes the right of action, but the claim or title itself, *ipso facto*, and declares it a nullity, after the lapse of the prescribed period, and the parties have been resident within the jurisdiction during the whole of that period, so that it has actually and fully operated upon the case, it must be held, as it was considered by *Justice* Story, Confl. L., sec. 582, to be an extinguishment of the debt, wherever an attempt might be made to enforce it. That rule, as he says, has the direct authority of this court in its support in *Shelby* v. *Guy*, 11 Wheat., 361-371; its correctness was recognized by *Ch. J.* Tindal in *Huber* v. *Steiner*, 2 Bing. (N. C.), 202; and it is spoken of by *Lord* Brougham in *Don* v. *Lippmann*, 5 Clark & F., 16, as "the excellent distinction taken by *Mr. Justice* Story." *Walworth* v. *Routh*, 14 La. Ann., 205. The same principle was applied by the Supreme Court of Ohio in the case of the *R. Co.* v. *Hine*, 25 Ohio

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St., 639, where it was held, that under the Act requiring compensation for causing death by wrongful act, neglect or default, which gave a [132] right of action, provided such action should be commenced within two years after the death of such deceased person, the proviso was a condition qualifying the right of action, and not a mere limitation on the remedy. *Bonte* v. *Taylor*, 24 Ohio St., 628.

The principle that what is apparently mere matter of remedy in some circumstances, in others, where it touches the substance of the controversy, becomes matter of right, is familiar in our constitutional jurisprudence in the application of that provision of the Constitution of the United States which prohibits the passing by a State of any law impairing the obligation of contracts. For it has been uniformly held that "Any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution." *McCracken* v. *Hayward*, 2 How., 612; Cooley, Const. Lim., 285.

Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the Legislature to take it away. A vested right to an existing defense is equally protected, saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract, and are not based on equity and justice. Cooley, Const. Lim., 362-369.

The general rule, as stated by Story, Confl. L., sec. 331, is, that a defense or discharge, good by the law of the place where the contract is made or is to be performed, is to be held of equal validity in every other place where the question may come to be litigated. Thus in fancy, if a valid defense by the *lex loci contractus*, will be a valid defense everywhere. *Thompson* v. *Ketchum*, 8 Johns., 190; *Male* v. *Roberts*, 3 Esp., 163. A tender and refusal, good by the same law, either as a full discharge or as a present fulfillment of the contract, will be respected everywhere. *Warder* v. *Arell*, 2 Wash. (Va.), 282. Payment in paper money bills, or in other things, if good by the same law, will be deemed a sufficient payment everywhere. [Anonymous] 1 Brown, Ch., 376; *Searight* v. *Calbraith*, [133] 4 Dall., 325; *Bartech* v. *Atwater*, 1 Conn., 409. And, on the other hand, where a payment by negotiable bills or notes is, by the *lex loci*, held to be conditional payment only, it will be so held even in States where such payment under the domestic law would be held absolute. So, if by the law of the place of a contract equitable defenses are allowed in favor of the maker of a negotiable note, any subsequent indorsement will not change his rights in regard to the holder. The latter must take it *cum onere*. *Ory* v. *Winter*, 4 Mart. (N. S.), 277; *Evans* v. *Gray*, 12 Mart. (La.), 475; *Chartres* v. *Cairnes*, 4 Mart. (N. S.), 1; Story, Confl. L., sec. 332.

On the other hand, the law of the forum determines the form of the action, as whether it shall be *assumpsit*, covenant or debt. *Warren* v. *Lynch*, 5 Johns., 239; *Andrews* v. *Herriot*, 4 Cow., 508. *Trasher* v. *Everhart*, 3 Gill & J., 234; *Adam* v. *Kerr*, 1 Bos. & P., 360; *Bank* v. *Donnally*, 8 Pet., 361; *Douglas* v. *Oldham*, 6 N. H., 150. In *Le Roy* v. *Beard*, 8 How., 451, where it was held that *assumpsit* and not covenant was the proper form of action brought in New York upon a covenant executed and to be performed in Wisconsin, and by its laws sealed as a deed, but which in the former was not regarded as sealed, it was said by this court, that it was so decided "Without impairing at all the principle, that in deciding on the obligation of the instrument as a contract, and not the remedy on it elsewhere, the law of Wisconsin, as the *lex loci contractus*, must govern." It also regulates all process, both *mesne* and final. *Ogden* v. *Saunders*, 12 Wheat., 213; *Mason* v. *Haile*, Id., 370; *Beers* v. *Haughton*, 9 Pet., 359; *Von Hoffman* v. *Quincy*, 4 Wall., 553 [71 U. S., XVIII., 409]. It also may admit, as a part of its domestic procedure, a set-off or compensation of distinct causes of action between the parties to the suit, though not admissible by the law of the place of the contract. Story, Confl. L., sec. 574; *Gibbs* v. *Howard*, 2 N. H., 296; *Ruggles* v. *Keeler*, 3 Johns., 263. But this is not to be confounded, as it was in the case of *Bank* v. *Hemingray*, 31 Ohio, 168, with that of a limited negotiability, by which the right of set-off between the original parties is preserved as part of the law of the contract, notwithstanding an assignment. The rules of evidence are also supplied [134] by the law of the forum. *Wilcox* v. *Hunt*, 13 Pet., 378; *Yates* v. *Thomson*, 3 Clark & F., 544; *Bain* v. *R. Co.*, 3 H. of L. Cas., 1; *Don* v. *Lippman*, 3 Clark & F., 1. In *Yates* v. *Thomson*, *supra*, it was decided by the House of Lords that in a suit in a Scotch court, to adjudge the succession to personalty of a decedent domiciled in England, where it was admitted that the English law governed the title, nevertheless it was proper to receive in evidence, as against a will of the decedent duly probated in England, a second will which had not been proved there, and was not receivable in English courts as competent evidence, because such a paper, according to Scottish law, was admissible. In the case of *Hoadley* v. *Northern Trans. Co.*, 115 Mass., 304, it was held that if the law of the place, where a contract signed only by the carrier is made for the carriage of goods, requires evidence other than the mere receipt by the shipper to show his assent to its terms, and the law of the place where the suit is brought presumes conclusively such assent from acceptance without dissent, the question of assent is a question of evidence, and is to be determined by the law of the place where the suit is brought. In a suit in Connecticut against the indorser on a note made and indorsed in New York, it was held that parol evidence of a special agreement, different from that imputed by law, would be received in defense, although by the law of the latter State no agreement different from that which the law implies from a blank indorsement could be proved by parol. *Downer* v. *Chesebrough*, 36 Conn., 39. And upon the same principle it has been held that a contract, valid by the laws of the place where it is made, although not in writing, will not be enforced in the courts of a country where the statute of frauds prevails, unless it is put in writing. *Leroux* v. *Brown*, 12 C. B., 801. But where the law of the forum and that of the place of the execution of the

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contract coincide, it will be enforced, although by the law of the place of performance required to be in writing, as was the case of *Scudder* v. *Bank*, 91 U. S., 406 [XXIII., 245], because the *form* of the contract is regulated by the law of the place of its celebration, and the *evidence* of it by that of the forum.

The case of *Williams* v. *Haines*, 27 Ia., 251, was an action upon a note executed in Maryland and, so far as appears from the report, payable there, where the parties thereto then resided and which was a sealed instrument, according to the laws of that State, in support of which those laws conclusively presumed a valid consideration. By the laws of Iowa, to such an instrument the want of consideration was allowed to be proved as a defense. It was held by the Supreme Court of that State, in an opinion delivered by *Ch. J.* Dillon, that the law of Iowa related to the remedy merely, without impairing the obligation of the contract, and, as the *lex fori* must govern the case. He said: "Respecting what shall be good defenses to actions in this State, its courts must administer its own laws and not those of other States. The common law rules do not so inhere in the contract as to have the portable quality ascribed to them by the plaintiff's counsel, much less can they operate to override the plain declaration of the legislative will." The point of this decision is incorporated by Mr. Wharton into the text of his treatise on the Conflict of Laws, section 788, and the case itself is referred to in support of it. He deduces the same conclusion from those cases, already referred to, which declare that *assumpsit* is the only form of action that can be brought upon an instrument which is not under seal, according to the laws of the forum, although by the law of the place where it was executed, or was to be performed, it would be regarded as under seal, in which debt or covenant would lie on the ground that a plea of want or failure of consideration is recognized as a defense in all actions of *assumpsit*. Whart. Confl. L., section 747.

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If the proposition be sound, its converse is equally so; and the law of the place where a suit may happen to be brought may forbid the impeachment of a contract, for want of a valid consideration, which, by the law of the place of the contract, might be declared invalid on that account.

We cannot, however, accept this conclusion. The question of consideration, whether arising upon the admissibility of evidence or presented as a point in pleading, is not one of procedure and remedy. It goes to the substance of the right itself, and belongs to the constitution of the contract. The difference between the law of Louisiana and that of New York, presented in this case, is radical, and gives rise to the inquiry, what, according to each, are the essential elements of a valid contract, determinable only by the law of its seat; and not that other, what remedy is provided by the law of the place where the suit has been brought to recover for the breach of its obligation.

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On this point, what was said in the case of *The Gaetano & Maria*, L. R. 7 P. D., 137, is pertinent. In that case the question was whether the English Law, which was the law of the forum, or the Italian Law, which was the law of the flag, should prevail, as to the validity of a hypothecation of the cargo by the master of a ship. It was claimed that because the matter to be proved was, whether there was a necessity which justified it, it thereby became a matter of procedure, as being a matter of evidence. *Lord Justice* Brett said: "Now, the manner of proving the facts is matter of evidence, and, to my mind, is matter of procedure, but the facts to be proved are not matters of procedure; they are matters with which the procedure has to deal."

It becomes necessary, therefore, to consider the applicability of the law of Louisiana as,

2. *The lex loci solutionis.*

The phrase *lex loci contractus* is used, in a double sense, to mean, sometimes, the law of the place where a contract is entered into; sometimes, that of the place of its performance. And when it is employed to describe the law of the seat of the obligation, it is, on that account, confusing. The law we are in search of, which is to decide upon the nature, interpretation and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by *Ch. J.* Marshall in *Wayman* v. *Southard*, 10 Wheat., 48, where he defined it as a principle of universal law: "The principle that in every forum a contract is governed by the law with a view to which it was made." The same idea had been expressed by *Lord* Mansfield in *Robinson* v. *Bland*, 2 Burr., 1077. "The law of the place," he said, "can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed." And in *Lloyd* v. *Guibert*, L. R., 1 Q. B., 120, in the Court of Exchequer Chamber, it was said that "It is necessary to consider by what general law the parties intended that the transaction should be governed, or rather, by what general law it is just to presume that they have submitted themselves in the matter." *Le Breton* v. *Miles*, 8 Paige, 261.

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It is upon this ground that the presumption rests, that the contract is to be performed at the place where it is made, and to be governed by its laws, there being nothing in its terms, or in the explanatory circumstances of its execution, inconsistent with that intention.

So, Phillimore says (4 Int. Law., 469) "It is always to be remembered that in obligations it is the will of the contracting parties, and not the law which fixes the place of fulfillment—whether that place be fixed by *express words* or by *tacit implication*—as the place to the jurisdiction of which the contracting parties elected to submit themselves."

The same author concludes his discussion of the particular topic (4 Int. Law, sec. DCLIV., pp., 470-471) as follows: "As all the foregoing rules rest upon the presumption that the obligor has voluntarily submitted himself to a particular local law, that presumption may be rebutted either by an express declaration to the contrary, or by the fact that the obligation is illegal by that particular law, though legal by another. The parties cannot be presumed to have contemplated a law which would defeat their engagements."

This rule, if universally applicable, which, perhaps it is not, though founded on the maxim,

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Ut res magis valeat, quam pereat, would be decisive of the present controversy, as conclusive of the question of the application of the law of Louisiana, by which alone the undertaking of the obligor can be upheld.

At all events, it is a circumstance, highly persuasive in its character, of the presumed intention of the parties, and entitled to prevail, unless controlled by more express and positive proofs of a contrary intent.

It was expressly referred to as a decisive principle in *Bell* v. *Packard*, 69 Me., 111, although it cannot be regarded as the foundation of the judgment in that case. *Milliken* v. *Pratt*, 125 Mass., 374.

[138] If now we examine the terms of the bond of indemnity, and the situation and relation of the parties, we shall find conclusive corroboration of the presumption, that the obligation was entered into in view of the laws of Louisiana.

The antecedent liability of Pritchard, as surety for the railroad company on the appeal bond, was confessedly contracted in that State, according to its laws, and it was there alone that it could be performed and discharged. Its undertaking was, that Pritchard should, in certain contingencies, satisfy a judgment of its courts. That could be done only within its territory and according to its laws. The condition of the obligation, which is the basis of this action, is, that McComb and Norton, the obligors, should hold harmless and fully indemnify Pritchard against all loss or damage arising from his liability as surety on the appeal bond. A judgment was, in fact, rendered against him on it in Louisiana. There was but one way in which the obligors in the indemnity bond could perfectly satisfy its warranty. That was, the moment the judgment was rendered against Pritchard on the appeal bond, to come forward in his stead and, by payment, to extinguish it. He was entitled to demand this before any payment by himself, and to require that the fund should be forthcoming at the place where otherwise he could be required to pay it. Even if it should be thought that Pritchard was bound to pay the judgment recovered against himself, before his right of recourse accrued upon the bond of indemnity, nevertheless he was entitled to be re-imbursed the amount of his advance at the same place where he had been required to make it. So that it is clear, beyond any doubt, that the obligation of the indemnity was to be fulfilled in Louisiana and, consequently, is subject, in all matters affecting its construction and validity, to the law of that locality.

This construction is abundantly sustained by the authority of judicial decisions in similar cases.

In *Irvine* v. *Barrett*, 2 Grant's Cas., 78, it was decided that where a security is given in pursuance of a decree of a court of justice, it is to be construed according to the intention of the tribunal which directed its execution, and in contemplation of law, is to be performed at [139] the place where the court exercises its jurisdiction; and that a bond given in another State, as collateral to such an obligation, is controlled by the same law which controls the principal indebtedness. In the case of *R.R. Co.* v. *Bartlett*, 12 Gray, 244, the Supreme Judicial Court of Massachusetts decided that a contract made in that State to subscribe to shares in the capital stock of a railroad corporation established by the laws of another State, and having their road and treasury there, is a contract to be performed there, and is to be construed by the laws of that State. In *Lanusse* v. *Barker*, 3 Wheat., 146, this court declared that "Where a general authority is given to draw bills from a certain place, on account of advances there made, the undertaking is to replace the money at that place."

The case of *Cox* v. *U. S.*, 6 Pet., 172, was an action upon the official bond of a navy agent. The sureties contended that the United States were bound to divide their action, and take judgment against each surety only for his proportion of the sum due, according to the laws of Louisiana, considering it a contract made there, and to be governed in this respect by the law of that State. The court, however, said: "But admitting the bond to have been signed at New Orleans, it is very clear that the obligations imposed upon the parties thereby looked for its execution to the City of Washington. It is immaterial where the services as navy agent were to be performed by Hawkins. His accountability for non-performance was to be at the seat of government. He was bound to account, and the sureties undertook that he should account for all public moneys received by him, with such officers of the government of the United States as are duly authorized to settle and adjust his accounts. The bond is given with reference to the laws of the United States on that subject. And such accounting is required to be with the Treasury Department at the seat of government; and the navy agent is bound, by the very terms of the bond, to pay over such sum as may be found due to the United States on such settlement; and such paying over must be to the Treasury Department, or in such manner as shall be directed by the Secretary. The bond is, therefore, in every point of view in which it can be considered, a contract to be executed at the City of Washing- [140] ton, and the liability of the parties must be governed by the rules of the common law." This decision was repeated in *Duncan* v. *U. S.*, 7 Pet., 436.

These cases were relied on by the Supreme Court of New York in the case of *Kentucky* v. *Bassford*, 6 Hill, 526. That was an action upon a bond executed in New York conditioned for the faithful performance of the duties enjoined by a law of Kentucky authorizing the obligees to sell lottery tickets for the benefit of a college in that State. It was held that the stipulations of the bond were to be performed in Kentucky, and that, as it was valid by the laws of that State, the courts of New York would enforce it, notwithstanding it would be illegal in that State.

The case of *Boyle* v. *Zacharie*, 6 Pet., 635, is a direct authority upon the point. There Zacharie and Turner were resident merchants at New Orleans, and Boyle at Baltimore. The latter sent his ship to New Orleans, consigned to Zacharie and Turner, where she arrived and, having landed her cargo, the latter procured a freight for her to Liverpool. When she was ready to sail, she was attached by process of law at the suit of certain creditors of Boyle, and Zacharie and Turner procured her release by

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becoming security for Boyle on the attachment. Upon information of the facts, Boyle promised to indemnify them for any loss they might sustain on that account. Judgment was rendered against them on the attachment bond, which they were compelled to pay, and brought suit against Boyle in the Circuit Court for Maryland, upon his promise of indemnity, to recover that amount. A judgment was rendered by confession in that cause and a bill in equity was subsequently filed to enjoin further proceedings on it, in the course of which various questions arose, among them whether the promise of indemnity was a Maryland or a Louisiana contract. *Mr. Justice* Story, delivering the opinion of the court, said: "Such a contract would be understood by all parties to be a contract made in the place where the advance was to be made, and the payment, unless otherwise stipulated, would also be understood to be made there;" "that the contract would clearly refer for its execution to Louisiana."

[141] The very point was also decided by this court in *Bell* v. *Bruen*, 1 How., 169. That was an action upon a guaranty written by the defendant in New York, addressed to the plaintiffs in London, the latter having made advances in the latter place of a credit to Thorn. The operative language of the guaranty was, "That you may consider this, as well as any and every other credit you may open in his favor, as being under my guaranty." The court said: "It was an engagement to be executed in England, and must be construed and have effect according to the laws of that country," citing *Bank* v. *Daniel*, 12 Pet., 54. As the money was advanced in England, the guaranty required that it should be replaced there, and that is the precise nature of the obligation in the present case. Pritchard could only be indemnified against loss and damage on account of his liability on the appeal bond, by having funds placed in his hands in Louisiana wherewith to discharge it, or by being repaid there the amount of his advance. To the same effect is *Woodhull* v. *Wagner*, Baldw., 296.

We do not hesitate, therefore, to decide that the bond of indemnity sued on was entered into with a view to the law of Louisiana as the place for the fulfillment of its obligation; and that the question of its validity, as depending on the character and sufficiency of the consideration, should be determined by the law of Louisiana, and not that of New York. *For error in its rulings on this point, consequently, the judgment of the Circuit Court is reversed, with directions to grant a new trial.*

New trial ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 549; 111 U. S., 37; 114 U. S., 220.

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[142] SIMON WING ET AL., *Appts.*,
v.
EDWARD ANTHONY ET AL.

(See S. C., 16 Otto, 142-147.)

Void patent—improvement in photography—re-issued patent, when void.

1. Where the claim of a re-issued patent is for a different invention from that described in the original patent, the re-issue is void.

2. Where the original patent was for a mechanism to accomplish a specific result, and the re-issued patent is for the process by which that result is attained, and is, therefore, much broader than the original patent, and covers every mechanism which can be contrived to carry on the process, the re-issue is void.

3. These principles applied to the re-issued patent to Albert S. Southworth for improvements in taking photographic impressions.

[No. 67.]

Argued Nov. 1, 2, 1882. Decided Nov. 13, 1882.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

Statement of the case by *Mr. Justice* **Woods:**

This was a bill in equity to restrain the infringement by the defendants of re-issued letters patent dated September 25, 1860, granted to Albert S. Southworth, for certain improvements in taking photographic impressions. The original letters patent were dated April 10, 1855, the re-issue, September 25, 1860.

The answer of the defendants denied the novelty and the utility of the invention, denied infringement, and alleged that the invention described in the re-issued patent was not the same invention described in the original patent.

The circuit court upon final hearing dismissed the bill. To obtain a review of this decree, the complainants have appealed to this court.

It appears from the evidence in this case, and is a matter of general knowledge, that a camera is the principal instrument used in taking photographic pictures. This is a rectangular, oblong box, in one end of which is inserted a tube containing a double convex lens, while at the other end is a plate-holder, immediately in front of which is a sliding shield. A plate of glass receives in a dark room a chemical preparation which renders it sensitive to the action of light. The plate is then put into the plate-holder at the end of the camera opposite the lens, the shield in front of the plate is withdrawn, and the rays of light, passing through the lens from an object suitably placed in front of it, fall upon the plate and produce there an image of the object. This is then perfected by certain other chemical processes, and is called a negative, and from it many copies may be printed. Thus photographic pictures are produced.

The camera should be so arranged with relation to the object to be pictured, that a right line drawn from the center of the object will [143] pass directly through the axis of the lens and fall upon the plate at right angles. In this manner the best pictures are obtained. If this method is not followed the picture will be distorted and otherwise imperfect.

It is conceded that, prior to the date of Southworth's invention, this object was accomplished by tilting the camera itself into different positions with respect to the object to be pictured, and in this manner bringing the center of the field of the lens upon different parts of the plate.

Complainants contend that, prior to Southworth's invention, only one correct picture could be taken on the same plate, except in the manner just stated. The object of the invention covered by his original patent was, to provide efficient means by which several correct pictures could be taken on different parts of the same plate.

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In the specification of his original patent he declares his invention to be "A new and useful plate-holder for cameras for taking photographic impressions," and says: "The object of my invention is to bring in rapid succession different portions of the same plate, or different plates of whatsoever material prepared for photographic purposes, into the center of the field of the lens, for the purpose of either tinning them differently, that the most perfect may be selected, or of taking different views of the same object with the least delay possible, or of taking stereoscopic pictures upon the same or different plates with one camera." He then declares: "My invention consists of a peculiarly arranged frame in which the plate-holder is permitted to slide, by which means I am enabled to take four daguerreotypes on one plate and at one sitting, different portions of the plate being brought successively opposite an opening in the frame, the opening remaining stationary in the axis of the camera while the plate-holder and plate are moved."

The specification here proceeds to describe minutely the frame-holder by which the object of the invention is accomplished.

The claim of the original patent is as follows:

"What I claim as my invention and desire to secure by letters patent is the within described plate-holder in combination with the frame in which it moves, constructed and operated in the manner and for the purpose substantially as [144] herein set forth."

The specification of the re-issued patent contains the following passages which do not appear in the original specification: "I have invented certain improvements in taking photographic impressions." * * * "In taking daguerreotypes, photographs, etc., it has been customary to use a separate plate for each impression, the plate being removed from the camera and replaced by another when several impressions of the same object were to be taken, as in multiplying copies or for the purpose of selecting the best-timed pictures. This caused considerable delay and trouble, to obviate which is the object of my present invention, which consists in bringing successively different portions of the same plate or several smaller plates secured in one plate-holder into the field of the lens of the camera.

"In carrying out my invention I have made use of a peculiarly arranged frame, in which the plate-holder is permitted to slide, and in which the position of the plate-holder is definitely indicated to the operator, so that he can quickly and accurately adjust the plate or plates, the accompanying drawings and description so explaining the same that others skilled in the art may understand and use my invention."

Then follows a description of the plate-holder, which is identical with the description contained in the original specification, and is illustrated by the same drawings

The re-issue specification further declares: "In this case, however," that is, when it is desired to take more than four impressions on the same plate, "I use suitable grooves, stops or indices, by which the operator adjusts the positions of the plate substantially on the same principle that he uses the corners of the opening K in the above described apparatus. It is evident that my improvement may be embodied by causing the lens of the camera to be made adjustable in different positions with respect to the plate, while the plate remains stationary, so that different portions of the plate may be brought into the field of the lens. This I have tried, but do not consider it practically to be so good a plan as the foregoing, as it necessitates a change of position of the camera itself or of the objects."

The claim of the re-issued patent was then [145] stated as follows:

"What I claim as my invention and desire to secure by letters patent is bringing the different portions of a single plate, or several smaller plates, successively into the field of the lens of the camera, substantially in the manner and for the purpose specified."

Messrs. John S. Abbott and **Albert A. Abbott**, for appellants.

Mr. **Edmund Wetmore**, for appellees.

Mr. Justice **Woods** delivered the opinion of the court:

It is manifest that the re-issued patent was taken out for the purpose of embracing under its monopoly what was not included by the original patent. The original patent was not, in the language of the statute, "Inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new."

The original claim was for a mechanism namely: "A plate-holder in combination with the frame in which it moves, constructed and operating in the manner and for the purpose" set forth in the specification. The claim of the re-issued patent is plainly for a process, namely: "The bringing of the different portions of a single plate, or several smaller plates, successively into the field of the lens of the camera, substantially in the manner and for the purpose specified."

This claim would cover any mechanism by which the different parts of the plate could be brought into the field of the lens. In fact, the specification of the re-issued patent suggests a different contrivance, namely: the causing of the lens of the camera to be made adjustable in different positions with respect to the plate, while the plate remains stationary, so that different portions of the plate may be brought into the field of the lens.

It is quite clear that the original patent covers a mechanism to accomplish a specific result, and that the re-issued patent covers the process by which that result is attained, without regard to the mechanism used to accomplish it. The re-issue is, therefore, much broader than the original patent, and covers every mechanism which can be contrived to carry on the [146] process

In the case of *Powder Co* v *Powder Works*, 98 U. S., 126 [XXV., 77], it was held by this court that when original letters patent were taken out for a process, the re-issued patent would not cover a composition unless it were the result of the process, and that the invention of one involved the invention of the other.

The converse of this proposition was decided by this court in the case of *James* v. *Campbell*, 104 U. S., 356 [XXVI., 786]. In that case the

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court said that a patent for a process and a patent for an implement or a machine are very different things, and decided, in substance, that letters patent for a machine or implement cannot be re-issued for the purpose of claiming the process of operating that class of machines, because, if the claim for the process is anything more than for the use of the particular machine patented, it is for a different invention.

To the same effect precisely is the case of *Heald* v. *Rice*, 104 U. S., 737 [XXVI., 910]. The present case falls within the rule laid down in the authorities cited.

Southworth's invention, as described in his original patent, must be limited to what is there set forth, namely: a mechanism for bringing successively different portions of the plate within the field of the lens. He did not discover the law that, to get the best effect in taking pictures, the plate or part of the plate on which the picture was to be taken should be brought into the field of the lens, nor did he invent the method of doing this by tilting the camera itself into different positions with respect to the object to be pictured.

This law was known, and the practice mentioned was followed, long before Southworth's invention. His device was simply a new and specific means to take advantage of a well known law of nature. In his re-issue, by claiming as his invention the process of bringing different parts of the plate successively into the field of the lens, he seeks to put himself in as good a position as if he had been the first to discover the law referred to, and the first to invent the method of taking advantage of the law by tilting his camera into different positions. In claiming the process, he excludes all [147] other mechanisms contrived to accomplish the same object. This he could not rightfully do.

We are of opinion that the claim of the re-issued patent is for a different invention from that described in the original patent, and that the re-issue is, therefore, void.

Gill v. *Wells*, 22 Wall., 1 [89 U. S., XXII., 699]; *The Wood Paper Patent*, 23 Wall., 566 [90 U. S., XXIII., 31]; *Powder Co.* v. *Powder Works*, 98 U. S., 126 [XXV., 77]; *Ball* v. *Langley*, 102 U. S., 128 [XXVI., 104]; *Miller* v. *Brass Co.*, 104 U. S., 350 [XXVI., 783]; *James* v. *Campbell*, Id., 356 [XXVI., 786]; *Heald* v. *Rice*, Id., 737 [XXVI., 910]; *Johnson* v. *R. R. Co.*, 105 U. S., 589 [XXVI., 1162]; *Bantz* v. *Frantz*, 105, Id., 160 [XXVI., 1013].

The decree of the Circuit Court must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 108; 112 U. S., 669.

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[338] AMERICA C. BEDFORD AND JOHN R. BEDFORD, *Appts.*,
v.
J. W. BURTON.

(See S. C., 16 Otto, 338-342.)

Note of married woman, when valid as a lien—improvements on land—interest on vendor's lien.

*1. Where a married woman, with the consent of her husband, buys land and gives her promissory notes for part of the purchase money, and a lien is reserved in the deed of conveyance for the payment of the notes, such lien may be enforced against the land though the notes be void as against the woman personally. (The husband and wife went into possession, made permanent improvements, and made payments on the notes.)

2. In such case the grantee is not entitled, by reason of her coverture, to have the sale set aside and the purchase money already paid refunded, though consenting to account for rents and profits; nor will she, or her husband, be allowed for permanent improvements erected by them.

3. In such case, also, in a State where, by contract, interest above the ordinary legal rate may be stipulated for, such interest may be recovered under the vendor's lien if agreed to be given in the notes for purchase money.

[No. 46.]

Submitted Oct. 24, 1882. Decided Nov. 13, 1882.

APPEAL from the Circuit Court of the United States for the Middle District of Tennessee.

The bill in this case was filed in the court below, to enforce a vendor's lien upon a certain tract of land.

The said court having entered a decree for the foreclosure and sale of the land in question, the defendants appealed to this court.

A further statement of the case appears in the opinion of the court.

Mr. **R. McP. Smith**, for appellants.

Messrs. **A. A. Freeman** and *John W. Burton*, for appellee.

Mr. Justice **Bradley** delivered the opinion of the court:

This case arises on a bill in equity filed by G. W. Burton, the appellee, alleging that in February, 1872, he sold and conveyed to America Bedford, one of the appellants, wife of John R. Bedford, the other appellant, in fee, for her separate use, free from the control of her husband, a certain tract of land in Tennessee, for the consideration of $7,500, one third of which was paid down, and the balance secured by the promissory notes of Mrs. Bedford, drawing interest at the rate of ten per cent per annum. The deed of conveyance specified these notes, and reserved a lien on the land for the payment thereof. The notes were paid in part but not in full, and the bill was filed for the foreclosure and sale of the land to raise the balance due. The defendants, Bedford and wife, filed a demurrer, which was overruled, and thereupon they filed an answer and cross-bill, admitting the facts stated in the bill, and that they took and still had possession under the purchase; and the cross-bill alleged that the defendants had made permanent improvements on the land to the value of $500; and claimed that the sale was void because of the coverture of the grantee, and prayed that it might be declared void, and that Burton should be decreed to refund [339] the amount paid on the purchase, together with the value of the improvements, with interest, after deducting the value of the rents whilst the property was occupied by the defendants. Burton demurred to the cross-bill, and on final hearing the court sustained this demurrer, and made a decree for the foreclosure and sale of the property as prayed in the original bill, but declared

*Head notes by *Mr. Justice* BRADLEY.

NOTE.—*Lien for purchase money.* See *note* to Bayley v. Greenleaf, 20 U. S. (7 Wheat.), 46.

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that the complainant was not entitled to a personal judgment against America Bedford. From this decree the defendants have appealed.

The decree is sought to be reversed on two grounds: first, because the sale to America Bedford was void by reason of her coverture, and ought to be declared void, and the money paid by her decreed to be refunded; secondly, because the decree gives ten per cent interest on the notes, a rate of interest which is not allowed by the law unless there is a special contract therefor, the legal rate being only six per cent; and a *feme covert* is incapable of making such special contract.

The authorities are numerous and conclusive to the effect that a *feme covert* may, with her husband's consent, take land by purchase, and that a security given thereon by her for the purchase money will be enforced. It was so held by this court in the case of *Chilton* v. *Braiden*, 2 Black, 458 [67 U. S., XVII., 304], where a lien for the unpaid purchase money of land sold to a married woman was enforced by a decree for the sale of the land. *Mr. Justice* Grier, delivering the opinion of the court, said: "When one person has got the estate of another, he ought not, in conscience, to be allowed to keep it without paying the consideration. It is on this principle that courts of equity proceed as between vendor and vendee. The purchase money is treated as a lien on the land sold, where the vendor has taken no separate security." In a well considered case decided by the Chancellor of New Jersey, *Armstrong* v. *Ross*, 5 C. E. Green [20 N. J. Eq.], 109, where property was sold and conveyed to a married woman, and she and her husband executed a mortgage for the purchase money, but the execution by the wife was void because she was not privately examined, it was nevertheless held that the vendor had a lien for the purchase money, and also that the mortgage, being given for the benefit of her [340] separate estate, although void as a mortgage, might be decreed a lien on such separate estate. In the case of *Willingham* v. *Leake*, 7 Bax., 453, it was held by the Supreme Court of Tennessee that where land was sold and a title bond given to a married woman, who gave her notes for a part of the purchase money, the vendor's lien could be enforced, although the notes might be void as against the vendee personally. In the subsequent case of *Jackson* v. *Rutledge*, 8 Lea, 626, decided as late as December Term, 1879, the same court held that if a married woman buy land, partly for cash and partly on time, and accept a deed of conveyance to her separate use, a lien being retained for the unpaid installments, she cannot have the money, which she has paid, refunded merely because of her coverture, and the lien reserved for the payment of the purchase money may be enforced in equity. This case was nearly parallel to the present. A deed was executed to the married woman for her sole and separate use, retaining a lien on the land for the payment of the notes given for the purchase money, and the grantee and her husband went into possession. A cross-bill was filed, as in the present case, seeking to set aside the contract as void, and for a return of the money paid, and the value of permanent improvements. A decree for the sale of the land to satisfy the unpaid purchase money was made by the Chancellor, but no personal decree against the parties. This decree was affirmed by the Supreme Court in an elaborate judgment, in which the authorities on the subject are fully reviewed. The court concludes the examination by saying, "If the conveyance be to the sole and separate use of the married woman, there seems to be no difficulty in treating a debt contracted in the purchase as binding on the property, although not personally obligatory on the *feme*, because, where she takes possession under the conveyance, the debt is contracted for the benefit of her separate estate." Again; "Her incapacity to execute valid notes, if we treat the purchase notes as void on that ground and because not expressly made obligatory on her separate estate, would not affect the vendor's right to subject the land to the satisfaction of the unpaid purchase money by virtue of the vendor's equity and of the lien reserved. By the delivery and acceptance of the deed of conveyance, the contract was executed and the title vested [341] in her. She takes the title subject to the charge created by the terms of the deed. *Trezevant* v. *Bettis*, 1 Leg. Rep., 48; *Lee* v. *Newman*, 1 Memph. L. J., 139; *Eskridge* v. *Eskridge*, 51 Miss., 522. Under such circumstances, the married woman is not entitled to have the cash payment refunded. In making the payment, as we have seen, she exercised a right which the law concedes. * * * All she can claim is exemption from personal liability."

These cases decided by the highest court of Tennessee, where the land lies and where the transaction took place, are of stringent authority, and they accord with our own views of the law.

It should be added that by the statute law of Tennessee, "Married women over the age of twenty-one years, owning the fee or other legal or equitable interest or estate in real estate, shall have the same powers of disposition, by will, deed or otherwise, as are possessed by *femes sole* or unmarried women." Code of Tennessee, sec. 2486. This provision would seem to be sufficient to confer upon a married woman, purchasing land to her own use, power to execute a mortgage upon the land to secure the purchase money—binding at least upon the land, if not creating any personal obligation against her.

But the present case is a stronger one than that of a mortgage. The deed by which she holds the property is qualified by expressly retaining a lien for the payment of the purchase money. The lien goes with the estate and affects it in a manner similar to a condition. It is, indeed, in the nature of a condition impressed upon the estate itself. It makes the deed say, in effect, "I convey to you the land, but only upon the condition that you pay the notes given for purchase money; if they are not paid I am to hold it as security."

This peculiar character of the lien seems to be a good answer to the second ground for reversal—the reservation of interest at the rate of ten per cent per annum on the notes. Ten per cent is not an unlawful rate of interest in Tennessee. It may be reserved if the parties so agree. If they make no agreement, the law gives six. The agreement to pay ten per cent in this case may not be binding on the wife personally, but it is not binding on the same ground that the [342] principal is not binding upon her personally.

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Nevertheless, as it is a rate that may be lawfully stipulated for, if it is stipulated for, and is made part of the consideration for which a lien is retained on the land, it is as much secured by the lien as the principal is.

We see no error in the decree, and it is therefore affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[86] EQUATOR MINING AND SMELTING COMPANY, *Plff. in Err.*,
v.
GEORGE W. HALL ET AL.

(See S. C., 16 Otto, 86-89.)

Colorado practice as to new trial—when binding on Federal Courts.

*1. Section 254 of the Code of Civil Procedure of Colorado grants as of right, without cause shown, one new trial to each party, as it may in turn have a verdict or judgment rendered against it in an action of ejectment.

2. The law of the State in that respect is binding on the Circuit Court of the United States in cases tried in that State.

[No. 55.]

Submitted Oct. 27, 1882. Decided Nov. 13, 1882.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of Colorado, and

IN ERROR to the Circuit Court of the United States for the District of Colorado.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **H. M. Teller**, for plaintiff in error.

No counsel appeared for the defendants in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Circuit Court for the District of Colorado. The case was an action of ejectment, to recover possession of a silver mine. The plaintiffs below were Hall and Marshall, who obtained a judgment for the possession of the property in controversy. At the December Term, 1878, of the circuit court, the case had been submitted, by agreement of the parties, waiving a jury, to the Judge, who rendered a judgment in favor of the defendant. Thereupon the plaintiffs paid the costs of the suit up to that time, and moved the court to grant them a new trial without showing any cause, which was ordered under the provisions of section 254 of the Code of Civil Procedure of Colorado. At the May Term, 1879, the case was submitted to a jury and a verdict was rendered for the plaintiffs, on which judgment was entered on the 15th of July. The *defendant* then made a motion for a new trial without showing cause, which was claimed to be a matter of right under the same section. On the question whether this new trial should be granted, the Judges of the Circuit Court were divided in opinion, and a judgment was entered overruling the motion. They have certified that question to this court.

The section of the Code of Colorado under which this motion was made reads as follows:

"Whenever judgment shall be rendered against either party under the provisions of this chapter, it shall be lawful for the party against whom such judgment is rendered, his heirs or assigns, at any time before the first day of the next succeeding term, to pay all costs recovered thereby, and, upon application of the party against whom the same was rendered, his heirs or assigns, the court shall vacate such judgment and grant a new trial in such case, but neither party shall have but one new trial in any case, as of right, without showing cause. And after such judgment is vacated, the cause shall stand for trial the same as though it had never been tried." [87]

Two questions are presented for our consideration in reviewing the action of the circuit court on this motion for a new trial. The first is, whether the Circuit Court of the United States sitting in Colorado is to be governed by the statute of that State on this subject.

At the common law, the fiction in an action of ejectment, by which John Doe and Richard Roe were made plaintiff and defendant, permitted any number of trials after verdict and judgment between the same parties in interest on the same question of title, by the use of other fictitious names, and other allegations of demise, entry, and ouster.

The evil of this want of conclusiveness in the result of this form of action led to the interposition of a court of equity, in which, after repeated verdicts and judgments in favor of the same party and upon the same title, that court would enjoin the unsuccessful party from further disturbance of the one who had recovered these judgments.

This form of action, with its inconclusive results, would be the law in Colorado for the recovery of the possession of real estate, but for the statutes of that State, of which section 254 of the Code of Civil Procedure is a part. The framers of those statutes, in abolishing the old common law action of ejectment with its accompanying evils, and in substituting an action between the real parties, plaintiff and defendant, found it necessary to provide a rule on the subject of new trials in actions concerning the titles of land.

A title to real estate has, under the traditions of the common law, been held, in all the States where that law prevailed, to be too important, we might almost say too sacred, to be concluded forever by the result of one action between the contesting parties. Hence, those States which, by abolishing the fictions of the action at the common law, and substituting a direct suit between the parties actually claiming under conflicting titles, which, according to the nature of [88] this new proceeding, would end in a judgment concluding both parties, have found it necessary to provide for new trials to such extent as each State Legislature has thought sound policy to require. These provisions for new trials in actions of ejectment are not the same in all the States, but it is believed that almost all of them which have abolished the common law action have made provision for one or more new trials as a matter of right.

We are of opinion that when an action of ejectment is tried in a Circuit Court of the United States according to the statutory mode of

*Head notes by *Mr. Justice* MILLER.

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proceeding, that court is governed by the provisions concerning new trials as it is by the other provisions of the state statute. There is no reason why the Federal Court should disregard one of the rules by which the State Legislature has guarded the transfer of the possession and title to real estate within its jurisdiction. See *Miles* v. *Caldwell*, 2 Wall., 35 [69 U.S., XVII., 755].

As regards the construction of the statute under consideration, which is the second question; while it is not clear that the language of the statute, that "Neither party shall have but one new trial in any case as of right without showing cause," gives to each party at least one new trial if he demands it, we are of opinion, on reflection, that such was the intention of the framers of the Code. This conclusion is fortified by a comparison of the previous enactments of the Colorado Legislature with this, its last expression on the subject. By the previous law, it was very clear that only one new trial was demandable as a matter of right in an action of ejectment, and the change of language adopted in the Code of 1877 is indicative of intentional change in that respect; a change which can only mean that each party against whom in turn a verdict may be rendered, shall have a right to one new trial. Apart from this absolute right of the parties, the court may grant another trial upon reasonable grounds being shown.

These views require that the question whether defendants are entitled to have the judgment of the court below vacated and a new trial in said cause without further showing, should be answered in the affirmative, and dispense with the [89] necessity of examining into the assignment of errors growing out of the trial before the jury.

The judgment of the Circuit Court is, therefore, reversed, with directions to grant a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 668; 112 U. S., 595.

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[265] FARMERS' LOAN AND TRUST COMPANY ET AL., *Appts.*,

v.

CHRISTIAN WATERMAN ET AL.

(See S. C., 16 Otto, 265-271.)

What parties can appeal—jurisdiction as to amount.

1. Only parties to a decree can appeal. If a party to the suit is in no manner affected by what is decreed, he cannot be said to be a party to the decree.
2. If distinct causes of action in favor of distinct parties, though growing out of the same transaction, are joined in one suit, and distinct decrees are rendered in favor of the several parties, these decrees cannot be joined to give this court jurisdiction.

[No. 814.]

Motions Submitted Oct. 9, 1882. Decided Nov. 13, 1882.

APPEAL from the Circuit Court of the United States for the District of Indiana.

The history and facts of the case sufficiently appear in the opinion of the court.

On motion by part of the appellees to dismiss as to them for want of jurisdiction, and motion by others to affirm as to them, on the ground that the appeal was taken for delay.

Mr. **J. M. Butler**, for appellees, in support of motions.

Messrs. **James D. Campbell** and *Herbert B. Turner*, for appellants, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

These motions present the following facts:

On the 24th of July, 1877, a decree was entered in a suit pending in the court below for the foreclosure of certain mortgages on the property of the Indianapolis, Bloomington & Western Railway Company, directing a sale of the mortgaged property and an application of the proceeds to the payment, among others, of "All such * * claims and sums of money as shall be hereinafter allowed by this court * * * in preference to the liens of the hereinbefore mentioned mortgages or deeds of trust for debts due by said railway company for work, labor, supplies, and material done and furnished during the six months next preceding the first day of December, 1874, * * * * which payment for debts due as last aforesaid for six months prior to December 1, 1874, shall be made into court without prejudice to the right of the Farmers' Loan and Trust Company to object to the same, and to appeal from any order or orders which may be hereafter made by the court directing the money so paid to be distributed to the various claimants thereof."

At the time this decree was made it was not known how much the debts for labor and supplies would amount to. That matter had been referred, on the 4th of June before, to certain [266] special masters to take testimony and report, but their report had not been filed. To meet this condition of the case the decree further provided that on the delivery of the deed the purchaser should pay into court enough of the purchase money to satisfy any amount that might in the further progress of the cause be found to be owing. It was also specially provided that the reference to the master, which had been made and which was approved and continued, should "In nowise abridge or impair the right of any of the parties hereto to prosecute an appeal from any order or orders of the court allowing or disallowing said claims, or any part thereof, and declaring the same to be prior and superior to said mortgage."

The Farmers' Loan and Trust Company was the trustee of the mortgages, having the paramount mortgage liens on the property.

On the 16th of November, 1877, the special masters filed their report as to the labor and supply claims, allowing eleven hundred and sixty-three separate claims, which had been presented to them by petition in accordance with the provisions of the order of reference, and which, in their opinion, had been established by the evidence. Of these claims only fourteen were for sums exceeding $5,000. All the rest, being eleven hundred and forty-nine in number, were in every instance for less than that amount. On the coming in of the report, numerous exceptions were filed by the Trust Company. These

NOTE.—*No one but parties to record can be heard on appeal or writ of error.* See *note* to Harrison v. Nixon, 34 U. S. (9 Pet.), 483.

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exceptions remaining undisposed of and no sale having been made under the decree, "On motion of the Farmers' Loan and Trust Company" it was, on the 8th of May, 1878, "by way of further directions for the execution of the decree * * * of date July 24, 1877, * * * considered by the court, and ordered, adjudged and decreed that the said original decree be, and the same is hereby, amended and modified as follows: * * *

13th. That the sale be made * * * subject to * * * such * * * claims and sums of money as are now under consideration by and as shall be hereafter allowed by this court, * * * and affirmed by the Supreme Court of the United States on appeal, should an appeal be taken, in preference to liens of the hereinbefore mentioned mortgages or deeds of trust for debts due by said railroad [267] company for work and labor done and supplies and material furnished, * * * without prejudice to the right of the Farmers' Loan and Trust Company to object to the same and to appeal from any order or orders which may be hereafter made by the court in relation thereto; * * * and such back pay, labor, and supply claims as shall be finally adjudged against the property herein directed to be sold, after an appeal so taken, shall be assumed by the purchaser or purchasers, in addition to the amount of the purchase money so bid. * * * And the payment of the amount of any claims so allowed, * * * shall not be required to be made at or prior to the time of the delivery of the deed, but the said sale shall be made subject to, and the purchaser or purchasers of said property shall agree to pay off so much of the said claims or sums of money as shall be finally allowed in the progress of this cause, on or after such appeal, and the same shall be paid and discharged by said purchaser or purchasers within six months after the entry of an order of this court, upon a mandate of the Supreme Court concerning matters so appealed from being filed in this court, and the said deed shall be delivered without payment of said claims or sums of money, or any part thereof, upon the purchaser so conditionally agreeing to pay so much and no more of such claims and sums of money as may finally be allowed on such appeal, and it shall be competent for the court to enforce hereafter, by proper order or decree herein, or to be added to the foot of this decree, any of the provisions or conditions of this thirteenth article of this decree."

On the 30th of October, 1878, the mortgaged property was sold under the decree of July 24, as thus modified, to Austin Corbin, Giles E. Taintor and Josiah B. Blossom, "Purchasing committee, in trust for certain bondholders under the trusts expressed in certain agreements dated December 20, 1875, and a supplement thereto, dated July 25, 1878," copies of which were attached to the report of the sale. These agreements had reference to a plan adopted by certain of the stockholders, bondholders and general creditors, for the purchase of the property, and defining their respective interests therein, if the purchase should be made.

The sale was confirmed by the court on the [268] 31st of March, 1879, upon the application of the purchasers, and the master was directed to make and deliver to the purchasers a deed of the property, subject, among other things, "To * * * such * * * claims and sums of money as are now under consideration by, and as shall be hereafter allowed by the said court, * * * in preference to the liens of the hereinbefore mentioned mortgages or deeds of trust, for debts due by said railroad company for work and labor done and supplies and material furnished during a period not exceeding the six months next preceding the first day of December, 1874, * * * but nothing herein contained shall be taken to prejudice the Farmers' Loan and Trust Company, or the said Austin Corbin, Giles E. Taintor and Josiah B. Blossom, their successor or successors and assigns, or any of them, to object to the same, or to appeal from any order or orders which may be hereafter made by the said court, or either of them, in relation thereto to the Supreme Court of the United States, which said * * * back pay, labor and supply claims * * * finally adjudged against said property hereby conveyed, are hereby expressly assumed by the said Austin Corbin, Giles E. Taintor and Josiah B. Blossom, purchasing committee, their successor and successors or assigns, as and for a charge and lien upon the property hereby conveyed, * * * prior and superior to any interest or estate hereby vested in them or any of them. * * *"

After this deed was delivered a further reference was made to take testimony and report as to certain special matters connected with the claims before reported on. Upon the coming in of the report under this last reference, exceptions were filed by the Trust Company and the purchasers; and on the 31st of October, 1881, the court, after a hearing, decreed "That said Austin Corbin, Giles E. Taintor and Josiah B. Blossom do, within sixty days, excluding Sundays, from and after the date of the decree, pay to said several intervening petitioners and claimants the several amounts set opposite their respective names, that is to say, to Charles F. Webb $270." Then followed the names of all the other separate claimants, with the amount due them respectively set opposite.

From this decree of the 31st of October the Trust Company and Corbin, Taintor and Blossom took the present appeal, which the appel- [269] lees having claims less than $5,000 move to dismiss as to them, for want of jurisdiction. Those whose claims exceed $5,000 have filed motions to affirm as to them, on the ground that it is manifest the appeal was taken for delay.

To our minds, it is clear the Trust Company has no interest in the questions arising under this appeal. That Company represented the bondholders for all the purposes of the foreclosure of the mortgages under which it was trustee, but the interest of the bondholders in the suit ended when the property was sold and the proceeds distributed. As the purchasers took the property subject to the lien, if any there was, of the back pay claims, the bondholders, as bondholders, cannot in any manner be affected by the result of the proceedings to determine whether such lien exists, and if so, to what extent. All questions as to such matters are between the purchasers and intervening petitioners alone. The decree ordering a sale subject to the claims was entered on the motion of the Trust Company, and the appeal is in

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express terms confined to the order establishing the claims against the purchasers. If, by reason of the agreement under which the purchase was made by the purchasing committee, any of the bondholders secured by the mortgages to the Trust Company are entitled to share in the property, they are for all such purposes represented by the purchasing committee, and not by the mortgage trustee. The trust created by the mortgage was fully executed when the foreclosure was complete. After that, the purchasing bondholders became purchasers of the mortgaged property, and their rights are to be determined accordingly.

Neither is it of any importance that in the decree of sale as modified, as well as in that originally entered, a right of appeal by the Trust Company was expressly reserved. Only parties to a decree can appeal. If a party to the suit is in no manner affected by what is decreed, he cannot be said to be a party to the decree. A reservation of the right to appeal has no effect, if there is no decree from which an appeal such as has been reserved will lie. In the present case, as has already been seen, the several claimants or interveners and the purchasing [270] committee were the only parties to the suit affected by the decree of October 31. The purchasing committee became parties by their purchase, to the extent that was necessary to protect their rights in the property purchased against any further orders to be made in the execution of the decree under which they bought. The Trust Company, by consenting to the decree ordering a sale subject to the back pay and supply liens, in effect voluntarily abandoned that part of the litigation, and left it to be carried on thereafter between the several claimants and the purchasers alone. Neither the Trust Company nor those it in equity represents, can gain or lose by either a reversal or affirmance of the decree appealed from.

Our jurisdiction, therefore, depends on the case as it stands between the purchasing committee and the several back pay claimants. As we have shown at the present Term in *Ex parte R. R. Co.* [*ante*, 78], if distinct causes of action in favor of distinct parties, though growing out of the same transaction, are joined in one suit, and distinct decrees are rendered in favor of the several parties, these decrees cannot be joined to give us jurisdiction; but if the controversy is about a matter in which several parties are interested collectively under a common title, and in the decree, after establishing the common right, a division is made among the claimants according to their respective interests, this separation of the decree into parts will not prevent an appeal.

We are satisfied the present case comes under the first division of this rule. There is a question involved, common to all the interveners; that is to say, whether back pay and supply claims of any kind are to be paid by the purchasers; but if that is settled in favor of the claimants, it will still have to be determined whether each one of the separate claimants has a claim of that kind. In determining this question each claim will depend on its own facts. A recovery by one claimant will not, necessarily, involve a recovery by another. While the rights of all depend on establishing a liability of the purchasers for the payment of debts of a particular kind, no one can recover unless he shows that there is owing to him individually a debt of that kind. There are, therefore, necessarily in the case as many separate and distinct controversies as there are separate claimants and interveners. The purchasers have the right to [271] contest each claim separately. They stand in the same relation to the several claimants that the ship-owner did in *Oliver* v. *Alexander*, 6 Pet., 143, to the seamen, or the alleged fraudulent grantee in *Seaver* v. *Bigelows*, 5 Wall., 208 [72 U. S., XVIII., 595], to the judgment creditors. The several interveners do not, as in *The Connemara*, 108 U. S., 754 [XXVI., 822], claim under one and the same title, and it *is* material to the purchasers how much is allowed to each and every one, for the amount of the recovery is not determined by any fixed sum, but by the aggregate of all the separate sums allowed the several claimants individually. The amount of the recovery by one is not affected in any manner by what is allowed to another. Clearly, therefore, distinct causes of action in favor of distinct parties have been joined in the same suit, and distinct decrees rendered in favor of the distinct parties. This is not only the form of the decree, but the substance.

There is no question here of a fund for distribution. The purchasing committee bought the road subject to the liens of the various backpay and supply claimants, if any such liens existed. The claimants are seeking to establish and enforce their respective liens. They, in effect, join in one suit for that purpose, but both their claims and decrees are separate and distinct.

It follows that the motion to dismiss must be granted, and it is so ordered.

The questions involved in the appeals from the decrees for more than $5,000 are not such as we are willing to consider on a motion to affirm. *The motion for an affirmance is, therefore, overruled.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 582; 108 U. S., 548, 549; 110 U. S., 399.

GEORGE W. MILTENBERGER ET AL., [286]
Appts.,
v.
LOGANSPORT, CRAWFORDSVILLE AND SOUTHWESTERN RAILWAY COMPANY, FARMERS' LOAN AND TRUST COMPANY ET AL.

(See S. C., 16 Otto, 286-314.)

Appeal — when citation necessary — parties in foreclosure — receivership, as to first and second mortgages — effect of foreclosure by second mortgagee — power of court to create claims through a receiver — payments and purchases by receiver — settlement of receiver's accounts — final decree.

*In August, 1870, a first mortgage on a railroad was made. In January, 1873, a second mortgage on the same railroad was made. Both mortgages covered after-acquired property. A default on the first mortgage occurred in November, 1873, and on the second mortgage in January, 1874.

*Head notes by *Mr. Justice* BLATCHFORD.

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In August, 1874, the second mortgagee filed a bill to foreclose the second mortgage, making the first mortgagee a party, acknowledging the priority of the first mortgage, not praying any relief against the first mortgagee, and praying for a receiver, and for the payment of his net revenue to those entitled to it. On the same day, an order was made appointing one Schuyler receiver, and directing that a copy of the order be served on the first mortgagee, a corporation, requiring it to appear "on or before" the first Monday of November then next, and authorizing the receiver to pay the arrears due for operating expenses for a period in the past not exceeding ninety days. A copy of the order was served on the first mortgagee three days afterwards, and proof of that service was filed two days after the service. In October following, the receiver, on his petitions filed, was authorized, by order, to purchase certain rolling stock, and to pay indebtedness, not exceeding $10,000, to other connecting lines, for materials and repairs, and for ticket and freight balances, a part of which was incurred more than ninety days before the order appointing the receiver was made, and to expend a sum named in building six miles of road and a bridge, which were part of the main line of the road, and the expenditures were charged as a first lien on the earnings of the road. The first mortgagee appeared and answered on the first Monday of November, and not before. The answer objected to the creation of fresh indebtedness. Nothing more was done in the suit for eleven months. Then the receiver reported that he had built the six miles and the bridge, and purchased rolling stock and incurred debts therefor. He also filed a petition showing that his trust owed $232,000, and asking leave to borrow that amount and $90,000 to put the road in order, on receivers' certificates, to be made a first lien. The petition set forth a meeting of both classes of bondholders, at which, on the report of a committee, the receiver was directed by a resolution passed, to obtain authority to borrow $322,000 on receivers' certificates. An order was made authorizing him to borrow $201,000 on receivers' certificates, payable out of income, and to be provided for in the final order of the court in the suit, if not paid out of income. Soon after, four holders of first mortgage bonds were made defendants, with leave to answer and to file a cross-bill. They answered and filed a cross-bill, in November, 1875, to foreclose the first mortgage. The cross-bill claimed that the six miles of road, and the bridge and the rolling stock, and the other property acquired by the receiver, were subject to the lien of the first mortgage, and that the mortgagor had been insolvent from October, 1873, and affirmed the foregoing statement as to the meeting of the bondholders and their resolution, and stated that the plaintiffs in the cross-bill had desired and sought for more than a year to have the first mortgage foreclosed; that the $201,000 ought not to be borrowed and made a first lien on the road; and that the receiver ought to be removed, and another receiver appointed under the cross-bill. In December, 1875, a reference was made to take evidence on the subject of the appointment of a new receiver. More than four months after that the first mortgagee answered the cross-bill; and the two suits being ready for hearing, they were consolidated and heard. One decree was made in them, in May, 1876, declaring that both mortgages covered all the property held by the mortgagor when the original suit was brought and all subsequent additions thereto, and providing for a foreclosure of the right of the second mortgagee to redeem, and for the presentation to a master of claims against the property and the receiver. In July, 1876, one Claybrook was appointed additional receiver in the original suit. He acted after August 11, 1876, as sole receiver until August 25, 1876, after which he and Schuyler were joint receivers, until December, 1876, when Schuyler resigned. Claybrook, on August 12, 1876, took possession of the entire property which Schuyler had, including a railway twenty-three miles long, used under a lease from another company. The master reported as to claims against the property and the receiver, from time to time. The plaintiffs in the cross-bill interposed objections to making any of the claims prior in lien to the lien of the first mortgage. In January, 1879, the court, by order, allowed certain claims, many of them not over $5,000, specifying the names of the claimants and the amounts allowed, and giving the claims allowed preference in payment out of the income and proceeds of sale, over the claims of the mortgagees. In this order, the plaintiffs in the cross-bill prayed an appeal to this court. In July, 1879, the court made a decree for the sale of the road as an entirety, and for the payment out of the proceeds of sale of the claims allowed, before paying any principal or interest on the mortgage debts. In this decree the plaintiffs in the cross suit prayed an appeal from it to this court. On a hearing of the appeal, *held:*

(1) The appeals were appeals in open court, not requiring citations, and the order and the decree appealed from sufficiently designated all the appellees by name.

(2) The first mortgagee was a proper party to the original bill of foreclosure, because a receiver was prayed for; and, the order appointing a receiver having been served on the first mortgagee three days after it was made, such mortgagee was bound to protect promptly the interests of the first mortgage bondholders.

(3) The original bill did not seek to create a receivership for the sole benefit of the second mortgage bondholders.

(4) The property in court under the original bill was the entire mortgaged property, and not merely the equity of redemption of the mortgagor, as against the second mortgagee.

(5) The exclusive right of a second mortgagee to the income of a receivership created under a bill filed by him is limited to a case where the first mortgagee is not a party to the suit.

(6) The first mortgagee having been entitled, by the terms of the first mortgage, to take possession of the mortgaged property and operate the road, and the cross-bill not having been filed for more than a year after the receiver was appointed and the first mortgagee had appeared and answered in the original suit, and it having been, in judgment of law or in fact, fully known, all the time, to the first mortgage bondholders, what was being done by the receiver in creating the claims, it was inequitable for the appellants to lie by and see the receiver and the court dealing with the property in the manner complained of, and merely protest generally and disclaim all interest under the receivership, and yet assert in the cross-bill that the property acquired by the receiver was subject to the lien of the first mortgage, and claim the proceeds of that property without paying the debts incurred for acquiring it.

The power of a court to create claims through a receiver, in a suit for the foreclosure of a railroad mortgage, which shall take precedence of the lien of the mortgage, considered and upheld.

The provisions allowing the receiver to pay the arrears due for operating expenses for a period in the past not exceeding ninety days, and to pay indebtedness, not exceeding $10,000, to other connecting lines, for materials and repairs, and for ticket and freight balances, a part of which was incurred more than ninety days before the order appointing him was made, and to purchase rolling stock, and to build six miles of road and a bridge, part of the main line of the road, and making such expenditures a lien prior to the lien of the mortgages, upheld.

The mortgagor held a leased road, under a written lease, providing for rent and for payment for depreciation, and for the payment of a monthly rent by the lessor to the lessee for the use of a part of the road. The successive receivers took possession of the leased road and ran it as a continuation of the mortgaged road. Part of the rent which accrued before Claybrook became receiver was unpaid. Claybrook, after he became receiver, paid the rent as it accrued. The successive receivers collected the rent monthly from the lessor for the use of a part of the road. The court allowed to the lessor, as a claim preferred to the first mortgage, a sum for the use of the road, based on the actual value of its use by the receivers, and for depreciation, and allowed, with a like preference, claims for operating supplies and materials furnished for the road, while so run. *Held*, that the allowances were proper.

The final decree was not erroneous in not requiring the accounts of the receiver to be settled before paying out of the proceeds of sale the debts allowed against him, nor in ordering the sale of the property as an entirety, without separating that acquired by the receiver.

The question of the jurisdiction of this court, in respect of the claims not over $5,000, was not considered.

The decree was affirmed.

[No. 78.]

Argued Nov. 9, 10, 1882. Decided Nov. 20, 1882.

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APPEAL from the Circuit Court of the United States for the District of Indiana.

The history and facts of the case are fully set out in the opinion of the court.

Mr. **Charles M. Osborn,** for appellants.

Messrs. **Benjamin Harrison, John G. Williams,** *W. H. H. Miller* and *Lawrence, Campbell & Lawrence,* for appellees.

Mr. Justice **Blatchford** delivered the opinion of the court:

On the first of August, 1870, the Logansport, Crawfordsville and Southwestern Railway Company, an Indiana Corporation, executed to the Fidelity Insurance, Trust and Safe Deposit Company, a Pennsylvania corporation, located at Philadelphia, as trustee, a mortgage to secure the payment of bonds to the amount of $1,500,000, covering the railway of the mortgagor from Logansport to Rockville, in length [289] about ninety-two miles, with all its franchises and property used in or connected with the operation of said railway, which the mortgagor then owned or might thereafter acquire. The bonds were coupon bonds, payable in gold, in the year 1900, with interest at 8 per cent per annum, in gold, payable quarterly, on the first days of November, February, May and August. The mortgage provided that, in case of default in the payment of the principal or interest of any of the bonds, the mortgagor would, within six months after the default should occur, it still continuing, surrender to the trustee, on its demand, the possession of the mortgaged property, and all management and control thereof; that, if possession should be so taken, all expenses of managing and operating the property should be paid from the income and, if the property should thereafter be sold, from the sale; that the trustee, having taken possession, might manage and operate the road and property, and receive all the income and apply it to pay the interest in default, first paying all expenses of management and all charges on the property; but that the trustee should not demand possession until required in writing to do so by the holders of at least one half of all the said issue of bonds then unpaid and outstanding. The mortgage also provided that, in case of such default and its continuance, the trustee might, after such entry, or other entry, or without entry, sell the mortgaged property as an entirety, at public auction, having first demanded of the mortgagor payment of all money then in default, and convey title to the franchises and property to the purchaser, and first pay out of the proceeds of sale all advances or liabilities of the trustee in operating and maintaining the railway and property and managing its business and affairs while in possession, and then apply the proceeds to paying, first, the interest on the bonds, and then the principal, such payment to be made on the bonds whether they should have become due or not at the time of the sale. The mortgage also provided that, if there should be a default continuing for six months after demand for the payment of any half year's interest, the principal of the bonds should immediately become due, and the trustee might so declare and notify the mortgagor and, on the written request of the holders of a majority of the bonds, should proceed to collect [290] the principal and interest of the bonds by foreclosure and sale of the property, or otherwise, as therein provided. Up to and including August 1, 1873, the Logansport Company paid the interest on the bonds. On November 1, 1873, and thereafter, it failed to pay any interest.

On the first of January, 1873, the Logansport Company executed to the Farmers' Loan and Trust Company, a New York corporation, located at the City of New York, as trustee, a mortgage to secure the payment of bonds to the amount of $500,000, covering the entire railroad of the mortgagor, with all the property which it had or might at any time thereafter acquire in the same, extending from Logansport to Rockville, about ninety-two miles in length, with all branch roads extending from said main line, built or to be built, with the right of way, and all the property used for operating and maintaining said road and branches, whether then owned or thereafter to be acquired, and all the corporate franchises of the mortgagor. The bonds were coupon bonds, payable in gold, in the year 1908, with interest at 8 per cent per annum, in gold, payable semi-annually, on the first days of July and January. The mortgage provided that, in case of default in the payment of any principal or interest, the mortgagor should, within six months after such default, the default continuing, surrender to the trustee, on its demand, the possession of the mortgaged property; and that the expense of managing the property should, if possession should be taken, be paid from the income and, if necessary, from the sale of such personal property as the trustee might deem proper. The mortgage also contained a warrant of attorney, by which, in case of default by the mortgagor to pay any principal or interest for six months after the same should become due, it authorized any attorney or solicitor of the State of Indiana, after notice to it as thereinafter provided, to enter its appearance, without process, in any court of competent jurisdiction, to any bill filed by the trustee to foreclose and sell the mortgaged premises and, if requested by the trustee, to consent, on behalf of the mortgagor, that a receiver be appointed forthwith, by order of said court, to take possession of said railway or any part thereof, and of all or any of the mortgaged property, on such terms as the court should prescribe, and to consent that a decree forthwith [291] pass for the sale of the whole or any part of the mortgaged property, without appraisement, but under the direction of the court; provided, that the trustee should not demand a surrender of possession, or file a bill to foreclose and sell, unless requested in writing by the holders of a majority in interest of the bonds at par. The mortgage also provided that, in case of default in the payment of any interest for six months after the demand of payment after due, the whole principal money named in the bonds should become due, and that, in case of a sale, the proceeds should be applied, first, to paying the trustee all reasonable expenses; second, to paying the principal and interest of the bonds; and, third, to paying the surplus to the stockholders. The mortgage declared that it and its lien were subordinate to the mortgage to the Fidelity Company. The mortgagor did not pay any of the interest which fell due January 1, 1874, and July 1, 1874, respectively.

On the 26th of August, 1874, the Farmers'

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Loan Company filed, in the Circuit Court of the United States for the District of Indiana, a bill for the foreclosure of the second mortgage, making as parties the mortgagor and the Fidelity Company and certain judgment creditors of the mortgagor. The bill set forth, that the mortgage to the Fidelity Company covered the same property as the second mortgage, and that the latter was subordinate to the lien of the former. It alleged facts showing that, by the terms of the second mortgage, the entire indebtedness secured by it had become due; that a majority in interest of the holders of the second mortgage bonds had, in writing, requested the plaintiff to foreclose the mortgage, and it had, more than thirty days before filing the bill, given notice to the mortgagor of its purpose to file the same; that the mortgagor was insolvent and unable to pay its debts; that its entire property and franchises were not equal in value to the amount of the two series of bonds; that its earnings, after paying current expenses and necessary repairs, were inadequate to the payment of interest on the two series of bonds; that the only possibility that it would in the future be able to pay the interest on the mortgage debt depended on its, or some person's as its representative, being permittted to operate the road [292] untrammeled by the embarrassments under which it labored; that it had a large floating debt, partly in judgment; and that executions had been levied on the property covered by the second mortgage and used by it in the operation of the road, and such property had been carried off by the officers of the law, whereby the operations of the road had been crippled, and the expense of its management increased, whilst its revenues were diminished. The bill prayed a foreclosure of the rights of the mortgagor and of the judgment creditors, and a sale of the mortgaged property and the application of the proceeds to the payment of the plaintiff's claims according to law. It also prayed the appointment of a receiver to take into his custody and control the mortgaged property during the pendency of the suit, to operate the railroad, receive its revenues, pay its expenses, make repairs and manage its entire business; and any surplus revenues, after paying said expenses, to bring into court and pay out, under the order of the court, "To such persons or corporations as shall be adjudged by the court to be entitled thereto."

On the day the bill was filed, the Logansport Company put in an answer admitting all the material allegations of the bill, and that the plaintiff was entitled to the relief demanded.

On the same day, on the bill and said answer, the court made an order that the Fidelity Company appear and plead, answer or demur to the bill, on or before the first Monday of November then next, and that a copy of said order be served on it not less than thirty days prior to that day, and directing that Spencer D. Schuyler be appointed receiver, on filing a bond, to take into his custody and control the mortgaged property, and all the property of the mortgagor of every kind and wherever situate, and empowering him to operate and manage said road, receive its revenues, pay its operating expenses, make repairs and manage its entire business and to pay the arrears due for operating expenses for a period in the past not exceeding ninety days, and to pay into the court all revenue over operating expenses.

On the 29th of August, 1874, a copy of said order was served on the Fidelity Company, by being given to its president, and proof of such service was filed on the 31st of August, 1874.

The receiver, having filed his bond and entered on his duties, the court, on his petition, [293] made an order, on the 23d of September, 1874, giving him leave to sell an unserviceable car and buy a new one; provided that, in the purchase, no lien should arise, for the money expended, against the interest of the first mortgage creditors.

On the 9th of September, 1874, the receiver filed a petition representing that the rolling stock of the road was insufficient to meet the demands of business on the same; that the line of the road was about 87 miles long; that the company owned only six locomotive engines, on one of which was a lien for its full value, and was paying a rental of $200 a month for another; that it would be for the interest of the trust for him to purchase four more locomotive engines, and to make an adjustment in regard to the one hired and the one on which there was a lien; that the Company owned only two first class passenger cars and one second class, and had in use one passenger car on lease; that it owned but one baggage car and had one on lease; that it needed four more passenger cars; that one of its main branches of business was transporting coal, and its rolling stock suitable to be used in transporting coal was inadequate to meet the then demands of said business; that it owned only twenty coal cars free from lien, and about 180 on which there was a lien to their full value; that he ought to be authorized to make an adjustment respecting the latter and to purchase not over one hundred additional coal cars; that the business of the road was greatly crippled for the want of such additional rolling stock; that the Company was indebted to other and connecting lines of road in about $10,000, for materials and repairs, and for ticket and freight balances; that a part of said indebtedness was incurred more than ninety days prior to the order of the court appointing him receiver and making provision for the payment of certain claims, but the payment of that class of claims was indispensable to the business of the road, and it would suffer great detriment unless he was authorized to provide for them at once; that about five miles of the road between Clymer's Station and Logansport, including a bridge across the Wabash River at Logansport, had never been built; that the City of Logansport had recently appropriated $80,000 to aid the Railroad Company to build [294] said track and bridge, which appropriation had been placed in the hands of a trustee, to be appropriated as the work progressed; and that, as the completion of said work would very largely increase the value of the property under his control, and materially aid the present and future business of the road, he asked for leave to expend such sums of money as might be necessary to complete the railway between the points named.

On the 30th of September, 1874, the receiver presented to the court a supplemental petition, setting forth that the $80,000 for building the five miles of road was raised; that the bridge

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would cost about $30,000; that the Detroit, Eel River and Illinois Railroad Company, with which the receiver's road would form an advantageous connection by the building of the bridge and the five miles of road, agreed to give to the Logansport Company the one half of the $30,000, so that that Company would be the sole owner of the bridge on paying one half of the cost of its construction; that five acres of valuable land at Logansport had been given to the Logansport Company on condition that the five miles of road should be built, said land being worth $2,500 and suitably located for a yard and shops of the Company; that the total cost of the five miles of road and the bridge would not exceed $80,000 above the amounts given by the City of Logansport and the Detroit Company; that the necessary expenditure could be met by anticipating the earnings of the railway for a comparatively short time; that the increased business that would accrue to the railway by the connections made by completing said five miles of road would soon re-imburse all moneys expended in constructing the same; that the building of the five miles and the bridge would be greatly to the advantage of the bondholders of the Company and would add a large amount to their security, because the five miles and the bridge, when completed, would become part and parcel of the property and covered by its mortgages; that the road, without the completion of said five miles, had no terminus connecting it with other lines, but ended at a point where there was no business of importance; and that said five miles was a part of the original line of the railway and covered by both mortgages.

[295] On the 3d of October, 1874, the court, on the said two petitions, made an order empowering the receiver to buy four new locomotive engines, four new passenger cars, and one hundred new coal cars, and to make an adjustment respecting the liens on and rentals of rolling stock, and to pay the indebtedness to other connecting lines for the purposes set forth in said petition, not exceeding $10,000, notwithstanding said limitation of ninety days; and to expend $30,000 in addition to said gifts and advances, to complete said five miles of road and said bridge, and to enter into the contracts required therefor. The order provided that, as to all the moneys that might be expended, and all liabilities incurred by the receiver in carrying out the provisions of the order, the earnings of the road were charged "as with a first lien prior to all incumbrances upon said road."

On the 3d of November, 1874, the Fidelity Company filed an answer to the bill, setting up the mortgage to it and its priority to the second mortgage. It admitted that the earnings of the road had been inadequate to pay current expenses and necessary repairs and the interest on the two series of bonds. It denied that the appointment of a manager or receiver to operate the road would enable the Company to pay the interest on its mortgage indebtedness, and alleged that to appoint a manager or receiver of the road, with authority to incur expense and create fresh indebtedness, for which the road or its earnings could in any way be made responsible, would only perpetuate its past condition of embarrassment and be unjust to the respondent and the holders of the first mortgage bonds; that the first mortgage could not rightfully, and ought not to be, affected, or its lien impaired, by any proceedings on the second mortgage; that any decree that might be made on the bill should be made expressly subject to the first mortgage; and that no order ought to be made in the cause that might or could lessen the paramount lien of the first mortgage on the property and franchises of the Company, or impair the right of the holders of the first mortgage bonds to proceed against the Company when entitled so to do under the mortgage.

No further proceedings in court, of any materiality, appear to have taken place for eleven months. On the 4th of October, 1875, the receiver filed a report and statement, showing that he had constructed six miles of new road from [296] Clymer's Station to Logansport, including the bridge, and had the same in running operation as a part of the main line; that the cost had been $104,651, of which he had paid and was to pay $29,015.64; and that he had purchased rolling stock, under said order of the court, for $110,260.46, on which there was unpaid $79,536.68. On the same day he filed a petition, showing that there was due from his trust $282,000, being $80,000 on rolling stock, $30,000 on the five miles of road and the bridge, $25,000 for taxes, $25,000 for rights of way, $43,000 for back pay and supplies in operating the road, $20,000 for rental due to the Evansville and Crawfordsville Railroad Company for that portion of the line extending from Rockville to Terre Haute, 23 miles, and $9,000 to the Missouri Car and Foundry Company, on rolling stock and in operating the road; and that $90,000 was required to place the road in proper running order. The petition prayed for authority to borrow $322,000 for said purposes, on receivers' certificates, made a first lien on the property, as for the best interest of the trust property. It set forth the grounds for asking such authority. As bearing on the interests of the first mortgage bondholders, it contained the following statement: "The receiver went to New York City in May last, to consult with the first mortgage bondholders, with the view of their taking some steps for the financial relief of the road. While there he met with parties holding and representing large numbers of the bonds in Boston, New York, Baltimore, Philadelphia and other cities and their vicinities and, as a result of his consultations with them, a meeting was advertised and held at the Fifth Avenue Hotel, in New York City, on May 24. At that meeting a committee was appointed to examine the road and ascertain its condition, its original cost, its present liabilities, and what amount would be necessary to place it in working order, etc., etc., and to report at a subsequent meeting, to be called by the chairman. That committee afterwards inspected the road and, at a meeting held in New York City, September 8, made their report. To that meeting the original holders of the first mortgage bonds were each invited by timely notice, naming the time and place of the meeting, to hear the report of the committee, and to take part in the [297] deliberations of the meeting. A large representation of the first mortgage bondholders was present. A letter from the Hon. John Baird, chairman of the meeting, to the receiver, states that from $800,000 to $1,000,000 were represented. A copy of the minutes of that meeting

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duly certified by its president and secretary, together with a copy of the report of the committee previously appointed, is filed herewith. By reference to the report of that committee the court will observe that three propositions were suggested to the bondholders *viz.*: 1. Foreclosure of first mortgage and sale of the road. 2. An assessment of not less than 20 per cent upon the par value of the bonds held by them, to pay off debts and repair the road. 3. To devise some means for borrowing not less than $300,000. These propositions were all fully discussed, and the discussions resulted in the passage of a resolution directing the receiver to obtain from the court authority to borrow, upon receivers' certificates, the sum of $322,000. The receiver was present and heard the discussions, and but repeats what was there many times positively asserted, that it would be impossible to collect in time for the pressing necessities of the hour an assessment of the requisite amount of money from the bondholders. Many of the bonds are held in small amounts, by people of limited means, who must have a lengthy previous notice of an assessment, to be able to meet it, if at all. He would show to the court that, as he has observed the condition of the bondholders, he believes that an immediate foreclosure of the first mortgage bonds, or any other steps requiring the early payment of any considerable sum by the holders of bonds, would result in the complete destruction of their interests; whereas, if the court will make some present provision for these pressing necessities, their interests will be preserved to them." Thereupon, the court, on the same day, made an order setting forth that it appeared to its satisfaction that, under its orders, the receiver had purchased for the use of the road, and then had in use on it, as part of its property, rolling stock on which there was due $79,536.68, and that there was danger of losing the property by reason of the forfeiture of the contract under which the same had been purchased, unless provision was made for the payment of that sum; and that, under [298] its orders, he had incurred liabilities, in constructing and completing the five miles of road and the bridge, to the amount of $29,015.64; and that said part of the road was a part of the line of the road, and contributed materially to its value; and that there were the said amounts due for taxes and rights of way and back pay and supplies, making, in all, $201,552.32; and that it appeared that those several sums could not at that time be paid or provided for out of the current receipts of the road, and then authorizing the receiver to raise money for that purpose by issuing and negotiating receivers' certificates, due in one year from that date, bearing interest not to exceed 8 *per centum* per annum, and payable out of the income of said road, to bearer or order, "Which certificates are to be provided for by this court in its final order in said cause, unless paid by the receiver out of the income of said road as aforesaid." The order further set forth that, it appearing to the court that there were other liabilities which had accrued "in connection with the operating of said road," being the $20,000 due for rental to the Evansville Company and the $9,000 due for rental to the Missouri Car Company, and that $90,000 was required to place the road in proper running order, and the same could not be provided for out of its income; it was, therefore, further ordered that, in case the plaintiff and the Fidelity Company, on due notice given to them of such application by the receiver, should file a memorandum therein consenting to that part of the order, or stating that they had no objections thereto, the receiver should be authorized to issue receiver's certificates and negotiate and sell them to raise money to pay said indebtedness and make said improvements, such certificates to be of like tenor and date and to be provided for in the same manner as those first authorized, and not to be sold or used at less than their par value. No certificates were ever issued under the second branch of this order.

On the 27th of November, 1875, the court on the petition of the appellants in this appeal, filed on the part of themselves and all other holders of the first mortgage bonds, made the appellants parties defendant to said suit and gave them leave to file an answer and a cross-bill. On the same day their answer was filed. It contained, substantially, the same allegations and denials as the answer of the Fidelity [299] Company and, in addition, admitted that the mortgagor was insolvent and unable to pay its debts, and that its entire property and franchises were not equal in value to the amount of the two series of bonds, and that the appointment of a manager or receiver to operate and run the road was necessary.

On the same day the appellants filed a cross-bill, on their own behalf and on behalf of all holders of the first mortgage bonds who should choose to join in the prosecution of the suit, making as defendants the Logansport Company, the Farmers' Loan Company, the Fidelity Company, and sundry judgment creditors. The cross-bill set forth the filing and the contents of the original bill and the proceedings in the original suit, including the petitions of September 9, 23 and 30, 1874; the order of October 3, 1874, the report of October 4, 1875, and the petition and the order of the same date. It set forth the first mortgage and averred that, before August 26, 1874, the mortgagor built a line of road from Rockville to Clymer's Station, a point between five and six miles southwesterly from Logansport, being a portion of the line contemplated by its charter and by said first mortgage; and acquired certain property which it used in constructing said road and in connection with operating it, and certain other property intended for the purpose of building the remainder of the road from Clymer's Station to Logansport, all of which were within the terms and covered by the lien of the first mortgage; that, since the appointment of said Schuyler as receiver, he had built and completed said line of road from Clymer's Station to Logansport and said bridge, and had acquired a large amount of personal property connected therewith, including certain lands intended to be used for machine shops at Logansport, and certain rolling stock and other property for use on said railroad, and had, in so doing, used much of the property subject to the lien of the first mortgage; and that all of said property acquired by the mortgagor, and that so acquired by the receiver, and the road built by him, were equitably subject to the lien of the first mortgage. The cross-bill set forth the failure of the mortgagor to pay the interest on the first mortgage

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bonds on and after November 1, 1873, and averred that on and always after October 20, 1873, it was insolvent; that its entire property [300] had not been and was not of sufficient value to pay the first series of bonds; and that its income had not been and was not more than sufficient to pay its necessary expenses incurred in operating and managing its property and making necessary and proper repairs. The cross-bill also set forth that a meeting of the bondholders was held May 24, 1875, at which the holders of a considerable number of the bonds of both series were present, and a committee was appointed to examine the road and ascertain its condition, original cost and present liabilities, and the amount which would be necessary to place it in working order, and to report at a subsequent meeting; and that, on the 3d of Septemper, 1875, said committee reported to an adjourned meeting its views respecting the property, to the effect that repairs and other expenditures to put the road in fair condition for use were needed, to the amount of several hundred thousand dollars; that additional rolling stock, to the amount of $168,000, was needed for the efficient conduct of its business; that liens to the amount of $322,000, being the items above mentioned, superior in dignity to the bonded debt, existed; that there were claims against the road and the receiver aggregating $35,000; that the income of the road over actual operating expenses and repairs, for 1874, was about $20,000; and that there had been a deficit of $79,800.87 during the same time, by reason of what were called extraordinary expenses, and, during the six months next preceding July 1, 1875, a like deficit of $43,883.50, and an income of $3,000, after deducting what were called extraordinary expenses. The cross-bill averred that said statistics and statements were substantially correct, but it denied that there were any prior liens to the lien of the first mortgage. It averred that the committee, in substance, recommended that the first mortgage should not be foreclosed, and that the receiver should apply to the court for leave to borrow $322,000, payable in one year, to relieve the road from its present necessities, and said sum should be made a first lien upon said property, prior to the lien of either mortgage; that said report was made at the instance of said Schuyler and of the holders of the second mortgage bonds; that the holders of first mortgage bonds, including the plaintiffs, [301] to the amount of $148,700, had not consented to said scheme for borrowing money and had joined in the cross-bill; that the plaintiffs desired and had for more than a year last past desired and sought to have the first mortgage foreclosed and the property sold; that they elected that the principal and interest should be due; that the Fidelity Company had refused, after request, to take measures to foreclose the first mortgage; that, under pretense of improving the property and increasing its value and earnings and acquiring additional property, the entire property was being destroyed and liens were being attempted to be created to take precedence of the first mortgage lien; that the Fidelity Company refused to take any means to preserve the property; that no material part of the sum of $201,552.32, which the said receiver had been authorized to borrow, could be paid from the income of the road, and it was not probable the interest on it could be paid from said income; that the borrowing of it for one year was not in the interest of the first mortgage bondholders, and it ought not be made a first lien upon the property; and that said Schuyler did not own any of the first mortgage bonds, but was interested only in the second mortgage bonds and the stock, and, for various reasons assigned, was not a proper person to have charge of the property. The cross-bill prayed for the sale of the mortgaged property to pay the first mortgage bonds, and for the appointment of a receiver to take possession of the property and operate the road, and for the removal of Schuyler as receiver.

On the 18th of December, 1875, the plaintiffs in the cross-bill moved for a receiver thereunder and for the discharge of Schuyler as receiver. A reference to a master was ordered to take evidence on the subject.

Nothing further of importance appears to have been done in the suit until the first of May, 1876, when the Fidelity Company filed an answer to the cross-bill, averring that it had declined to take proceedings to foreclose the first mortgage because it had not been requested to do so by the holders of a majority of the first mortgage bonds, and that their true interests would be best subserved by an early foreclosure of said mortgage. On the same day, the Farmers' Loan Company and the mortgagor filed separate answers to the cross-bill. These answers denied all allegations made against Schuyler in the [302] cross-bill, and alleged that all improvements had been made in good faith, for the benefit of the property, and had added largely to its value.

On the 3d of May, 1876, the original suit and the cross suit were brought to a hearing together on the bills and the answers therein and certain stipulations, and one decree was made in both suits, on the 17th of May, 1876, consolidating the suits, adjudging what was due on each mortgage, and declaring that the properties covered by the two mortgages were one and the same, and that the lien created by them respectively covered all the property held by the mortgagor at the time of the bringing of the original suit and all subsequent additions made thereto. The decree described said property as being the railroad from Logansport to Rockville, ninety-two miles, with all branch roads extending from said line, which had been built or acquired by the mortgagor, or for its use, with all its franchises and property which had been acquired for the purpose of operating said road and its branches, and all leases, contracts and agreements made with the mortgagor or for its use and benefit. It declared that the lien of the first mortgage was superior to that of the second mortgage upon all of said property. It provided for a redemption of the first mortgage lien by the second mortgagee, and, on failure, for a foreclosure of all its rights in said property except in the proceeds of a sale. It provided for the presentation before a master of claims by the holders of first mortgage bonds and coupons, and of claims to an interest in the property, and of claims against the receiver arising out of his actings and doings as such, allowing any parties interested in the funds to be derived from a sale to dispute and contest such claims. It reserved all questions concerning priority of liens, except as between persons entitled under the

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first and second mortgages, and declared that it should not be necessary to pass on said claims before having a sale.

On the 25th of July, 1876, the court appointed Joseph P. Claybrook joint receiver with Schuyler in the original suit, without prejudice to the right of the plaintiffs in the cross-bill and of the Fidelity Company to claim that the receivership of Schuyler was not in their interest and by their consent, as fully as they might have [303] done if no such joint receiver had been appointed, and the order declared that it should not be held to entitle the first mortgage bondholders, or their trustee, to any of the income of the property which might be realized by the receivers, until said Claybrook should qualify as receiver, or until Schuyler should requalify, which he was ordered to do by a day named. Claybrook qualified on the 11th of August, 1876, and after that acted as sole receiver, until Schuyler requalified on the 25th of August, 1876.

Under the decree of May 17, 1876, the master made reports, from time to time, as to claims, allowing some wholly or in part and rejecting some. Various questions arise on this appeal in respect to those of said claims which were allowed.

On the 20th of October, 1876, Claybrook filed a report, stating that, as receiver, he took possession, on the 12th of August, 1876, of the line of railway from Logansport to Rockville, $92\frac{87}{100}$ miles, and a line of railway from Rockville to Terre Haute, 23 miles, said to belong to the Evansville and Crawfordsville Railway Company, and $4\frac{99}{100}$ miles of side tracks at stations between Logansport and Rockville, and a hand-railway, $1\frac{1}{4}$ to 2 miles, from Sand Creek to the coal mines, and certain station buildings and other property, and certain rolling stock, some owned by the mortgagor and some leased by it.

On the 22d of November, 1876, the court suspended Schuyler from his position as receiver. On the first of December, 1876, an order was made, on the consent of Schuyler and the plaintiffs in the cross suit, vacating said order of suspension and accepting Schuyler's resignation as receiver, and allowing him $500 for services and expenses as joint receiver, and $15,380.29 for salary as separate receiver, without prejudice to the rights of the parties to contest any matter connected with the accounts of Schuyler as receiver, except as therein expressed, or any claims made under said accounts and asserted against said trust estate, or the claim that the receiver's indebtedness should have priority over the first mortgage.

On the 19th of February, 1877, the plaintiffs in the cross suit filed a paper setting forth that any fund derived from the property covered by the first mortgage, or from any property acquired for the use of said railway, which was [304] or should be subject to the lien of said mortgage, ought not to be charged with any indebtedness whatever, whether incurred by the mortgagor or by Schuyler, as receiver, under the prayer of the original bill; also objecting to certain items in Schuyler's account, because credited or paid out without the authority of the court, or upon accounts or contracts and debts which accrued or were made and matured more than three months before Schuyler became receiver, or because for indebtedness which Schuyler, as receiver, had not lawful authority to incur or pay, or because for his personal indebtedness, or unnecessary or excessive; also alleging that the receivers' certificates and certain notes were issued improvidently and improperly and without the authority of the court. Afterwards, further objections, of like tenor, were filed to other items. The plaintiffs in the cross suit also filed various exceptions to the reports of the master allowing various claims.

On the 22d of January, 1879, after a hearing as to the claims, on the reports, the evidence and the exceptions, the court made an order allowing certain claims, many of them not over $5,000, specifying the names of the claimants and the amounts allowed, and referring back the claim of the Evansville Company for further evidence, and a report based on certain specified rulings then made. The order also contained this provision: "All claims allowed by the court, by this order of this day, against the receiver, are adjudged to be valid claims, to be paid out of the funds in the possession of the court, as well from the income of the road as from the proceeds of any sale hereafter made, and prior in equity to any claims of the mortgagees of the railroad, the court reserving to the mortgagees the right to object to any order hereafter to be made in distributing the whole or any part of the funds which may be in court arising from the income of the railroad, or from the sale of the same." In the order the plaintiffs in the cross suit prayed an appeal to this court.

On the 25th of June, 1879, the master filed a special report as to the claim of the Evansville Company, to which, two days afterwards, the plaintiffs in the cross suit filed exceptions. On the 3d of July, 1879, the court allowed the claim at $85,318.62, in preference to the mortgage liens. On the same day it made a decree for the sale, as an entirety, by the master, of the road from Logansport to Rockville, together [305] with all the branch roads of the mortgagor extending from said main line, which had been built or acquired by it or for its use, together with all its franchises, and property owned by it, or which had been acquired for the purpose of operating said road, together with all contracts and agreements made with it or for its use or benefit, giving a particular description of the property in schedules. The decree provided that, out of the net proceeds of sale, the master should pay, first, the costs of suit and the allowances made to the trustees and the solicitors; second, the taxes; third, the claims against the receivership and fund in court allowed by the order of January 22, 1879, and the claim of the Evansville Company as so allowed, and all other claims against said receivership and fund which might thereafter be allowed, and which might remain unpaid after the funds in the hands of the receiver, not otherwise disposed of, should have been exhausted; fourth, the surplus to be applied, first, to the payment of the first mortgage bonds and coupons *pro rata*, and the remainder, if any, to be distributed as the court might thereafter direct. The decree contained a prayer for an appeal from it to this court, by the plaintiffs in the cross suit. That appeal was perfected.

This chronological history of the proceedings in the case is given, because a full understanding of those proceedings conduces to an easy

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solution of the questions involved in the appeal herein.

The appellees insist that the appeal should be dismissed for the alleged reason that the parties have not been named as either appellants or appellees on the docket of this court or in the transcript. But the order of January 22, 1879, allows the claims, specifying the persons to whom allowed and the amounts; and the body of the order states that the plaintiffs in the cross suit pray an appeal to this court; and the decree of July 3, 1879, orders the payment of the claims allowed by the order of January 22, 1879, and contains a prayer by the plaintiffs in the cross suit for an appeal from said decree. These were appeals in open court, not requiring citations, and the order and the decree appealed from sufficiently designated all the appellees by [306] name, and the appeals were appeals from the whole of the order and the whole of the decree. The decision in *The Protector*, 11 Wall., 82 [78 U. S., XX., 47], does not apply to a case of this kind.

As a general proposition, applicable to the whole case, the appellants insist that the mortgagee under the second mortgage carried out a fraudulent scheme to obtain a priority over the lien of the first mortgage for the claims allowed, without giving the mortgagee under the first mortgage an opportunity to resist it until after the orders had been obtained and acted on. As evidence of this, the fact is urged that the first mortgagee was made a party to the original foreclosure suit, without any relief being asked against him. It is contended that the first mortgagee was not a proper party to the bill. The appointment of the receiver without notice to the first mortgagee, although a party to the suit, is commented on, coupled with the fact that its day of appearance was fixed as being on or before the first Monday of November then next. It is further suggested that, under the receivership originally created, the second mortgage bondholders alone were entitled to the income from that receivership, and that the trust fund under the control of the court was only that which the second mortgagee could put there, namely: the mortgagor's right to an equity of redemption as against the second mortgagee, and not the entire property.

We see no warrant for the charge of fraud. The second mortgagee, in filing its bill, made the first mortgagee a party, though admitting the priority of the lien of the first mortgage, and not asking any direct relief against the first mortgagee, evidently because a receiver was prayed for. This was proper. Although the order of August 26, 1874, appointing the receiver, was made without notice to the first mortgagee, it was served on the first mortgagee three days after it was made, and its broad terms as to the powers conferred on the receiver, called upon the first mortgagee to appear in the suit promptly, to protect the interests of the first mortgage bondholders, and not to wait, as it did, until the first Monday of November following. It was required by the order to appear and answer "on or before" that day. It waited until that day before appearing or answering. The original bill evinced no in- [307] tention to create a receivership for the sole benefit of the second mortgage bondholders. On the contrary, it asked that the net revenue of the receivership should be paid to such persons or corporations as should be adjudged by the court to be entitled to it. This was in substance saying to the first mortgagee that it too had an interest in the receivership. The receiver's petitions, filed September 9 and September 20 following, respectively, were not acted on till October 3, after the first mortgagee had had ample time to appear. These petitions showed the pressing necessity of the road. The authority conferred by the order of October 3 was intended to benefit the *res* in the hands of the court, which was the entire mortgaged property, as covered by both mortgages, and not merely the equity of redemption of the mortgagor as against the second mortgagee. Whatever may be the rule as to the rents and profits of a mortgaged estate, under a receivership, on a bill filed by a second mortgagee, where the first mortgagee is not made a party to the suit, that rule has not been applied to such a receivership where the first mortgagee was made a party, especially on a bill such as that in this case. The authorities limit the exclusive right of the second mortgagee to the income of a receivership created under a bill filed by him, to a case where the first mortgagee is not a party to the suit. *Howell* v. *Ripley*, 10 Paige, 43; High, Receivers, sec. 688. It is further to be observed that, the mortgagor having defaulted in paying its interest on the first mortgage bonds on the first of November, 1878, the first mortgagee was entitled, by the terms of its mortgage, to take possession of the mortgaged property and operate the road. Moreover, the cross-bill was not filed for more than a year after the receiver had been appointed, and it was, in judgment of law or in fact, fully known all the time to the first mortgage bondholders what was being done by the receiver in creating the claims now sought to be disputed; nor was it filed for more than a year after the first mortgagee had appeared and answered in the original suit. It was at all times competent for the first mortgage trustee, as a party to that suit, to have asked the court to protect the interests of the bondholders, in case the receiver was disregarding them; and the cross-bill could as well have been filed earlier as later by the plaintiffs in it or by other bondholders. On these views the charge of fraud, made by the appellants, has no basis. [308] On the other hand, it did not comport with the principles of equity for the appellants to lie by and see the court and the receiver dealing with the property in the manner now complained of, and content themselves with merely protesting generally and disclaiming all interest under the receivership, and yet assert, as they did in the cross-bill, that the piece of road from Clymer's Station to Logansport, and the bridge and the land and the rolling stock and the other property acquired by the receiver, and now alleged to have been acquired by him without authority, were subject to the lien of the first mortgage, and now claim the proceeds of all that property without paying the debts incurred for acquiring it. A court of equity, however it might act on the question of original authority or discretion, if presented in season and under circumstances of good faith, will not visit upon innocent parties dealing with a receiver within the authority of its orders, consequences which result from the inequitable negligence and supineness of a party

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to the suit, or of those represented by him. The cross-bill alleges that the plaintiffs in it had desired for more than a year to have the first mortgage foreclosed.

The original bill set forth ample grounds for appointing a receiver promptly. The payment of interest on the second mortgage bonds ceased January 1, 1874. That mortgage gave a warrant of attorney for the appointment of a receiver forthwith, after six months' default; a provision not in the first mortgage.

The order of August 26, 1874, is questioned by the appellants because it empowered the receiver "To pay the arrears due for operating expenses for a period in the past not exceeding ninety days." They also object to the order of October 3, 1874, because it authorized the receiver to purchase rolling stock and to adjust the liens on rolling stock, and to pay indebtedness, not exceeding $10,000, to other connecting lines of road, in settlement of ticket and freight accounts and balances, and for materials and repairs, which had accrued in part more than ninety days before August 26, 1874, and to construct the piece of road from Clymer's Station to Logansport, and the bridge across the Wabash River, and to enter into contracts necessary therefor, and because it provided that, as to all moneys that might be expended, and all liabilities incurred by the receiver in carrying out the provisions of the order, the earnings of the road were charged "as with a first lien prior to all incumbrances upon said road." They also object to the order of October 4, 1875, because it provided that the certificates, which might be issued by the receiver under that order, were to be provided for by the court in its final order in the cause, unless paid by the receiver out of the income of the road. They also object to the order of January 22, 1879, because it adjudged all claims allowed by it against the receiver to be valid claims, to be paid out of the funds in the possession of the court, as well from the income of the road as from the proceeds of any sale to be thereafter made, and prior in equity to any claims of the mortgagees of the railroad. They also object to the decree of July 8, 1879, because it directed the master to pay out of the proceeds of the sale of the mortgaged property the several claims against the receivership which had been allowed by the order of January 22, 1879, in preference to the amount due by the mortgagor to the holders of the first mortgage bonds and coupons; and because it directed the master to pay the claim of the Evansville Company, and all other claims against the receivership which might thereafter be allowed, and which might remain unpaid after the funds in the hands of the receiver, not otherwise disposed of, should have been exhausted, in preference to the amount due on the first mortgage indebtedness; and because it did not order that the accounts of the receiver should be adjusted and settled before the master should pay out of the proceeds of the sale of the property any of the amounts allowed as debts against the receiver; and because it directed a sale to be made of the property covered by the first mortgage and that acquired by the receiver, under the orders of the court, as an entire property, and did not separate the two classes of property or the funds to be realized from them respectively.

[309]

The question of the power of a court to create claims through receivers in a suit for the foreclosure of a railroad mortgage, which shall take precedence of the lien of the mortgage, was considered by this court in *Wallace* v. *Loomis*, 97 U. S., 146 [XXIV., 895]. There, in a suit for the foreclosure of the first mortgage on a railroad, to which the trustees of a second mortgage were parties, the court, on notice, appointed receivers, with power to put the road in repair and operate it, and complete any uncompleted portions, and procure rolling stock; and for these purposes to raise money by loan to an amount named in the order, and to issue their certificates of indebtedness therefor, which should be a first lien on the property, payable before the first mortgage bonds. Wallace, a holder of second mortgage bonds, afterwards became a party to the suit. The final decree declared that the moneys raised by loan, or advanced by the receivers and expended on the road, pursuant to their order of appointment, were a lien paramount to the first mortgage, and it directed them and such receivers' certificates or other indebtedness as might thereafter be ordered by the court to be paid, to be paid out of the proceeds of the sale of the road before paying any of the first mortgage bonds or coupons. On an appeal to this court by Wallace, this court, by *Mr. Justice* Bradley, said: "The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot at this day be seriously disputed. It is a part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution and, if possible, with the consent or acquiescence of the parties interested in the fund." Wallace had not become a party to the suit until several months after the order complained of was made. This court sustained the decree.

[310]

The principle thus recognized covers most of the objections here urged. The facts set forth in the petitions of September 9 and 30, 1874, on which the order of October 3, 1874, was based, show ample reasons for making that order, in respect to the purchase of rolling stock and the adjustment of liens on rolling stock, and the construction of the Clymer Division and the bridge. The contents of those petitions have been set forth.

In respect to the $10,000 due other and connecting lines of road for materials and repairs and for ticket and freight balances, a part of which it was stated was incurred more than ninety days before the 26th of August, 1874, the first petition stated that payment of that class of claims was indispensable to the business of the road, and that, unless the receiver was authorized to provide for them at once, the business of the road would suffer great detriment. These reasons were satisfactory to the court. In the examination by the master, of the accounts of the receiver, evidence was taken as to the payment by him of items due, when he took possession, for operating expenses, and of

[311]

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moneys due other and connecting lines for the matters named. The report of the master shows that he disallowed several items in the receiver's accounts, claimed under the above heads, where the claims were made on the ground that the creditors threatened not to furnish any more supplies on credit unless they were paid the arrears. His action, sanctioned by the court, in allowing items within the scope of the orders of the court appears to have been careful, discriminating and judicious, so far as the facts can be arrived at from the record. It cannot be affirmed that no items which accrued before the appointment of a receiver can be allowed in any case. Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts of certain classes, out of the earnings of the receivership, or even the *corpus* of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands, *prima facie*, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines [312] of road for materials and repairs and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in case of non-payment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien. This view of the public interest, in such a highway for public use as a railroad is, as bearing on the maintenance and use of its franchises and property in the hands of a receiver, with a view to public convenience, was the subject of approval by this court, speaking through *Mr. Justice* Woods, in *Barton* v. *Barbour*, 104 U. S., 126 [XXVI., 672]. The appellants furnish no basis for questioning any specific amounts allowed in respect of the arrears referred to, but object to the allowance of anything out of the sale of the *corpus* for such expenditures. Under all the circumstances of this case, we see no valid objection to the provisions of the orders complained of.

The objections made to the orders of October 4, 1875, and January 22, 1879, and to certain provisions in the decree of July 8, 1879, fail for the reasons before stated.

Specific objection is made to the allowance of the claim of the Evansville Company to be paid in preference to the first mortgage bonds. The Evansville road ran from Rockville to Terre Haute, twenty-three miles. The mortgagor had, in June, 1872, hired that road by a written lease, the term of which was for one year and until one year's notice of its termination should be given by either party, after that term. The rent was $2,012.50 per month, and the lessee was to maintain the road in as good condition as when received, and to permit the Evansville Company to use six miles of it at a stipulated price. Provision was made, in the lease, for initial and subsequent inspection of the road, to ascertain its condition, and any improvement or depreciation the lessor or the lessee was to pay the other party for, in accordance. The lessee used the road from July 1, 1872, until the receiver was appointed. He took possession of it and ran it while he was receiver, as a continuation of his road, and so did he and Claybrook [313] afterwards; and subsequently Claybrook, as sole receiver, did the same. The rent was paid to September 1, 1874, then for a year it was not paid, then it was paid for four months, then it was unpaid to August 12, 1876, and after that Claybrook, as receiver, paid it as it accrued. During all the time from September 1, 1874, the successive receivers collected from the Evansville Company, every month, $262.50 for the use of the six miles. In the winter of 1876 there was found, on inspection, a depreciation of $19,846.82. The Evansville Company made a claim against the receiver for the unpaid rent, the amount of the depreciation, the value of certain supplies, and the rent of an engine. The master reported as due $56,036.21. On exceptions, the court directed the master to ascertain what would be a fair rental value for the use of the leased property by the receivers and to take into consideration any dilapidations. On this basis a new report, for $25,218.62, was made, and this amount was allowed, with a preference. We see no valid objection to this allowance. It is on the basis, not of the lease, but of the actual value of the use of property used by the receivers, with the clear assent, under the circumstances, of all parties interested, which use the first mortgage bondholders and their trustee, chargeable with full knowledge, never sought to prevent, such use being founded on the lease, which was property in the hands of the mortgagor. The line was used for the benefit of the mortgagor's road and of the holders of the bonds under the mortgages, with their acquiescence. Whatever the court would have done, as an original question, if called on to determine whether the receiver should use and run the Evansville road, these appellants must now be held, in view of all the facts, to have consented to treat the right to run that road and take its income, as if that right were a part of the mortgaged property and subject to the same rules as the other mortgaged property. This leads to the allowance, also, of the claims for operating supplies and materials, including steel rails, furnished for that road while so run.

As to the objection that the decree of July 8, 1879, was erroneous in not requiring the accounts of the receiver to be settled before any payment should be made, out of the proceeds of sale, of any amounts allowed as debts against [314] the receiver; the contention is, that items may yet be disallowed to the receiver, which will leave in the fund derived from income moneys applicable to pay debts incurred by the receiver, and so decrease the deficiency of income; and that the final decree of July 8, 1879, was

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erroneous in going beyond all prior orders, and not keeping the income separate from the proceeds of sale, and in directing the debts allowed to be paid wholly, at once, out of the proceeds of sale. This view rests entirely on the mistaken idea that the first mortgage bondholders and their trustee had no interest in any income of the receivership created under the original bill. If hereafter there shall arise any receiver's net fund, the court must apply it to pay, in the same order of rank as in the final decree, the four sets of creditors therein mentioned, and which is the proper order, as we hold. The creditors having these claims against the receiver were *bona fide* creditors and have waited long to receive their due. It was very proper, under the correct view of the law taken by the court below, that it should not compel them to wait longer for the settlement of the receiver's accounts, in which they have no interest.

Under the foregoing views, the objection that there was error in ordering the sale of the property as an entire property fails.

Many points were urged by the counsel for the appellants, which are either disposed of under the views we have announced, or are not, though they have been considered, deemed of sufficient importance for special remark. *The decree of the Circuit Court must be affirmed.* In reaching this conclusion we have assumed that the appeal has brought before us the claims which are not over $5,000, and have not considered the question as to whether this is or is not a case in which our jurisdiction as to those claims could be successfully challenged.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 594; 98 N. Y., 628.

UNITED STATES, *Plff. in Errr.*,
v.
FREDERICK FRERICHS, Claimant of the House and Lot, etc., known as No. 8 ABATTOIR PLACE, in the CITY OF NEW YORK.

(See S. C., "*U. S.* v. *Abatoir Place*," 16 Otto, 160-162.)

Reasonable cause of seizure—final judgment.

1. The refusal of the District Court to grant a certificate of reasonable cause of seizure, is not a matter which can be reviewed in the Circuit Court or in this court.
2. The granting of the certificate is not a final judgment to which a writ of error will lie.

[No. 74.]

Submitted Nov. 7, 1882. Decided Nov. 20, 1882.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the

Statement of the case by *Mr. Justice* **Woods**:

The following sections of the Revised Statutes of the United States are pertinent to the controversy in this case:

"Sec. 909. In suits or informations brought, where any seizure is made pursuant to any Act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant; *Provided*, That probable cause is shown for such prosecution to be judged of by the court.

Sec. 970. When, in any prosecution commenced on account of the seizure of any vessel, goods, wares or merchandise, made by any collector or other officer under any Act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was a reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not in such case be entitled to costs, nor shall the person who made the seizure nor the prosecutor be liable to suit or judgment on account of such suit or prosecution; *Provided*, That the vessel, goods, wares or merchandise be, after judgment, forthwith returned to such claimant or his agent."

This case was an information filed in the District Court of the United States for the Southern District of New York against a distillery, claiming that it was forfeited to the United States for violation of the revenue laws.

Frerichs, the defendant, appeared as claimant and denied the forfeiture. Upon the trial, the District Court was of opinion that there was no evidence of any violation of the revenue laws for which the seizure had been made, and directed a verdict for the claimant, which having been brought in, judgment was rendered thereon in his favor.

Thereupon the United States, by their attorney, moved the court to enter of record a certificate that there was a reasonable cause of seizure. The motion was denied. The case was then carried by writ of error to the Circuit Court, where it was adjudged that there was no error in the record. To reverse this latter judgment, this writ of error is prosecuted. The only question raised in this court is, whether the District Court erred in refusing to enter the certificate of reasonable cause. [161]

Mr. **Samuel F. Phillips**, *Solicitor-Gen.*, for plaintiff in error.

Mr. **Edward Salomon**, for defendant in error.

Mr. Justice **Woods** delivered the opinion of the court:

We are of opinion that the refusal of the District Court to grant a certificate of reasonable cause is not a matter which can be reviewed in the Circuit Court or in this court. It is only from final judgments that a writ of error lies from the District to the Circuit Court, or from the latter court to the Supreme Court.

The granting or the refusal to grant the certificate is not a final judgment in the sense of the statute which allows writs of error. The certificate when granted is no part of the original case. It is a collateral matter, which arises after final judgment. [162]

It is granted to protect the person at whose instance the seizure was made, should an action of trespass be brought against him by the claimant for the wrongful seizure of the latter's property. The granting of the certificate of reasonable cause is, therefore, only antecedent and ancillary to another suit, and is not a final judgment in the case in which it is given. It is not final or effectual for any purpose unless certain facts subsequent to the judgment are shown,

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namely: the immediate return to the claimant or his agent of the property seized in the original suit.

This court has decided that a refusal to enter an *exoneretur* on a bail bond, that judgments awarding or refusing to award or setting aside writs of restitution in actions of ejectment, that a judgment on a writ of error *coram nobis*, that a judgment refusing a writ of *venditioni exponas*, that a refusal to quash an execution or to quash a forthcoming bond, were not final judgments to which a writ of error would lie. *Morsell* v. *Hall*, 13 How., 212; *Smith* v. *Trabue*, 9 Pet., 4; *Barton* v. *Forsyth*, 5 Wall., 190 [72 U. S., XVIII., 545]; *Gregg* v. *Forsyth*, 2 Wall., 56 [69 U. S., XVII., 782]; *Pickett* v. *Legerwood*, 7 Pet., 144; *Boyle* v. *Zacharie*, 6 Pet., 648; *Evans* v. *Gee*, 14 Pet., 1; *McCargo* v. *Chapman*, 20 How., 555 [61 U. S., XV., 1021]; *Amis* v. *Smith*, 16 Pet., 303; see, also, *Barker* v. *Hollier*, 8 Mees. & W., 513.

These authorities lead to the opinion we have expressed in this case. *We think the judgment of the Circuit Court should be affirmed; and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

SAMUEL OSBORNE, Jr., *Plff. in Errr.*,
v.
COUNTY OF ADAMS, IN STATE OF NEBRASKA.

(See S. C., 16 Otto, 181-183.)

Municipal bonds—for what purposes may be issued.

*A steam grist mill is not a work of internal improvement, within the meaning of a Statute of Nebraska authorizing counties, cities and precincts of organized counties, to issue bonds "to aid in the construction of any railroad or other work of internal improvement."

[No. 577.]

Submitted Nov. 2, 1882. Decided Nov. 20, 1882. Petition for rehearing filed May 7, 1883. Petition denied Oct. 15, 1883.

IN ERROR to the Circuit Court of the United States for the District of Nebraska.

The petition in this case was filed in the court below, by the plaintiff in error, to enforce the payment of the coupons of certain bonds issued by the defendant county to aid in the construction of a steam grist mill.

The court below sustained a demurrer and gave judgment for the defendant; whereupon the plaintiff sued out this writ of error.

Messrs. **Adna H. Bowen, John H. Ames** and *J. C. Corwin*, for plaintiff in error.

Messrs. **John Doniphan** and *John M. Ragin*, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

A steam grist mill is not, in our opinion, a work of internal improvement, within the meaning of the Statute of Nebraska, approved February 15, 1869, which authorizes counties, cities and precincts of organized counties "to issue bonds to aid in the construction of any railroad or other work of internal improvement."

The case of *Burlington* v. *Beasley*, 94 U. S., 312 [XXIV., 163], is not, as supposed by counsel, an authority for a different conclusion. That case arose under a Statute of Kansas, which empowered municipal townships in that State to issue bonds "For the purpose of building bridges, free or otherwise, or to aid in the construction of railroads or water-power, by donation thereto, or the taking of stock therein, or for other works of internal improvement." The bonds there in suit were issued to aid in the construction and completion of, and to furnish the motive power for, a steam custom grist mill. It was held that the statute, reasonably interpreted, embraced a grist-mill operated by steam, as well as one run by water-power; that, since municipal aid was authorized for "the construction of * * * water-power," the [183] phrase "other works of internal improvement," in the Kansas Statute, might be fairly construed as embracing works of the same class, and consequently as embracing a steam grist-mill. The court was somewhat influenced, as plainly appears from its opinion, by decisions of the Supreme Court of Kansas, particularly that of *Leavenworth Co.* v. *Miller*, 7 Kan., 479.

The present case is different. The only work of internal improvement specially described in the Nebraska Statute, is that of a railroad, and we are not justified by anything in *Burlington* v. *Beasley*, or in the decisions of the courts of Nebraska in holding that a steam or other kind of grist-mill is of the class of internal improvements which municipal townships in that State, were empowered, by the statute in question, to aid by an issue of bonds.

For these reasons we adjudge that the bonds issued by the County Commissioners in behalf of Juniata Precinct, in Adams County, Nebraska, in aid of the construction of a steam grist-mill in that precinct, are unauthorized by the Act of February 15, 1869; and as authority for their issue is not claimed to exist under any other statute, they must be held to be without binding force against the precinct.

The judgment is, consequently, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 1; 111 U. S., 370; 113 U. S., 7.

EDWARD G. MASON, *Appt.*, [163]
v.
NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

(See S. C., 16 Otto, 163-166.)

Redemption from mortgage foreclosure—cases considered.

*1. The error of an absolute foreclosure of the right of redemption, without allowing fifteen months for that purpose by the decree, is not waived by the failure of the defendant to tender the redemption money within that time, when the case is brought to this court by an appeal taken within the two years allowed by the Act of Congress.

2. The cases of Brine v. Ins. Co., 96 U. S., 627 [XXIV.]; Burley v. Flint, last Term of this court [XXVI., 986]; and Suitterlin v. Ins. Co., 90 Ill., 491, considered and explained.

[No. 79.]

*Head notes by *Mr. Justice* MILLER.

*Head note by *Mr. Justice* HARLAN.

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Submitted Nov. 8, 1882. Decided Nov. 20, 1882.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The history and facts of the case appear in the opinion of the court.

Mr. **Edward G. Mason,** for appellant:

The decree of foreclosure entered January 2, A. D. 1877, made no provision for redemption after sale, and was, therefore, erroneous, and should be reversed.

Brine v. *Ins. Co.*, 96 U. S., 627 (XXIV., 858); *Burley* v. *Flint*, 105 U. S., 247 (XXVI., 986); *Orvis* v. *Powell*, 98 U. S., 178 (XXV., 239); *Swift* v. *Smith*, 102 U. S., 450 (XXVI., 196).

The position of appellant is not affected by the expiration of the statutory time of redemption.

It can hardly be seriously claimed that the appellant, appealing to this court to reverse the erroneous decrees in this cause, can be deprived of his remedy because the statutory period of redemption has expired pending the appeal.

U. S. v. *Pacheco*, 20 How., 261 (61 U. S., XV., 920).

Mr. **Thomas Hoyne,** for appellant.

Mr. Justice **Miller** delivered the opinion of the court:

This is an appeal from the Circuit Court for the Nothern District of Illinois.

The suit below was a bill in chancery to foreclose a mortgage brought by the Insurance Company against Murphy and others. Murphy, the mortgagor, after making the mortgage, had assigned the property to Edward G. Mason, the appellant, and Mason was made a party to the foreclosure suit with a view to barring his equity of redemption. On the second day of January, 1877, a decree was entered for the amount of the money due on the mortgage, and directing H. W. Bishop, a master in chancery of the court, to sell the property, and to make such sale "in accordance with the course and practice of this court."

The master, in due time, reported the sale of the property to the complainant, which report and sale were, on the 31st day of July, 1877, confirmed. The decree of confirmation contained a clause that the defendants, including Mason, "be forever barred and foreclosed of all equity of redemption in or to said property," and directed the commissioner to make a deed and deliver possession to the purchaser.

From this decree Mason, in proper time, took the present appeal.

The error relied on to reverse the decree is the absolute foreclosure of the equity of redemption, without allowing the time for that purpose which the Statute of Illinois provides. The case comes directly within that of *Brine* v. *Ins. Co.*, 96 U. S., 627 [XXIV., 858]. Indeed, it is stronger, for while in that case we took the admission of counsel on both sides that "a sale in accordance with the course and practice of the court" meant a sale which did not admit of any equity of redemption, we have in this case a decree of confirmation of the sale which expressly and in the strongest terms cuts off all such right. In accordance with the principle settled by this court in the case of *Brine* v. *Ins. Co.*, both these decrees were erroneous.

It is, however, urged as a reason for not applying that principle in the present case, that the appeal was not taken until after the period had elapsed within which the appellant could by the statute have exercised the right of redemption, and that he has neither paid nor tendered the sum necessary to redeem. The cases of *Switterlin* v. *Ins. Co.*, 90 Ill., 491, and *Burley* v. *Flint*, 105 U. S., 247 [XXVI., 986], decided at the last Term of this court, are relied on in support of this view.

The first of these cases was a suit in the State [165] Court of Illinois, to obtain the benefit of the right of redemption from a sale under a foreclosure decree in the Circuit Court of the United States for the Northern District of Illinois. The Supreme Court of Illinois refused the relief asked because the plaintiff in that court had made no effort to redeem within the statutory period, a ruling which this court, in the case of *Burley* v. *Flint*, held to be sound.

The reason for this is that, while not seeking to reverse the decree under which the sale was made, nor to set aside the sale, the proceeding recognized both as valid, and undertook to assert the right of the party to redeem, as though the sale had been made in accordance with the Statute of Illinois. This right, of course, could only be secured by a strict compliance with that statute, and having permitted the period to elapse within which he had a right to redeem, he came too late. The court very properly dismissed the bill.

In the case of *Burley* v. *Flint* this court approved and adopted the views of the Illinois court, and applied the principle to the case of a bill of review which sought the same end. The bill was filed after the period of statutory redemption and without any tender of the amount necessary to redeem within that time.

Both these cases differ from the present one, in that they were efforts to enforce the right of redemption outside of and against the terms of the decree, while the present case seeks by an appeal to reverse and set aside the decree. In the former cases, equity required that before coming to the court for the relief which plaintiffs asked, they should have done what the law required of them, or go at least so far as to offer, within proper time, to pay the redemption money. Not having done this, the court very properly refused to permit them to exercise this right after that time had passed, and with it the right to redeem. In the present case the appellant has exercised his right of appeal from the decree within the time allowed to him by the laws of the United States for that purpose. He has, therefore, rightfully brought this case before us for review. His right to do this does not depend upon any offer to redeem within the fifteen months allowed by the Illinois Statute, but is an absolute right, which we cannot refuse or deny. As it is apparent, from the face of the decree and from what we have said in the [166] case of *Brine* v. *Ins. Co.*, that both the original decree of sale and the subsequent decree of confirmation are eroneous in refusing to allow the right of redemption under the statute, they must be reversed. If anything were necessary to add force to this reasoning it would be found in the fact that the appellant Mason, in his answer to the original foreclosure bill, expressly referred to the Statute of Illinois and asked that

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any decree made in the case should make provision for redemption within fifteen months after the sale.

The decree for sale and the decree of confirmation of the Circuit Court are reversed, and the case remanded to that court for further proceedings in accordance with this opinion.

Mr. Justice **Harlan** being absent at the argument, took no part in the decision in this case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[191]

ALEXANDER FRASER ET AL., *Plffs. in Err.*,

v.

WILLIAM JENNISON ET AL.

(See S. C., 16 Otto, 191-195.)

Removal of causes—by part of parties.

1. To entitle a party to a removal under the second clause of the 2d section of the Act of March 3, 1875, there must exist in the suit a separate and distinct cause of action, on which a separate and distinct suit might properly have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different States from those on the other.
2. Where the contest is joint, and is not separable for any purpose, as the probate of a will, part of the parties on one side of it cannot remove the cause where it is not removable as to all.

[No. 72.]

Argued Nov. 7, 9, 1882. Decided Nov. 20, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of Michigan.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **Henry M. Duffield** and *Edwards Pierrepont*, for plaintiffs in error.

Messrs. **William Jennison** and *W. A. Moore*, for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The defendants in error filed in the Probate Court of Wayne County, Michigan, a paper purporting to be the will of Alexander D. Fraser, and asked that it be admitted to probate. The court appointed a time and place for the hearing, and gave the general notice required by law to all persons interested. In due time Ellis Fraser, Alexander Fraser, Elizabeth Calvin, Sophia Redden, Mary Calvin, Francis P. Fraser, and John Fraser, heirs at law of the decedent, appeared and jointly gave notice of their intention to contest the probate, "On the grounds that the said Alexander D. Fraser was not, at the date of the alleged execution thereof, of sound mind and memory; that he, at that time, did not have mental capacity to make a will; that the said paper was procured to be executed by undue influence, and that the same was not executed and attested in the manner required by said statute." Alexander Fraser, one of the contesting heirs, was a citizen of Illinois, and Francis P. Fraser, another contestant, a citizen of Iowa. All the other contestants were citizens of Michigan, as were the appellees who were named executors of the will. At the time and place appointed the proponents and contestants appeared and, after a hearing, the will was admitted to probate and letters testamentary granted to the appellees. By the laws of Michigan the order for the probate of a will, as long as it remains unreversed, is conclusive evidence of the due execution of the will; Comp. L. Mich. 1871, p. 1374, sec. 4341; but any person aggrieved by such an order may appeal to the circuit court of the county, by filing in time a notice to that effect with the judge of probate, with his reasons therefor, and also an appeal bond. *Id.*, p. 1562, sec. 5216. Notice of the appeal must be given to the adverse party, and copies of the proceedings in the probate court filed in the circuit court. Sec. 5218. After the case gets to the circuit court, that court is required to "Proceed to the trial and determination of the question according to the rules of law, and if there shall be any question of fact to be decided, issue may be joined thereon under the direction of the court, and a trial thereof had by a jury." Sec. 5220. The circuit court may make such order or decree as the judge of probate ought to have made, and remit the case to the probate court for further proceedings. Sec. 5226. [192]

After the order admitting this will to probate was entered, Alexander Fraser and Francis P. Fraser, who were not citizens of Michigan, appealed to the circuit court, as did also the other contestants. The two appeals were in form separate, but they were taken at the same time and on the same grounds. They were filed in the circuit court together, and the same order was entered in both for allegations of objections to the will and for notice to the proponents. Under this order the same issues were joined at the same time in both appeals, and the appellants in both demanded jury trials. The papers filed in the two appeals were substantially copies of each other, except as to the names of the appellants.

As soon as the issues were joined, Alexander Fraser and Francis P. Fraser, citizens of States other than Michigan, filed their petition for a removal of the cause to the Circuit Court of the United States for the proper district. In their petition for removal they made no reference to any other contestants than themselves, nor to any other appeal than their own. The state court refused the removal, and thereupon the petitioning appellants filed in the Circuit Court of the United States a copy of the record in the Circuit Court of the State, so far as it related to them, but which failed to show that any persons, except themselves had united in the contest. The cause having been docketed in the Circuit Court of the United States, the proponents of the will appeared and moved to remand, filing with their motion an affidavit showing that the record presented by the petitioners was defective. The court thereupon issued a *certiorari* to bring in the whole record, "Including the record of all the appeals taken from the order of the probate court * * * admitting the will to probate, by whomsoever instituted." [193]

NOTE.—*Removal of causes under Act of 1875; citizenship.* See *note* to Removal Cases, 100 U. S., XXV., 818.

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In obedience to the command of this *certiorari*, a copy of the whole record was certified to the Circuit Court of the United States, and the foregoing facts appearing therefrom, the order to remand was granted. From that order Alexander Fraser and Francis P. Fraser brought this writ of error.

The objections to the removal insisted on here are:

1. That a proceeding in a state court for the probate of a will is not removable;

2. That if such a proceeding is removable, the application in the present case should have been made to the probate court prior to the hearing there, and that it comes too late after the appeal from that court to the Circuit Court of the State; and,

3. That the requisite citizenship of the parties does not exist.

In the view we take of the case it is necessary to consider only the last of these objections.

In Michigan, on an appeal from the order of a probate court admitting a will to probate, there is but one main issue, to wit: "whether the paper propounded is or is not a will. There may be more or less minor issues included, but they all belong to the same inquiry, and cannot be presented separately." *Hathaway's Appeal*, 46 Mich., 328; *People, ex. rel. Fraser*, v. *Wayne Co.* [*Judge*], 39 Mich., 198. The only thing the appellate court can do is to determine the main issue, and certify its judgment to the probate court.

The contest in this case was begun by citizens of Michigan jointly with citizens of Illinois and Iowa against other citizens of Michigan. There was but a single proceeding, and that between all the contestants on one side and all the proponents on the other. [194] There was but one judgment, and that against all the contestants. From the very nature of the proceeding there could have been no other. Either all the contestants must succeed or all fail. They were all heirs-at-law, and whether the will was established or set aside, it would affect them all alike and in the same right.

Neither was the position of the parties or the nature of the contest changed because two appeals were taken by the contestants instead of one. By the operation of the two appeals, the controversy was transferred from the probate to the circuit court, and it stood in the circuit court just as it did in the probate court, with all the contestants actively participating in the contest on one side and all the proponents on the other. It is unnecessary to consider what would have been the effect of an appeal by the citizens of Illinois and Iowa alone, for the citizens of Michigan were not content to leave the case in that position, but followed it to the circuit court themselves in the character of appellants. Unless, therefore, there was in the proceeding, as it stood in the Circuit Court of the State, a separate controversy which was wholly between citizens of different States, and which could be fully determined between them, there could not, according to the rule established in the *Removal Cases*, 100 U. S., 457 [XXV., 593], and *Blake* v. *McKim*, 103 U. S., 336 [XXVI., 563], be any removal to the Circuit Court of the United States under the Act of March 3, 1875, ch. 137 [18 Stat. at L., 470]. 1 Sup. R. S., 173.

But the plaintiffs in error insist there was such a separate controversy, and that they were entitled to a removal under the rulings in *Barney* v. *Latham*, 103 U. S., 205 [XXVI., 514]. To this we cannot agree. As has already been seen, the contest when begun was joint and presented but one issue for trial. To entitle a party to a removal under the 2d clause of the 2d section of the Act, there must exist in the suit a separate and distinct cause of action, on which a separate and distinct suit might properly have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different States from those on the other. *Hyde* v. *Ruble*, 104 U. S., 407 [XXVI., 823]. To say the least, the case must be one capable of [165] separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more States on one side and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun. Such is not this case. As was said by the Supreme Court of Michigan in this very contest, when an application was made for a *mandamus* to compel the circuit court to set aside an order consolidating the two appeals, "The probate of every will, whether in the original or appellate tribunal, must always be single and complete in one hearing. It would be absurd to have such proceedings severed, so that the will might be held good as to one class of contestants, and bad as to another. No matter how many different persons may appeal, they can only raise one issue, and there can be but one trial of that issue, which is to determine the question of will or no will. * * * There can be no such thing as a determination of testacy or intestacy, which binds one appellant and does not bind the rest. The controversy includes all interests that the law recognizes for any purpose, and binds all." For these reasons it was held that all of the several claims of appeal were merely appearances in a single and indivisible proceeding, which could not be severed for any purpose. The *mandamus* asked for was refused, the court remarking that the order for consolidation was entirely unnecessary and, undoubtedly, made out of abundant caution. This seems to be conclusive of the question now under consideration. The contest was joint when it was begun. It was joint after the two appeals were taken, and is not separable for any purpose. Although, in form, separate issues were joined in the appeals, in reality they were but one and were capable of but one trial.

The order remanding the cause is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 193; 113 U. S., 391; 114 U. S., 55.

HENRY C. BROWN, *Plff. in Err.*,

v.

STATE OF COLORADO.

(See S. C., 16 Otto, 95-99.)

Federal question, what is.

In a suit of ejectment in a state court brought by the State of Colorado, an objection to a deed conveying the land to the Territory of Colorado, that

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the Territory could not take a conveyance of real property without the consent of the Government of the United States, does not raise any federal question of which this court has jurisdiction, where the objection was not based on any statute of the United States.

[No. 612.]

Motions submitted Oct. 30, 1882. Decided Nov. 20, 1882.

IN ERROR to the Supreme Court of the State of Colorado.

This action was brought in the District Court in and for Arapahoe County, Colorado, by the defendant in error, to recover a certain tract of land, known as the "Capitol Grounds," situated in Denver.

The case was tried by the court, trial by jury having been waived. The trial resulted in a judgment in favor of the plaintiff. The court below having affirmed this judgment, on appeal, the defendant sued out this writ of error.

The facts of the case are stated by the court.

On motion to dismiss.

Messrs. **Charles H. Toll,** *Atty-Gen., of Colorado,* and *Henry M. Teller,* for defendant in error, in support of motion.

Messrs. **James H. Brown** and **Charles Case,** for plaintiff in error, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a writ of error to the Supreme Court of Colorado, to reverse the judgment of that court in a suit in ejectment brought by the State against the plaintiff in error, and a motion has been made to dismiss for want of jurisdiction.

It is not claimed that any question which can give us jurisdiction was directly raised by the pleadings, but on the trial the State, to make out its title, offered in evidence a deed from Brown, the plaintiff in error, to the Territory of Colorado. To the introduction of this deed in evidence an objection was made, on the ground, among others, "That the Territory of Colorado had no right to take a conveyance of real estate at the time of making the deed, without the consent of the Government of the United States." This objection was overruled and an exception taken. When the case went to the Supreme Court, one of the assignments of error was to the effect that the court erred in receiving this deed in evidence. As the judgment of the district court was affirmed, this assignment of error must have been overruled. It is claimed that on account of this the judgment is reviewable here.

To give us jurisdiction under section 709 of the Revised Statutes, it must in some way appear, from the return which is made to the writ of error, that "the validity of a treaty or statute of, or an authority exercised under, the United States" has been drawn in question and the decision is against their validity; or that "the validity of a statute of, or an authority exercised under, any State" has been drawn in question "on the ground of their being repugnant to the Constitution, treaties or laws of the United States," and the decision is in favor of their validity; or that some "Title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity" so claimed.

It certainly does not appear that in this case the court below decided against the validity of any treaty, statute or authority of the United States, or in favor of any statute or authority of a State claimed to be repugnant to the Constitution, treaties or laws of the United States. All the plaintiff in error insisted upon below was that the Territory of Colorado could not take a conveyance of real property without the consent of the Government of the United States, but whether this disability grew out of a statute of the United States, or of the Territory, is not stated. We know, judicially, and so did the court below, that Congress granted the Territory legislative power over all rightful subjects of legislation consistent with the Constitution and the provisions of the Organic Act, 12 Stat. at L., 174, ch. 59, sec. 6, and that neither the Constitution nor the Organic Act contained, in express terms, any such limitation as is now contended for. There is nowhere in any part of the record the least indication that any particular statute of the United States was brought to the attention of the court below, and a ruling asked upon it in connection with the objection which was made to the admissibility of the deed. No judge, in deciding upon the objection, as it was made and presented, would be likely to suppose that if he admitted the evidence he would deny the defendant any "right, title, privilege or immunity" "set up or claimed" under a statute of the United States. Certainly if the judgments of the courts of the States are to be reviewed here for decisions upon such questions, it should be only when it appears unmistakably that the court either knew or ought to have known that such a question was involved in the decision to be made. The rule was stated by *Mr. Justice* Miller in *Bridge Propre.* v. *Hoboken Co.*, 1 Wall., 148 [68 U. S., XVII., 576], thus: "The court must be able to see clearly, from the whole record, that a certain provision of the Constitution or Act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied." While *Mr. Justice* Story, in *Crowell* v. *Randell*, 10 Pet., 398, said that it was not necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms, *ipissimis verbis;* and that it was sufficient if it appeared by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment; he also said it was "Not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, on the record, that it did arise, and was applied by the state court to the case." Under this rule it is clear, the admission of the deed did not necessarily involve any such error as will give us jurisdiction.

Neither does the record show that a decision was rendered below in favor of the validity of any law of Colorado impairing the obligations of a contract. No such question was presented by the pleadings, and the rulings do not indicate

NOTE.—*Jurisdiction of U. S. Supreme Court where federal question arises, or where is drawn in question statute, treaty or Constitution of U. S.* See, *note* to Matthews v. Zane, 8 U. S. (4 Cranch), 382; *note* to Martin v. Hunter, 14 U. S. (1 Wheat.), 304; and *note* to Williams v. Norris, 25 U. S. (12 Wheat.), 117.

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that anything of the kind was brought to the attention of the court; but if the point made here in the argument had been made below, it would not have altered the condition of the case in regard to our jurisdiction. The claim is, that the Territory of Colorado contracted with the plaintiff in error to erect a capitol and other public buildings on the premises conveyed; but, if that were so, the Constitution of the State and the statutes relied on, did not impair the obligation of such a contract. The most that can be said of them is, that, in this way, the contract was violated by the State. The question is not, whether the constitutional provisions and the statutes in question are valid, but whether, by the adoption of the Constitution by the people, and the passage of the statutes by the Legislature, any condition attached to the conveyance has been broken which authorized the plaintiff in error to revoke his deed and take possession of the property he conveyed. The decision of this question by the state court is not reviewable here. All the obligations of the original contract remain, and the State has not attempted to impair them. If the contract is all the plaintiff in error claims it to be, and the Constitution and statutes are just what he says they are, the most that can be contended for, is that the State has refused to do what the Territory agreed should be done. This may violate the contract, but it does not in any way impair its obligation. If we should declare the constitutional provisions and the statutes invalid as against the contract, it would not change the rights of the parties in this action. Whether valid or invalid, the plaintiff in error could not defend the action successfully, unless he was entitled to revoke his deed and re-enter upon his land, in case the Territory or the State delayed for an unreasonable time to erect the buildings [99] which were contemplated. If he could, the Constitution and the statutes would have no other effect than as evidence to show that the State had deliberately refused to perform.

It follows that the case presents no question which can be considered here, and the motion to dismiss is granted.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—110 U. S., 58; 114 U. S., 95.

THEODORE CLOUGH, *Appt.*, *v.* GILBERT AND BARKER MANUFACTURING COMPANY ET AL.

(See S. C., "*Clough* v. *Barker*," 16 Otto, 166-178.)

Valid letters patent—improvement in gas-burners—Clough's burner—infringements.

*1. The claims of letters patent granted to Theodore Clough, July 14, 1870, for an "improvement in gas-burners," namely: (1) "The bat-wing burner, perforated at the base, in combination with the surrounding tube, substantially as described;" (2) "In combination with the bat-wing burner, perforated at the base, and surrounding tube, the tubular valve for regulating the supply of external gas to the burner, substantially as described," are valid.

2. Both of said claims are infringed by a burner constructed in accordance with the description contained in letters patent granted to John F. Barker, July 26, 1870, for an "improvement in gas-burners."

*Head notes by *Mr. Justice* BLATCHFORD.

3. A prior burner was set up as anticipating the invention. If used now in a way in which it was never designed to be used, and was not shown to have ever been used, before Clough's invention, it might be made to furnish a supplementary supply of gas. But as it was not designed for the same purpose as Clough's burner, and no person looking at it or using it would understand that it was to be used in the way Clough's was used, and it was not shown to have been really used and operated in that way, it was held not to have amounted to an invention of what Clough invented.

4. The combination of the first claim being new, and Clough having been the first person who applied a valve regulation of any kind to such combination, he is entitled to hold as infringements of the second claim all valve regulations, applied to such a combination, which perform the same office in substantially the same way as, and were known equivalents for, his form of valve regulation.

[No. 64.]

Argued Oct. 31 and Nov. 1, 1882. Decided Nov. 27, 1882.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the opinion of the court.

Messrs. **Roger H. Lyon** and **E. N. Dickerson**, for appellant.

Mr. **William Stanley**, for appellees.

Mr. Justice **Blatchford** delivered the opinion of the court:

This suit was brought by the appellant against the appellees, to recover for the infringement of letters patent granted to the appellant, July 14, 1870, for an "improvement in gas-burners." The circuit court dismissed the bill. The specification of the patent says: "My invention relates more particularly to the burners for burning illuminating gas made by saturating air with vapors of gasoline, commonly called air-gas. It has been found that common bat-wing or fish-tail burners are not adapted to burning this gas as ordinarily made, owing to the variable density of the gas coming from the generating apparatus. The object of my improvement is to adapt the slitted or bat-wing burner to the burning of air-gas. Said improvements consist: first, in perforating the base of the burner tube with small holes or passages for gas to escape at the base of the burner and surrounding the burner with a tube open at the top but closed at the bottom and united to the burner below the perforations in the burner tube. It is more convenient to screw the tube to the burner, but it may be attached in any suitable manner. Second, in regulating the escape of the gas from the perforations at the base of the burner by a sliding tubular valve or cut-off, introduced into the burner tube at the base and extending upward within it, the position of the tubular valve being regulated by a screw. These improvements, by furnishing a regulated supply of gas outside of the burner, but directed to the tip of the burner by the surrounding tube, give steadiness and increased illuminating power to the flame of the bat-wing burner and make it a desirable burner for burning air-gas. The drawings represent a bat-wing burner as improved by me. Figure 1 represents an elevation of my improved burner attached to a short piece of gas pipe. Figure 2, a view showing the surrounding tube in section and the burner therein. Figure 3, a vertical section through the burner and tube. Figure

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4, a transverse section through the base of the burner tube. Letter *a* represents the burner tip; *b*, the burner tube; *c*, perforations at the base of the burner tube; *d*, the surrounding tube screwed to the base of the burner tube; *e*, [168] the tubular valve extending up in the burner tube, and operated by an annular screw, *f*, attached to the lower end. Said annular screw, besides having a screw to work in the base of the burner, has an internal screw by which it and the burner is attached to the gas pipe, as clearly shown in Fig. 3 and the other drawings, the gas way being through the annular screw and tubular valve to the burner. As the burner is connected to the gas pipe, *g*, by means of the annular screw, the adjustment of the gas escaping through the perforations of the burner tube is easily made by turning the burner upon the annular screw. I claim as my invention and improvement in air-gas burners, the bat-wing burner, perforated at the base, in combination with the surrounding tube, substantially as described. Also, in combination with the bat-wing burner, perforated at the base, and surrounding tube, the tubular valve for regulating the supply of external gas to the burner, substantially as described."

The defendants, in their answer, set up that they have not infringed the patent, and that it is void for want of novelty. At the request of both parties a trial at law was had in the court below, of two questions: "First. Whether or not the complainant is the first and original inventor of the improvement in gas-burners for which the first above named patent has been granted to him. Second. Whether or not the gas-burners manufactured by the defendants are substantially identical with those described in the complainant's patent and schedule thereto annexed, in their construction and mode of operation." The issues were tried before the court and a jury, and the jury answered both of the questions in the affirmative. Afterwards, on a case made, the defendants moved, before the Judge who tried the issues, for a new trial, on the ground that the verdict was against the weight of the evidence. He denied the motion in a written opinion, in which he stated that the weight of the evidence on the question of infringement was not such as to justify him in granting a new trial, and that he was satisfied with the conclusion of the jury on the question of priority. He afterwards signed and filed a certificate that in his opinion the verdict on both questions was sustained by the evidence given.

The burners made by the defendants were made in accordance with the description of the [169] first form of burner described in the specification of letters patent granted to John F. Barker, one of the defendants, July 26, 1870, for an "improvement in gas-burners." The drawings of that patent consist of ten figures, which are thus referred to in the specification: "Figure 1 is a side view of one modification of my invention; Figure 2 is a side view of the shell; Figure 3 is a side view of the burner; Figure 4 is a vertical longitudinal section of the shell through line A B of Fig. 2; Figure 5 is a vertical longitudinal section of the burner through line C D of Fig. 3; Figure 6 is a side view of another modification of my invention; Figure 7 is a side view of the shell; Figure 8 is a side view of the burner; Figure 9 is a vertical longitudinal section of the shell through line E F of Fig. 7; and Figure 10 is a vertical section through line G H of Fig. 8." The specification goes on to say: "My invention relates to a device for regulating the flow of carbureted air or gas from the burner to its point of combustion, and it consists of a burner having a screw thread made upon its lower part, upon which is fitted, to turn freely thereon, a shell or tube, also having a screw thread upon its interior lower part; and the bore of said tube or shell is somewhat larger in diameter than the diameter of the upper part of the burner upon which it turns. A series of perforations is made in the lower part of the burner so that, when the burner is made or set for the combustion of carbureted air or gas of any certain quality, the flame may be increased or diminished by turning the shell either up or down, as the case may be, the shell, in its movements up or down, either closing or opening the holes or perforations, and letting out or stopping the flow of the gas through the said holes, as it is moved up or down. In the use of carbureted air for illuminating purposes it is almost always the case that, when the gasoline is first placed within the generator, it gives off a much greater amount of vapor, and the air, in passing through the generator, absorbs a greater amount of the carbon, and, consequently, becomes more thoroughly charged with and is much richer in the illuminating qualities of the gasoline, than when the generator has been charged for a greater length of time; and, as a result, the carbureted air is sometimes too rich to make a desirable light, with the same amount passing out of the burner; and at other times, as when the generator has been charged a longer time, the carbureted air flowing through the burner is deficient in illuminating power, and the light or flame produced is not uniform in its power or steadiness, and is sometimes liable to produce a smell or [170] smoke when too rich in carbon. My invention is designed to obviate all difficulty in this respect, as the burner is set or made to let out at the tip the minimum quantity of gas that will produce a good flame and, as the gasoline remains longer in the generator and becomes weaker in its illuminating qualities, the outer tube or shell may be turned so as to let out more gas and increase the flame without liability to smoke. That others skilled in the art may be enabled to make and use my invention, I will now proceed to describe its construction and mode of operation: in the drawing, L represents the main part of the burner, which is made similar to the common burner, except that the lower part has a screw thread made upon the outside and inside. Figs. 1, 2, 3, 4 and 5 represent one modification, in which L is the burner, having the usual screw thread made upon the lower interior part by which to secure it to the pipe. At *d* is a conical shoulder or seat upon the exterior, shown in Figs. 3 and 5, and a screw thread *d* made upon the exterior of the lower end, and the small holes *c* are made either at the seat *d* or just below it. I is a shell or tube, the inside diameter of its upper part being somewhat greater than the outside diameter of the part L, and upon the interior of the tube, at *a*, is a conical shaped seat, made to fit upon the exterior seat *d* upon the burner L. A screw thread *d'* is made upon the interior of the lower

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part of the tube I, which fits the thread *d* upon the exterior of the burner L. The operation of this modification is as follows: when the tube I is turned entirely on to the burner L, the inner seat *a* fits down upon the shoulder *d* of the burner L, and the only place of egress for the gas is through the slot at the tip. When the gasoline is fresh or new, this slot will be quite sufficient to supply the flame, but, as the gasoline becomes more exhausted of carbon, the tube or shell, I, may be turned up a little, so that the seat *a* shall be raised slightly from the shoulder *d*, and more or less of the gas will pass out through the holes *c* and pass up between the tube I and the burner L as the tube I is turned up or down, and when the gas, which escapes through the holes *c* and passes up between the tube and burner, reaches the top, it unites with that passing out of the slot at the tip, increasing the volume and flame. In this device the gas, after passing out through the holes *c*, is prevented from passing down between the tube and burner by the screw threads *d'* and *d* upon the inside of the tube and outside of the burner. In the modification shown in Figs. 6, 7, 8, 9 and 10, both the burners and regulating tube are similar to that already described, except that the thread *d* upon the outside of the burner L is carried up higher, and the holes *c* are made below the top of the outer thread but above the top of the inside thread. The thread upon the inside of the tube, I, is not so long as the outside thread upon the burner L, but is considerably less, so that, when the tube, I, is turned entirely down on the burner the holes will be above the thread on the inside of the tube; and there is no inside seat in the tube, I, to operate upon a beveled or conical exterior shoulder upon the burner L, as in the other modification. The operation of this modification is as follows: if the flame be too weak, the tube I is turned down upon the burner L until the top of the inside thread of the tube begins to pass below the holes *c*, when the gas will escape and pass up between the tube and burner and increase the flame as before. If it should be desirable to stop the escape of gas through the holes *c*, it is only necessary to turn up the tube upon the burner and, when the thread inside the tube covers the holes *c*, then there will be no escape of gas. It will be seen that the principles of the operation of both modifications are very much alike and are intended to accomplish the same object, although the tube turns up in the first case to let out more gas while it turns down in the second case, both being equivalent, however, in their operation and accomplishing the same result. I am aware that gas-burners have been heretofore made to give an additional supply of gas to the flame, but in those that I have seen they consisted of more pieces and were considerably more expensive to manufacture, and in their operation the burner revolved with the tube, thus causing the flame to revolve also. This is very objectionable, as it is often desirable to have the flame stand in one particular direction. In this device, the flame does not turn in the least, while the whole burner may consist of only two pieces, and is cheaply made and its operation and effect are perfect." The claim of that patent is, "An improved gas-burner, consisting of the burner or pillar L, having holes *c c* therein, and provided with the movable or adjustable shell or tube, I, all constructed and operating substantially as and for the purposes herein described and specified."

[171]

After such certificate was signed and filed, the Gilbert and Barker Manufacturing Company, one of the defendants in this suit, brought a suit in equity in the court below, as owner of the said patent granted to John F. Barker, for the infringement of the same, against Clough, the plaintiff in this suit, alleging as the infringement the making and selling of burners constructed exactly like the two forms described in the patent to said Barker. The only testimony taken directly in the present suit was that taken on the trial before the jury and embodied in the case made, on which the motion for a new trial was made. But considerable testimony was taken, for final hearing, in the suit against Clough, and that testimony is contained in the record in this case, and it is understood that such testimony was considered and used, by agreement of parties in the court below, as part of the proofs in this case.

[172]

The first claim of the Clough patent is a claim to "The bat-wing burner, perforated at the base, in combination with the surrounding tube, substantially as described." The elements of this claim are, a bat-wing burner, with a burner tube; the burner tube perforated at its base with small holes or passages for gas to escape at the base of such burner tube; and another tube, surrounding the burner tube, open at the top, and closed at the bottom, and united to the burner tube below the perforations in it. The method of regulating the escape of gas from the perforations is no part of the first claim. The office of the combination in the first claim is, as the specification states, to enable the surrounding tube to direct to the tip of the burner the gas which comes through the perforations, such surrounding tube being open at the top and closed at the bottom, and united to the burner tube below the perforations.

Two forms of burner are presented as infringements of the first claim. They are both of them substantially like the first form of burner described in the patent of Barker, the outside tube, in both of them, turning up to let out more gas. Each of these burners contains the combination of the first claim of the Clough patent.

It was held by the court below that the combination covered by the first claim of the Clough patent was found in a burner called the Horace R. Barker burner, the existence of which prior to Clough's invention was held to have been satisfactorily proved. Of the Horace R. Barker burners it was said by the court: "In those burners the burner was a bat-wing burner, perforated at the base. The perforations did not consist of small holes, but the stem of the burner was slitted all the way down to the base, allowing the gas to escape through the whole length of the slit. There was a surrounding tube united to the burner below the lower end of the slit. The burner stem had a cone near its top, and when the surrounding tube was screwed so as to be in a certain position with reference to such cone, the effect was to direct to the tip of the burner the supply of gas coming through the slit below, the surrounding tube being open at the top and closed at the bottom, and the flame was thickened and a ring of flame

[173]

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was formed. The structure and mode of operation of the combination were the same as those of the combination covered by the first claim of the plaintiff's patent. The fact that the perforations in the Horace R. Barker burner existed not only at the base, but were continued in the form of a slit all the way up, makes no difference. Nor does it make any difference that the Horace R. Barker burner had a cone near its top. The first claim of the plaintiff's patent is broad enough to cover the Horace R. Barker burner, and that claim must be held to be invalid for want of novelty."

On the trial before the jury, the existence and operation of the Horace R. Barker burners were testified to by Horace R. Barker himself and by John F. Barker, and a copy of the rejected application of Horace R. Barker for a patent was put in evidence. The question was submitted to the jury by the court as to whether the effect produced by Clough's invention had been produced in the Horace R. Barker burner by a combination or mode of operation substantially the same as in the burner of Clough; and the attention of the jury was called by the court, in its charge, to the contention of Clough, that the object of the Horace R. Barker burner was to control the size of the slit in the burner by a clamp; that, if some gas escaped through an orifice at the top of the surrounding tube and was projected upon the burner tip, the escape was accidental and not desired; and that in a well made burner it was not intended to escape and did not escape. The jury found for Clough, on the question of novelty, as against the Horace R. Barker burner. When the motion for a new trial was made before the Judge who presided at the jury trial, he said, in his opinion denying the motion: "The device mainly relied upon by the defendants upon the question of priority was a burner of Horace R. Barker, for [174] which he made an unsuccessful application for a patent prior to the date of the plaintiff's invention. It consisted of a bat-wing burner, slitted nearly to the base, and a surrounding tube smaller at the top than at the bottom. There was a screw upon the inside of the lower part of the tube. When the tube was screwed down upon the burner, the top of the tube pressed against a conical and enlarged part of the burner near its top, and the slit was closed. When the tube was screwed up, the slit was enlarged. The defendants claimed that the top of the tube, in connection with the protuberant part of the burner, formed a valve, and that the gas passed to the tip, not only through the burner, but through the ring near the tip at the end of the surrounding tube, in a double current, and that the device was substantially like the burner of the complainant. The complainant claimed that the object and the effect of this invention was to provide a burner in which the bat-wing slit could be enlarged or diminished at pleasure, and to consume but a single current of gas; that the top of the tube, in connection with the conical part of the burner, was not a valve but a clamp; that, when the burner was new or well made, this clamp prevented the escape of gas; and that there was no appreciable delivery of gas in a well made burner, except through the tip. I am of opinion that the jury, upon this question of fact, did not misconceive the weight of the evidence." In the proofs taken in the suit against Clough, and used in this case by agreement, John F. Barker gave further testimony as to the prior use of the Horace R. Barker burners, and such testimony seems to have been understood by the court below as showing that the Horace R. Barker burner was used with the surrounding tube raised to such a height that the horizontal line of its upper end was raised from its seat at the cone on the burner pillar, and an additional supply of gas passed out of the top of the surrounding tube and mingled with the gas which escaped from the burner tip; that, by screwing down the surrounding tube so that it would impinge sufficiently against the cone, the slit would be closed; that the effect of the operation of thus raising or lowering the surrounding tube was to increase or diminish the supply of gas; and that the surrounding tube, considered in connection with the cone on the pillar of the burner, operated as a valve to control the flow of gas. In this view, the structure and its mode of oper- [175] ation were held to be such as to anticipate the first claim of the Clough patent. But we are all of opinion that an erroneous view was taken of the purport of the additional testimony of John F. Barker. He was testifying in February, 1875. The question was as to what the Horace R. Barker burner was, and as to what was its mode of operation in use. In the specification of the patent of John F. Barker, issued in July, 1870, he said: "I am aware that gas-burners have been heretofore made to give an additional supply of gas to the flame, but in those that I have seen they consisted of more pieces, and were considerably more expensive to manufacture, and in their operation the burner revolved with the tube, thus causing the flame to revolve also." The expression "more pieces" means more pieces than in the burner he was patenting. His burner consisted of two pieces only. The Clough burner consisted of three pieces, and in it the burner revolved with the tube. In the John F. Barker patent, the burner did not revolve with the tube. The Horace R. Barker burner consisted of two pieces only, and the burner did not revolve with the tube. Therefore, the reference by John F. Barker, in his patent, to the burners which he had seen which would give an additional supply of gas was to the Clough burners, which it is proved he had seen; and it is impossible that he could have then understood that the Horace R. Barker burners, which also he had seen, were burners which had been used to give an additional supply of gas to the flame.

The testimony as to any additional or supplementary supply of gas in the Horace R. Barker burner amounts really to this only: that, if that burner is used now in a way in which it was never designed to be used, and is not shown to have ever been used, before Clough's invention, it may be made to furnish a supplementary supply of gas. Its structure was such that, to give full effect to its mode of operation, the surrounding tube did not require ever to be raised so high as not to be in contact with the cone. As it was raised from its lowest position the slit opened and, when the slit was opened to its full extent, the tube was still in contact with the cone, and there was no orifice between them. Any fur- [176] ther raising of the tube was accidental and not a part of the law of the structure. The object of raising and lowering the tube was, by less or

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greater pressure on the cone, to open or close the slit in the burner. The specification of Horace R. Barker, in his rejected application, shows that the only object of his burner was to control the flow of gas through the slit in the burner, instead of controlling the flow at the cock or further back. The spring of the two parts of the burner was intended to carry them away from each other and open the slit when the pressure of the tube against the cone was relieved, while the increased pressure of the tube against the cone closed the slit. Any raising of the tube unnecessarily high, so as to admit of a flow of gas through an orifice between the tube and the cone to the flame, cannot be regarded as amounting to an invention of what Clough invented. The structure was not designed for the same purpose as Clough's; no person looking at it or using it would understand that it was to be used in the way Clough's is used, and it is not shown to have been really used and operated in that way.

The foregoing remarks apply equally to the Coolidge burner, which was like the Horace R. Barker burner in structure, except that in the Coolidge burner the raising of the ring against an inverted conical projection closed the slip. The Solliday burner and the Lunkenheimer burner did not contain Clough's invention. We are, therefore, brought to the conclusion that the first claim of the Clough patent is valid.

The second claim of the Clough patent is for a combination of the bat-wing burner, perforated at the base, the surrounding tube, and the tubular valve for regulating the supply of external gas to the burner, substantially as described. The specification describes the tubular valve as extending upward into the burner-tube. The view taken by the court below as to this second claim was, that there was in the Horace R. Barker burner a regulation of a supplementary flow of gas, and by a valve arrangement, the raising of the tube above the cone allowing the gas to flow out of the tube, and the lowering of the tube to bear against the cone closing the orifice. The court said: "In view of the existence of that burner, which contained the combination of a bat-wing burner, a [177] perforated tube in substance like that of the plaintiff's patent, and a tubular valve for regulating the supply of external gas to the burner, the construction of the second claim of the plaintiff's patent must be such as to limit that claim to the form of tubular valve which he describes, namely: one in the interior of the burner tube and not forming part of the surrounding tube. Under this construction, the second claim of the plaintiff's patent is not infringed." The defendants' burners had no tubular valve extending up into the burner tube. In them the tubular valve formed part of the surrounding tube, and reached or left its seat by screwing down or up the surrounding tube. The surrounding tube could not be permanently attached to the burner, because it carried the movable valve. In the Clough burner, the surrounding tube may be permanently attached to the burner, because the tubular valve is not carried by the surrounding tube, but is a third and separate instrument, carried by an adjustable cylinder inserted within the burner tube from below.

The combination of the first claim of the Clough patent being new and, consequently, there never having been any valve arrangement applied to regulate the flow of gas in such a combination, the premises, on which the decision of the court below proceeded, fail. Clough is entitled to the benefit of the doctrine of equivalents as applied to the combination of the burner, surrounding tube and regulating tube, covered by the second claim of his patent. The regulation in the defendants' burners was by a tubular valve on the outside of the perforations instead of on the inside, and performing its work by being screwed up or down, as in Clough's. Although in the Clough structure the burner and surrounding tube revolve together in adjusting their position in reference to that of the tubular valve, so as to let in or turn off the supply of gas through the perforations, and although in the Clough structure the flame revolves by the revolution of the burner, and although in the defendants' burners the revolution of the surrounding tube regulated the supply of gas through such perforations, and neither the burner nor the flame revolved, the defendants' valve arrangement must be held to have been an equivalent for that of Clough to the full extent to which that of Clough goes, involving, perhaps, patentable im- [178] provements, but still tributary or subject to the patent of Clough. It is true that that patent describes the tubular valve as being inside of the burner tube. But Clough was the first person who applied a valve regulation of any kind to the combination to which he applied it, and the first person who made such combination; and he is entitled, under decisions heretofore made by this court, to hold as infringements all valve regulations, applied to such a combination, which perform the same office in substantially the same way as, and were known equivalents for, his form of valve regulation. The record shows that prior to the existence of the appellant's burner it was common in gas-burners to check the flow of gas out of the burner by applying an obstruction operated by a screw indifferently outside or inside of the burner. It follows, from these considerations, that the defendants infringed the second claim of the Clough patent.

The decree of the Circuit Court is reversed, with costs, and the cause is remanded, with directions to enter a decree for the appellant for an account and an injunction, as prayed in the bill, with costs, and to take such further proceedings therein as shall be in conformity with law and with the opinion of this court.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 179.

THEODORE CLOUGH, *Appt.*,
v.
GILBERT & BARKER MANUFACTURING COMPANY.

(See S. C., 16 Otto, 173-181.)

Valid letters patent—improvement in gas-burners.

*1. The claim of letters patent granted to John F. Barker, July 26, 1870, for an "improvement in gas-

*Head notes by *Mr. Justice* BLATCHFORD.

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burners," namely: "An improved gas-burner, consisting of the burner or pillar L, having holes c c therein, and provided with the movable or adjustable shell or tube I, all constructed and operating substantially as and for the purposes herein described and specified," is valid.

2. Although a gas-burner made according to the description of said patent infringes both of the claims of letters patent granted to Theodore Clough, July 14, 1870, for an "improvement in gas-burners," in its method of supplying additional gas and in its valve arrangement for regulating the supply, yet, as it dispenses with the interior tubular valve of Clough, and is made in two pieces instead of three, and is less expensive to make, and the shell alone revolves, in regulating the supply, and not the burner with it, and the flame always remains in one position, the modifications are new and useful and patentable.

[No. 63.]

Argued Oct. 31 and Nov. 1, 1882. Decided Nov. 27, 1882.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the opinion of the court. See, also, the preceding case between these parties, *ante*, 134.

Messrs. **Roger H. Lyon** and **Edward N. Dickerson,** for appellant.

Mr. **William Stanley,** for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

This suit was brought by the appellees against the appellant to recover for the infringement of letters patent granted to John F. Barker, July 26, 1870, for an "improvement in gas-burners." The specification of that patent and its claim are set forth at length in the opinion just delivered by the court in another suit between the same parties. The answer of the defendant admits that he has made and sold gas-burners substantially like those described in the Barker patent. The principal defense set up in the answer is, that the defendant invented the improvement patented to Barker, and obtained letters patent therefor from the United States on the 14th of June, 1870, being the same patent on which such other suit was founded, and the specification of which is set forth at length in the opinion therein; that the burners which the defendant has made and sold were made under and according to that patent; that the defendant made and used said improvement in December, 1869, and applied for a patent for it December 4, 1869, which was granted, being the said patent of June 14, 1870; that, after he had invented and perfected said improvement, and had filed such application for a patent for it, he showed a sample of it to Barker, in May, 1870; and that Barker, thereupon, fraudulently intending to deprive the defendant of the benefits of his invention, obtained a patent for it, being the said patent of July 26, 1870, the gas-burner patented by him being substantially like that previously patented by the defendant, in construction, mode of operation and result, and being a mere mechanical equivalent therefor. No other anticipation of Barker's invention is set up in the answer. The decree of the court below was in favor of the plaintiff.

The claim of the Barker patent covers a gas-burner having these features: a pillar with holes therein around the circumference at its bottom, and an adjustable or movable surrounding shell or tube; such shell, by being moved up or down, either closing or opening [180] the holes, and thus stopping or permitting the flow of gas through the holes. The general principle of the burner, so far as regards supplying additional gas to the burner, through the holes and the surrounding tube, as the illuminating qualities of the gas become weaker, and as regards having a method of increasing or diminishing such supply by a valve arrangement covering or uncovering the holes as required, is the same as that of the prior patent to Clough, the appellant, and which was the prior invention. It has been held by this court, in the other suit between the same parties, that a gas-burner made according to the description in the Barker patent infringes both of the claims of the Clough patent; the claim for the method of supplying the additional gas, and the claim for the application of a valve arrangement to regulate the supply. But, the point of the invention and patent of Barker is, that the surrounding shell or tube is so arranged that the screwing of such shell up or down causes it to act as a valve, on the outside of the pillar, to close or open the holes. As a consequence, the interior tubular valve of Clough is dispensed with, the burner is made in two pieces instead of three, is less expensive to make and, moreover, in regulating the supply of gas, the shell alone revolves, and not the burner with it, as in Clough's burner, and so the flame always remains in one position. We think, from the evidence, that these modifications were new and useful, and sufficient in character to sustain a patent. The burner, in the form patented by Barker, appears to have superseded the burner in the form patented by Clough and, after Barker had introduced his burner into use, Clough commenced making, for market, burners in the same form patented by Barker.

As to the claim that Clough made, prior to Barker, the form of burner covered by Barker's patent, the circuit court held that, the burden of proof being on the defendant to make out that allegation satisfactorily, the evidence fell short of showing clearly that Clough anticipated Barker as to that form of burner. Without discussing the evidence in detail, it is sufficient to say that we concur in that view. The burner of Clough which Barker saw before he made his burner was the Clough burner which had the tubular valve in the inside of the burner tube. [181]

If the evidence as to the existence, prior to the invention of Barker, of other burners than that of Clough be considered, on the question of the novelty of the arrangement claimed by the Barker patent, it must be held that none of the prior forms of burner introduced in evidence anticipate the arrangement covered by the claim of the Barker patent.

The decree of the Circuit Court is affirmed, with costs.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ANNA A. CLARKSON ET AL., *Plfs. in Err.*,
v.
MARTHA B. STEVENS ET AL. [505]

(See S. C., 16 Otto, 505-519.)

Title to vessel—title to article in process of manufacture—question of intent.

1. Under a contract for the construction of a war

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steamer for the United States, payments to be made thereon from time to time, and the full amount of the price remaining unpaid to become due when she should be fully completed, and upon the certificate of examiners accepted, the title to the vessel did not vest in the United States until such completion and acceptance.

2. When a man contracts with another to make any article for him for a given price, the general rule is, in the absence of all circumstances from which a contrary conclusion may be inferred, that no property passes in the chattel until it be completed and ready for delivery.

3. The courts of this country have not adopted any arbitrary rule of construction as controlling such agreements, but consider the question of intent as to when the title shall pass, open in every case, to be determined upon the terms of the contract and the circumstances attending the transaction.

[No. 88.]

Argued Nov. 16, 17, 1882. Decided Nov. 27, 1882.

IN ERROR to the Court of Chancery of the State of New Jersey.

The bill in this case was filed in the court below, by Martha B. Stevens, widow of Edwin A. Stevens, deceased, as executrix, and on her own behalf as one of the residuary legatees, and on behalf of her children as heirs and residuary legatees, against her co-executors, Messrs. Shippen and Dod, and the Attorney-General of the State of New Jersey, *et al.*, for the construction of the will of the said Edwin A. Stevens, and for a declaration as to the validity of the various trusts, devises and bequests therein contained, including the bequest of the Stevens Battery to the State of New Jersey.

The Attorney-General filed an information in the nature of a cross-bill on behalf of the State, making the heirs of Robert L. Stevens parties.

The other executors, the heirs of Robert L. Stevens and others, filed answers and, on the hearing of the cause, the Chancellor entered a decree declaring, among other things, that the title of the said vessel was in the said Edwin A. Stevens, and passed by his will to the State of New Jersey. *Stevens* v. *Shippen*, 28 N. J. Eq., 487.

On appeal by the heirs of Robert L. Stevens, from the part of said decree affecting said vessel, the Court of Errors and Appeals of the State of New Jersey entered a decree affirming such part of said decree, and remanded the record to the Court of Chancery. *Stevens* v. *Shippen*, 29 N. J. Eq., 602. Thereupon said heirs sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **Walter L. Clarkson** and **Frederic W. Stevens,** for plaintiff in error:

The Court of Appeals holds that the case comes within the operation of the rule established in *Elliott* v. *Edwards*, 35 N. J. L., 265; *Edwards* v. *Elliott*, 36 N. J. L., 449, which decides in conformity with the decision in *Andrews* v. *Durant*, 11 N. Y., 35, that, under a contract for the building of a vessel, no property vests in the purchaser, even where certain portions of the contract price are agreed to be and are paid to the builder at specified stages of the work, and where an agent of the purchaser is to and does superintend such work and approve the materials. These decisions are in conflict with a long line of English cases, commencing with *Woods* v. *Russell*, decided by *Lord* Tenterden. *Woods* v. *Russell*, 5 B. & Ald., 942; *Clarke* v. *Spence*, 4 Ad. & El., 448; *Carruthers* v. *Payne*, 5 Bing., 270; *Laidler* v. *Burlinson*, 2 Mees. & W., 602; *Wood* v. *Bell*, 5 El. & Bl., 772, affirmed in Exchequer Chamber; *Wood* v. *Bell*, 6 El. & Bl., 355; *McBain* v. *Wallace*, L. R. 6, App. Cas., 589; with the rule as adopted and approved by nearly all the text writers, Benj. Sales, 315; Ad. Cont., ch. 6, sec. 1., p. 176, Eng. ed.; Maude & P., Ship., 52, 4th ed.; Chit. Cont., Vol. 1, p. 531, 11th Am. ed.; Story, Sales, secs. 315, 316; Long, Sales, 168, 288, and with several American cases; *Moody* v. *Brown*, 34 Me., 107; *Butterworth* v. *McKinly*, 11 Humph., 209—the rule as it obtains in New York having been expressly repudiated in *Sanford* v. *Wiggins Ferry Co.*, 27 Ind., 522; and by *Mr. Justice* Clifford, in *Scudder* v. *Calais Steamboat Co.*, 1 Cliff., 370; the case of *Williams* v. *Jackman*, 16 Gray 514, is not *contra*, though cited as being so, *Chief Justice* Bigelow taking pains to distinguish it from *Woods* v. *Russell*, 5 B. & Ald., 942, and *Clarke* v. *Spence*, 4 Ad. & E., 448, with which it is plainly consistent. At the time of this last decision, *Woods* v. *Bell*, 5 El. & Bl., 772 and *Sandford* v. *Wiggins Ferry Co.*, 27 Ind., 522, had not been decided. The case of *Scull* v. *Shakespear*, 75 Pa. St., 297, is, in the point decided, consistent with the English rule. In *Edwards* v. *Elliott*, 35 N. J. L., 265, 36 N. J. L., 449, the court seems to be under a misapprehension as to the earlier English cases, and with little force of argument, follows *Andrews* v. *Durant*, 11 N. Y. 35, *supra*. The only intimation of opinion given by this court on the subject is found in what *Mr. Justice* Clifford says in his dissenting opinion in *Calais Steamboat Co.* v. *Scudder*, 2 Black, 380 (67 U. S., XVII., 287). In this opinion he adopts the English rule, but the case turned on another point.

The property in the unfinished vessel under the contract, was originally in the United States, and not in Robert L. Stevens. The title there remained until the approval of the Resolution of Congress on July 17, 1862.

Upon the passage of that Resolution the heirs took title beneficially.

Messrs. **Leon Abbott,** *John P. Stockton, Joel Parker* and *W. J. A. Fuller*, for defendants in error.

Mr. Justice **Matthews** delivered the opinion of the court:

The controversy in this case arises between the plaintiffs in error, who are, with others, heirs at law of Robert L. Stevens, deceased, and the State of New Jersey, and involves the title to [506] an uncompleted ship of war, known as the Stevens Battery.

The claim of the plaintiffs in error is founded on a Resolution of Congress, approved July 17, 1862, 12 Stat. at L., 628, as follows:

"A Resolution releasing to the heirs at law of Robert L. Stevens, deceased, all the right, title and interest of the United States in and to Stevens' Battery.

Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, That all the right, title and interest of the United States in and to Stevens' Battery be, and the same hereby are released and conveyed to the heirs at law of the said Robert L. Stevens, or their legal representatives."

Robert L. Stevens died in 1856, having his domicil in New Jersey, and by his will consti-

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tuted his brother, Edwin A. Stevens, who was one of his heirs at law, and whom he made one of his executors, his sole residuary devisee and legatee.

Edwin A. Stevens died August 7, 1868, and by his will, conceiving himself to be the owner of the unfinished vessel, of which he had been in possession since the death of his brother, and claiming as his residuary legatee, he directed his executors to complete it on his general plan, at a cost not exceeding $1,000,000, and then to offer it to the State of New Jersey as a present. The executors, after having expended $919,915.94 upon the vessel, found that they could not finish it for the amount of money to which they were limited, and discontinued the work. In the meantime, the State of New Jersey had accepted the bequest, and the consent of Congress thereto was given in the following Resolution [16 Stat. at L., 388], approved July 1, 1870:

"A Resolution giving the consent of Congress to the reception of a certain bequest by the State of New Jersey, under the will of the late Edwin A Stevens.

Whereas, Edwin A. Stevens, who was in his lifetime the owner of the ship known as the Stevens Battery, originally commenced under contract for the United States Government, and upon the building of which large sums of money were spent by his brother and himself, did, by his last will and testament (the United States having previously relinquished all claims to said ship), leave the same to be finished by his executors, at an expense not exceeding the sum [507] of $1,000,000, and when finished to be offered to the State of New Jersey as a present, to be by her received and disposed of as the said State shall deem proper; and,

Whereas, doubts have been suggested as to the right of the said State to accept the said bequest without the consent of Congress, under the prohibition of the tenth section of the first article of the Constitution of the United States: Therefore,

Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given that the State of New Jersey shall receive and dispose of the said ship according to the terms and conditions of said bequest."

A bill in equity was filed in the Chancery Court of New Jersey by the executors of Edwin A. Stevens, asking for a construction of the will in certain particulars, including the questions arising upon this bequest to the State of New Jersey. The Attorney-General appeared on behalf of the State, and filed an information, by way of cross-bill, to which the heirs at law of Robert L. Stevens were made parties, as claiming an adverse title. A final decree was made, establishing the title of the State, which was affirmed on appeal by the Court of Errors and Appeals. To reverse that decree the present writ of error is prosecuted; the question presented being one, which, as it arises under a law of the United States, and the decision thereon of the state court being in denial of the title claimed under the authority thereof, falls within the jurisdiction of this court.

To determine the proper construction and legal effect of the Resolution of Congress of July 17, 1862, it becomes necessary to trace from its origin the history of the Stevens Battery.

An Act of Congress "authorizing the construction of a war steamer for harbor defense," approved April 14, 1842, enacted "That the Secretary of the Navy be, and he is hereby authorized to enter into contract with Robert L. Stevens for the construction of a war steamer, shot and shell proof, to be built principally of iron, upon the plan of the said Stevens; *provided*, The whole cost, including the hull, armament, engines, boiler and equipment, in all respects complete for service, shall not exceed the average cost of the steamers Missouri and Mississippi," and $250,000 was thereby appropriated [508] towards carrying the law into effect. 5 Stat. at L., 472.

In pursuance of this law, on Feb. 10, 1843, the Secretary of the Navy entered into a contract with Robert L. Stevens for the construction of a war steamer for harbor defense, which recited his proposal, describing the vessel, and containing certain specifications as to its construction, with a covenant on his part that he would faithfully build and construct the steamer conformably to the plan submitted, and complete the same within two years, provided Congress should make the further appropriations necessary for the purpose within a reasonable period.

According to the plan proposed, the war steamer was to be shot and shell proof against the artillery then in use on board vessels of war, *viz.*: from 18 pounders to 64 pounders; to be propelled by submerged machinery, called Stevens' circular shells; to have greater speed than any of our steam vessels of war then built; the whole engine to be out of the way of shot from any vessel of an enemy; and with other specifications as to the character of the material and the dimensions and relations of the parts, which are important to be noticed only so far as to show that the proposed vessel was to be constructed upon a plan original and novel, and with the expectation of results not previously obtained in any naval construction.

On November 14, 1844, the Secretary of the Navy and Stevens entered into an explanatory contract, which recited that the stipulations of the former had been found to be too loose and indefinite as to the details of its execution, and that the parties considering themselves bound by so much thereof as related to the dimensions, power, ability to resist shot and shell, and other qualities and arrangements of the vessel, and the amount to be paid therefor, entered into further stipulations modifying and explaining the same. The time for the completion and delivery of the vessel was extended two years from the date of the new contract. Many additional specifications as to the details of construction were inserted. It was agreed that if the cost of making any models or patterns used in the construction should be included in bills paid by the United States in the course of the work or at its completion, they should become the property of the United States.

It was also agreed that the Secretary of the [509] Navy should appoint some person, whom Stevens should admit within his establishment for building said vessel, whose duty it should be to

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receive and receipt for, on account of the Navy Department, all materials delivered therein for constructing said steamer; which materials, when so received and receipted for, should be distinctly marked with the letters U. S., and should become the property of and belong to the United States; and it should be his further duty to certify all accounts, presented and certified by Stevens, for materials and labor, which should form the evidence on which payments should be made; but the authority of such inspecting officer, it was understood, should not extend to a right to judge of the quality or fitness of the materials or workmanship, but merely as to the cost thereof; "It being understood," the contract proceeds, "that the quality and fitness thereof, with other matters concerning the performance of the contract, are to be inspected and determined in the manner hereinafter provided for."

It was thereupon further stipulated, that before the final payment for the said war steamer should be made, a certificate should be rendered to the Navy Department, that, in her construction, armament and equipment, all the provisions of the contract had been fully performed by Stevens, which certificate should be given and signed by persons appointed to examine the vessel; one by Stevens, one by the Secretary of the Navy and, in case of disagreement, a third by the other two, the decision of the majority to be conclusive. It was also agreed that Stevens, in lieu of other security for the faithful performance of the contract on his part, should make to the United States a mortgage, which should be a first lien on all the land, docks, wharves, slips and all their appurtenances belonging to and embraced within the establishment at Hoboken, New Jersey, at which the war steamer was to be constructed, with ample power to enter upon and sell the same in case of failure on the part of the said Stevens to fulfill his part of the contract, or so much thereof as should be necessary to complete any deficiencies on his part.

The Secretary of the Navy agreed to pay, as the price of the said war steamer, when fully completed and delivered at the Navy Yard at Brooklyn, in conformity with the contract, the sum of $586,717.84, the supposed mean cost of the [510] steamers Missouri and Mississippi, or any additional sum that might afterwards be ascertained as properly included in that cost, to be indorsed on the contract "As the price which is to be paid for the said war steamer when fully completed, delivered and accepted."

Payments were to be made, from time to time, upon bills certified by Stevens and the agent of the United States, for not less than $5,000 each, and approved by the Navy Department, until the sum of $500,000 should have been paid; at which time, it was stipulated, that an examination should be had of the war steamer by persons to be appointed, as before agreed, for final examination, and if a majority of them should certify their opinion that the vessel could be fully completed according to contract for the remaining balance which might then be due, then payments of further bills in full should continue, not exceeding the full amount of the whole agreed price; but otherwise, the examiners were required to certify the amount which in their opinion would be required to complete the steamer, when the Secretary of the Navy was authorized to withhold from future payments such deductions as might be necessary to meet the probable excess of cost. It was further provided, that when the said Stevens should have fully completed the said war steamer, and when she should have been duly delivered to and received by the agent of the United States, according to the terms of the contract, the full amount of the price remaining unpaid and to become due when the said war steamer should be fully completed and accepted, was required to be paid and the mortgage security canceled and returned.

In pursuance of his contract to that effect, Robert L. Stevens executed and delivered a mortgage on the premises therein described, being the basin, dock, shops, etc., wherein the war steamer was to be constructed, conditioned to be void, in case he fully performed his contract in relation thereto, with a power of entry and sale, on the part of the mortgagee, in case default should be made in the completing and delivery of the said war steamer at the expiration of four years from that date, according to the conditions and stipulations of the contract; and out of the proceeds of such sale to retain any dues that might have accrued by reason of the failure to perform the contract, or so much [511] thereof as should be necessary to complete any deficiencies on the part of the said Stevens.

The time for the performance of the contract was, by a subsequent agreement, extended for four years from September 9, 1848.

From January 5, 1845, to December 14, 1855, there was paid out by the Navy Department on account of the vessel $500,000.

Robert L. Stevens, prior to his death, in 1856, had, in addition, expended in its construction, of his own means, $113,579.

The Naval Appropriation Act, approved August 16, 1856, 11 Stat. at L., 48, contains an appropriation "for Stevens' war steamer, eighty-six thousand seven hundred and seventeen dollars and eighty-five cents," being the remainder of the contract price, but no portion of this was ever paid.

In the meantime, Edwin A. Stevens took possession of the work upon the death of his brother, as executor and residuary legatee, and expended thereon, prior to September 5, 1857, of his own money, the sum of $89,185.37.

Nothing further appears to have been done until Congress passed an Act, approved April 17, 1862, 12 Stat. at L., 380, making an additional appropriation for the naval service for the year ending June 30, 1862. The 2d section of that Act is as follows:

"*And be it further enacted*, That the sum of $783,294, being the amount necessary to be provided, as estimated by a board appointed for that purpose, to pay for and finish the Stevens Battery now partially constructed at Hoboken, New Jersey, be and the same is hereby appropriated out of any money not otherwise appropriated for the immediate construction of said battery; *Provided*, That, in the contract for the completion of said vessel, it shall be stipulated that no part of the money claimed by Edwin A. Stevens to have been heretofore expended by him upon said vessel shall be refunded until the amount of said claim shall be established to the satisfaction of the Secretary of the Navy

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and the payment of the said sum shall be contingent upon the success of said vessel as an ironclad, sea-going war steamer, to be determined by the President, and such contract shall stipulate the time within which the vessel shall be completed; *Provided, nevertheless*, That said money shall not be expended unless the Secretary of the Navy is of opinion that the same will secure to the public service an efficient steam battery."

[512] The board, whose estimate is adopted in this Act, was one appointed by the Secretary of the Navy, under the authority of a Joint Resolution of Congress, approved July 24, 1861 [12 Stat. at L., 328], whose report was communicated to the House of Representatives in a letter of the Secretary of the Navy to the Speaker, dated January 2, 1862. Ex. Doc. No. 23, H. R., 37th Congress, 2d Sess. Upon the question of the expediency of completing the vessel, the board specify six important particulars, as among "the many novel characteristics which she would possess," in which she differed from ordinary war vessels, and conclude by saying: "We cannot recommend the expenditure of important sums of money upon projects of more than doubtful success when put into practical execution; and, therefore, we do not deem it expedient to complete this vessel upon the plan proposed." The report had previously stated "That the original projector of the vessel was the late Robert L. Stevens, Esq., deceased, and that his brother, Edwin A. Stevens, Esq., who now proposes to complete it, has materially changed the plans from what appears to have been originally intended."

No part of the sum appropriated by the Act of April 17, 1862, was applied to the purpose of completing the battery. The Secretary of the Navy declined to do so, in the exercise of the discretion confided to him in the last clause of the section, for reasons set forth in his letter to the Speaker of the House of Representatives, dated May 27, 1862, in which he states that he had taken the opinion of a commission of experts, who had reported that "The vessel, if completed on the plans of Mr. Stevens, will not make an efficient steam battery" and, therefore, that he did not feel authorized to make the expenditure unless Congress should so direct.

Congress thereupon passed the Joint Resolution, approved July 17, 1862 [12 Stat. at L., 628], on which the plaintiffs in error found their claim.

Nothing appears to have been done towards resuming work on the vessel, from the date of the last previous expenditure in 1857 until the death of Edwin A. Stevens, on August 7, 1868, during which time it remained in his possession and control. His will contained the following provision:

"I empower my executors to apply, not exceeding the sum of one million dollars, to finish, on my general plans, as near as may be, in [513] the discretion of my said executors, the battery known as the Stevens Battery, and for the accomplishment of the said object I give to them the use of the dock and yards and basin heretofore appropriated to the said battery, and all the material provided for said battery. When said battery shall be finished, I direct my executors to offer the same to the State of New Jersey as a present, to be disposed of as the said State shall deem proper; and if not accepted by the said State, I direct my executors to sell the same, and the proceeds thereof shall fall into the residue of my estate."

In execution of this authority, the executors, prior to February 27, 1873, expended $919,915.49, of which $27,809.79 was received from the sale of old material.

The Legislature of New Jersey, on March 21, 1871, had authorized the appointment of commissioners with power to sell the battery and, in pursuance of that authority, the vessel, never having been finished, was sold for the sum of $75,000.

The contention of the plaintiffs in error is that the title to the unfinished vessel passed, as the work progressed, to the United States, and became vested, together with the right to enforce the contract for its completion, and the security of the mortgage, as against the estate of Robert L. Stevens, in his heirs at law, by force of the Joint Resolution of July 17, 1862.

In support of the proposition that, by the building contract the title to the unfinished ship vested, as the work progressed, in the United States, counsel rely upon the rule of construction announced by *Lord* Tenterden in *Woods* v. *Russell*, 5 B. & Ald., 942, and followed by the English cases of *Clarke* v. *Spence*, 4 Ad. & El., 448; *Carruthers* v. *Payne*, 5 Bing., 270; *Laidler* v. *Burlinson*, 2 Mees. & W., 602; *Wood* v. *Bell*, 5 El. & Bl., 772, affirmed in the Exchequer Chamber, 6 El. & Bl., 355; *McBain* v. *Wallace*, L. R., 6 App. Cas., 589; and the American cases of *Moody* v. *Brown*, 34 Me., 107; *Butterworth* v. *McKinley*, 11 Humph., 209; *Sandford* v. *Ferry Co.*, 27 Ind., 522; *Scudder* v. *Steamboat Co.*, 1 Cliff., 370.

This conclusion was assented to in the present case by the Chancellor, who proceeded to a final decree, however, against the plaintiffs in error, on the ground that the title of the United States passed by the Resolution of July 17, 1862 [12 Stat. at L., 628], not to the heirs at law of [514] Robert L. Stevens for their own benefit, but to or for the benefit of Edwin A. Stevens, the residuary legatee. The Court of Errors and Appeals took a different view, and decided that the title of the ship never vested in the United States as owner, following its own previous decision in *Elliott* v. *Edwards*, 35 N. J. L., 265; *S. C.*, 36 N. J. L., 449; the New York case of *Andrews* v. *Durant*, 11 N. Y., 35, and supported by the decision in *Williams* v. *Jackman*, 16 Gray, 514, in which the rule is stated by Bigelow, *Ch. J.*, as follows:

"Under a contract for supplying labor and materials and making a chattel, no property passes to the vendee till the chattel is completed and delivered or ready to be delivered. This is a general rule of law. It must prevail in all cases, unless a contrary intent is expressed or clearly implied from the terms of the contract."

The rule first introduced in *Woods* v. *Russell* [*supra*], as interpreted by the English courts, according to *Clarke* v. *Spence* [*supra*], is "Founded on the notion that provision for the payment, regulated by particular stages of the work, is made in the contract with a view to give the purchaser the security of certain portions of the

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work for the money he is to pay, and is equivalent to an express provision that on payment of the first installment, the general property in so much of the vessel as is then constructed shall vest in the purchaser." This *dictum* from *Woods* v. *Russell*, according to Benjamin on Sales, 246, 2d ed., was deliberately adopted as a rule of construction by which, in similar ship building contracts, the parties are held to have, by implication, evinced an intention that the property shall pass, notwithstanding the general rule to the contrary, and adds: "The law thus established has remained unshaken to the present time."

Nevertheless, in *Wood* v. *Bell*, 5 El. & Bl., 791, Lord Campbell, *ch. J.*, said: "When a man contracts with another to make any article for him for a given price, the general rule is, in the absence of all circumstances from which a contrary conclusion may be inferred, that no property passes in the chattel until it be completed and ready for delivery; on the other hand, where a bargain is made for the purchase of an existing ascertained chattel, the general rule, in the [515] same absence of opposing circumstances, is that the property passes immediately to the vendee; that is, that there is at once a complete bargain and sale. But these general rules are both and equally founded on the presumed intention of the parties. If, in the first, there are attendant circumstances from which the intention may be inferred that the property shall pass in the incomplete and growing chattel as the manufacture of it proceeds, or even in ascertained materials from which it is to be carried to perfection, that intention will be effectuated; and equally, in the latter, if it appear that the parties intended to postpone the transfer of the property till the payment of the price or the performance of any other condition, such intention will be upheld in the courts of law." "This principle," he added, "we believe to be well settled;" and referring to the cases of *Woods* v. *Russell*, *Clarke* v. *Spence*, *Laidler* v. *Burlinson et al.*, cited in argument, he remarked, that "Previous decisions, therefore, are mainly useful as serving to guide our judgment in estimating the weight of circumstances as evidence of intention;" and concluded by saying: "Still it must be remembered, after all, that what we have to determine is a question of fact, namely: what, upon a careful consideration of all the circumstances, we believe to have been the contract into which the parties have entered."

It is, perhaps, worthy of remark, that this passage from the judgment of *Lord* Campbell has been incorporated into the text of Abbott on Merchant Ships and Seamen, 4, by the editors of that treatise.

The courts of this country have not adopted any arbitrary rule of construction as controlling such agreements, but consider the question of intent, open in every case, to be determined upon the terms of the contract, and the circumstances attending the transaction. 1 Pars. Ship. and Adm., 68. And such seems to us to be the true principle.

Accordingly, we are of opinion, that the fact that advances were made out of the purchase money, according to the contract, for the cost of the work as it progressed, and that the government was authorized to require the presence of an agent to join in certifying to the accounts, are not conclusive evidence of an intent that the property in the ship should vest in the United [516] States prior to final delivery. Indeed, in reference to the latter circumstance, it is noticeable, as indicating a contrary intention, that the authority of the inspecting officer was expressly limited, so that it should not extend to a right to judge of the quality and fitness of the materials or workmanship, such matters and all others concerning the performance of the contract being reserved for determination after the completion of the work, as a condition of acceptance and final payment.

Much stress is laid, in argument, upon that provision of the contract which required all materials received at the yard for use in constructing the steamer, to be distinctly marked with the letters U. S., and declared that they should become the property of and belong to the United States. But it does not follow, because the materials provided for that use were declared to be the property of the United States, it was intended that they should remain so after becoming part of the structure. Such a precaution might well have been suggested, as a security against a diversion of the materials to any unauthorized use, or to preserve the materials to the United States, in case, by reason of the failure of the work or from any other cause, they should not be used in the vessel. Indeed, as is remarked by the learned Judge who delivered the opinion of the Court of Errors and Appeals in this case, the express declaration that defined the property in the unused materials, seems to exclude the implication sought to be raised as to the property in the unfinished ship; for the inference is obvious, from the particularity of such a provision, that the larger interest would not be left to mere intendment.

There are two other provisions of the contract, which seem to us conclusive of the question and, in a sense, adverse to the construction of the plaintiffs in error.

The first of these is that which required Stevens to execute and deliver a mortgage, in lieu of other security, for the faithful performance of the contract on his part, on all the land, docks, wharves, slips and all their appurtenances belonging to and embraced within the establishment at Hoboken, New Jersey, at which the war steamer was to be constructed, with power to the mortgagee to enter upon and sell the same [517] in case of failure on the part of Stevens to fulfill his part of the contract, or so much thereof as should be necessary to complete any deficiencies on his part.

The taking of this security, as an indemnity to the United States, assumes the anticipated possibility that the failure might be total, so that the vessel, when offered for delivery, might be altogether rejected. And it does not detract from the force of this conclusion, that the alternative provides for completing deficiencies, if they should prove to be remediable; for, in that case, the United States, at its option, might accept the vessel, thus becoming invested with the title, and make good its deficiencies out of this security.

The other feature of the contract, which corroborates this view, is that which provides that final payment for the steamer shall be made only upon the certificate of examiners, to be appointed for that purpose, that in her construc-

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tion, armament and equipment all the provisions of the contract have been fully performed and completed, which requires that the steamer shall be fully completed and delivered at the Navy Yard at Brooklyn, and fixes the gross amount which is to be paid for it when fully completed, delivered and accepted. The fact that advances are to be made in the meantime is expressly stated to be in consideration of the security to be given by Stevens for the faithful performance of his contract, and that compensation for his time and services must be wholly deferred until the final completing and delivery of the vessel.

It is thus apparent, as we think, from these stipulations that the vessel was in all respects to be at the risk of the builder until, upon its completion, the United States should accept it, upon final examination and certificate, as conforming in every particular with the requirements of the contract, and answering the description and warranty of an efficient steam battery for harbor defense, shot and shell proof.

And looking at the situation of the parties, and the objects they must have had in view, all doubt is removed as to their intention. Mr. Stevens was an ardent and sanguine inventor, who had convinced himself that his unique design of a naval structure was practicable and of great value, and that, if adopted, it would prove to be of immense public utility. He succeeded [518] also in persuading the government to make the experiment, and give him the opportunity of realizing his theories. But it was understood to be merely an experiment, and evidently, by the Navy Department, naturally conservative and inclined to adhere with some tenacity to its own traditions, regarded, at best, as of very doubtful success. The steamer, when built, was to constitute a part of the naval establishment of the United States. Can it be supposed that this was to take place except upon condition that, after completion and sufficient examination, it should be found fit for the service? This is the view, as it seems to us, which Congress, by its legislation, and the Navy Department, in all its dealings with the subject, constantly entertained and acted upon, and which both Robert L. Stevens and his brother, Edwin A. Stevens, did not hesitate to accept, the latter not shrinking from a further investment of $1,000,000 in an enterprise which he still cherished with confidence of ultimate success, after it had become to almost everyone else a demonstrated failure, and after the government, for whom it was originally intended, had refused to it all further subsidies.

We find, therefore, that on July 17, 1862, the date of the Joint Resolution of Congress, under which the plaintiffs in error make their claim, the United States had no title to the Stevens Battery; but that the property in it had continued in Robert L. Stevens until his death, and passed, by his will, to Edwin A. Stevens, as residuary legatee. It follows that it did not pass to the heirs at law of Robert L. Stevens by virtue of the Joint Resolution.

It is urged, in argument, that, if the right to the vessel itself did not pass, then the Joint Resolution must be construed as a transfer to the heirs of Robert L. Stevens, of the right of action of the United States to recover against his estate damages for his non-performance of his contract, together with the securities, by way of mortgage and lien, it held as indemnity. We see no ground for a construction that leads to so remarkable a result. The plain meaning of the Resolution is limited to a relinquishment on the part of the United States of any interest it might be supposed to have in the vessel, in which the heirs of Robert L. Stevens are mentioned, probably, because it was with him that the building contract was made; and if it could operate at [519] all as a release, would be to them, for the benefit of those who, by law, had become his successors in the title; and that release would necessarily convey with it, as an incident, an extinguishment of the obligation of the contract for construction, and all the securities taken for its performance. It was, in effect, and was doubtless intended as a declaration, on the part of the United States, for the benefit of whom it might concern, of its entire abandonment of all further connection with the battery and the contract for its construction. The subsequent assent on the part of Congress to its acceptance by the State of New Jersey, as a bequest from Edwin A. Stevens, while it could not operate to affect any rights vested in the interval, is, at least, a legislative interpretation of its previous release. This Resolution expressly recites that Edwin A. Stevens was the owner of the battery in his lifetime, and is scarcely more explicit in the recognition of his title than was the conduct of all the parties, including the present plaintiffs in error.

We are of opinion, for the reasons stated, that there is no error in the decree complained of, and it is accordingly affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ARTHUR R. RICHARDSON, *Appt.*, [252]
v.
BENJAMIN C. HARDWICK.

(See S. C., 16 Otto, 252-255.)

Parol evidence to vary written contract—obligation of contract.

1. Where a written contract is free from ambiguity, it is not competent to show by parol that payment was to be made in some other way than therein specified.
2. In suits upon unilateral contracts, it is only where the defendant has had the benefit of the consideration for which he bargained that he can be held bound.
3. Where one has, by contract, the privilege or option of buying an interest in lands by paying a certain sum within a limited time, the contract itself does not vest him with any interest or estate in the lands, and by his failure to pay the money or any part of it within the time limited, the privilege accorded him by the contract is at an end, and his rights under it cease.

[No. 83.]

Argued Nov. 16, 1882. Decided Nov. 27, 1882.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

The history and facts of the case appear in the opinion of the court.

Messrs. **D. C. Holbrook,** *H. H. Wells* and *Theo. Romeyn*, for appellant.

Messrs. **Henry M. Campbell** and *Alfred Russell*, for appellee.

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Mr. Justice **Woods** delivered the opinion of the court:

This was a bill in equity filed by Richardson, the appellant, to compel the specific performance of a contract relating to lands between him and Hardwick, the appellee.

The contract opened with a description of the lands to which it related, and then proceeded as follows:

"The above described lands have been purchased by me under an arrangement with Arthur R. Richardson, as follows: it is understood that said Richardson may become equally interested in the above lands by paying to me one half the purchase price of the lands, together with an equal share of all expenditures made by me for taxes or any other purpose, and also ten per cent interest on all capital furnished by me in connection with his half interest. It is further understood that the purchase price of the lands bought of T. H. Eaton is to be reckoned at $10 per acre, and the terms of the above agreement are limited to two years from this date. Said Richardson is to pay one half his share in one year, and the balance in two years.

ALPENA, Oct. 1st, 1868.

Arthur R. Richardson may cut timber on the within described lands on the following terms: he is to pay ($1.50) one dollar and a half per thousand feet, board measure, for all timber cut by him, and he further agrees to cut not less than twelve (12) thousand feet from each and every acre on which he may cut any, or in the event of his not doing so, he agrees to pay for twelve thousand feet, the same as though that [253] amount had been cut by him. The logs are to be holden for the stumpage and to be his when paid for, it being understood that payment is to be made for the same when they come into market.

B. C. HARDWICK,
ARTHUR R. RICHARDSON.

ALPENA, Oct. 1st, '68."

It is not disputed that before the date of this contract, Hardwick, the appellee, had purchased the lands described therein, had paid for them in full out of his own means, and had received a deed therefor in his own name. Prior to October 1, 1870, the date at which the two years mentioned in the contract expired, Richardson had cut timber on the lands on the terms mentioned in the contract, and had paid to Hardwick for "stumpage" $4,050, and, unless this was to be considered a payment on the contract, he, up to the date mentioned, had made no payment whatever thereon. On or just before October 1, 1870, by a verbal contract between Richardson and Hardwick, the time for the payment by Richardson of the half of the price of the lands was extended to October 1, 1871; but, up to that time, he made no payment on the lands, and never made any payment at any subsequent time and never tendered any. In the meantime, Hardwick was selling timber off the lands to other parties, and in the year 1872 sold all the lands themselves except 160 acres. The contention of Richardson now is, that, after crediting upon the contract one half the amount received by Hardwick for timber sold and for lands sold, the half of the purchase money and other expenses, which he was to pay in case he became equally interested in the lands, has been satisfied, and that he is entitled to share equally in the proceeds of the timber and lands, and is entitled to a conveyance of an undivided half of the lands remaining unsold.

But it was not until May or June, 1874, that Richardson ever intimated to Hardwick that he claimed an interest in the lands, and his claim was then peremptorily denied by Hardwick; and it was not until he filed the bill in this case, December, 10, 1875, that Richardson ever made any definite demand on Hardwick for an account of the proceeds of the sales of timber and lands, or for a conveyance of the undivided half of the lands remaining unsold.

Upon final hearing, upon the pleadings and evidence, the circuit court dismissed the bill, and the complainant appealed.

The rights of the parties must be governed [254] by their contract in writing entered into on October 1, 1868. All their previous negotiations resulted in that contract, and it was never subsequently changed, except by the verbal agreement to extend for one year the time allowed by it to Richardson to refund to Hardwick one half the purchase money, expenditures and taxes paid by him.

We cannot give any weight to the assertion of Richardson that it was one of the unexpressed terms of the contract that one half of the proceeds of timber sold from the lands should be indorsed upon the contract as payments made by him thereon. It is a matter in dispute between the parties whether any such understanding existed.

If it were competent to prove such an understanding by parol, the burden of proof would be on Richardson to establish it. Richardson, in his testimony, affirms the existence of this understanding, and Hardwick, in his testimony, denies it. We think the other testimony in the case leaves the preponderance of evidence on this point with the defendant.

But evidence to establish this understanding is clearly inadmissible. In respect to this matter the contract is free from ambiguity. Its plain meaning is that Richardson was to make payment directly to Hardwick, in money, of one half the amount paid by the latter on the lands. It is, therefore, not competent to show by parol that payment was to be made in some other way than that specified in the written instrument. *Sprigg* v. *Bank*, 14 Pet., 201; *Specht* v. *Howard*, 16 Wall., 564 [83 U. S., XXI., 348]; *Forsythe* v. *Kimball*, 91 U. S., 291 [XXIII., 352]; *Brown* v. *Spofford*, 95 U. S., 482 [XXIV., 510].

Looking, therefore, at the contract as reduced to writing by the parties, we are clear that Richardson is not entitled to the relief prayed for by his bill.

The written contract gives him the privilege, or, as counsel call it, an "option," to become equally interested in the lands by paying one half the purchase money, etc., written two years after its date. The contract, of itself, did not vest him with any interest or estate in the lands. It merely pointed out the mode in which he might acquire an interest, namely: by paying a certain sum of money within a certain time. He did not pay the money within the time limited by [255] the contract, and has never paid it or any part of it, and eighteen months before the commencement of this suit, Hardwick gave him notice that his option to purchase had been lost, and told him that he had no interest in the lands.

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It is clear from the terms of the contract that Richardson was not bound by it. He did not agree to purchase any share in the lands or to pay Hardwick any money. The contract gave Hardwick no cause of action against Richardson. The latter was not bound to become interested in the lands, or to pay any money thereon, unless he chose to do so.

In suits upon unilateral contracts, it is only where the defendant has had the benefit of the consideration for which he bargained that he can be held bound. *Jones* v. *Robinson*, 17 L.J.Exch., 36; *Mills* v. *Blackall*, 11 Q. B., 358; *Morton* v. *Burn*, 7 Ad. & El., 28; *Kennaway* v. *Treleavan*, 5 Mees. & W., 501.

In this case, Richardson having failed to pay the money or any part of it within the time limited, the privilege accorded him by the contract was at an end, and all the rights under it ceased.

The decree of the Circuit Court dismissing the bill was, therefore, right, and must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ROBERT M. WALLACE, Public Administrator of LEWIS COUNTY, MISSOURI, In Charge of the Estate of WILLIAM Y. WILLIAMS, Deceased, AND SARAH C. WILLIAMS, *Appts.*,

v.

URI S. PENFIELD AND FIRST NATIONAL BANK OF QUINCY, ILLINOIS.

(See S. C., 16 Otto, 260-264.)

Sufficient description in deed—voluntary conveyance, when fraudulent as to creditors.

1. Although a deed does not give an accurate description of the land intended to be conveyed, the deed will be held good if the description is such as to leave no one in serious doubt of the land intended.

2. A voluntary conveyance by a person in debt is not, as to subsequent creditors, fraudulent *per se*; to make it fraudulent, as to subsequent creditors, there must be proof of actual or intentional fraud. If the effect of the conveyance is to hinder or defraud existing creditors, it is, as to them, invalid.

[No. 19.]

Submitted Oct. 12, 1882. Decided Nov. 27, 1882.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri. The history and facts of the case appear in the

Statement of the case by *Mr. Justice* **Harlan**:

The First National Bank of Quincy, Illinois, recovered against W. Y. Williams and others, in the Circuit Court of Lewis County, Missouri, three judgments: one, on the 10th day of May, 1873, upon a note, dated June 19, 1871, and signed by J. R. Harris & Co., G. H. Simpson, W. Y. Williams and R. N. Blackwood; and the others, on the 5th day of March, 1874, upon notes, dated, respectively, July 19, June 3, and July 3, 1871, and each signed by J. R. Harris & Co., G. H. Simpson, W. Y. Williams, J. A. Hay and John Sisler.

The La Grange Savings Bank of Missouri recovered, in the same court, against Williams and others, two judgments, each on May 12, 1873, upon two notes: one for $1,635.25, dated August 14, 1871, and signed by G. H. Simpson, W. Y. Williams and R. N. Blackwood; the other, upon a note, dated February 1, 1872, and signed by G. H. Simpson, W. Y. Williams, John S. Motter and J. A. Hay.

Upon these various judgments executions issued, and were levied upon a tract of land, in Lewis County, Missouri, containing forty-two acres, and occupied by Williams and his family as their residence. The legal title to the land, at that time, was in the wife of Williams. It was conveyed to her by deed of February 11, 1868, duly filed for record on the 24th day of February, 1868. The deed did not accurately describe the metes an dbounds of the property intended to be conveyed and, in order to correct the description, another deed was made to Mrs. Williams on the 13th day of December, 1871, which was duly filed for record on the [261] 6th day of the succeeding month. The property so levied on, with all the improvements thereon, were sold at public auction, when U. S. Penfield became the purchaser, at the sum of $25, "in trust for the use and benefit of the execution creditors." As to the balance of the judgment debts, the executions were returned unsatisfied, and Penfield received from the sheriff a deed, in trust for the use and benefit of the creditors in whose behalf he bid off the property.

The present suit was commenced on the 30th day of June, 1875. It proceeds upon these grounds: that the property, so conveyed to Mrs. Williams, was purchased and paid for with the means of the husband, who caused the title to be placed in her name, with the fraudulent intent to hinder and delay his creditors; that after the conveyance Williams, being insolvent and in expectation of contracting future debts, did, with intent to hinder, delay and defraud his creditors, existing and future, and for the purpose of placing his means beyond the reach of creditors, with the knowledge, consent and approval of his wife, and out of his own means, exclusively, make valuable, permanent and

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NOTE.—*Settlement or conveyance for benefit of wife and child; when good or void as to creditors.* See, *note* to Sexton v. Wheaton, 21 U. S. (8 Wheat.), 229.

Misdescription in deed, when avoids it; when does not.

If the subject of the grant cannot be ascertained from the description the grant itself is void. Campbell v. Johnson, 44 Mo., 247; Bailey v. White, 41 N. H., 337; Wofford v. McKinna, 23 Tex., 44; Massie v. Long, 2 Ohio, 287; Shackleford v. Bailey, 35 Ill., 391.

Uncertainty or defects in the description do not render the deed void, if that result can be avoided by construction. Stone v. Stone, 116 Mass., 279; Bosworth v. Sturtevant, 2 Cush., 392; Harvey v. Mitchell, 31 N. H., 575; Andrews v. Murphy, 12 Ga., 431.

An evident omission may be thus supplied. Hoffman v. Riehl, 27 Mo., 554.

Where by rejecting a false and impossible part, a perfect description remains, the false part will be rejected and the deed held good. Tubbs v. Gatewood, 23 Ark., 128; Anderson v. Boughman, 7 Mich., 69; Beal v. Gordon, 55 Me., 482; Wade v. Deray, 50 Cal., 376; Wendell v. Jackson, 8 Wend., 183; S. C., 22 Am. Dec., 635; Raymond v. Coffey, 5 Oregon, 132; Thayer v. Torrey, 37 N. J. L., 339; Bond v. Fay, 12 Allen, 86; Shewalter v. Pirner, 55 Mo., 218; Vose v. Handy, 2 Greenl., 322; S. C., 11 Am. Dec., 101; Worthington v. Hylyer, 4 Mass., 196; Seaman v. Hogeboom, 21 Barb., 408; Hathaway v. Power, 6 Hill, 453; Melvin v. Proprietors, 5 Met., 15; S. C., 38 Am. Dec., 384.

No part will be rejected if all can stand together Herrick v. Hopkins, 23 Me., 217; Lane v. Thompson, 43 N. H., 320; Robertson v. Mosson, 26 Tex., 248.

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expensive improvements on the land, to the injury of his creditors; that the wife accepted the conveyance with knowledge and notice of the fraud imputed to her husband, and confederated with him to cheat and hinder his creditors by withholding from them, as well the land as all the moneys invested in its purchase and improvement.

The prayer of the bill is, that the conveyance to Mrs. Williams be declared inoperative against the creditors of the husband, and that the title to the land be decreed to and vested in Penfield, in trust for the execution creditors, and that he be decreed possession thereof for their use and benefit; that if the deed cannot be declared inoperative, as to creditors, then that the amount expended by Williams in the improvement of the land be declared a charge and incumbrance thereon in favor of his creditors.

The material allegations of the bill are denied in the answer both of Williams and his wife.

The circuit court, upon final hearing, decreed all the right, title and interest of both Williams and his wife in the land be, without further conveyance, vested in Penfield in trust for the banks, and that possession be forthwith delivered to him. From that decree the present appeal is prosecuted.

Messrs. F. M. Cockrell, **W. H. Hatch** and **Eppa Hunton,** for appellants.

Messrs. **John D. S. Dryden** and *H. S. Lipscomb*, for appellees.

[262] *Mr. Justice* **Harlan** delivered the opinion of the court:

A very careful scrutiny of the record has brought our minds to the conclusion that the decree cannot be sustained. That the land described in the conveyances to Mrs. Williams was purchased and paid for by her husband, with his means exclusively, and that the purchase was made with the intention of immediately improving the land and making it the permanent residence of himself and family, are facts clearly established by the evidence. Indeed, they are substantially admitted in the answer of both Williams and his wife. But the evidence falls far short of establishing fraud upon the part of Williams, either in causing the conveyance to be made to his wife, or in using his means, to the extent that he did, in improving the land. The facts are entirely consistent with an honest purpose to deal fairly with any creditors he then had, or might thereafter have, in the ordinary course of his business. It is true that Williams was somewhat indebted at the time of this voluntary settlement upon his wife, but his indebtedness was not such in amount or character as, taking into consideration the value of his other property interests, rendered it unjust to creditors existing or future, that he should, out of his income or estate, provide a home for his family by improving the land in question. When the conveyance was made to the wife, as well as during all the period when the land was being improved by the erection of a dwelling and other houses thereon, he had, according to weight of evidence, property which creditors could reach, exceeding, in value, all his existing indebtedness by several thousand dollars. He was engaged in active business, with fair prospects, good credit and, as we may infer from the record, of an unsullied reputation. His indebtedness existing at the time of the settlement upon the wife, as well as that which arose during the period when the improvements were made, was subsequently, and without unreasonable delay, fully discharged by him. The improvements were commenced in 1868, and were all, with trifling exceptions, completed and paid for before the close of the summer of 1869. So far as the record discloses, no creditor, who was such when the settlement was made or while the improvements were going on, was hindered materially by the withdrawal by Williams, from his means or business, of the sums necessary to pay for the land and the improvements. Those who seek, in this suit, to impeach the original settlement, or to reach the means invested by the husband in improving the wife's land, became creditors of the former sometime after the improvements (with slight exceptions not worth mentioning) had been made and paid for. If they trusted the husband in the belief that he owned the land, it was negligent in them so to do, for the conveyance of February 11, 1868, duly acknowledged, was filed for record within a few days after its execution. The circumstance that the original deed did not give an accurate description of the land intended to be conveyed, ought not to be permitted to defeat the original settlement upon the wife; this, because the description was such as to leave no one in serious doubt that the land intended to be conveyed was the identical land now in dispute. There is no intimation in the pleadings that the banks supposed, when contracting with Williams or when accepting from others commercial paper upon which his name appeared, that the deed of February 11, 1868, described land other than that upon which Williams, after that date, resided. On the contrary, the amended bill proceeds, in part, upon the ground, distinctly stated, that the land intended to be conveyed [263]

When effect cannot be given to the whole description the more definite and fixed prevails. Johnson v. McMillan, 1 Strob., 143; Den v. Graham, 1 Dev. & B., 76; S. C., 27 Am. Dec., 226; Abbott v. Abbott, 53 Me., 356; Gates v. Lewis, 7 Vt., 511; Piercy v. Crandall, 34 Cal., 334; Vance v. Forè, 24 Cal., 435; Reed v. Spicer, 27 Cal., 57; Bass v. Mitchell, 22 Tex., 285.

A description by a known meridian will prevail over that by a county. Sickmon v. Wood, 69 Ill., 339.

A mortgage is void if it fails to state the township or range, or the county or State in which the land is situate. Boyd v. Ellis, 11 Iowa, 97; Cochran v. Utt, 42 Ind., 267.

An omission of a township and range in describing land may be supplied by parol evidence. Foute v. Fairman, 48 Miss., 550.

The addition of false or mistaken descriptions in a deed will not frustrate the grant if there are others sufficiently clear to identify the thing intended to be granted. Morton v. Jackson, 1 Smedes & M., 494; S. C., 40 Am. Dec., 107; Jackson v. Marsh, 6 Cow., 284; McNaughton v. Loomis, 18 Johns., 81; Loomis v. McNaughton, 19 Johns., 448; Fish v. Hubbard, 21 Wend., 262; Hull v. Foster, 7 Vt., 100; Andrews v. Murphy, 12 Ga., 431; Gibson v. Bogy, 28 Mo., 478; Cooley v. Warren, 53 Mo., 166; Myers v. Ladd, 26 Ill., 415; Kruse v. Wilson, 79 Ill., 233; Eggleston v. Bradford, 12 Ohio, 312; Doane v. Willcutt, 16 Gray, 368.

A particular description will control a general description of the same tract. Phillips v. Porter, 3 Ark., 18; S. C., 36 Am. Dec., 448.

A mistake in the description will not vitiate a deed, if it is nevertheless sufficient to ascertain the land intended to be conveyed. Clark v. Munyan, 23 Pick., 410; S. C., 33 Am. Dec., 752.

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by that deed was the land now in dispute, and that the only purpose of the deed of December 13, 1871, was to correct the erroneous description in the deed of 1868.

An effort is made to show that some of the debts, evidenced by the notes, upon which the banks obtained judgment, existed when the conveyance of 1868 was executed, or when the improvements in question were made. But the evidence furnishes no basis for such a contention, except as to the note for $1,635.25, executed August 14, 1871, by G. H. Simpson, W. Y. Williams and R. N. Blackwood, and held by the La Grange Savings Bank. As to that note, the president of the bank states that in it was merged a prior note for $800 or $1,000, given by the parties last named in 1866 or 1867. But his evidence shows that he is not at all clear or positive in his recollections upon the subject; and, according to the decided preponderance of testimony, Williams was not a party to the note, which, it is claimed, was merged in that of August 14, 1871. The proof, upon this point, renders it quite certain that no part of the debt evidenced by that note existed against Williams, until, as surety for Simpson, he signed that note.

The principles of law which must determine the rights of the parties are well established by the decisions of the Supreme Court of Missouri. In *Pepper* v. *Carter*, 11 Mo., 543, that court, [264] after remarking that the question as to what would render a voluntary conveyance void as to creditors under the Statute of Elizabeth, from which the Missouri Statute was borrowed, had undergone much discussion, and been the subject of contradictory opinions, said: "Some would make an indebtedness *per se* evidence of fraud against existing creditors. Others would leave every conveyance of the kind to be judged by its own circumstances, and from them infer the existence or non-existence of fraud in each particular transaction. Without determining the question as to existing creditors, we may safely affirm that all the cases will warrant the opinion that a voluntary conveyance as to subsequent creditors, although the party be embarrassed at the time of its execution, is not fraudulent *per se* as to them; but the fact, whether it is fraudulent or not, is to be determined from all the circumstances. I do not say that the fact of indebtedness is not to weigh in the consideration of the question of fraud in such cases, but that it is not conclusive." In the later case of *Payne* v. *Stanton*, 59 Mo., 159, the same court, while quoting approvingly the language just cited from *Pepper* v. *Carter*, said that the "Doctrine is well settled that a voluntary conveyance by a person in debt is not, as to subsequent creditors, fraudulent *per se*. To make it fraudulent, as to subsequent creditors, there must be proof of actual or intentional fraud. As to creditors existing at the time, if the effect and operation of the conveyance are to hinder or defraud them, it may, as to them, be justly regarded as invalid, but no such reason can be urged in behalf of those who become creditors afterwards."

These decisions control the present case. Neither the conveyance to the wife nor the withdrawal of the husband's means from his business for the purpose of improving the land settled upon the wife, had the effect and operation to hinder or defraud his then existing creditors. Nor does the evidence justify the conclusion that the conveyance was executed, or the improvements made, with an intent to hinder or defraud either existing or subsequent creditors. Giving full weight to all the circumstances, there is no reason to impute fraud to the husband.

The decree is reversed, with directions to dismiss the bill.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

THE STEAMSHIP NEVADA, Her Tackle, etc., LIVERPOOL AND GREAT WESTERN STEAM COMPANY, LIMITED, Claimant, *Appt.*,

v.

SERGEANT J. QUICK, Libelant, ET AL.

(See S. C., "*The Nevada*," 16 Otto, 154-160.)

Collision—want of lookout—towage of steamer—injury by—canal-boat, when not in fault.

*1. An ocean steamer starting from a crowded slip, the motion of her propeller caused a canal-boat to break her fastenings and swing around against the propeller, whereby she was sunk. Held, that the steamer was in fault for not having a lookout at her stern, by whom the peril of the canal-boat could have been seen in time to stop the propeller and prevent the collision.

2. If towage is necessary to extricate a large steamer from a crowded slip or harbor without injury to other vessels, it should be employed.

3. Although powerful machines, like those of steamers and locomotives, may produce incidental inconveniences for which there is no remedy, yet they should be so managed and operated as to do the least possible injury consistent with their substantial usefulness.

4. Those in charge of the canal-boat, in this case, having done all that reasonable prudence required of them, by properly fastening their boat, were held free from blame.

[No. 58.]

Argued Oct. 30, 31, 1882. Decided Nov. 27, 1882.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the opinion of the court.

Mr. **Stephen P. Nash**, for appellant.

Messrs. **Robert D. Benedict, Eugene H. Lewis** and *D. H. Chamberlain*, for appellees.

Mr. Justice **Bradley** delivered the opinion of the court:

This case arises upon a libel filed in the District Court for the Southern District of New York, by S. J. Quick, master and owner of the canal-boat Kate Green, for himself and for F. A. McKnight, against the steamship Nevada, in a cause of collision. The libel alleges that McKnight was invested by subrogation, or otherwise, with the interest of the Western Insurance Company of Buffalo, who were insurers of 8100 bushels of corn, the cargo of The Kate Green at the time of the collision; that on the 27th of September, 1871, whilst the boat was lying securely fastened in a slip in New York City, between piers No. 46 and No. 47 on the North [155]

*Head notes by *Mr. Justice* Bradley.

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River, The Nevada, which had been moored in the same slip on the north side of pier No. 46, proceeded on her way to sea, and carelessly and negligently ran into and struck The Kate Green with her propeller, causing her to sink, whereby she was greatly injured and the cargo was destroyed, resulting in a total damage of $12,000.

The Liverpool and Great Western Steam Company appeared as claimants of The Nevada, and answered the libel, setting up that the collision was occasioned solely by the carelessness and negligence of the master and crew of The Kate Green.

McKnight filed a petition for leave to intervene, setting forth his interest in the cargo, to wit: that it had been insured by the Western Insurance Company, which became liable for and paid the full value thereof to the owners, and afterwards became bankrupt, and at the sale of its assets, he, McKnight, became the purchaser of its claims arising from the loss and destruction of said cargo. He was allowed to intervene accordingly.

Proofs being taken, a decree was made by the district court that the libelants recover their damages and costs against The Nevada, and it was referred to a commissioner to ascertain the amount of damage.

The commissioner reported that the damage done to The Kate Green, her furniture, loss of freight and interest, amounted to $4,289.72; and that the damage to the cargo, with interest, was $8,109.64. A decree was made for these sums with costs.

Upon appeal to the circuit court, this decree was affirmed and a new decree was entered (including interest to the date of the decree) in favor of Quick for the sum of $4,577.65, besides costs; and in favor of McKnight for the sum of $8,653.98, besides his costs.

The owners of The Nevada have appealed from this decree. So far as relates to Quick, the owner of The Kate Green, under the recent ruling of this court in the case of *Ex parte R.R. Co.* [*ante*, 78], decided at the present Term, the appeal must be dismissed; as to McKnight, it is necessary to examine the case at large.

The circuit court found the facts in detail, of [156] which it is sufficient to state, that about 8 o'clock P. M., September 27, 1871, the propeller steamship Nevada, belonging to one of the regular lines between New York and Liverpool, was lying alongside of pier No. 46 in the slip between that pier and pier No. 47 on the North River, New York, about to start on her voyage to Liverpool. She had been advertised to start at that hour, had rung her bells and blown her whistle several times, and her signals for starting were flying at mast-head. At that instant before her screw was put in motion, a steam-tug entered the slip with the canal-boat Kate Green in tow, and placed her alongside of another canal-boat, The C. H. Hart, lying fastened to a grain elevator, which was in turn fastened to the steamship Scotia, lying alongside pier No. 47 on the north side of the slip. The master and steersman of The Kate Green, which lay about sixty feet from The Nevada, instantly made her fast to The Hart, and at that moment the propeller of The Nevada began to revolve, and produced a suction and commotion of the water which caused The C. H. Hart to break her fastenings, and The Kate Green to swing around under the stern of The Nevada, where she was struck by the propeller and sunk and much injured, and her cargo was lost. She was not seen from The Nevada when she came in, and no special notice was given to her that The Nevada was about to leave, and those in charge of her had no actual knowledge of the fact until the propeller of The Nevada began to move. As soon as she began to swing around her master called loudly to The Nevada to stop her propeller, but he was not heard, or, if heard, not heeded.

The court further found as follows:

"10. No one on board of The Nevada knew of the parting of The Hart's lines, or of the swinging of The Green, or of the accident until after they arrived in Liverpool. If a man had looked from her deck over her side into the slip, he could not have failed to see what was going on all the time, from the first movement of the propeller and before, until she got out.

11. There was an abundance of time after the breaking of the fastenings of The Hart, and after The Green began to swing, and after the hail of her master, to have stopped the propeller, before the collision. [157]

12. The report of the commissioner as to the damages is warranted by the evidence, and the libelant, McKnight, was the owner of the claim for damages when the libel was filed.

The conclusions of law found by the circuit court were as follows:

"1. The Nevada was in fault for not keeping a sufficient lookout aft and on the side next the slip, and in not seeing The Kate Green when she came in, or as she swung over, and in not stopping the propeller in time to avoid the collision.

2. The Kate Green, under the peculiar circumstances in which she was placed, was not in fault.

3. The libelants are entitled to recover the damages reported by the commissioner."

It seems hardly necessary to do more than to state the case as the facts are found by the court in order to decide it. The Kate Green came into the slip, it is true, at the time The Nevada was about to leave; and those in charge of her ought to have known this fact from the ringing of The Nevada's bells and her visible signals for starting. But supposing they did know it, what more could they do than they did do? They immediately made fast to The C. H. Hart, which was also made fast to the ship lying at the north pier. It was reasonable for them to suppose that the fastening of The Hart was secure. They could not know that it would break. It was that break which set them adrift, subject to the suction caused by the motion of The Nevada's propeller. Their own fastenings were sufficient. We do not see how the court could find otherwise than that they were free from fault or negligence. Perhaps they might have done something else which would have been better. The event is always a great teacher. They might have staid out in the river and not entered the slip; or, having entered, they might have gone back to the bulk-head, and staid there till The Nevada left. But these possibilities are not the criteria by which they are to be judged. The question is: did they do all that reasonable

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prudence required them to do under the circumstances? And this question, we think, must be answered in the affirmative.

Then, how is it with The Nevada? Did those [158] on board of her do all that was reasonably required of them? It is significantly asked by her counsel, whether a steamship is to be precluded from the use of her own means of locomotion? Must she be subjected to the inconvenience and expense of employing a tug to tow her out into open water? That does not necessarily follow. If, indeed, the action of her propellers is such as to cause unavoidable injury to other craft in a crowded harbor, or in a confined space like that of a slip or dock used by vessels of every kind, she might be justly required to find other means of moving in a position involving so much peril. This is no more than is required in analogous cases. Railroad companies are compelled to slacken the speed of their trains in passing through cities, and are often either prohibited from using ordinary locomotive engines in the more public streets, or required to guard their tracks by means of gates, bars or fences in order to prevent accidents and collisions. Incidental inconveniences, it is true, attach to the use of many of the great improvements of the age; inconveniences which must be submitted to in order that the public may have the benefit of those improvements. Almost every new machine inflicts loss of employment upon some portion of the laboring class, which are thus obliged to seek other fields of industry. Steamboats have taken the place of sailing vessels; railroads have interfered with steamboats, and have rendered useless thousands of stage-coaches, and the appliances connected with them. The vast power and speed of the modern locomotive engine, carrying its thousand passengers or its hundreds of tons of merchandise, require the private carriage and the country team to await its passage and give it the right of way. The large steamer which navigates our rivers creates an agitation of the waters which cannot be prevented without staying its speed and crippling its usefulness, and which requires from smaller vessels in its neighborhood increased attention and care to avoid being foundered or injured. Horse railroads in cities incumber the streets with their iron tracks and render the passage of private vehicles more difficult and dangerous. But whilst these incidental and unavoidable inconveniences must be submitted to, in order that the greater benefit derived from the new improvements may be enjoyed, there still remains [159] the duty of so managing and operating them as to do the least possible injury consistent with the fair attainment of their substantial benefits. The ocean steamer is one of the great inventions of the century, and one of the advanced instrumentalities of modern civilization; but whilst it may freely exercise its powerful propeller and sport its leviathan proportions on the ocean or in deep and open waters, it is justly required to observe extraordinary care and watchfulness when surrounded by feebler craft in a crowded harbor. Under some circumstances, and within a limited space, it may even be required to dispense with the use of its ordinary means of locomotion, and resort to the employment of towage or other safe and quiet means of changing its position and effecting its necessary movements. Such a modification of the use of its power, when absolutely required for the safety of other vessels rightfully located in its vicinity, would produce no material diminution of its efficiency in the accomplishment of its principal design.

However, we do not mean to say that, in the application of these principles to the present case, it was the duty of The Nevada to remit the use of her propeller in leaving her place in the slip where she lay. The court does not find her in fault for using it, but for not having a lookout at her stern, and on the side next to the slip, who could have seen the breaking away of The Hart and The Kate Green from their fastenings and, by giving timely alarm, could have averted the disaster by a momentary stopping of The Nevada's engine. In such a place, and in the midst of such a crowd of vessels as then filled the slip, since she did put her propeller in motion, she was bound to use the utmost caution and circumspection in order to avoid doing injury. The least that could be expected of her was a constant lookout at every part. But the court finds that "No one on board of The Nevada knew of the parting of The Hart's lines, or of the swinging of The Green, or of the accident, until after they arrived at Liverpool. If a man had looked from her deck over her side into the slip, he could not have failed to see what was going on all the time, from the first movement of the propeller, and before, until she got out." And the court further finds that "There was abundant time after the breaking of the fastenings of The Hart, and after [160] The Green began to swing, and after the hail of her master, to have stopped the propeller before the collision."

This, as it seems to us, settles the case and amply justifies the conclusion of law made by the court below, that "The Nevada was in fault for not keeping a sufficient lookout aft and on the side next the slip, and in not seeing The Kate Green when she came in, or as she swung over, and in not stopping the propeller in time to avoid the collision." In view of the principles to which we have adverted, and which ought to control this case, no other conclusion could have been reached.

We see no error in the decree of the Circuit Court and it is, therefore, affirmed, with interest and costs.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Plff. in Err.*,
v. [327]
ERIE RAILWAY COMPANY.

(See S. C., 16 Otto, 327-337.)

Tax on railway company.

Under section 122 of the Act of June 30, 1864, ch. 173, as amended by the Act of July 13, 1866, ch. 184, a railway company is liable to pay a tax of 5 per cent on the interest which it has paid to non-resident alien owners and holders of its coupons and bonds, with interest at 6 per cent from the several times when the same became due and payable.

[No. 11.]

Argued Mar. 3, 1882. Reargued Oct. 17, 18, 1882. Decided Nov. 27, 1882.

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IN ERROR to the Circuit Court of the United States for the Southern District of New York.

This action was brought in the District Court of the United States for the Southern District of New York, by the plaintiff in error, to recover certain taxes and penalties alleged to be due and unpaid.

The district court entered a judgment, on an agreed statement of facts, in favor of the plaintiff, for $3,467.48, being a less sum than the amount claimed by said plaintiff. This judgment having been affirmed, on error, by the court below, the plaintiff sued out this writ of error.

Statement of the case by *Mr. Justice* **Field:**

This was an action to recover taxes alleged to be due to the plaintiff on certain interest coupons paid by the defendant in the years 1866, 1867, 1868 and 1869, on bonds previously issued by it; and also certain penalties alleged to be due the plaintiff for failure of the defendant to make returns of the amount of the taxes. The action was founded on section 122 of the Act of June 30, 1864, 13 Stat. at L., 284, 285, as amended by section 9 of the Act of July 13, 1866, 14 Stat. at L., 138, 139.

That section, as amended, provides as follows: "That any railroad, canal, turnpike, canal navigation or slack-water company, in- [329] debted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money due or payable to its stockholders, *including non-residents, whether citizens or aliens, as part of the earnings, profits, income or gains of such company*, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five *per centum* on the amount of all such interest or coupons, dividends or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable, *including non-residents, whether citizens or aliens;* and said companies are hereby authorized to deduct and withhold from all payments on account of any interest or coupons and dividends due and payable as aforesaid, the tax of five *per centum;* and the payment of the amount of said tax, so deducted from the interest or coupons or dividends and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend or interest, or coupon on the bonds or other evidences of their indebtedness, so held by any person or party whatever, except where said companies may have contracted otherwise; and a list or return shall be made and rendered to the assessor or assistant assessor, on or before the tenth day of the month following that in which said interest, coupons or dividends become due and payable, and as often as every six months; and said list or return shall contain a true and faithful account of the amount of tax, and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said tax. And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the tax as aforesaid, the company making such default shall forfeit as a penalty the sum of $1,000; and in case of any default in making or rendering said list or return, or of the payment of the tax or any part thereof, as aforesaid, the assessment and collection of the [330] tax and penalty shall be made according to the provisions of law in other cases of neglect or refusal; *Provided*, That, whenever any of the companies mentioned in this section shall be unable to pay the interest on their indebtedness, and shall in fact fail to pay such interest, that in such cases the tax levied by this section shall not be paid to the United States until said companies resume the payment of interest on their indebtedness."

The case was tried in the District Court for the Southern District of New York upon an agreed statement of facts, of which the following are all that are deemed material to explain the question raised and decided. By this statement it was admitted that, prior to September 1, 1866, the defendant had issued sterling coupon bonds to the amount of £800,000, dated September 1, 1865, the principal of which was payable two years after date, drawing interest at 6 per cent per annum, payable semi-annually on the first days of March and September of each year; and the principal and interest of which were payable in London, England, at the office of Junius S. Morgan & Co., bankers, of London; that, after March 1, 1868, and prior to September 1, 1868, the defendant had issued and sold bonds of the same class amounting to £200,000, the principal and interest of which were payable at the same place as the bonds previously issued; that all the bonds, with coupons for interest attached, were sold directly to J. S. Morgan & Co., J. T. Mackenzie and Stern Brothers, all foreign bankers, having their places of business in London, and were by them sold to their customers in England and on the Continent of Europe; that during the years 1866, 1867, 1868, 1869, the bonds and coupons were all held by non-resident aliens, and not by citizens of the United States, except bonds to the amount of £20,000, and the coupons attached, which were held and owned by a citizen or citizens of the United States residing in Europe; that the amount of interest on all the bonds was provided for, and sent forward by the defendant, in one sum or block, to J. S. Morgan & Co., before the dates at which it fell due, and as it fell due was paid by J. S. Morgan & Co., at their banking house in London, to the holders of the bonds and coupons; that the amount of interest paid in the years mentioned on the above described bonds was £186,000, of which £4,200 were paid on the £20,000 held by a citizen or citizens of the United States; that the defendant made no returns to the assessor, or to any other officer of the internal revenue of the United States, of the payment of the interest or any part thereof, nor did it ever pay to the United States, or to anyone on their behalf, 5 per cent tax, or any tax on the interest or any part thereof; nor did the defendant withhold the tax, or any part thereof, from the amount of the interest, but paid the full amount to the holders of the bonds; and that no assessment was ever made by the

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plaintiffs, or by any officer of the plaintiffs, on the defendant for any portion of the tax, nor was any demand ever made on the defendant for the payment of the same to the United States until December 31, 1872.

The district court held that the defendant was not liable for a tax on the £181,800 sterling paid for interest upon coupons and bonds owned and held by non-resident aliens, but was liable for the tax on £4,200 sterling paid for interest on coupons and bonds owned and held by citizens of the United States; and, also, that the defendant was liable for only one penalty for failure to make return to the revenue officer of the amount paid. Judgment was rendered accordingly.

From this judgment the plaintiff carried the case to the circuit court, which affirmed the judgment of the district court. To review this latter judgment a writ of error was taken from this court.

Two questions were presented for determination:

First. Whether the court below erred in holding that the defendant was not liable to pay the alleged tax on the £181,800 sterling interest which defendant paid to non-resident alien owners and holders of coupons and bonds. No question was made as to the liability of the defendant to recover the tax on the £4,200 interest paid to American citizens, as adjudged by the court below; and,

Second. Whether the court below erred in holding that the defendant was liable for one penalty only out of the seven which the plaintiff claimed in its complaint.

Messrs. **E. B. Smith,** *Asst. Atty-Gen.*, and **S. F. Phillips,** *Solicitor-Gen.*, for plaintiff in error.

Mr. **Wm. D. Shipman,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This judgment is reversed on the authority of *Railroad Company* v. *Collector*, 100 U. S., 595 [XXV., 647], *and the cause is remanded, with instructions to enter a judgment in favor of the United States, for the equivalent in lawful money of the United States of the tax of £9,300 sterling, with interest at the rate of 6 per cent per annum from the several times when the same became due and payable according to the agreed statement of facts on which the submission was made below.* As no claim was made on the argument in this court, either for a penalty or for the currency value of the pounds sterling when the taxes fell due, we have not considered the questions which would have arisen if such a demand had been made. For these reasons the judgment will be without penalties and for the present value of the pounds sterling in lawful money.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Bradley,** with whom *Mr. Justice* **Harlan,** concurred:

I concur in the judgment of the court in this case, but not for the reasons given in the case of the *R. R. Co.* v. *Collector*, 100 U. S., 595 [XXV., 647]. I concurred in the judgment in that case, as in this, on grounds essentially different from those given by the court. I always regarded the tax which, by the 122d section of the Internal Revenue Act of 1864 [13 Stat. at L., 284], was laid upon the interest payable on the bonds and upon the dividends declared on the stock, of railroad and other corporations, as a tax on the incomes *pro tanto* of the holders of such bonds and stock. [*Stockdale* v. *Ins. Co.*], 20 Wall., 333 [87 U. S., XXII., 851]; *R. R. Co.* v. *Rose*, 95 U. S., 78 [XXIV., 876]. As to the interest payable on bonds, it was not a tax upon the companies in respect of a debt owed by them, nor upon the property represented thereby. The property obtained by the proceeds of the loans represented by the bonds was taxable (if not taxed) in another form. That property consisted of the railroad tracks, or canal, and other specific property of the companies respectively. If this property was not taxed directly, it was taxed indirectly by means of the duty of 2½ per cent which was laid on their gross earnings. The tax laid upon their bonds was intended to affect the owners of the bonds, and whilst the companies were directed to pay it, they were authorized to retain the amount from the installments due to the bondholders, whether citizens or aliens. The objection that Congress had no power to tax non-resident aliens, is met by the fact that the tax was not assessed against them personally, but against the *rem*, the credit, the debt due *to* them. Congress has the right to tax all property within the jurisdiction of the United States, with certain exceptions not necessary to be noted. The money due to non-resident bondholders in this case was in the United States—in the hands of the Company—before it could be transmitted to London, or other place where the bondholders resided. Whilst here it was liable to taxation. Congress, by the internal revenue law, by way of tax, stopped a part of the money before its transmission, namely: 5 per cent of it. Plausible grounds for levying such a tax might be assigned. It might be said that the creditor is protected by our laws in the enjoyment of the debt; that the whole machinery of our courts and the physical power of the government are placed at his disposal for its security and collection.

Whether taxation thus imposed would be respected by foreign governments if the creditor could bring before their courts the debtor Company or its property, does not concern us in considering the question now presented. There is nothing in the Constitution which authorizes this court, or any other court, to disaffirm the power of Congress to lay the tax. Congress is its own judge of the propriety or expediency of laying it.

Indeed, so far as the power of Congress is concerned, regarded in reference to any power the courts have to limit or restrain it, I see no reason why Congress may not lay a tax upon any property on which the government can lay its hands, whether within or without the jurisdiction of the United States. If, in imitation of the dues levied by Denmark upon vessels passing through the Cattegat Sound, Congress should levy a duty upon all vessels passing through the Strait of Florida, I do not know of any power which the courts possess to prevent it. It might create complications with foreign governments, it is true, and involve the country in war; but Congress has the power, if it chooses to take the responsibility of creating, or giving occasion to such complications. The responsibility rests upon it alone.

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So if, in taxing money due from citizens of the United States to foreign citizens, any complications arise with the governments to which the latter are subject, Congress alone has the responsibility, and is the only department of our government which has a right to take such a responsibility. In the *Foreign-Held Bonds Cases*, 15 Wall. [82 U. S., XXI., 146, 164, 179], the State Legislature had laid a tax on the interest payable upon the bonds of all corporations doing business in the State; and authorized the companies to retain the amount out of the interest payable to the bondholders without regard to their residence or nationality. I concurred in the judgment rendered in that case on the ground that the State, in passing such a law, applicable to pre-existing contracts, exceeded its just powers under our form of government, and that the law, in its effect upon non-resident bondholders, impaired the obligation of the contract.

Considering, therefore, that if Congress chooses to take the responsibility of levying such a tax as the one in question, the courts have no power to control its action, or to give any relief to parties affected by it, I concur in the judgment of reversal.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Field**, dissenting:

I am not able to agree with the majority of the court in the decision of this case. The tax which is sustained is, in my judgment, a tax upon the income of non-resident aliens and nothing else. The 122d section of the Revenue Act of 1864, as amended by that of 1866, subjects the interest on the bonds of the Company to a tax of 5 per cent, and authorizes the Company to deduct it from the amount payable to [331] the coupon holder, whether he be a non-resident alien or a citizen of the United States. The Company is thus made the agent of the Government for the collection of the tax. It pays nothing itself; the tax is exacted from the creditor, the party who holds the coupons for interest. No collocation of words can change this fact. And so it was expressly adjudged with reference to a similar tax in the case of *U. S.* v. *R. R. Co.*, reported in the 17th Wall., [84 U. S., XXI., 597]. There a tax, under the same statute, was claimed upon the interest of bonds held by the City of Baltimore. And it was decided that the tax was upon the bondholder, and not upon the corporation which had issued the bonds; that the corporation was only a convenient means of collecting it; and that no pecuniary burden was cast upon the corporation. This was the precise question upon which the decision of that case turned.

A paragraph from the opinion of the court will show this, beyond controversy. "It is not taxation," said the court, "that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property. In the cases we are considering, the corporation parts not with a farthing of its own property. Whatever sum it pays to the government is the property of another. Whether the tax is five per cent on the dividend or interest, or whether it be fifty per cent, the corporation is neither richer nor poorer. Whatever it thus pays to the government, it by law withholds from the creditor. If no tax exists, it pays seven per cent, or whatever be its rate of interest, to its creditor in one unbroken sum. If there be a tax, it pays exactly the same sum to its creditor, less five per cent thereof, and this five per cent it pays to the government. The receivers may be two, or the receiver may be one, but the payer pays the same amount in either event. It is no pecuniary burden upon the corporation, and no taxation of the corporation. The burden falls on the creditor. He is the party taxed. In the case before us, this question controls its decision. If the tax were upon the railroad, there is no defense; it must be paid. *But we hold that the tax imposed by the 122d section is, in substance and in law, a tax upon the income of the creditor or stockholder, and not a tax upon the corporation.*" [332] See, also, *Haight* v. *R. R. Co.*, 6 Wall., 15 [78 U. S., XVIII., 818], and *R. R. Co.* v. *Jackson*, 7 *Id.*, 262, 269 [74 U. S., XIX., 88, 90].

The bonds, upon the interest of which the tax in this case was laid, are held in Europe, principally in England; they were negotiated there; the principal and interest are payable there; they are held by aliens there, and the interest on them has always been paid there. The money which paid the interest was, until paid, the property of the company; when it became the property of the bondholders it was outside of the jurisdiction of the United States.

Where is the authority for this tax? It was said by counsel on the argument of the case, somewhat facetiously, I thought at the time, that Congress might impose a tax upon property anywhere in the world, and this court could not question the validity of the law, though the collection of the tax might be impossible, unless, perchance, the owner of the property should at some time visit this country or have means in it which could be reached. This court will, of course, never, in terms, announce or accept any such doctrine as this. And yet it is not perceived wherein the substantial difference lies between that doctrine and the one which asserts a power to tax, in any case, aliens who are beyond the limits of the country. The debts of the Company, owing for interest, are not property of the Company, although counsel contended they were, and would thus make the wealth of the country increase by the augmentation of the debts of its corporations. Debts, being obligations of the debtors, are the property of the creditors, so far as they have any commercial value, and it is a misuse of terms to call them anything else; they accompany the creditors wherever the latter go; their *situs* is with the latter. I have supposed heretofore that this was common learning, requiring no argument for its support, being, in fact, a self-evident truth, a recognition of which followed its statement. Nor is this the less so because the interest may be called in the statute a part of the gains and profits of the Company. Words cannot change the fact, though they may mislead and bewilder. The thing remains through all disguises of terms. If the Company makes no gains or profits on its business and borrows the money to meet its interest, though it be in the markets abroad, it is still required [333] under the statute to withhold from it the amount of the taxes. If it pays the interest, though it be with funds which were never in the United

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States, it must deduct the taxes. The Government thus lays a tax, through the instrumentality of the Company, upon the income of a non-resident alien over whom it cannot justly exercise any control, nor upon whom it can justly lay any burden.

The *Chief Justice*, in his opinion in this case, when affirming the judgment of the district court, happily condensed the whole matter into a few words. "The tax," he says, "for which the suit was brought, was the tax upon the owner of the bond, and not upon the defendant. It was not a tax in the nature of a tax *in rem* upon the bond itself, but upon the income of the owner of the bond, derived from that particular piece of property. The foreign owner of these bonds was not in any respect subject to the jurisdiction of the United States, neither was this portion of his income. His debtor was, and so was the money of his debtor, but the money of his debtor did not become a part of his income until it was paid to him, and in this case the payment was outside of the United States in accordance with the obligations of the contract which he held. The power of the United States to tax is limited to persons, property and business within their jurisdiction, as much as that of a State is limited to the same subjects within its jurisdiction." *State Tax on Foreign-Held Bonds*, 15 Wall., 300 [82 U. S., XXI., 179].

"A personal tax," says the Supreme Court of New Jersey, "is the burden imposed by government on its own citizens for the benefits which that government affords by its protection and its laws, and any government which would attempt to impose such a tax on citizens of other States would justly incur the rebuke of the intelligent sentiment of the civilized world." *State* v. *Ross*, 23 N. J. L. (3 Zab.), 521.

In imposing a tax, says *Ch. J.* Marshall, the Legislature acts upon its constituents. "All subjects," he adds, "over which the power of a state extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced [334] self-evident." *McCulloch* v. *Maryland*, 4 Wheat., 428, 429.

There are limitations upon the powers of all governments, without any express designation of them in their organic law; limitations which inhere in their very nature and structure, and this is one of them—that no rightful authority can be exercised by them over alien subjects, or citizens resident abroad or over their property there situated. This doctrine may be said to be axiomatic, and courts in England have felt it so obligatory upon them, that where general terms, used in Acts of Parliament, seem to contravene it, they have narrowed the construction to avoid that conclusion. In a memorable case, decided by *Lord* Stowell, which involved the legality of the seizure and condemnation of a French vessel engaged in the slave trade, which was, in terms, within an Act of Parliament, that distinguished Judge said: "That neither this British Act of Parliament nor any commission founded on it can affect any right or interest of foreigners unless they are founded upon principles and impose regulations that are consistent with the law of Nations. That is the only law which Great Britain can apply to them, and the generality of any terms employed in an Act of Parliament must be narrowed in construction by a religious adherence thereto." *Le Louis*, 2 Dod., 239.

Similar language was used by *Mr. Justice* Bailey of the King's Bench, in *Madrazo* v. *Willes*, 3 B. & Ald., 353, where the question was whether the Act of Parliament, which declared the slave trade and all dealings therewith unlawful, justified the seizure of a Spanish vessel, with a cargo of slaves on board, by the captain of an English naval vessel, and it was held that it did not. The odiousness of the trade would have carried the justice to another conclusion if the public law would have permitted it, but he said, "That, although the language used by the Legislature in the statute referred to is undoubtedly very strong, yet it can only apply to British subjects, and can only render the slave trade unlawful if carried on by them; it cannot apply in any way to a foreigner. It is true that if this were a trade contrary to the law of nations a foreigner could not maintain this action. But it is not; and as a Spaniard could not be considered as bound by the Acts of the British Legislature prohibiting this trade, it would be unjust to deprive him of a remedy for the heavy damage he has sustained." [335]

In the case of *The Apollon*, 9 Wheat., 362, a libel was filed against the Collector of the District of St. Mary's for damages occasioned by the seizure of the ship and cargo whilst lying in a river within the territory of the King of Spain, and *Mr. Justice* Story said, speaking for the court, that "The laws of no Nation can justly extend beyond its own jurisdiction, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other Nation within its own jurisdiction. And however general and comprehensive the phraseology used in our municipal laws may be, they must always be restricted in construction to places and persons upon whom the Legislatures have authority and jurisdiction."

When the United States became a separate and independent Nation, they became, as said by *Chancellor* Kent, "subject to that system of rules which reason, morality and custom had established among the enlightened Nations of Europe as their public law," and by the light of that law must their dealings with persons of a foreign jurisdiction be considered; and according to that law there could be no debatable question, that the jurisdiction of the United States over persons and property ends where the foreign jurisdiction begins.

What urgent reasons press upon us to hold that this doctrine of public law may be set aside, and that the United States, in disregard of it, may lawfully treat as subject to their taxing power the income of non-resident aliens, derived from the interest received abroad on bonds of corporations of this country negotiable and payable there? If, in the form of taxes, the United States may authorize the withholding of a portion of such interest, the amount will be a matter in their discretion; they may authorize the whole to be withheld. And if they can do this, why may not the States do the same thing with reference to the bonds issued by corporations created under their laws? They will not be slow to act upon the example set. If such a tax may be levied by the United States in the rightful

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exercise of their taxing power, why may not a similar tax be levied upon the interest on bonds of the same corporations by the States within their respective jurisdictions in the rightful exercise of their taxing power? What is sound [336] law for one sovereignty ought to be sound law for another.

It is said, in answer to these views, that the governments of Europe—or at least some of them, where a tax is laid on incomes—deduct from the interest on their public debts the tax due on the amount as income, whether payable to a non-resident alien or a subject of the country. This is true in some instances, and it has been suggested in justification of it that the interest, being payable at their treasuries, is under their control, the money designated for it being within their jurisdiction when set apart for the debtor, who must in person or by agent enter the country to receive it. That presents a case different from the one before us in this—that here the interest is payable abroad, and the money never becomes the property of the debtor until actually paid to him there. So, whether we speak of the obligation of the company to the holder of the coupons, or the money paid in its fulfillment, it is held abroad, not being, in either case, within the jurisdiction of the United States. And with reference to the taxation of the interest on public debts, Mr. Phillimore, in his treatise on International Laws, says:

"It may be quite right that a person having an income accruing from money lent to a foreign State should be taxed by his own country on his income derived from this source; and if his own country impose an income tax, it is, of course, a convenience to all parties that the government which is to receive the tax should deduct it from the debt which, in this instance, that government owes to the payer of the tax, and thus avoid a double process; *but a foreigner, not resident in the State, is not liable to be taxed by the State;* and it seems unjust to a foreign creditor to make use of the machinery which, on the ground of convenience, is applied in the cases of domestic creditors, in order to subject him to a tax to which he is not on principle liable." 2d Vol., 14, 15.

Here, also, is a further difference: the tax here is laid upon the interest due on private contracts. As observed by counsel, no other government has ever undertaken to tax the income of subjects of another Nation accruing to them at their own domicil upon property held there, and arising out of ordinary business, or contracts between individuals.

This case is decided upon the authority of *R.* [337] *R. Co.* v. *Collector*, reported in 100 U. S., 595 [XXV., 647], and the doctrines from which I dissent necessarily flow from that decision. When that decision was announced I was apprehensive that the conclusions would follow which I now see to be inevitable. It matters not what the interest may be called, whether classed among gains and profits, or covered up by other forms of expression, the fact remains, the tax is laid upon it, and that is a tax which comes from the party entitled to the interest—here, a non-resident alien in England, who is not and never has been subject to the jurisdiction of this country.

In that case the tax is called an excise on the business of the class of corporations mentioned and is held to be laid, not on the bondholder who receives the interest, but upon the earnings of the corporations which pay it. How can a tax on the interest to be paid be called a tax on the earnings of the corporation if it earns nothing—if it borrows the money to pay the interest? How can it be said not to be a tax upon the income of the bondholder when out of his interest the tax is deducted?

That case was not treated as one, the disposition of which was considered important, as settling a rule of action. The opening language of the opinion is: "As the sum in this suit is small and the law under which the tax in question has long since been repealed, the case is of little consequence as regards any principle involved in it as a rule of future action." But now it is invoked in a case of great magnitude, and many other similar cases, as we are informed, are likely soon to be before us; and, though it overrules repeated and solemn adjudications rendered after full argument and mature deliberation; though it is opposed to one of the most important and salutary principles of public law, it is to be received as conclusive, and no further word from the court, either in explanation or justification of it, is to be heard. I cannot believe that a principle so important as the one announced here, and so injurious in its tendencies, so well calculated to elicit unfavorable comment from the enlightened sentiment of the civilized world, will be allowed to pass unchallenged, though the court is silent upon it.

I think the judgment should be affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 234.

EDWARD SCHWED ET AL., *Appts.*, [188]

v.

WILLIAM SMITH ET AL.

(See S. C., 16 Otto, 188-190.)

Jurisdictional amount.

Although the effect of a decree is to deprive defendant, in the aggregate, of more than $5,000, if it has been done at the suit of several parties on several claims, who might have sued separately but whose suits have been joined in one for convenience and to save expense, neither one of whom separately recovered $5,000, the amount is not sufficient to give defendant the right of appeal to this court.

[No. 1067.]

Motion submitted Nov. 13, 1882. Decided Nov. 27, 1882.

APPEAL from the Circuit Court of the United States for the Western District of Missouri.

The history and facts of the case appear in the opinion of the court.

On motion to dismiss.

Messrs. **Enoch Totten** and **James S. Botsford,** for appellees, in support of motion.

Messrs. **Mayer Sulzberger** and *Bryant, Holmes & Waddill,* for appellants, *contra.*

NOTE.—*Jurisdiction of U. S. Supreme Court depends on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See, *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

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Mr. Chief Justice **Waite** delivered the opinion of the court:

On the 26th of January, 1880, Schwed & Newhouse confessed a judgment in the Circuit Court of Jackson County, Missouri, against themselves and in favor of Henry Heller, for $9,512.50. Execution was at once issued on this judgment, and levied by Bailey, sheriff of the county, on a stock of goods.

On the 12th of February, 1880, William Smith & Co. had a suit pending in the same court, in their favor, against Schwed & Newhouse for the recovery of $3,829.71, and William C. Greene & Co., another suit for the recovery of $1,013.98. In both the suits, attachments were issued and levied on the same goods taken under the execution in favor of Heller, and then in the hands of the sheriff. Smith & Co. and Greene & Co. thereupon began a suit in the same court against Schwed, Newhouse, Heller and the sheriff, the object of which was to set aside the judgment in favor of Heller on the ground that it was confessed without any consideration, and for the purpose of covering up the property of Schwed & Newhouse, and hindering and delaying creditors in the collection of their debts. This suit was afterwards removed to the Circuit Court of the United States for the Western Division of the Western District of Missouri. Afterwards judgments were rendered in the attachment suits; that in favor of Smith & Co. being for $4,174.38, and that in favor of Greene & Co. for $1,104.09. In the meantime other creditors of Schwed & Newhouse got attachments and judgments against [189] them, to wit: The Seth Thomas Clock Company for $1,518.49, The E. N. Welch Manufacturing Company for $455.58, and F. Quayle for $356. The attachments in these cases were also levied on the goods in the hands of the sheriff. All the later attaching creditors were admitted as parties to the original suit begun by Smith & Co. and Greene & Co., to set aside the judgment in favor of Heller, and in proper time a supplemental bill was filed in which all the attaching creditors appeared as complainants, setting up the recovery of their respective judgments. Pending the suit, the property levied upon was sold, and the proceeds, being $7,405.55, paid into the registry of the court. At the final hearing, a decree was rendered declaring the judgment confessed in favor of Heller, void as against the attaching creditors. From this decree Schwed, Newhouse, Heller and Bailey, the sheriff, took an appeal, which the appellees now move to dismiss on the ground that the value of the matter in dispute between the appellants and the several appellees is less than $5,000.

It is impossible to distinguish this case in principle from *Seaver* v. *Bigelow*, 5 Wall., 208 [72 U. S., XVIII., 595], where an appeal by creditors who had joined in a suit to set aside a fraudulent conveyance by their debtor, was dismissed because the amounts found due the appellants, respectively, were less than our jurisdictional limit. In delivering the opinion of the court, *Mr. Justice* Nelson said: "The judgment creditors who have joined in this bill have separate and distinct interests, depending upon separate and distinct judgments. In no event could the sum in dispute of either party exceed the amount of their judgment. * * * The bill being dismissed, each fails in obtaining payment of his demands. If it had been sustained, and a decree rendered in their favor, it would only have been for the amount of the judgment of each." In the present case, the judgment creditors did succeed and, in effect, each recov- [190] ered a decree against Heller, setting aside his judgment so far as it affected them individually. Had they been defeated they could not have appealed, because, although allowed in equity to join in their suit, they had "separate and distinct interests depending on separate and distinct judgments," as well as separate and distinct attachments. But if the decree is several as to the creditors, it is difficult to see why it is not as to their adversaries. The theory is, that, although the proceeding is in form but one suit, its legal effect is the same as though separate suits had been begun on each of the separate causes of action.

The appeal in *Seaver* v. *Bigelow* was from a decree against the creditors, but, in deciding the case, the court, in express terms, adopted the analogous practice in admiralty, where, under certain circumstances, separate and distinct causes of action may be united in one suit; and in that practice it has always been held that the ship-owner cannot unite the separate decrees against him in a suit, to make up the amount necessary for our jurisdiction on appeal. That question has been fully considered at the present Term in *Ex parte Baltimore & Ohio Railroad Company* [*ante*, 78]. Although the effect of the decree is to deprive Heller in the aggregate of more than $5,000, it has been done at the suit of several parties on several claims, who might have sued separately, but whose suits have been joined in one for convenience and to save expense.

The motion to dismiss is granted.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 582; 108 U. S., 548, 549; 110 U. S., 399; 113 U. S., 686.

PETER W. GEEKIE, Sheriff of OCONTO COUNTY, WISCONSIN, AND WILLIAM KLASS, *Plffs. in Errr.*,

v.

THE KIRBY CARPENTER COMPANY.

(See S. C., 16 Otto, 379-390.)

Wisconsin Statute of Limitations—deed on tax sale—sheriff, when not bound by judgment against his deputy—review on agreed statement of facts.

*1. Under section 5 of chapter 138 of the General Laws of Wisconsin, of 1861, providing that "No action shall be commenced by the former owner or owners of any lands, or by any person claiming under him or them, to recover possession of land which has been sold and conveyed by deed for non-payment of taxes, or to avoid such deed, unless such action shall be commenced within three years next after the recording of such deed," land is to be regarded as having been sold for non-payment of

*Head notes by *Mr. Justice* BLATCHFORD.

NOTE.—*Sale of lands for taxes; strict compliance with the statute necessary.* See *note* to Williams v. Peyton, 17 U. S. (4 Wheat.), 77.

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taxes, although the sum to raise which it was sold included five cents for a United States revenue stamp, to be put and which was put on the certificate issued to the purchaser on the sale.

2. A deed on a tax sale recited that "S. A. Coleman, assignee of Oconto County," had deposited certificates of sale showing that five parcels, each of which sold for so much, were sold "to the said Oconto County, and by its treasurer assigned to S. A. Coleman," for so much "in the whole," the total being the sum of the five several sums. The statute, chapter 50, section 22, of the General Laws of Wisconsin, of 1859, prescribed a form of deed, and provided that it should be "substantially" in that or "other equivalent form," showing that the land was sold for a sum named "in the whole." Held, that the deed followed the form substantially.

3. A sheriff, having possession of property under a writ of attachment, is not bound by a judgment in a replevin suit to which he was not a party, and in which he was not served with process and did not appear, and which he did not defend, although his under sheriff, as an individual, was a party to the replevin suit.

4. *Quære:* are the waters of the Menominee River, which is the boundary between Michigan and Wisconsin, within the concurrent jurisdiction of both Wisconsin and Michigan?

5. Although there was no general verdict of a jury in this case, and no special verdict in any form known to the common law, and no waiver in writing of a jury trial, and no such finding of the court below upon the facts as is provided for by section 649 of the Revised Statutes, this court, on a written stipulation filed in this court by the parties, agreeing upon the facts, reviewed the case on a writ of error, and reversed a judgment below for the defendant, and directed a judgment for the plaintiff, in an action of trover.

[No. 93.]

Argued Nov. 20, 21, 1882. Decided Dec. 4, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **Samuel D. Hastings, Jr.,** *George G. Green* and *T. O. Howe,* for plaintiffs in error.

Messrs. **L. S. Dixon** and *B. J. Brown,* for defendant in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

This suit was brought in a court of the State of Wisconsin, by Peter W. Geekie, Sheriff of Oconto County, Wisconsin, and William Klass, citizens of Wisconsin, against The Kirby Carpenter Company, an Illinois Corporation, and was removed into the Circuit Court of the United States for the Eastern District of Wisconsin, before answer. The cause of action set forth in the complaint was, that the plaintiff, Klass, was the owner of certain saw-logs lying in the waters of the Menominee River, in Oconto County, Wisconsin; that, in April, 1876, the plaintiff Geekie, as such Sheriff, levied on and attached said logs under a writ of attachment issued against said Klass by the Circuit Court of said County; that the defendant, by its *employés,* took in Wisconsin, a large quantity of saw-logs from the Sheriff, and converted them to its own use, to the value of $8,500; and that the Sheriff expended $940 in endeavoring to safely keep the logs so wrongfully taken, and as increased expense in keeping what logs the defendant did not succeed in taking. The claim made is for treble damages, with interest.

The answer sets up that the logs were not the property of Klass, but were the property of the defendant; that whatever the defendant did in regard to the logs was done under writ of replevin issued in a suit brought by it, as plaintiff, in the Circuit Court for Menominee County, Michigan, to the sheriff of that county, commanding him to take said logs and deliver them to it; and that said Sheriff took said logs into his custody under said writ in said County of Menominee, in the State of Michigan, and delivered them to said Company.

The case was tried before a jury. The record states that the jury "Rendered a special verdict in answer to the questions propounded by the court, said questions and the answers of the jury thereto being as follows." There is no other or further special verdict than the eight questions and answers which then follow, and there is no general verdict for either party. Afterwards, [381] the plaintiffs moved the court "upon the special verdict" and on "the records and evidence in said cause" "for judgment in their favor for $6,791.56, with interest at the rate of seven per cent per annum from April 24, 1876, and costs." The defendant also moved for judgment in its favor on the "special verdict" "and because in law the plaintiffs established no cause of action." The court ordered judgment in favor of the defendant and overruled the motion of the plaintiffs for judgment in their favor. Judgment was rendered for the defendant, against the plaintiffs, for $186.02 costs. This writ of error is brought by the plaintiffs, to review and reverse this judgment.

At the trial, as appears by the bill of exceptions, the plaintiffs, to show title in Klass to the logs, offered in evidence a tax deed from the State of Wisconsin and Oconto County to one S. A. Coleman, dated and acknowledged April 27, 1867, and the certificate of its record indorsed on it, showing that it was recorded in the office of the register of deeds for said county, on the same day. The defendant objected to the reception of the deed in evidence: (1) because it was not in the form prescribed by statute; (2) because it was not executed and acknowledged as required by law; (3) because it was void upon its face. The court reserved its rulings on said objections, and received said deed and certificate in evidence, subject to said objections. Like objections and a like ruling were made in respect to a certified copy of the record of said deed, showing the date of its recording. The deed covered $79\frac{53}{100}$ acres of land, in section 13, in town 33, of range 22, and 120 acres in section 14, in town 33, of range 22; being five several tracts, all in Oconto County. The sale was for $12.20, which was the amount of the taxes and costs of sale. The plaintiffs then proved that Klass purchased from Coleman the timber standing on the premises described in the deed; that all the logs in controversy were cut by Klass from the premises during the winter of 1875 and 1876, and put into the river; that the premises remained vacant and unoccupied during the whole of the three years next after the recording of the deed; that the logs were held by Geekie, as Sheriff, under a regular and valid attachment and levy; and that the Company [382] claimed to own the logs and sought to take them from the custody of Geekie. After the plaintiffs had rested, the defendant offered to show by certified copies of the records from Oconto County, that the county treasurer of that

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county, in making the sale of the lands on which the said tax deed to Coleman was based, added to the amount of all legal taxes and charges for which each of said tracts was liable to be sold, the sum of five cents to pay for a United States' revenue stamp, to be placed on the certificate issued to the purchaser on such sale; that said illegal excess of five cents was included in the amount for which each one of said tracts was sold; and that a five cent United States' internal revenue stamp was affixed to each one of said certificates of sale. The plaintiffs objected to the reception of said evidence, as incompetent and immaterial, because said tax deed was regular and valid on its face, and had been recorded more than three years before the commencement of the action and the cutting of the timber. The court reserved its ruling on said objection until the close of the case, and received said testimony subject to said objection. It was then admitted by the plaintiffs that the facts relative to said sale were as the defendant offered to show them to be, but not waiving their objection to said evidence, or consenting to its being received. The defendant then gave evidence showing that it owned in fee simple, at the time the tax deed to Coleman was executed and recorded, the premises from which said timber was cut. After the close of the evidence, the questions to be answered by the jury were submitted to them by the court, and they were answered by the jury. The bill of exceptions states as follows: "Both said plaintiffs and said defendant filed motions for judgment on the pleadings, records and evidence in said cause, and, upon the argument of said counter motions and said objections to testimony reserved, the court overruled said defendant's objections to the admissibility of said tax deed in evidence, and said plaintiffs' objection to said defendant's testimony, showing the illegal excess of five cents in the amount for which each of said tracts of land was sold by said county treasurer, and overruled said plaintiffs' motion for judgment, and ordered judgment for said defendant; to each of which said rulings against said plaint-
[383] iffs said plaintiffs then and there duly excepted."

To obviate any objection that this court could not review the judgment in this case because there was no general verdict of the jury, and no special verdict in any form known to the common law, and no waiver in writing of a jury trial, and no such finding of the court below upon the facts as is provided for by section 649 of the Revised Statutes, the parties have filed in this court a written stipulation, agreeing "That the facts appearing from the special verdict and stated by the bill of exceptions to have been proved, shall be taken and considered as the facts in this case for all purposes, and as fully as if they had been specifically found by the circuit court"; and "That the circuit court submitted certain questions to the jury by agreement of the parties, and that the other facts were to be found and stated as shown by the bill of exceptions; and that upon the whole case, as thus shown, judgment was to be pronounced by the court below, as they should determine the law."

The ground upon which the circuit court overruled the objection of the plaintiffs to the testimony on the part of the defendant, to show the illegal excess of five cents in the amount for which each of the tracts of land was sold was, that, in being sold to raise the five cents, the land was sold for that which was not a tax; that the amount assessed against the land for a tax was less than the amount for which it was sold; that, although a tax was included in that amount, there was also included in it, that for which the land could not be sold; and that this fact deprived the officer of the power to sell, and made the tax deed void.

The Statute of Wisconsin applicable to this subject is found in chapter 138 of the General Laws of 1861, sections 5 and 6: "Sec. 5. No action shall be commenced by the former owner or owners of any lands, or by any person claiming under him or them, to recover possession of land which has been sold and conveyed by deed for non-payment of taxes, or to avoid such deed, unless such action shall be commenced within three years next after the recording of such deed. Sec. 6. The limitation for bringing actions prescribed in the last preceding section shall not apply * * * where the taxes, for [384] the non-payment of which the land was sold and the tax deed executed, were paid prior to the sale or where the land was redeemed from the operations of such sale, as provided by law, nor where the land was not liable to taxation." The sole question presented under these provisions is, whether the land in this case can be said not to have been sold for non-payment of taxes, because in the $12.20 for which it was sold, was included twenty-five cents for the five stamps, in addition to $11.95 for taxes proper. It is admitted that the land could not properly be sold to raise the five cents as a tax, and that, if the question had been raised on behalf of the original owner of the land, in a suit commenced within three years next after the recording of the deed on the sale, he could have had relief against the sale; but it is contended for the plaintiffs in error, that the lapse of the three years prevented the questioning of the validity of the deed, because of the irregularity complained of. We are of opinion that the circuit court erred in its construction of the statute. The exceptions in section 6 do not apply to this case, and the land was sold for non-payment of taxes, although an improper item was included in the amount for which the sale was had. It matters not whether such item was five cents for a revenue stamp, or an illegal excess for fees, or any other illegal excess. The statute applies whenever there has been an actual attempt, however defective in detail, to carry out a proper exercise of the taxing power. As against the grantee in the tax deed, the statute puts at rest all objection raised, after the time specified, against the validity of the tax proceeding, from and including the assessment of the land, to and including the execution of the deed. If the deed is valid on its face, and purports to convey the land on a sale for the non-payment of taxes, it is, during the three years, *prima facie* evidence of the regularity of the tax proceeding; and, after the statute has run in favor of the grantee, the deed becomes conclusive to the same extent. The general authority of the taxing officers and the liability of the land to taxation having existed, there was no want of authority to put the taxing power in motion. That being so, the lapse of time establishes conclusively the validity of the tax and

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[385] of the sale, as against the irregularity in question. There having been jurisdiction, all error was conclusively barred by the statute. This construction is that held by the Supreme Court of Wisconsin in regard to this statute, in *Oconto Co.* v. *Jerrard*, 46 Wis., 317, and *Milledge* v. *Coleman*, 47 Wis., 184; and it is said and correctly, in the latter case, that that is the view which has been uniformly taken of that statute by that court, and that to adopt a contrary view would disturb numerous titles. Such construction was, therefore, always a rule of property in respect to land in Wisconsin, and is one which this court will follow. *Suydam* v. *Williamson*, 24 How., 427 [65 U. S., XVI., 742]. In *Milledge* v. *Coleman*, the illegality alleged was the including of five cents for a United States' revenue stamp in the amount for which the land was sold. That case was decided some four months after the decision in the present case was made by the court below.

The deed in question was not open to the other objections taken to it at the trial. One of those objections was that the deed was not substantially in the form prescribed by statute, or any equivalent form, and was void upon its face. The form is given in chapter 50, section 22, of the General Laws of Wisconsin, of 1859, and the statute says that the deed "shall be substantially in the following or other equivalent form." There is no doubt that the form must be substantially pursued, or the deed will be invalid. Part of the form is a recital that the purchaser or his assignee has deposited a certificate, whereby it appears that certain lands, describing them, were, for the non-payment of taxes, sold by the officer named, at public auction, at a place and time named, to the said purchaser, for a sum named, "in the whole, which sum was the amount of taxes assessed and due and unpaid," on said tracts of land, etc. The deed in the present case recites that "S. A. Coleman, assignee of Oconto County," has deposited five certificates, whereby it appears that five certain parcels of land, describing them, three containing 40 acres each, each sold for $2.48, one containing 39$\frac{58}{100}$ acres, sold for $2.48, and one containing 40 acres, sold for $2.48, were, for the non-payment of taxes, sold by the officer named, at public auction, at a place and time named, "To the said Oconto County, and by its treasurer assigned to S. A. Coleman, for the sum of $12.20, in the whole, which sum [386] was the amount of taxes assessed and due and unpaid," on said tracts of land, etc. The objection made is, that the recital is not that the lands were sold for so much in the whole, but that they were sold "To the said Oconto County, and by its treasurer assigned to S. A. Coleman" for so much in the whole; that the words "the sum of", in the recital relate to the word "assigned;" that the meaning is that the lands were assigned to Coleman for the $12.20 in the whole, or were sold and assigned for that sum in the whole, and not that they were sold for that sum in the whole. The circuit court held that it clearly enough appeared, taking the whole deed together, for what sum, in dollars and cents, the land was sold in the whole, as required by the statute; and that, taking the statement as to the $12.20 with the preceding statement as to the sum for which each parcel of land sold, the inference was irresistible that the $12.20 was the amount for which the land was sold in the whole, for the non-payment of taxes. We think this view was correct. A like construction was given to a recital in the same language, by the Supreme Court of Wisconsin in *Milledge* v. *Coleman* (*ubi supra*). It is manifest that the words "and by its treasurer assigned to S. A. Coleman," are to be read as if they were in a parenthesis. In connection with the prior words "Whereas, S. A. Coleman, assignee of Oconto County, has deposited," etc., they are put in to indicate that Oconto County was the purchaser, and Coleman was its assignee, of the purchase, by assignment from the treasurer of the county. Everything required by the statute, as to form, is found in the deed, with added facts as to the assignment.

The objection as to the form of the acknowledgment of the deed does not seem to be insisted on by the defendant in error. We think the circuit court was correct in its ruling that the acknowledgment was in proper form. The same form was upheld as proper by the Supreme Court of Wisconsin, in *Milledge* v. *Coleman* (*ubi supra*).

The defendant offered in evidence at the trial a copy of a judgment in an action in the Circuit Court for the County of Menominee, Michigan, in which The Kirby Carpenter Company "Was plaintiff and the Menominee River Manufacturing Company, Charles J. Ellis and Mil- [38 lard F. Powers, were defendants, in which action a writ of replevin was issued to the sheriff of said county, commanding him to forthwith take into his custody the goods and chattels therein mentioned, which were the logs in controversy, and deliver them to said Kirby Carpenter Company; which action was commenced on the 31st day of May, 1876, and process therein served on said parties, therein named as defendants, on said day; and in which action judgment was entered as by default against the defendants therein named, on the 24th day of September, 1878, adjudging the title to said logs to be in said Kirby Carpenter Company." The plaintiffs objected to the admission of said record in evidence, as incompetent and immaterial, "because neither of the plaintiffs in this action were parties to said action." The court reserved its ruling upon said objection, and received said testimony subject to said objection. The record does not show that the objection was afterwards either overruled or sustained. As the court held that Coleman acquired no title under the tax deed, it was unnecessary for it to make any ruling as to the effect of the judgment in the replevin suit. But, under the stipulation so made in this court, the question is here to be passed upon.

The bill of exceptions states that the defendant showed that the Millard F. Powers named as one of the defendants in said replevin suit, was the under sheriff of Oconto County; that process in said suit was served on said Powers on an island in the Menominee River, near its mouth, on the Michigan side of the main channel of said river, near the head of which island are situated what are called the dividing piers; and that at the time of the service of said process upon said Powers, he was on said island, assisting the plaintiff Geekie in his endeavors to retain said logs under said writ of attachment, under which they were levied on by said Powers;

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that all of said logs that were taken from said plaintiffs, after the issuing of said writ of replevin, were taken by said sheriff and his *posse*, acting under the authority of said writ; that not to exceed twenty of said logs came to the possession of said defendant before the issuing of said writ of replevin; and that the point in said Menominee River, at which said dividing piers are located, and at which said defendant took from said Geekie said logs, was on the [388] Michigan side of the main channel of said river.

The bill of exceptions states that the plaintiffs showed that Geekie, by and through Powers, his under sheriff, levied on said logs on April 24, 1876, in the Menominee River, about one mile above said piers; that the piers were managed and controlled by the Menominee River Manufacturing Company, a corporation; that Powers, after making the levy, remained in charge of the logs for some days, and then turned the writ over to Geekie, the sheriff, on or about May 9, 1876, it not being shown on the trial that the defendant had notice of that fact; that the defendant claimed to own said logs and sought to take them from the custody of said sheriff, as they passed through said dividing piers; that, from the time they commenced running through said piers until they had all passed through, said Geekie and others acting for and under him, and parties acting for and under the direction of the defendant, were struggling with each other for the possession of the logs; that the Menominee River runs between the States of Michigan and Wisconsin; that when said logs were levied upon by said sheriff, they were in a bend in said river and on the Wisconsin side of the channel; and that the expense of executing said writ of attachment by said sheriff, if he had not been interfered with by said defendant, would have been not more than $240.

The questions and answers forming the so-called special verdict were as follows: 1. "Did the defendant take or cause to be taken, from the possession of the plaintiffs, and convert to its own use, the logs in question, or any part thereof? Answer. Yes. 2. If you answer the preceding question in the affirmative, then, when were said logs so taken from the possession of the plaintiffs? Answer. On the 24th day of April, 1876. 3. What quantity of logs, if any, were so taken and converted to its own use by the defendant? Answer. 1,040,238 feet. 4. What was the value of the logs so taken and appropriated by the defendant? Answer. Six dollars per thousand feet. * * * 6. What was the amount of expenses necessarily incurred and paid by the plaintiff, Geekie, in endeavoring to retain possession of said logs? Answer. $538.14. 7. What number of days was the plaintiff Geekie necessarily engaged in endeavoring to keep pos- [389] session of said logs, and what was the value of his services per day? Answer. Forty-nine days, at $3 per day, $147.00. 8. What number of days was M. F. Powers necessarily engaged in attempting to keep possession of said logs, and what was the value of his services per day? Answer. Fifteen days, at $3 per day, $45.00."

It is contended for the defendant in error, that Geekie was concluded by the judgment in the replevin suit, and that, although he was not a party to it, the judgment against Powers, his under sheriff bound him. But it clearly appears, from the foregoing facts, that Powers did not have possession of the logs when the replevin suit was commenced, and that Geekie did. Powers was sued as an individual. Geekie was not served with process in the suit nor did he appear in it or defend it; and, so far as appears, no defense was made to it.

It is further contended for the defendant in error, that the conversion, by the defendant, took place in Michigan and not in Wisconsin, as alleged in the complaint, because it is shown that the place where the defendant took the logs from Geekie was on the Michigan side of the main channel of the river. This is not equivalent to a finding that the taking was wholly or exclusively in Michigan, so as to make, as against Geekie, a taking at a place where the lien of the attachment did not exist. It is contended that, the Menominee River being, as found, the boundary between Michigan and Wisconsin at the *locus in quo*, Wisconsin has, by section 3 of the Act of Congress, of August 6, 1846, 9 Stat. at L., 57, concurrent jurisdiction, with Michigan, over the waters of the Menominee River. But it is unnecessary to determine that question.

Klass, having the general property in the logs, and Geekie a special property in them, and the logs having been taken by the defendant from the possession of Geekie, who held them as sheriff, under the attachment against Klass, it was proper for both to join in the suit. The damages found to have been sustained by each may be added together and awarded to them as plaintiffs. The damages to Klass are the value of the logs, 1,040,238 feet at $6 per thousand feet, being $6,241.42. The damages to Geekie are the $538.14 expenses, less the $240, being $298.14 extra expenses, and the $147 and the $45. The sum of the whole to Klass and Geekie [390] is $6,731.56. The date of the conversion, found by the jury, was April 24, 1876. There appears to be some confusion in the record. It is stated that the replevin suit was commenced May 31, 1876; that all of the logs which were taken from the plaintiffs, after the issuing of the writ of replevin, were taken by the sheriff under that writ; and that not to exceed twenty of such logs came to the possession of the defendant before the issuing of said writ. Yet the jury found that the defendant took all the logs or caused them to be taken from the possession of the plaintiffs, and converted them to its own use, on the 24th of April, 1876. But, the attachment levy was made on the 24th of April by Powers, and the record states that he remained in charge of the logs for some days, and turned the writ over to Geekie on May 9th. The bill of exceptions states, however, that there was other evidence tending to show the time of the conversion of the logs by the defendant and the manner in which the defendant and the Sheriff of Menominee County took possession of them. On the whole, we think that, as to the damages to Klass, interest should be given from the 24th of April, 1876, the date of conversion found by the jury; and as to those to Geekie, interest should be given from the bringing of this suit, November 21, 1876.

The judgment of the Circuit Court is reversed, with costs, and the case is remanded to that court, with directions to it to enter a judgment for the plaintiffs for $6,731.56, with lawful interest on $6,241.42 thereof, from April 24, 1876,

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and with lawful interest on $490.14 thereof, from November 21, 1876, with costs.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

DANIEL TYLER, *Appt.*,
v.
ROBERT B. CAMPBELL.

(See S. C., 16 Otto, 322-326.)

Opinion on questions of fact.

Where the decision of a case involves no question of law, but only a pure question of fact, and can be of no value as a precedent, the preparation of an extended opinion is not according to the practice of this court.

[No. 52.]

Argued Oct. 25, 26, 1882. Decided Dec. 4. 1882.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The bill in this case was filed in the court below by the appellant, to recover the sum of $30,000, alleged to have been lost through a breach of trust by the defendant.

The court below having dismissed the bill, the complainant appealed to this court.

For a statement of the case, see the dissenting opinion of *Mr. Justice* **Field.**

Messrs. **Wheeler H. Peckham** and **Cortlandt Parker,** for appellant.

Messrs. **Clifford A. Hand** and *Charles B. Moore,* for appellee.

Mr. Justice **Gray** delivered the opinion of the court:

Upon a careful scrutiny of the evidence by each of the Judges, a majority of the court is of opinion that the proofs do not make out the breach of trust alleged, and that the view of the defendant's obligations, which the plaintiff has undertaken to assert since the loss occurred, is inconsistent with the previous conduct and mutual dealings of the parties.

As the decision involves no difficult or doubtful question of law, but a pure question of fact, depending on the weighing and comparison of varying and conflicting evidence, it can be of no value as a precedent, and the preparation of an extended opinion would not be according to the practice of the court, and would serve no useful purpose.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Field,** dissenting:

I am unable to assent to the decision of the majority of the court, and, as it involves an important principle, I am unwilling to let it pass in silence. I do not perceive any serious controversy as to the material facts upon which the liability of the defendant is asserted and, in my judgment, there is no doubt as to the law applicable to them.

Devested of immaterial details, the case is briefly this: in January, 1865, one James Monroe, of New Jersey, applied to the complainant for a loan of money—at first specified to be $30,000, afterwards increased to $50,000—for use in connection with the Morris County Bank, a corporation of that State, of which Thomas E. Allen was president. The application was made through the defendant, Robert B. Campbell; and the proposition was to give as security for the loan an assignment of two mortgages on a mine, known as the Hibernia Mine, in that State, then held by the bank, accompanied with a lease of the property. As the result of the negotiation, the complainant agreed to loan $50,000 to Monroe, upon an assignment to Campbell of the two mortgages and lease, in trust as security for the loan. In pursuance of this agreement, the bank assigned the mortgages and lease to Monroe, who assigned them to Campbell, with an irrevocable power of attorney to the latter to collect the money due on the mortgages and pay the loan at its maturity. Both assignments were executed February 11, 1865, and were to be void if the loan, with interest, was paid; the one to Monroe, if payment was made by the 11th of June following, and the one to Campbell, if payment was made by the 5th of August. The complainant thereupon gave to Campbell securities, which on sale produced the $50,000, and this sum was delivered to Monroe. Of the two mortgages, one was for $100,000 and the other for $75,000. Both were, at the time of the assignment, in process of foreclosure in chancery, in New Jersey, and of this fact Campbell was fully aware. A decree for the sale of the premises was made in the fore- [324
closure proceedings on the first of March following. On the 20th of June the sale took place. Campbell was present and knew of it, and of the amount realized, which was $86,400. He did not, however, place the assignment on record in the office of the register of the county, though it was acknowledged so as to be entitled to registry; nor did he give any notice of it to the solicitor engaged in the foreclosure proceedings, or to the master who made the sale, but allowed all proceedings to be conducted, and the parties connected therewith to act, as though no assignment had ever been made to him. Nor was he merely passive in the matter. Though the assignment was executed expressly to take from the mortgagee, the bank, and its assignee, Monroe, the control of the mortgages, and secure an application of their proceeds to the payment of the loan, he authorized the president of the bank to receive the proceeds. His letters show this, and the only reason he assigns for it is, that he supposed the president would prefer to receive them. "I know," he writes to that officer, "that you would prefer that it (the money) should be received from the master by yourself and, therefore, I sent you the request to collect it and send it to me." The president of the bank did collect it and keep it, and subsequently became bankrupt. The complainant thereby lost $30,000 of his loan; only $20,000 of the $50,000 were ever received. To charge Campbell, by whose negligence this money was lost, and compel him to pay it, this suit was brought.

If proof of the facts thus stated depended upon uncertain and conflicting testimony, I might accede to the disposition of the case made by the majority of the court; but these facts are either not controverted or appear in the statements of the defendant himself. After the conversion of the money by the president of the

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bank, a suit was brought against him by the complainant, who, to obtain an order for his arrest, made an affidavit setting forth the particulars of the loan, the assignment of the mortgages, their foreclosure, the sale of the premises mortgaged, and the receipt and use of the money by the president. In that affidavit he states—I quote his words—that when the loan was made and the assignments were received, he "Instructed said Robert B. Campbell to take [325] all necessary steps to make said assignments available to secure said loan" to him, the deponent; that Campbell, notwithstanding this instruction, instead of requiring the master to pay the proceeds of the sale into the court of chancery, so that the loan might be paid out of them, did, through confidence in the honesty of the president of the bank, permit the master to pay the proceeds to its solicitor, who afterwards paid them over to the president directly, or upon his order. This affidavit is accompanied with one of Campbell, who states that he had read the complainant's affidavit and knew he contents thereof, and that the matters there set forth in relation to himself and his action in the matters referred to, were true. Thus it appears from the sworn statement of Campbell that his action, which caused the loss of the money, was in direct disregard of instructions to him.

Under these circumstances, why should he not be held to make good the loss? By the assignment to him, he became a trustee of the mortgages for the complainant. He did not take the assignment on his own account; it was for the lender to secure the loan. In taking it he assumed a duty towards his *cestui que trust*, which he could not disregard. It was to see that the assignment effected its purpose, so far, at least, as to withdraw the control of the mortgages from the mortgagee, the bank and its assignee, Monroe, and thus render them available to the lender.

In stating the duties of trustees, Lewin, in his work on Trusts, says:

"The first duty of trustees is to place the trust property in a state of security. Thus, if the trust fund be an equitable interest, of which the legal interest cannot be at present transferred to them, it is their duty to lose no time in giving notice of their own interest to the persons in whom the legal estate is vested; for otherwise, he who created the trust might encumber the interest he has settled, in favor of a purchaser without notice, who, by first giving notice to the legal holder, might gain a priority. If the trust fund be *a chose in action*, as a debt, which may be reduced into possession, it is the trustee's duty to be active in getting it in; and any unneces- [326] sary delay in this respect will be at his own personal risk." Lewin, chap. XIV., sec. 1, 6th Eng. ed.; *Jacob* v. *Lucas*, 1 Beav., 436; *Caffrey* v. *Darby*, 6 Ves., 488; *Platel* v. *Craddock*, Coop. Cas., 481; *McGachen* v. *Dew*, 15 Beav., 84; *Wiles* v. *Gresham*, 2 Drewry, 258; *Cooper* v. *Day*, 1 Rich. Ch., 26.

To the same effect is the language of Perry in his treatise on Trusts. The trustee must take such steps as will prevent incumbrances from being placed upon the property transferred to him and, of course, as will prevent the possibility of its destruction, as in this case, from its conversion by the original assignor or settler. "If the trust fund," he says, "consists in part of notes, bonds, policies of insurance and other similar *choses in action*, notice should be given to the promissors, obligors, or makers of the instruments." Law of Trusts, sec. 438.

This doctrine is supported and asserted in different forms by a great number of adjudged cases. That a trustee, by whose negligence of a plain duty the property in his hands is wasted or injured, is chargeable with the loss, is a doctrine which pervades the whole law of trusts. And it is the only doctrine which will insure fidelity in trustees and protection to the interests of *cestuis que trust*. As justly observed by counsel, the simpler and easier the act required, the clearer the duty and liability for its neglect. If any distinction can be made in liability where duties are neglected, the liability should be the more strictly enforced where, as in a case like this, the duty required was the mere observance of ordinary prudence.

I think the decree should be reversed, and *Mr. Justice* **Harlan** and *Mr. Justice* **Matthews** concur with me in this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Plff. in Err.*,
v.
J. M. STONE AND W. C. McALEXANDER.

J. M. STONE AND W. C. McALEXANDER,
Plffs. in Err.,
v.
UNITED STATES.

(See S. C., 16 Otto, 525-532.)

Striking out notice—objection to evidence—liability of sureties of collector—adjustment of his accounts—charge to jury—transcript from treasury books, as evidence.

1. There is no error in striking out a notice of special matter, which can be given in evidence, under the plea of *nil debet*, which was pleaded with the notice.

2. In an action against a collector and his sureties, brought by the United States on his official bond, an objection to certified statements of his account from the books of the Treasury Department, offered in evidence by the plaintiff, which did not arise upon the face of the accounts, but only after a comparison between them and evidence of the same kind offered by the defendants, lies not to the competency of the evidence, but to its effect.

3. The sureties of a collector are liable for taxes which he collected during the term for which their bond was given, upon assessment rolls received during a prior term, or for moneys or stamps on hand at the expiration of a former term, and remaining in his possession at the beginning of a new one.

4. The separate adjustment of his accounts for both periods, made at the Treasury Department upon its books, is *prima facie* evidence only of the fact and of the amount of his indebtedness, and of the time when and the manner in which it arose.

5. An omission to charge the jury as requested is not error where it is not shown, by anything in the record, how such charge could apply to the case.

6. A certified transcript from the books of the Treasury Department were admissible to show that credits had been given to the collector on a prior account, that belonged to subsequent ones, and that

NOTE.—*Evidence; exemplification of patents, grants, records, surveys, facts, maps, etc.* See *note* to Patterson v. Winn, 30 U. S. (5 Pet.), 233.

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he had been debited in the latter with items improperly transferred from previous ones, although it required further evidence to show the impropriety of the adjustment.

[Nos. 97, 98.]

Argued Nov. 22, 1882. Decided Dec. 4, 1882.

IN ERROR to the District Court of the United States for the Northern District of Mississippi.

The case is stated by the court.

Mr. **William A. Maury,** *Asst. Atty-Gen.*, for the United States.

Mr. **George E. Harris,** for defendants in error in No. 97, and plaintiffs in error in No. 98.

Mr. Justice **Matthews** delivered the opinion of the court:

This action was brought by the United States upon an official bond of Benjamin B. Emory, as Collector of Internal Revenue for the Third District of Mississippi, against himself and Stone and Alexander, two of his sureties. The bond is dated March 29, 1870; is in the penal sum of $50,000, and reciting that Emory had been appointed and had received a commission as collector for the district mentioned, dated December 29, 1869, is conditioned that "He shall truly and faithfully execute and discharge all the duties of the said office according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, all public moneys which may come into his hands or possession," etc. The breach alleged is, that he failed to account for and pay over the sum of $57,497.84 of public moneys, which had come into his possession as such collector.

The defendants pleaded *nil debet*, and gave notice of special matter to be given in evidence under that plea, among others, that "The alleged liability for which this suit is brought arose, if it arose at all, under a bond given by said Emory, as such collector, in October, 1869, and not under the bond on which this suit was brought," etc. They also pleaded payment before suit brought, and also an argumentative plea of *non est factum*, to which a demurrer was sustained. Subsequently, they filed an additional plea traversing the alleged breach of the condition of the bond.

Before the trial, the district attorney moved to strike out the defendants' plea of *nil debet*, with the notice of special matter attached; and an order sustaining that motion appears from the record to have been made; although, from a bill of exceptions taken at the time, it is stated that the motion was sustained only so far as the notice was concerned, and overruled as to the plea.

[527] There was a verdict in favor of the United States for $10,008.52, and judgment rendered thereon.

Writs of error were sued out by both parties, and are now prosecuted to reverse that judgment, for errors alleged to have been committed by the court in its rulings on the trial, duly excepted to by the parties, respectively, and brought upon the record by bills of exception.

They will be considered in their order, beginning with these assigned by the defendants below:

1. There was no error, as alleged, in striking out the notice of the special matter to be given in evidence, under the plea of *nil debet*. It was proper to strike it out, because it was matter which denied the plaintiff's whole cause of action, which, consequently, it was bound to meet with its own evidence in the first instance, and which, therefore, the defendants traversed by the plea of *nil debet*, and the plea denying the alleged breach of the condition of the bond. Any evidence which would have been competent under the notice, would have been equally so without it; and in point of fact, all the evidence, offered on the part of the defendants, which was competent under the notice, was admitted under the pleas.

2. The first bill of exceptions taken by the defendants states that "The said plaintiff offered to read to the jury certain transcripts from the books of the Treasury Department at Washington City, and certified transcripts of papers on file in said department, touching the official conduct of B. B. Emory, as late Internal Revenue Collector of the Third District of Mississippi, which said transcripts are dated respectively * * * as shown by the certificates of the Secretary of the Treasury. And to these transcripts the defendants had filed written exceptions and objected to their introduction as evidence for the reasons assigned in said exceptions." The court overruled the objection and permitted the transcripts to be read in evidence, to which reading the defendants excepted; and it is now assigned for error.

In another part of the record there is this statement: "The following are transcripts from the books of the Treasury Department at Washington and of papers on file, which are referred to in the bills of exception taken and filed in this cause." Then follows forty-seven printed pages of matter, consisting of certified statements of account from the books of the Treasury Department, and copies of numerous papers on file, apparently relating to the accounts of this collector. But it is impossible to know, with accuracy, from the record, which of these were offered in evidence by the plaintiff, and to which the objection was intended to apply; for it appears from another bill of exceptions, and there were six in all, which was taken by the plaintiff, that some of these transcripts from the books of the Treasury Department were offered by the defendants themselves, and admitted in evidence, against the objection of the district attorney; a ruling we are called upon to consider hereafter, as it is alleged as error on the part of the United States, under the writ of error which it prosecutes. It is only by subtracting these from the entire mass, that we can infer to what the defendants objected. [528]

The exceptions filed to these transcripts, referred to in the bill of exceptions and found elsewhere in the record, are as follows:

"1. The certificates are not such as the law requires.

2. The transcripts are incomplete, and do not set out the entries on the books of the department, and are not transcripts from the books, but summaries of what the officers suppose the books contain.

3. The reports and receipts of Emory, as collector for assessments, and other papers connected with the settlement of his accounts by the department, are not set out in said transcripts.

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4. Emory's monthly and quarterly reports are not set out in said transcripts.

5. Emory's receipts for assessments are not set out in said transcripts.

6. Facts are set out in said transcript which did not come before the department, which were not in the course of its business, and of which its transcript is no evidence.

7. Said transcripts are partial, imperfect, and do not present the whole record statement in regard to said Emory's accounts as late collector, as aforesaid."

The particulars in which the transcripts in question are supposed to be open to these exceptions are not pointed out to us, either by anything in the record or in argument by counsel, and there is nothing upon their face which suggests them to us. The papers in question seem to be in the usual form of such statements, and purport to be copies, from the books of the Treasury Department, of the accounts between the collector and the United States, containing the usual items, and showing the appropriate balance between the debits and credits. If there is anything in them illegal, insufficient or incomplete, we have not been able to discover it. *U. S.* v. *Gaussen*, 19 Wall., 198 [86 U. S., XXII., 41].

[529]

It is, however, said by counsel for defendants, that in the treasury transcript, showing an adjustment of the collector's accounts, covering all his official time prior to the date of giving the bond sued upon, he is charged with five items, aggregating $50,068.20; and that this account is balanced by credits, three items of which purport to be transfers to himself, as his own successor, amounting to $30,584.42, which, it is alleged, was an existing indebtedness to the Government. In the next adjustment he is charged with the same items, showing an arrearage at that time, of $60,618.85, and a balance is found against him as occurring since the date of the bond in suit, the effect of which, it is argued, is to shift a default from the first to the second bond; and it is claimed that, for this reason, the transcript offered by the district attorney was not competent evidence and should have been excluded from the jury.

But this objection did not arise upon the face of the accounts offered in evidence by the United States, but only after a comparison between them and that offered by the defendants and, therefore, would lie, not to the competency of the evidence, but to its effect.

And while it is true that the sureties sued are liable only for money received during the term for which the collector was appointed, covered by the bond to which they are parties, and not for the misapplication of money received and misapplied prior or subsequent to that term, *U. S.* v. *Eckford*, 1 How., 250, nevertheless it is equally true that they are liable for taxes collected during that term, upon assessment rolls received during a prior term, or for moneys or stamps on hand at the expiration of a former term, and remaining in his possession at the beginning of a new one; for the collector is responsible as well for moneys and stamps retained by him as his own successor, as for those received by him from any other predecessor. And the separate adjustment of his accounts for both periods, made at the Treasury Department upon its books, is *prima facie* evidence, not only of the fact and of the amount of the indebtedness, but also of the time when and the manner in which it arose. It is, of course, always open to the defendants sought to be charged, to show by opposing proof that the default charged occurred before the commencement of their liability. We repeat what was said by this court in *U. S.* v. *Eckford*, 1 How., 263: "The amount charged to the collector at the commencement of the term is only *prima facie* evidence against the sureties. If they can show, by circumstances or otherwise, that the balance charged, in whole or in part, had been misapplied by the collector, prior to the new appointment, they are not liable for the sum so misapplied."

[530]

3. It is next assigned for error, that the court omitted to charge the jury, "That facts not properly appearing on the books of the Treasury Department could not be embraced in the transcript, facts of which the department had no knowledge; and if so embraced they did not constitute proof in this case." This alleged omission on the part of the court is stated in the bill of exceptions to have occurred in connection with the following instruction, which was given: "That, while it was true that the plaintiff could only recover in this case for money actually collected by Emory, and not accounted for to the Government, yet, if they believe from the evidence that Emory had received the assessment rolls of the taxes imposed, that was *prima facie* evidence that he had received the money on them, in the absence of any other or further proof on that subject."

Although the giving of this charge was excepted to, the error assigned upon it was not pressed in argument, nor could it be maintained; as the instruction was, undoubtedly, correct. Nor does it appear from the bill of exceptions that the court was asked to give the instruction, the omission of which is now complained of; although it states that for that cause the defendants then and there excepted. But, waiving the form of the exception, it must be overruled, because, however correct the rule may be, which it states the court omitted to give to the jury, it is not shown, by anything in the present record, how it could apply to the case. It was not shown that there were any facts embraced in the transcripts which could not properly appear on the books of the Treasury Department, nor any of which the department had not knowledge; and no attempt has been made to point them out in argument.

[531]

This disposes of the errors assigned by the defendants, in none of which do we find any ground for disturbing the judgment.

4. A bill of exceptions was taken, during the trial on the part of the United States. From that it appears that the defendants offered in evidence a certified copy of the official bond of Emory, as Collector of Internal Revenue for the Third District of Mississippi, under an appointment dated October 2, 1869; the bond being dated October 11, 1869, with sureties other than the present defendants, and a certified transcript from the books of the Treasury Department of an adjustment of his accounts, as such collector, under that appointment, from November 4, 1869, to March 28, 1870, showing a balance due from him to the United States, "transferred to himself as his own successor," of $4,027.52, and with which he is charged in the next adjust-

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ment under the bond sued on, dated March 29, 1870; and in which, also, he is credited with $13,050.17, as "Amount of taxes on lists transferred to himself as collector under second bond," and with $13,456.13, as "Amount of stamps transferred to himself as collector under second bond, *viz.:* tobacco $8,098.88, spirits $5,327.25." To the introduction of these documents in evidence, the district attorney objected. The objection was overruled, the evidence was admitted, and an exception was taken, on which error is now assigned on the part of the United States.

The objection, however, cannot be sustained. We have already stated that it was competent for the defendants to show, in their own exoneration, that the balance charged against the collector, upon the adjustment of his accounts, during the period when they were liable for his defaults, in fact, had arisen by virtue of some default accruing during a prior term. For that [532] purpose and as tending to prove such a claim, it was competent and proper to show that credits had been given to him, on a prior account, that belonged to subsequent ones, and that he had been debited in the latter with items improperly transferred from previous ones. And to do that, the accounts, in which these charges and credits appeared, were manifestly pertinent and material. It required, of course, further evidence to show the impropriety of the adjustment, unless the facts appeared on the face of the papers, as they did not in this case; and the failure to follow them up, with such further evidence, might have been a sufficient ground, when the defendants had rested, for granting a motion to rule out the testimony, or for an instruction to the jury as to its effect; but the objection would not prevail, in the first instance, to its introduction.

We find no error in the record, and the judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

SAMUEL P. WALKER'S EXECUTORS AND ROBERTSON TOFF'S ADMINISTRATOR, *Appts.*,

v.

UNITED STATES.

(See S. C., 16 Otto, 413–422.)

Purchase of cotton within insurrectionary lines, when invalid—claim against Government.

*On the 12th day of April, 1865, Walker, a citizen and resident of Memphis, purchased, in Mobile, from O'Grady, a citizen and resident of that city—both cities being then in the occupancy of the national forces—a lot of cotton, which, at the time, was in the military lines of the insurgent forces, in the States of Alabama and Mississippi, the inhabitants whereof had been declared to be in insurrection. Between June 30, and December 1, 1865, a portion of the cotton—while in the hands of the planters from whom it was originally purchased by the Confederate Government, and from the agent of which O'Grady had purchased, in Mobile, on the 5th day of April, 1865—was seized by Treasury agents of the United States, sold, and the proceeds paid into the treasury. Held, that the purchase from O'Grady by Walker was in violation of law, and was not one out of which could arise, in favor of the latter, any right, as against the United States, which could be enforced in the courts of the Union.

[No. 9.]

Argued Apr. 24, 25, 1882. Decided Dec. 4, 1882.

APPEAL from the Court of Claims.

The history and facts of the case fully appear in the

Statement of the case by *Mr. Justice* **Harlan:**

In this action, brought under the Captured and Abandoned Property Act of March 12, 1863, the present appellants seek to recover from the United States the net proceeds (alleged to be at least $600,000) of certain cotton, seized and sold by the agents of the Government in the year 1865. The petition was dismissed in the Court of Claims, and from the judgment of dismissal this appeal has been prosecuted. The facts, as found by that court, are substantially these: prior to the year 1865, John Scott, the [414] chief agent for produce loan for the Confederate Government, in Alabama and East Mississippi, purchased in lots, at different times and of different planters in those States, 3,405 bales of cotton, taking from the planter on each purchase, a receipt and agreement in the following form:

"STATE OF MISSISSIPPI,
County of , *town or postoffice*
November 27, 1862.

The undersigned, having sold to the Confederate States of America, and received the value of the same in bonds, the receipt whereof is hereby acknowledged, one hundred and thirty-five bales of cotton, marked, numbered and classed as in the margin, which is now deposited at plantation, hereby agrees to take due care of said cotton whilst on his plantation, and to deliver the same, at his own expense, at , in the State of Mississippi, to the order of the Secretary of the Treasury, or his agents or their assigns."

In each instance, he delivered to the planter a certificate in the following form:

ABERDEEN, Nov. 27, 1862.

The undersigned, as agent of the Government, certifies that the within cotton has been examined by him or by a competent judge, and that its character will rank, according to the commercial scale, as middling; and also, that the weights and marks are as described—the cotton being in good merchantable order, marked with the name of the planter, and on one end the initials, C. S. A., and safely stored in a covered building.

The undersigned certifies that the price agreed upon is a fair market price at the present time.
Agt."

There were thirty-seven such certificates, upon which appeared the number, weight and marks of the bales purchased.

The Confederate Government, being in need of large sums of money for its military department, and in order to pay debts incurred and to be incurred, authorized and directed Scott to sell this cotton, and all other cotton purchased by him in like manner. Accordingly, on the 6th day of April, 1865, at Mobile, Alabama, the place of his residence and business, he, as such Confederate produce loan agent, sold to one O'Grady, a citizen and resident of [415]

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the same place, all of the 3405 bales of cotton, at the price of $1 per pound in Confederate States currency, transferring to him the planters' receipts, as above described, and attaching to each one a certificate in the following form:

"CONFEDERATE STATES OF AMERICA,
TREASURY DEPARTMENT, April 6, 1865.

This is to certify that the within and above described cotton has been sold to D. O'Grady, bales, and delivery is hereby ordered to be made to him, or his order, with license to export the same from the Confederate States to any neutral port, on complying with the requisitions of the law.

Given under my hand and the seal of the treasury department, on the year and day above mentioned.

JOHN SCOTT,
Chief Ag't Produce Loan for Ala. and East Miss.
P'r J. G. ULRICK, Ag't."

Prior to these transactions, to wit: on the 6th day of March, 1865, President Lincoln gave to Samuel P. Walker (whose executors are claimants in this case) an order, of which the following is a copy:

"EXECUTIVE MANSION, March 6, 1865.

Whereas, Samuel P. Walker, of Memphis, Tenn., claims to own products of the insurrectionary States near Grenada and Canton, Miss., and Montgomery and Selma, Alabama, and has arrangements with parties in the same vicinities for other products of the insurrectionary States, all which he proposes to sell and deliver to agents authorized to purchase for the United States, the products of the insurrectionary States, under the Act of Congress of July 2, 1864, and the regulations of the Secretary of the Treasury, it is ordered that all such products which a purchasing agent of the Government has agreed to purchase, and the said Walker has stipulated to deliver, as shown by the certificate of the purchasing agent, authorized by Regulations VIII., Form No. 1, appended to regulations attached hereto by such agent, and being transported, or in store awaiting transportation, for fulfillment of stipulations and in pursuance of the regulations of the Secretary of the Treasury, shall be free from seizure, detention or forfeiture to the United States; and officers of the army and navy and civil officers of the Government will observe this order, and will give [416] the said Walker, his agents, and means of transportation, and said products, free and unmolested passage through the lines (other than blockade lines), and safe conduct within the lines, while going for or returning with said products, or while said products are in store awaiting transportation for the purposes aforesaid. ABRAHAM LINCOLN."

On the 12th day of April, 1865, the City of Mobile, which had been continuously invested from 1862, was captured by the Union forces. On that day, at Mobile, Walker, who was a resident and citizen of Memphis, Tennessee, purchased from O'Grady the 3,405 bales of cotton referred to, and which was still in the hands of the planters under their arrangement with Scott, taking from him a bill of sale, which was attached to a list specifying the number of bales, weight and the names of the counties where the cotton was originally purchased from planters. The bill of sale was as follows:

"For value received of Sam'l P. Walker, I hereby transfer, sell and assign the above lots of cotton, amounting to 3,405 bales, without recourse upon me, and the holders thereof will please deliver the same to the said Walker or his authorized agent.

April 12, 1865. D. O'GRADY."

At the same time O'Grady delivered and indorsed to Walker the planters' certificates, which the former had received from Scott. The cotton remained on the plantations, and the only delivery to Scott, O'Grady or Walker was by the planters' certificates, and their transfer by indorsement, as hereinbefore stated.

On the 5th of May, 1865, by the surrender of General Taylor, commanding the Confederate forces in Alabama and Mississippi, the counties in which this cotton was held, passed under the military control of Gen. E. R. S. Canby, commanding the Union forces at Mobile. The United States military authorities seized all the lines of railroads and steamboats in that section; and on May 10, 1865, the following order was issued by General Canby:

"HEADQUARTERS ARMY AND DIVISION OF [417]
WEST MISSISSIPPI,
MOBILE, ALABAMA, May 10th, 1865.

(General Field Orders, No. 39.)

The cotton belonging to the Confederate Government in East Louisiana, Mississippi, Alabama and West Florida, having been surrendered to the Government of the United States, its sale to private individuals, or its transfer to any persons except the officers or agent of that Government, is prohibited. This order applies to all cotton procured by subscriptions to the cotton loan, by the sale of Confederate bonds or notes, by the tax in kind, or by any other process by which the title was vested in the Confederate Government; whether in the possession of the agents of that Government or still in the hands of the producers; and all persons in whose charge it may be, will be held accountable for its delivery to the agents of the United States. Commanders of districts will be furnished with a transcript from the records of the cotton agents, showing the quantity and location of the cotton within the limits of their commands, and will give the agents of the Treasury Department, appointed to receive it, such facilities as may be necessary to enable him to secure it.

Any sales of this property in violation of this order will be treated as the embezzlement of public property.

By order of Major-General E. R. S. Canby."

On the first of June, 1865, F. W. Kellogg, agent of the United States for the purchase of cotton in insurrectionary States, entered into an agreement with Walker, of which the following is a copy:

"MOBILE, ALABAMA, June 1st, 1865.

I, Francis W. Kellogg, agent for the purchase of cotton of insurrectionary States, on behalf of the Government of the United States, at Mobile, Alabama, do hereby certify that I have agreed to purchase from Samuel P. Walker, Esq., of Memphis, Tennessee, thirty-five hundred bales of cotton, which, it is represented, are or will be stored at Green, Pickens & Marengo Co's, in the State of Alabama, and with planters in the counties of Lauderdale, Noxubee, Lowndes and Monroe, in the State of Mississippi, and which he stipulates shall be

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delivered to me, unless prevented from so doing by the authority of the United States.

I, therefore, request safe conduct for the said Samuel P. Walker and his means of transportation, and said cotton from where it is stored to Mobile, where the cotton so transported is to [418] be sold and delivered to me, under the stipulation referred to above, and pursuant to regulations prescribed by the Secretary of the Treasury.

F. W. KELLOGG,
United States Purchasing Agent.

NOTICE. Cotton arriving at Mobile under this permit must be promptly reported to the United States purchasing agent."

Between June 30 and December 1, 1865, 1,922¾ bales of this cotton, on plantations in Lowndes and other Counties in Mississippi, were seized by Treasury agents, appointed by the Secretary of the Treasury to collect cotton which had been sold to the Confederate States, and sent to New York, where the cotton was sold, and the net proceeds covered into the United States Treasury.

The territory embracing the counties in Mississippi where the cotton was stored, and where it was when seized by the treasury agents, was held and occupied by the Confederates on and prior to April 12, 1865, while Mobile and Memphis, at that date and until the close of the war, were both occupied by the Union forces.

"The negotiations for the sale of this cotton to O'Grady took place in the early part of the year 1865, and the final conveyance delayed until April 6, 1865, and finally completed on that day, by reason of the ill health of Scott, and for other reasons."

In making sales of cotton in that section of the country, during Confederate control, the custom was to transfer the planters' certificates, as if negotiable. That was the usual, and, generally, the only mode of delivery made or required.

The Court of Claims found, as conclusions of law, that the order of President Lincoln, of March 6, 1865, was not a license or permit which authorized Walker to purchase the cotton in question in Mobile at the time and under the circumstances set forth in the findings; that Walker acquired no title as against the United States by his alleged purchase from O'Grady; and that the claimants, consequently, had no cause of action against the Government.

[419] *Messrs.* **Warner M. Bateman,** *Benjamin F. Butler, Quinton Corwine* and *John Pool,* for appellants.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.,* for appellee

Mr. Justice **Harlan** delivered the opinion of the court:

By the Proclamation of the President of the United States, issued on the 16th day of August, 1861 [12 Stat. at L., 1262], in pursuance of authority given by the Act of July 13, 1861, 12 Stat. at L., 257, the inhabitants of Tennessee, Alabama, Mississippi and other States—except that part of Virginia west of the Alleghany Mountains, and of such other parts of that and the other States named as might maintain a loyal adhesion to the Union, or might, from time to time, be occupied and controlled by the Union forces—were declared to be in a state of insurrection against the United States; and "all commercial intercourse between the same and the inhabitants thereof, with the exceptions aforesaid, and the citizens of other States and other parts of the United States," was made unlawful until the insurrection ceased or was suppressed. The 5th section of the Act of July 13, 1861, upon which the Proclamation was based, provided that "The President may, in his discretion, license and permit commercial intercourse with any such part of said State or section, the inhabitants of which are so declared in a state of insurrection, in such articles and for such time and by such persons as he, in his discretion, may think most conducive to the public interests; and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury."

By the subsequent Proclamation of April 2, 1863 [13 Stat. at L., 730], the territorial exceptions made in the former Proclamation were revoked, except as to West Virginia and the Ports of New Orleans, Key West, Port Royal and Beaufort.

By the 4th section of the Act of July 2, 1864 [13 Stat. at L., 375], the prohibitions and provisions of the Act approved July 13, 1861, and of the Acts amendatory thereof or supplementary thereto, were made to apply "To all commercial intercourse by and between persons residing or being within districts within the present or future lines of national military occupation, in the States or parts of States declared in insurrection, *whether with each other* or with persons residing or being within districts [420] declared in insurrection and not within those lines."

The 8th section of the same Act makes it lawful for the Secretary of the Treasury, with the approval of the President, to authorize agents to purchase, for the United States, any products of States declared in insurrection, at such places as shall be designated by him. And the 9th section provides:

"That so much of section 5 of the Act of thirteenth of July, eighteen hundred and sixty-one, aforesaid, as authorizes the President, in his discretion, to license or permit commercial relations in any State or section, the inhabitants of which are declared in a state of insurrection, is hereby repealed, except so far as may be necessary to authorize supplying the necessities of loyal persons residing in insurrectionary States, within the lines of actual occupation by the military forces of the United States, as indicated by published order of the commanding general of the department or district so occupied; and, also, except so far as may be necessary to authorize persons residing within such lines to bring or send to market in the loyal States, any products which they shall have produced with their own labor, or the labor of freedmen, or others employed and paid by them, pursuant to rules relating thereto, which may be established under proper authority. And no goods, wares or merchandise shall be taken into a State declared in insurrection, or transported therein, except to and from such places, and to such monthly amounts, as shall have been previously agreed upon in writing by the commanding general of the department in which such places

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are situated, and an officer designated by the Secretary of the Treasury for that purpose."

From these Acts—in force on the 12th day of April, 1865, when Walker purchased from O'Grady—it is quite clear that persons residing or being in Memphis, then occupied by the national forces, were forbidden, unless authorized by competent authority, to have commercial intercourse with persons residing or being in Mobile, which was at that time likewise occupied by the national forces; this, because both cities were within States, the inhabitants whereof were declared to be in insurrection, and neither within the territorial exceptions made in the Proclamation of President Lincoln.

[421] But it is contended that the order of President Lincoln, given on the 6th of March, 1865, fully authorized Walker to proceed from Memphis, his place of residence, to Mobile, after that city had surrendered to the Union forces, and there contract with O'Grady for the purchase of the cotton in question, then but recently the property of the Confederate States (at least as between them and the original owners), and within the district actually occupied and controlled by the insurgent forces. A portion of the argument of counsel is addressed to the question whether, notwithstanding the repeal of the 5th section of the Act of July 13, 1861, authorizing the President, in his discretion, to license or permit commercial relations in any State or section in insurrection, he could not, in virtue of his power as Commander-in-Chief of the Army, license trade with insurgents within the lines of Confederate military occupancy. If this question has not been distinctly concluded by the former decisions of this court, we deem it unnecessary now to consider or determine it. For, plainly, the order of March 6, 1865, was not a license to trade or have commercial intercourse with the enemy, without limit as to amount, or without restriction as to persons and territory. The order proceeds solely upon the ground that Walker *then* owned products of the insurrectionary States, near Grenada and Canton, in Mississippi, and Montgomery and Selma, in Alabama; and that he *then* had arrangements with parties in the vicinity of those places for other products of the insurrectionary States. It was in reference to *such* products—those he then owned, and those as to which he then had arrangments with other parties—that the President ordered that they should be free from seizure, detention or forfeiture to the United States. Now, the finding of the facts, upon which alone this court can act, shows that Walker did not, on the 6th of March, 1865, own any part of the cotton in question. It was then in the possession of the planters, who held it for the Confederate Government; and if it ever was, as against the United States, after its sale to the Confederate Government, to be used in aid of the rebellion, the property of O'Grady, from whom Walker purchased, it did not become so until April 5, 1865. Nor does it appear that this cotton constituted, at any time, a part of the cotton with reference to which Walker had "arrangements" at the time President Lin-
[422] coln gave the order of March 6, 1865. It is true that the court below finds that "The negotiations for the sale of the cotton to O'Grady took place in the early part of the year 1865, and the final conveyance delayed until April 6, 1865, and finally completed on that day, by reason of the ill-health of Scott, the Confederate produce loan agent, and for other reasons." But the negotiations here referred to were, manifestly, not the arrangements which Walker claimed to have had, on March 6, 1865, for products of the insurrectionary districts. There is nothing to show that he ever had any communication upon the subject of this cotton, with the Confederate produce loan agent, or with O'Grady, until after the capture of Mobile. The negotiations, which were not completed until April 6, 1865, by reason of Scott's ill health, and "for other reasons," were evidently those by which Scott proposed to sell *to* O'Grady, and with which Walker, it must be assumed, had no connection whatever. The case, as it stands, seems to be one in which the claimants seek to bring within the operation of the order of March 6, 1865, a transaction in cotton not covered nor intended to be covered by it. The contract, upon the finding of facts, must be regarded as one made between Walker and O'Grady, in palpable violation of the laws of the United States, forbidding commercial intercourse between persons respectively residing in places occupied by the national forces, within districts the inhabitants whereof were declared to be in insurrection. It is, therefore, according to the settled doctrines of this court, a contract from which could arise, in favor of Walker, no right to the cotton, as against the United States, which could be enforced in the courts of the Union.

Without, therefore, giving other reasons, quite apparent upon the record and which would make it our duty to sustain the judgment of the Court of Claims, we content ourselves with affirming it upon the grounds indicated

It is so ordered.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

L. F. HODGES ET AL., *Plfs. in Err.*,

v.

JAMES H. EASTON ET AL.

(See S. C., 16 Otto, 408-418.)

Special verdict, when insufficient to sustain judgment.

*The court propounded to the jury certain questions, covering only a part of the material issues of fact. The questions, with the answers thereto, were returned as a special verdict. There was no general verdict, nor was there a bill of exceptions showing the evidence adduced. The judgment recited that it was rendered against the defendants "upon the special verdict of the jury, and facts conceded or not disputed upon the trial." Held, as the facts set out in the special verdict were insufficient to sustain the judgment, and as, without a waiver of trial by jury—against which every reasonable presumption should be indulged—it was the constitutional right of the defendants to have the jury pass upon all the material facts in issue, the judgment must be reversed and a new trial had.

[No. 92.]

Argued Nov. 17, 20, 1882. Decided Dec. 4, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

The history and facts of the case are sufficiently stated by the court.

*Head note by *Mr. Justice* HARLAN.

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Messrs. **L. S. Dixon** and *Dewitt Davis*, for plaintiffs in error:

"It is of the very essence of a special verdict, that the jury should find the facts on which the court is to pronounce the judgment according to the law, and the court, in giving judgment, is confined to the facts so found."

Suydam v. *Williamson*, 20 How., 427 (61 U. S., XV., 978); *Barnes* v. *Williams*, 11 Wheat., 415; *Wallingford* v. *Dunlap*, 14 Pa. St., 31.

Mr. **H. M. Finch**, for defendants in error:

The plaintiffs in error ask the judgment to be reversed, because the "conceded" facts, or facts not disputed, are not in the special verdict.

The short answer to this is, that these facts need not appear in the special verdict.

The decisions of the Supreme Court of Wisconsin are clear and conclusive on this point.

McHugh v. *R. R. Co.*, 41 Wis., 75; *Farrell* v. *Drees*, 41 Wis., 186; *Williams* v. *Porter*, 41 Wis., 430; *Ward* v. *Busack*, 46 Wis., 408; *Berg* v. *R. R. Co.*, 50 Wis., 424; *Ault* v. *W. & W. Mfg. Co.*, 54 Wis., 304.

Mr. Justice **Harlan** delivered the opinion of the court:

The foundation of this action is the alleged conversion by the plaintiffs in error, who were defendants below, of certain wheat, stored in separate bins in the warehouse of William H. Valleau, in Decorah, Iowa.

The complaint contains two counts, the first one of which proceeds upon the ground, that the wheat, when so converted, was the property of the defendants in error, who were plaintiffs below. In the second count it is averred that, during the winter and spring of 1876, the First National Bank of Decorah, Iowa, discounted notes and drafts for and loaned money to said Valleau, upon the security of a large quantity of wheat delivered to the bank, of which he, Valleau, was then the owner and had the possession, and which was stored, in separate bins, in a warehouse in Decorah, Iowa; that, thereby, the wheat became the property of the bank; that, subsequently, in April and [409] May, 1876, Valleau, without repaying such loans and discounts, and without the knowledge and consent of the bank, wrongfully and tortiously took and removed the wheat from the warehouse and from the possession of the bank, shipped it to the defendants, at Milwaukee, by whom it was wrongfully and tortiously received and sold, and the proceeds converted to their own use; that no part of the moneys, so loaned and advanced, has ever been paid by Valleau, or by any one for him; that, prior to this suit, the bank sold, assigned and transferred its right, title and interest in the wheat, and all right of action to recover the same or its value; of which assignment the defendants had notice before this action; and lastly, that, prior to the commencement of the action, the bank and plaintiffs had each demanded from defendants the delivery of the wheat, but they had refused to deliver it, or any part thereof, either to the bank or to plaintiffs.

The answer denies, generally, "Each and every allegation, statement, matter, fact and thing in the complaint, set forth, alleged and contained."

The record states that the jury, impaneled and sworn to try the issues, "rendered a special verdict in answer to the questions propounded by the court." The questions so propounded, with the answers thereto, were made the special verdict. The jury having been discharged, the plaintiffs, by counsel, moved for judgment upon the special verdict for the value of the wheat wrongfully converted by defendants, or for such damages as the court should adjudge, and for such other and further relief as might be granted in the premises. On a later day, the defendants moved to set aside the special verdict and grant a new trial, upon the ground, among others, that the special verdict "does not contain findings upon the material issues in the case."

These motions were heard together, and it was ordered by the court "That the motion of defendants for a new trial be and is hereby overruled, and that the motion of the plaintiffs for judgment upon the special verdict of the jury and *facts conceded or not disputed upon the trial* be and is hereby granted." The damages were assessed by the court at $12,554.89, for which sum judgment was entered against the defendants. From that judgment this wri [410] of error is prosecuted.

Under the Code of Practice of Wisconsin, the answer in this case puts in issue every material allegation in the complaint. 2 Taylor, Stat. Wis., 1871, p. 1439; Rev. Stat. Wis., 1878, sec 2655. And since the practice, pleading, forms and modes of proceeding, in civil causes, other than equity and admiralty causes, in the Circuit and District Courts of the United States, must conform, as near as may be, to the practice, pleadings, forms and modes of proceeding, existing, at the time, in like causes in the courts of record in the State within which such circuit or district courts are held, Rev. Stat., sec. 914, it was incumbent upon the plaintiff, as was conceded in argument here, to prove, at the trial, among other things, that the bank had sold, assigned and transferred all its title and interest in the wheat, and thereby, also, its right to recover the wheat or its value. No bill of exceptions was taken showing the evidence introduced by either party, nor was there a general verdict. Having regard alone to the questions and answers propounded to the jury, it is clear that plaintiffs did not prove their case, as made by the first count, which proceeded upon the ground that the wheat was the property of the plaintiffs. It is equally clear that the jury made no finding upon the issue, raised by the second count, as to the alleged assignment by the bank to plaintiffs. No question was propounded to the jury upon that subject, nor was that point covered by the written stipulation as to the amount of freight and the value of the wheat. We infer from the oral statement of counsel for plaintiffs, that, at the trial below, the assignment by the bank was conceded and that the final judgment was based, in part, upon that concession. But in that representation, counsel who appeared in this court for defendants, but who did not participate in the trial in the circuit court, did not feel authorized to concur. Looking, therefore, as we must, to the case as disclosed by the record, we are constrained to hold that the answers to the special questions propounded by the court, being silent as to the assignment by the bank, did not furnish a basis for judgment in behalf of plaint-

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iffs. Without proof upon that point, plaintiffs, it is manifest, were not entitled to judgment upon the second count. In *Patterson* v. *U. S.*, 2 Wheat., 225, it was said, that if it appeared [411] to the court of original jurisdiction, or to the appellate court, that the verdict was confined to a part only of the matter in issue, no judgment could be rendered upon it. In *Barnes* v. *Williams*, 11 Wheat., 415, the claim of the plaintiff being founded upon a bequest of certain slaves, it was essential to a recovery, at law, that the assent of the executor to the legacy should be proved. This court, speaking by *Ch. J.* Marshall, said: "Although in the opinion of the court there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the court could not, upon a special verdict, intend it. The special verdict was defective in stating the evidence of the fact, instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the plaintiff."

But it is suggested that the final judgment, upon its face, shows that it was not based, exclusively, on answers to the special questions, and the stipulation by the parties as to the amount of freight and value of wheat; but, also, "upon facts conceded or not disputed upon the trial." Although this court is not informed by the record as to what those conceded and undisputed facts are, it is insisted, that we should presume, in support of the judgment, that they were, in connection with the facts specially found, sufficient to justify the action of the court below. This position, it is contended, is sustained by numerous decisions of the Supreme Court of Wisconsin, upon the subject of general and special verdicts, as defined and regulated by the laws of that State in force when this action was tried.

It is not necessary, in this opinion, to enter upon an examination of those decisions, nor to consider how far the local law controls in determining, either the essential requisites of a special verdict in the courts of the United States, nor the conditions under which a judgment will be presumed to have been supported by facts other than those set out in a special verdict. The difficulty we have arises from other considerations. The record discloses that the defendants had a determination, by the jury, of a part of the facts, while other facts, upon which the final judgment was rested, were found by the court to have been conceded or not disputed. If we should presume that there were no ma- [412] terial facts considered by the court beyond those found in the answers to special questions, then, as we have seen, the facts found do not authorize the judgment. If, on the other hand, we should adjudge it to have been defendants' duty to preserve the evidence in a bill of exceptions, and that, in deference to the decisions of the state court, it should be presumed that the "facts conceded or not disputed at the trial" were, in connection with the facts ascertained by the jury, ample to support the judgment, we then have a case, at law, which the jury was sworn to try, determined, as to certain material facts, by the court alone, without a waiver of jury trial as to such facts. It was the province of the jury to pass upon the issues of fact, and it was the right of the defendants, secured by the Constitution of the United States, to have them do so. That right could have been waived, but it could not be taken from them by the court. If, upon the trial, all the facts essential to recovery had been undisputed, or so conclusively established the cause of action as to have authorized the withdrawal of the case altogether from the jury, by a peremptory instruction to find for plaintiffs, it would still have been necessary that the jury make its verdict, albeit in conformity with the order of the court. The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and itself determine the remainder, without a waiver by the defendants of a verdict by the jury. In civil cases, other than those in equity and admiralty, and except where it is otherwise provided in bankruptcy proceedings, "the trial of issues of fact"—that is, of all the material issues of fact —"in the circuit courts shall be by jury," unless the parties, or their attorneys of record, stipulate in writing for the waiver of a jury. R. S., secs. 648, 649. There is no such stipulation in this case, and there is nothing in the record from which such stipulation or waiver may be inferred. It has been often said by this court that the trial by jury is a fundamental guaranty of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver. For these reasons, the judgment below must be reversed.

One other point discussed by counsel for defendants in error must be noticed. He insisted that the order of reversal, if one be made, should be accompanied by a direction to the court below to restrict the next trial to such issues as [413] are not covered by the answers of the jury to special questions. In support of this position we have been referred to several adjudications which seem to recognize the authority of the court, when setting aside a judgment, to restrict the subsequent trial to such issues as were not passed upon by the jury at the first trial. Whether this contention be sound or not, we need not now determine, for the reason that the grounds upon which it rests have no existence, where, as here, the case, as to the issues triable by jury, was not submitted to the jury in the mode required by law. *There is, then, no alternative but to reverse the judgment, with directions that a trial be had upon all the material issues of fact.*

It is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 623; 107 U. S., 501; 113 U. S., 321.

UNITED STATES, *Plff. in Err.*, [196]
v.
GEORGE W. P. C. LEE.

FREDERICK KAUFMAN ET AL., *Plffs. in Err.*,
v.
GEORGE W. P. C. LEE.

(See S. C., 16 Otto, 196-251.)

Exemption of United States from suit—suits

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against officers and agents—power of courts—English decisions—constitutional rights of citizen—habeas corpus—*wrongs by Government—removal of suit—certificate of sale for taxes—tender of taxes when unnecessary.*

*1. The doctrine that the United States cannot be sued as a party defendant in any court whatever, except where Congress has provided for such suit, examined and reaffirmed, and the nature of this exemption considered.

2. This exemption is, however, limited to suits against the United States directly and by name, and cannot be successfully pleaded in favor of officers and agents of the United States, when sued by private persons for property in their possession as such officers and agents.

3. In such cases, a court of competent jurisdiction over the parties before it, may inquire into the lawfulness of the possession of the United States as held by such officers or agents, and give judgment according to the result of that inquiry.

4. The difference in the essential features of a monarchical and republican form of government, renders the decisions of the English Courts on this subject of but little value as precedents; while an examination of numerous decisions of this court, from its organization under the Constitution to the present day, establishes the foregoing proposition.

5. The constitutional provisions that no person shall be deprived of life, liberty or property without due process of law, nor private property taken for public use without just compensation, are intended as limitations upon the power of the Government in its dealings with the citizen, and relate to that class of rights whose protection is peculiarly within the province of the judicial branch of the Government.

6. In regard to the life and liberty of the citizen, the courts have so often exercised the power by writ of *habeas corpus*, that there remains no question about their right to do so. The cases here examined show that they are equally bound to give remedy for unlawful invasion of rights of property, by officers of any branch of the Government.

7. The evils which it is suggested may arise from interference of state or other courts with the exercise of powers essential to government, are illusory, and are insignificant in comparison with the proposition that no relief can be granted when it is asserted that the United States has authorized the wrong.

8. Such suits, if commenced elsewhere, are by existing laws always removable into a court of the United States, in which injustice to the Government will neither be presumed nor permitted.

9. On the trial of the present case before the jury the title relied on by defendants was a certificate of sale of the land to the United States by the commissioners under the Act of Congress for the collection of direct taxes, and the certificate was impeached because of the refusal of the commissioners to permit the owner to pay the tax, with interest and costs, before the day of sale, by an agent, or in any other way than by payment in person.

10. The cases of Bennett v. Hunter, 9 Wall., 326 [76 U. S., XIX., 672]; Tracey v. Irwin, 18 Wall., 549 [85 U. S., XXI., 786], and Atwood v. Weems, 99 U. S., 183 [XXV., 471], re-examined, and the principle they establish held to apply to a purchase by the United States as well as by a private person, namely, that when the commissioners had established a uniform rule that they would receive such taxes from no one but the owner in person, it avoids such sale, and a tender is unnecessary, since it would be of no avail.

[Nos. 25, 26.]

Argued Mar. 10, 13, 1882. Order for reargument Apr. 24, 1882. Reargued Oct. 18, 19, 1882. Decided Dec. 4, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

†Head notes by *Mr. Justice* MILLER.

NOTE.—*What is due process of law.* See *note* to Pearsons v. Yewdall, 95 U. S., XXIV., 436.

Eminent domain; the right to payment for private property taken for public use, generally recognized; Fifth Amendment to Constitution applies only to Federal Government, and not to States. See *note* to Withers v. Buckley, 61 U. S., XV., 816.

The history and facts of the case fully appear in the opinion of the court, and in the dissenting opinion.

Messrs. **S. F. Phillips,** *Solicitor-Gen.* and **Westell Willoughby,** for plaintiffs in error:

The mode of proceeding by the United States is justified by the rule in *Doe d. Legh* v. *Roe*, 8 Mees. & W., 579; also by the following cases: *The Exchange*, 7 Cranch, 117; *Maxwell* v. *Levy*, 2 Dall., 381; *Florida* v. *Georgia*, 17 How., 478 (58 U. S., XV., 181).

The object of the suit is to recover from the possession from the United States, and can be maintained only by invalidating this record title of the United States. It is, therefore, in substance, a controversy between Lee on one side, and the United States on the other.

A principle, underlying all the authorities relating to the jurisdiction of courts, is, that the sovereign power of any Nation being supreme, is not amenable to the judicial department, and will not permit process against itself, either directly or indirectly, or allow its operations or instrumentalities to be affected or disturbed except by special consent. It cannot admit of coercion by judicial process. Hence, the well known proceedings at common law, by petition of right, and *Monstrans de droit*. Bl. Com., Vol. 3, p. 236.

Reference is made in this connection to the following English authorities: *Sadlers' Case*, 4 Coke, 55 *a;* Staundeforde, Prerog., 72 *a*, *b*, 606; 6 Com. Dig., tit. Prerog., 64, 67; Year Books, 3d Edw., 171; *The Bankers*, 14 Howell St. Tr., 28, 78, 81, 82; *Barclay* v. *Russell*, 3 Ves., 436; Mitf. Ch. Pl., 31; *Hovenden* v. *Annesley*, 2 Sch. & Lef., 617; *Anonymous*, 1 Anst., 215; 5 Bac. Abr., 569, 570.

Special attention is called to the case of *Doe d. Legh* v. *Roe*, 8 Mees. & W., 579, where in ejectment a suggestion was made by the Attorney-General, as in this case, whereupon a rule issued, and was made absolute, the doctrines now asserted being fully maintained. See, also, *Atty-Gen.* v. *Hallett*, 15 Mees. & W., 106.

But this doctrine is as fully maintained in this country.

In No. 81 of the Federalist, the author says: "It is inherent in the nature of sovereignty, not to be amenable to the suit of a individual without its consent. This is the general sense and general practice of mankind."

See, also, *Cohens* v. *Virginia*, 6 Wheat., 264; *Chisholm* v. *Georgia*, 2 Dall., 419; *U. S.* v. *Clarke*, 8 Pet., 444; *U. S.* v. *Eckford*, 6 Wall., 484 (73 U. S., XVIII, 920); *Field* v. *U. S.*, 9 Pet., 201; 1 Story, Eq. Pl., sec. 69 and *n.*; *Hill* v. *U. S.*, 9 How., 389; *Reeside* v. *Walker*, 11 How., 290.

For this purpose, reasoning employed in judgments upon prize cases is pertinent. *The Siren*, 7 Wall., 152 (74 U. S., XIX., 129); *The Davis*, 10 Wall., 15 (77 U. S., XIX., 875); *The Light Boats*, 11 Allen, 157; *Case* v. *Terrell*, 11 Wall., 199 (78 U. S., XX., 134).

The fact that the United States are in possession, brings the present within the principles established by these cases.

More than that, the property is in government use.

Final process, besides interfering with the possession, will seriously disturb the operations of the Government. It will do much more than

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deprive the United States of property. A proceeding like this against officers in charge of a fortification is mentioned in *Carr* v. *U. S.*, 98 U. S., 438 (XXV., 211), as a legal absurdity. *Mississippi* v. *Johnson*, 4 Wall., 475 (71 U. S., XVIII., 437); *Dobbins* v. *Comrs.*, 16 Pet., 435; *Collector* v. *Day*, 11 Wall., 113 (78 U. S., XX., 122); *McCulloch* v. *Maryland*, 4 Wheat., 316; *Harris* v. *Dennie*, 3 Pet., 292.

Messrs. **William D. Shipman, William J. Robertson, S. F. Beach,** *Francis L. Smith* and *Leigh R. Page*, for defendant in error:

It may be conceded as a general proposition, that the political corporation known as the United States cannot be directly sued, either at law or in equity. It is exempt from coercive legal process, on the ground that it is a sovereign power, not amenable to the jurisdiction of the civil tribunals. So much of the modern English law on the subject seems to have been adopted by the courts of this country; although the doctrine has been stigmatized by one very learned Justice of this court as a "Branch of a much more extensive principle, on which a plan of systematic despotism has lately been formed in England and prosecuted with unwearied assiduity and care."

Wilson, *J.*, in *Chisholm* v. *Georgia*, 2 Dall., 458.

The same doctrine was repudiated by the *Chief Justice* of this court.

Jay, *Ch. J.*, *Chisholm* v. *Georgia*, 2 Dall., 472, 473.

The following authorities show to what extent this doctrine has been sanctioned by this court:

U. S. v. *Clarke*, 8 Pet., 436; *U. S.* v. *McLemore*, 4 How., 286; *Hill* v. *U. S.*, 9 How., 386; *Reeside* v. *Walker*, 11 How., 272; *Nations* v. *Johnson*, 24 How., 195 (65 U. S., XVI., 628); *The Siren*, 7 Wall., 152 (74 U. S., XIX., 129); *The Davis*, 10 Wall., 15 (77 U. S., XIX., 875).

These cases are the principal ones in which the doctrine of the exemption of the sovereign power from suit has been dwelt upon, or in which it is supposed to have been affirmed, except the cases of *Carr* v. *U. S.*, 98 U. S., 438 (XXV., 211), and *James* v. *Campbell*, 104 U. S., 356 (XXVI., 786), decided at the last Term.

They may be said to affirm the following propositions:

First. * * * That no suit can be maintained directly against the United States without its consent expressed in an Act of Congress.

Second. * * * As a necessary consequence, this immunity of the sovereign power from suit cannot be waived by any officer of the Government, nor by all of them combined.

Third. * * * That the property of the United States, to which they have an *undisputed* title, cannot be proceded against and their officers dispossessed, for the purpose of enforcing a lien on such property.

We are aware of no case in which it has ever been held in this country that the *mere possession* of the agents or officers of the Government, of however high rank, without valid title in the Government itself, exempted them from suit and ousted the jurisdiction of the court. This court has practically and repeatedly repudiated any such doctrine, as will be clearly seen by an examination of several cases which cover the period from 1815 to 1870.

Meigs v. *M'Clung*, 9 Cranch, 11; *Wilcox* v. *Jackson*, 13 Pet., 498; *Brown* v. *Huger*, 21 How., 305 (62 U. S., XVI., 125); *Grisar* v. *McDowell*, 6 Wall., 363 (73 U. S., XVIII., 863); *Cooley* v. *O'Connor*, 12 Wall., 391 (79 U. S., XX., 446).

The United States, in the purchase of this property, acted in the mere exercise of a corporate right, and not in the exercise of any of the attributes of a political sovereign.

Elliot v. *Van Voorst*, 3 Wall., Jr., 302.

Its possession is, therefore, that of a purchaser; and mere possession, whatever its character, is never allowed to prevail over one who holds a valid title.

The character of the title claimed is well known to this court. Three times have such documents been pronounced void, and conveying no title whatever to the bidder at the sale. By a rule early adopted and uniformly acted upon by the commissioners, they refused to receive the tax unless tendered by the owners in person. This court has held that such certificates were void.

Bennett v. *Hunter*, 9 Wall., 326 (76 U. S., XIX., 672); *Tacey* v. *Irwin*, 18 Wall., 549 (85 U. S., XXI., 786); *Atwood* v. *Weems*, 99 U. S., 183 (XXV., 471).

Mr. Justice **Miller** delivered the opinion of the court:

These are two writs of error to the same judgment, one prosecuted by the United States, *eo nomine*, and the other by the Attorney-General of the United States, in the names of Frederick Kaufman and Richard P. Strong, the defendants against whom judgment was rendered in the circuit court. [197]

The action was originally commenced in the Circuit Court for the County of Alexandria, in the State of Virginia, by the present defendant in error against Kaufman and Strong and a great number of others, to recover possession of a parcel of land of about eleven hundred acres, known as the Arlington estate. It was an action of ejectment in the form prescribed by the Statutes of Virginia, under which the pleadings are in the names of the real parties, plaintiff and defendant.

As soon as the declaration was filed in that court, the case was removed into the Circuit Court of the United States by writ of *certiorari*, where all the subsequent proceedings took place. It was tried by a jury, and during the progress of the trial an order was made at the request of the plaintiff dismissing the suit as to all of the defendants except Kaufman and Strong. Against each of these, a judgment was rendered for separate parcels of the land in controversy, namely: against Kaufman for about two hundred acres of it, constituting the National Cemetery and included within its walls; and against Strong for the remainder of the tract, except seventeen acres in the possession of Maria Syphax.

As the United States was not a party to the suit below and, while defending the action by its proper law officers, expressly declined to submit itself as a defendant, to the jurisdiction of the court, there may exist some doubt whether it has a right to prosecute the writ of error in its own name; but as the judgment against Kaufman and Strong is here on their writ of error, and as under that writ all the questions

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are raised which can be raised under the other, their writ being prosecuted in the interest of the United States, and argued here by the Solicitor-General, the point is immaterial, and the question has not been mooted.

The first step taken in the case after it came into the Circuit Court of the United States was the filing in the clerk's office of that court of the following paper by the Attorney-General:

[198] "GEORGE W. C. LEE,
v.
FREDERICK KAUFMAN,
R. P. STRONG AND OTHERS. } In ejectment.

And now comes the Attorney-General of the United States and suggests to the court and gives it to understand and be informed (appearing only for the purpose of this motion) that the property in controversy in this suit has been for more than ten years and now is held, occupied and possessed by the United States, through its officers and agents, charged in behalf of the Government of the United States with the control of the property, and who are in the actual possession thereof, as public property of the United States, for public uses, in the exercise of their sovereign and constitutional powers as a military station, and as a national cemetery established for the burial of deceased soldiers and sailors, and known and designated as the 'Arlington Cemetery,' and for the uses and purposes set forth in the certificate of sale, a copy of which, as stated and prepared by the plaintiff and which is a true copy thereof, is annexed hereto and filed herewith, under claim of title, as appears by the said certificate of sale, and which was executed, delivered and recorded as therein appears.

Wherefore, without submitting the rights of the Government of the United States to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction of the subject in controversy, he moves that the declaration in said suit be set aside, and all the proceedings be stayed and dismissed, and for such other order as may be proper in the premises.

CHAS. DEVENS,
Att'y Gen'l U. S."

The plaintiff demurred to this suggestion and, on hearing, the demurrer was sustained.

The case was thereupon tried before a jury on the general issue pleaded by defendants Kaufman and Strong, in the course of which the question raised by this suggestion of the Attorney-General was again presented to the court by prayers for instruction, which were rejected and exceptions taken.

The plaintiff offered evidence establishing title in himself by the will of his grandfather, George Washington Parke Custis, who devised the Arlington estate to his daughter, the wife of General Robert E. Lee, for life, and after [199] her death to the plaintiff. This, with the long possession under that title, made a *prima facie* right of recovery in plaintiff.

The title relied on by defendants was a tax sale certificate made by the commissioners appointed under the Act of Congress of June 7, 1862 [12 Stat. at L., 422], "for the collection of direct taxes in the insurrectionary districts within the United States," as amended by the Act of February 6, 1863 [12 Stat. at L., 640]. At this sale, the land was bid in by said Commissioners for the United States, and a certificate of that fact was given by these commissioners and introduced on the trial as evidence by defendants.

If this sale was a valid sale, and the certificate conveyed a valid title, then the title of plaintiff was thereby devested and he could not recover.

If the proceedings evidenced by the tax sale did not transfer the title of the property to the United States, then it remained in the plaintiff and, so far as the question of title was concerned, his recovery was a rightful one.

We have then two questions presented to the court and jury below, and the same questions arise in this court on the record:

1. Could any action be maintained against the defendants for the possession of the land in controversy, under the circumstances of the relation of that possession to the United States, however clear the legal right to that possession might be in plaintiff?

2. If such an action could be maintained, was the *prima facie* title of plaintiff devested by the tax sale and the certificate given by the commissioners?

It is believed that no division of opinion exists among the members of this court on the proposition that the rulings of law, under which the latter question was submitted by the court to the jury, was sound; and that the jury were authorized to find, as they evidently did find, that the tax certificate and the sale which it recited, did not devest the plaintiff of his title to the property.

For this reason we will consider first the assignment of errors on that subject.

No substantial objection is seen on the face of the certificate, to its validity, and none has been seriously urged. It was admitted in evidence by the court and, unless impeached by extrinsic evidence offered by the plaintiff, it defeated his [200] title.

When this tax sale was made, the Act of February 6, 1863, which amended the original Act of June 7, 1862, by substituting a new section 7 for that of the former, was in force. It declares that the certificate of the commissioners given to the purchaser at such sale, "Shall be received in all courts and places as *prima facie* evidence of the regularity and validity of said sale, and of the title of the said purchaser or purchasers under the same;" and that it "Shall only be affected as evidence of the regularity and validity of sale by establishing the fact, that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of this Act."

It is in reference to the clause which permits the certificate to be impeached, by showing that the taxes had been paid previous to sale, that the plaintiff in the present case introduced evidence.

This court has, in a series of cases, established the proposition, that where the commissioners refused to receive such taxes, their action in thus preventing payment was the equivalent of payment, in its effect upon the certificate of sale. *Bennett* v. *Hunter*, 9 Wall., 326 [76 U. S., XIX., 672]; *Tracey* v. *Irwin*, 18 Wall., 549 [85 U. S., XXI., 786]; *Atwood* v. *Weems*, 99 U. S., 183 [XXV., 471].

There are exceptions to the ruling of the court on the admission of evidence, and instructions to the jury given and refused on this sub-

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ject, which are made the foundation of several assignments of error.

All that is necessary to be considered in this matter is presented in the instructions granted and refused. The point in issue is fairly raised by the following, given at the request of plaintiff and against the objection of defendants.

"If the jury believe from the evidence that the commissioners, prior to January 11, 1864, established, announced and uniformly followed a general rule, under which they refused to receive on property which had been advertised for sale from anyone but the owner or a party in interest, in person, when offered, the amount chargeable upon said property by virtue of the said Acts of Congress, then said rule dispensed [201] with the necessity of a tender and, in the absence of proof to the contrary, the law presumes that said amount would have been paid, and the court instructs the jury that, upon such a state of facts, the sale of the property in controversy made on the 11th day of January, 1864, was unauthorized, and conferred no title on the purchaser;" and by instructions six and seven, given at the request of defendants, in the following language:

6. The burden of proof is upon the plaintiff to establish the fact that the tax commissioners, before the sale of this property, made a general rule not to receive taxes except from the owner in person after the advertisement and before the sale; and if the jury believe that only two such instances occurred before the sale of this property, and if there is no evidence that the other two commissioners or either of them ever acted under such rule or practice, except Commissioner Hawxhurst, or that they or either of them ever concurred in such action before the sale of this property, then the said two instances in which Mr. Hawxhurst alone acted do not establish the said practice by the Board of Commissioners before the sale of this property, in a sufficient manner to render the certificate of sale of this property invalid.

7. In order to establish a general practice or rule of the board of commissioners, not to receive taxes except from the owner in person, after advertisement and before sale, before the date of the sale of the property in controversy, the jury must find from evidence produced on this trial that a majority of such board adopted such practice, or rule, or concurred therein, before the date of the sale of this property; and in the absence of proof to the contrary the law presumes that a majority of such board did not adopt such practice or rule, or concur therein before such date."

We think these presented correctly to the jury the principle established by the cases in this court above referred to; that is, that the commissioners themselves having established and acted upon a rule, that payment of the taxes after advertisement would be received from no one but the owner of the land appearing in person to pay them, that if offered by his tenant, his agent or his attorney in fact duly appointed, it would be rejected, it would be an idle ceremony for any of these to make [202] the offer, and an actual tender by such persons, as it would certainly not be accepted, need not be made. That the commissioners, having in the execution of the law acted upon a rule which deprived the owner of the land of an important right; a right which went to the root of the matter; a right which has, in no instance known to us or cited by counsel, been refused to a taxpayer, the sale made under such circumstances is invalid, as much so as if the tax had been actually paid or tendered. The proposition is thus expressed by this court at its last Term, in the case of *Hills* v. *Bank* [XXVI., 1052], as the result of the cases above cited: "It is a general rule that when the tender or performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused."

The application of these decisions to the case before us is denied by counsel on two grounds. The first of these is, that the case of *Bennett* v. *Hunter* [76 U. S., XIX., 672], was decided on the language of the Act of 1862, and that due attention was not given to the peculiar language of the substituted section 7 of the Act of 1863, which says that "When the owner of the land shall not on or before the day of sale appear *in person* before said board of commissioners and pay the amount of the tax, with ten per centum interest thereon, with the costs of advertising the same, or request the same to be struck off to a purchaser for a less sum than two thirds of the assessed value of said several lots or parcels of ground, the said Commissioners shall be authorized at said sale to bid off the same for the United States at a sum not exceeding two thirds of the assessed value thereof." It is argued from this, that no right to pay the tax under *this* statute existed except by the owner in person.

The reply to this is, that in the cases of *Bennett* v. *Hunter* and *Tracey* v. *Irwin*, the sales that were under consideration are clearly shown by the reports to have been made after the Act of 1863, and it is believed that no sale for taxes was made under the original tax law until after that amendment was passed, and that all the officers charged with the duty of collecting that tax were aware of the language of the new 7th section. It is quite apparent from the opinion of *Ch. J.* Chase, who spoke for the court in the case of *Bennett* v. *Hunter*, and who was Secretary of the Treasury when both statutes were [203] enacted, that he understood well that he was deciding the very question raised by the requirement to appear in person in the latter Act, and intended to decide that, notwithstanding this, the owner had a right to pay the tax before sale by an agent or a friend.

Besides, there was no other provision of either the Act of 1862 or the amendment of 1863, which gave the owner the right to pay at all between the advertisement and the sale. The 3d section of the original Act gave the right to pay for sixty days after the tax commissioners had fixed the amount of the tax, and no longer; and the 7th section of that Act, as well as its substitute of 1863, gave the right to redeem after the sale was made.

It is clear, therefore, that *Bennett* v. *Hunter*, *Tracey* v. *Irwin* and *Atwood* v. *Weems*, were decisions construing the substituted 7th section of 1863.

In the case of *Turner* v. *Smith*, 14 Wall., 558 [81 U. S., XX., 724], this court in construing the change in the language of the 7th section,

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held that its object was to authorize the United States, by its commissioners, to bid more than the tax and costs, which they could not do before, and to limit them to two thirds of its value; and that, after the amount of costs and tax had been bid, the United States should not bid against a purchaser named by the owner. It was probably in reference to this, that the Act required the personal presence of the owner before the commissioners to name a purchaser, against whom the United States should not compete after it was secured by a bid which covered the tax, interest and costs.

The other point raised is, that the right to pay the taxes between the advertisement and day of sale, in any other mode than by personal appearance of the owner before the commissioners, did not exist in cases where the United States became a purchaser. As it could never be known until the day of sale whether the United States would become the purchaser or not, it would seem that the duty of the commissioners to receive the taxes was to be exercised without reference to the possibility of the land being struck off to the United States.

[204] In the case of *Cooley* v. *O'Connor*, 12 Wall., 391 [79 U. S., XX., 446], it was held that the Act contemplated that a certificate of sale should be given when the United States became the purchaser, as in other cases, and no reason is shown why that certificate should have any greater effect as evidence of title than in the case of a private purchaser, nor why it should not be subject to the same rules in determining its validity, nor why the payment or tender of the tax, interest and costs, should not be made by an agent in the one case as in the other.

It is proper to observe that there was evidence, uncontradicted, to show that Mr. Fendall appeared before the commissioners in due time and offered, on the part of Mrs. Lee in whom the title then was, to pay the taxes, interest and costs, and was told that the commissioners could receive the money from no one but the owner of the land in person.

In all this matter we do not see any error in the rulings of the court, nor any reason to doubt that the jury were justified in finding that the United States acquired no title under tax sale proceedings.

In approaching the other question which we are called on to decide, it is proper to make a clear statement of what it is:

The counsel for plaintiffs in error and in behalf of the United States assert the proposition, that though it has been ascertained by the verdict of the jury, in which no error is found, that the plaintiff has the title to the land in controversy, and that what is set up in behalf of the United States is no title at all, the court can render no judgment in favor of the plaintiff against the defendants in the action, because the latter hold the property as officers and agents of the United States, and it is appropriated to lawful public uses.

This proposition rests on the principle that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property, held by such persons as officers or agents for the Government.

The first branch of this proposition is conceded to be the established law of this country and of this court at the present day; the second, as a necessary or proper deduction from the first, is denied.

In order to decide whether the inference is justified from what is conceded, it is necessary to [205] ascertain, if we can, on what principle the exemption of the United States from a suit by one of its citizens, is founded, and what limitations surround this exemption. In this, as in most other cases of like character, it will be found that the doctrine is derived from the laws and practices of our English ancestors; and while it is beyond question that, from the time of Edward the First until now, the King of England was not suable in the courts of that country, except where his consent had been given on petition of right, it is a matter of great uncertainty whether prior to that time he was not suable, in his own courts and in his kingly character, as other persons were. We have the authority of *Chief Baron* Comyn, 1 Dig., 132, Action, C, 1, and 6 Dig., 67, Prerogative; and of the Mirror of Justices, ch. 1, sec. 3, and ch. 5, sec. 1, that such was the law; and of Bracton and *Lord* Holt, that the King never was suable of common right. It is certain, however, that after the establishment of the petition of right, about that time, as the appropriate manner of seeking relief where the ascertainment of the parties' rights required a suit against the King, no attempt has been made to sue the King in any court, except as allowed on such petition.

It is believed that this petition of right, as it has been practiced and observed in the administration of justice in England, has been as efficient in securing the rights of suitors against the Crown, in all cases appropriate to judicial proceedings, as that which the law affords in legal controversies between the subjects of the King among themselves.

"If the mode of proceeding to enforce it be formal and ceremonious, it is, nevertheless, a practical and efficient remedy for the invasion by the sovereign power of individual rights." *U. S.* v. *O'Keefe*, 11 Wall., 178 [78 U. S., XX., 131].

There is in this country, however, no such thing as the petition of right, as there is no such thing as a kingly head to the Nation, nor to any of the States which compose it. There is vested in no officer or body the authority to consent that the State shall be sued, except in the law-making power, which may give such consent on the terms it may chose to impose. *The Davis*, 10 Wall., 15 [77 U. S., XIX., 875]. Congress has created a court in which it has authorized suits to be brought against the United States, [206] but has limited such suits to those arising on contract, with a few unimportant exceptions.

What were the reasons which forbade that the King should be sued in his own court, and how do these reasons apply to the political body corporate which we call the United States of America? As regards the King, one reason given by the old judges, was the absurdity of the King's sending a writ to himself to command the King to appear in the King's Court. No such reason exists in our Government, as process runs in the name of the President and may be served on the Attorney-General, as was done in the case of *Chisholm* v. *Georgia* [2 Dall.,

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419]. Nor can it be said that the dignity of the Government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts and submitting its rights, as against the citizens, to their judgment.

Mr. Justice Gray, of the Supreme Court of Massachusetts, in an able and learned opinion which exhausts the sources of information on this subject, says: "The broader reason is, that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen; and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury." *Briggs* v. *The Light Boats*, 11 Allen, 162. As we have no person in this Government who exercises supreme executive power or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests. It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists, that the supreme power in every State, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts.

It is obvious that, in our system of jurisprudence, the principle is as applicable to each of the States as it is to the United States, except in those cases where by the Constitution a State [207] of the Union may be sued in this court. *R. R. Co.* v. *Tennessee*, 101 U. S., 337 [XXV., 960]; *R. R. Co.* v. *Alabama*, *Id.*, 832 [XXV., 973].

That the doctrine met with a doubtful reception in the early history of this court, may be seen from the opinions of two of its justices in the case of *Chisholm* v. *State of Georgia*, where *Mr. Justice* Wilson, a member of the Convention which framed our Constitution, after a learned examination of the Laws of England and other States and Kingdoms, sums up the result by saying: "We see nothing against, but much in favor of the jurisdiction of this court over the State of Georgia, a party to this cause." 2 Dall., 461. *Ch. J.* Jay also considered the question as affected by the difference between a republican state like ours, and a personal sovereign, and held that there is no reason why a State should not be sued, though doubting whether the United States would be subject to the same rule. 2 Dall., 478.

The first recognition of the general doctrine by this court is to be found in the case of *Cohens* v. *Virginia*, 6 Wheat., 380.

The terms in which *Chief Justice* Marshall there gives assent to the principle does not add much to its force. "The counsel for the defendant," he says, "has laid down the general proposition that a sovereign, independent State is not suable except by its own consent." This general proposition, he adds, will not be controverted.

And while the exemption of the United States and of the several States, from being subjected as defendants to ordinary actions in the courts, has since that time been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine. *U. S.* v. *Clarke*, 8 Pet., 436; *Same* v. *McLemore*, 4 How., 286; *Hill* v. *U. S.*, 9 How., 386; *National* v. *Johnson*, 24 How., 195 [65 U. S., XVI., 628]; *The Siren*, 7 Wall., 152 [74 U. S., XIX., 129]; *The Davis*, 10 Wall., 15 [77 U. S., XIX., 875].

On the other hand, while acceding to the general proposition that in no court can the United States be sued directly by original process as a defendant, there is abundant evidence in the decisions of this court that the doctrine, if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs, [208] when the United States is not a defendant or a necessary party to the suit.

But little weight can be given to the decisions of the English courts on this branch of the subject, for two reasons:

1. In all cases where the title to property came into controversy between the Crown and a subject, whether held in right of the person who was King or as representative of the Nation, the petition of right presented a judicial remedy—a remedy which this court, on full examination in a case which required it, held to be practical and efficient. There has been, therefore, no necessity for suing the officers or servants of the King who held possession of such property, when the issue could be made with the King himself as defendant.

2. Another reason, of much greater weight, is found in the vast difference in the essential character of the two governments as regards the source and the depositaries of power.

Notwithstanding the progress which has been made since the days of the Stuarts, in stripping the Crown of its powers and prerogatives, it remains true to-day that the monarch is looked upon with too much reverence to be subjected to the demands of the law, as ordinary persons are, and the king-loving Nation would be shocked at the spectacle of their Queen being turned out of her pleasure garden by a writ of ejectment against the gardener. The Crown remains the fountain of honor, and the surroundings which give dignity and majesty to its possessor are cherished and enforced all the more strictly because of the loss of real power in the government.

It is not to be expected, therefore, that the courts will permit their process to disturb the possession of the Crown by acting on its officers or agents.

Under our system the *people*, who are there called *subjects*, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should [209] prevent him from using the means which the law gives him, for the protection and enforcement of that right.

Another class of cases in the English courts, in which attempts have been made to subject

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the public ships and other property of foreign and independent Nations found within English territory, to their jurisdiction, is also inapplicable to this case; for, both by the English courts and ours, it has been uniformly held that these were questions the decisions of which, as they might involve war or peace, must be primarily dealt with by those departments of the Government which had the power to adjust them by negotiation, or to enforce the rights of the citizen by war. In such cases the Judicial Department of this Government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction. Such were the cases of *The Exchange*, 7 Cranch, 116; *Luther* v. *Borden*, 7 How., 42; *Georgia* v. *Stanton*, 6 Wall., 75 [73 U. S., XVIII., 725].

The earliest case in this court in which the true rule is laid down, and which, bearing a close analogy to the one before us, seems decisive of it, is that of *U. S.* v. *Peters*, 5 Cranch, 115. In an admiralty proceeding, commenced before the formation of the Constitution and which afterwards came into the District Court of the United States for Pennsylvania, that court, after full hearing, had decided that the libelants were entitled to the proceeds of the sale of a vessel, condemned as prize of war, which had come to the possession of David Rittenhouse, as Treasurer of the State of Pennsylvania. The District Judge had declined to issue any process to enforce his decree against the representatives of Rittenhouse, on the ground that the funds were held as the property of that State, and that as the State could not be subjected to judicial process, neither could the officer who held the money in her right. The analogy to the case before us will be seen, when it is further stated that the examination of the case and the decree of the court had passed upon this claim of the State to the money, which had been fully presented, and had decided that the libelants and not the State were legally entitled to it. In that case, as in this, it was argued that the suit was in reality against the State. But on an application for a writ of *mandamus*, to compel the Judge of the district court to proceed in [210] the execution of his decree, it was granted. In delivering the opinion, Marshall, *Ch. J.*, says: "The State cannot be made a defendant to a suit brought by an individual, but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State, when a State is not necessarily a defendant. In this case the suit was not instituted against the State or its treasurer, but against the executrices of David Rittenhouse, for the proceeds of a vessel condemned in the court of admiralty, which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it was unnecessary to give an opinion; *but it certainly can never be alleged that a mere suggestion of title in a State, to property in possession of an individual, must arrest the proceedings of the court and prevent their looking into the suggestion and examining the validity of the title.*"

The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property. The suggestion was made that it was the property of the United States, and that the court, without inquiring into the truth of this suggestion, should proceed no further; and in this case, as in that, after a judicial inquiry had made it clear that the property belonged to plaintiff and not to the United States, we are still asked to forbid the court below to proceed further and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States.

It may be said, in fact it is said, that the present case differs from the one in 5 Cranch, because the officers who are sued assert no personal possession, but are holding as the mere agents of the United States, while the executors of Rittenhouse held the money until a better right was established. But the very next case in this court of a similar character, *Meigs* v. *McClung*, 9 Cranch, 11, shows that this distinction was not recognized as sound. The property sued for in that case was land on which the United States had a garrison erected at a cost of $30,000, and the defendants were the mili- [211] tary officers in possession, and the very question now in issue was raised by these officers, who, according to the bill of exceptions, insisted that the action could not be maintained against them, "Because the land was occupied by the United States troops, and the defendants as officers of the United States, for the benefit of the United States and by their direction." They further insisted, says the bill of exceptions, that the United States had a right, by the Constitution, to appropriate the property of the individual citizen. The court below overruled these objections and held that the title being in plaintiff he might recover, and that "If the land was private property, the United States could not have intended to deprive the individual of it without making him compensation therefor."

Although the judgment of the circuit court was in favor of the plaintiff, and its result was to turn the soldiers and officers out of possession and deliver it to plaintiff, *Ch. J.* Marshall concludes his opinion in this emphatic language: "This court is unanimously and clearly of opinion that the circuit court committed no error in instructing the jury that the Indian title was extinguished, to the land in controversy, *and that the plaintiff below might sustain his action.*"

We are unable to discover any difference whatever, in regard to the objection we are now considering, between this case and the one before us.

Impressed by the force of this argument, counsel say that the question of the objection arising out of the possession of the United States was not considered in that case, because it was not urged in argument by counsel. But it is manifest that it was so set out in the bill of exceptions, and so much relied on in the court below that it could not have escaped the attention of the court and of the eminent man who had only six years before delivered the opinion in the case of *U. S.* v. *Peters* [5 Cranch, 115]. Nor could the case have been decided as it was, if the doctrine now contended for be sound, since the effect of the judgment was to dispossess the United States of an occupied garrison, by the

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judgment against the officers in charge of it.

In the case of *Wilcox* v. *Jackson*, 13 Pet., 498, the contest was over a fort of the United States which had been in its continued possession for over thirty years, and was so occupied when [212] the suit was brought against its officers to dispossess them. The case came from the Supreme Court of Illinois to this court, on writ of error, and the judgment in favor of the plaintiff was reversed. The question now under consideration was not passed upon directly by this court. But a long examination of the question, whether the plaintiff had proved title in himself, and a decision that, while the State Courts of Illinois held a certificate of purchase from the United States to be a legal title under her statute, that statute was invalid, might all have been avoided by the simple declaration that the United States, being in possession of the property as a fort, no action at law against its officers could be maintained. But no such proposition was advanced by counsel on either side or considered by the court.

There is a very satisfactory reason for this. The cases of *U.S.* v. *Peters*, of *Meigs* v. *McClung*, and of *Osborn* v. *U. S. Bank* [9 Wheat. 738], had all involved the same question, and in the first and last of these cases, the principle was fully discussed, and in the other necessarily decided in the negative. And in the case of *Georgia* v. *Madrazo*, 1 Pet., 110, the court had referred to these cases, and again asserted the principle, quoting the language of them. Counsel were not justified in asking the court to reconsider it, while most of the Judges were still on the bench, including the *Chief Justice*, who had made those decisions.

The case of *Osborn* v. *U. S. Bank* [*supra*], is a leading case, remarkable in many respects, and in none more than in those resembling the one before us.

The case was this: the State of Ohio having levied a tax upon the branch of the Bank of the United States located in that State, which the bank refused to pay, Osborn, Auditor of the State of Ohio, was about to proceed to collect said tax by a seizure of the money of the bank in its vaults, and an amended bill alleged that he had so seized $100,000, and while aware that an injunction had been issued by the Circuit Court of the United States on the prayer of the bank, the money so seized had been delivered to the Treasurer of the State, Curry, and afterwards came to the possession of Sullivan, who had succeeded Curry as treasurer. Both Curry and Sullivan were made defendants, as well as Osborn and his assistant, Harper.

One of the objections pressed with pertinacity [213] all through the case to the jurisdiction of the court, was the conceded fact that the State of Ohio, though not made a defendant to the bill, was the real party in interest: that all the parties sued were her officers, her auditor, her treasurer and their agents, concerning acts done in their official character, and in obedience to her laws. It was conceded that the State could not be sued, and it was earnestly argued there, as here, that what could not be done directly could not be done by suing her officers. And it was insisted that, while the State could not be brought before the court, it was a necessary party to the relief sought, namely; the return of the money and obedience to the injunction, and that the bill must be dismissed.

A few citations from the opinion of Marshall, *Ch. J.*, will show the views entertained by the court on the question thus raised. At page 842 of the long report of the case, he says:

"If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree, unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties, but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him could his principal be joined in the suit."

In another place he says: "The process is substantially, though not in form, against the State, * * * and the direct interest of the State in the suit as brought is admitted; and had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause until the State was before the court. But this was not in the power of the bank, * * * and the very difficult question is to be decided, whether, in such a case, the court may [214] act upon agents employed by the State and on the property in their hands." In answering this question he says: "A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the Government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a State, alleging the authority of a law void in itself because repugnant to the Constitution, may arrest the execution of any law in the United States." Again; "The bank contends that in all cases in which jurisdiction depends on the character of the party, reference is made to the party on the record, not to one who may be interested, but is not shown by the record to be a party." "If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced where any person can be considered as a party who is not made so in the record." Again: "In cases where a State is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depend not on this plain fact, but on the interest of the State, what rule has the Constitution given by which this interest is to be measured? If no rule is given, is it to be settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause, inquiring into and deciding on the extent of a State's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?"

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The Supreme Court affirmed the decree of the Circuit Court for the District of Ohio, ordering a restitution of the money.

The case of *Grisar* v. *McDowell*, 6 Wall., 363 [73 U. S., XVIII., 863], was an action in the circuit court against General McDowell, to recover possession of property held by him as an officer of the United States, which had been set apart and reserved for military purposes. Though this was set up by him as part of his defense, it does not appear that in the argument of counsel for the government, or in the opinion of the court, any importance was attached to this circumstance; but the opinion of *Mr. Justice* Field in this court examines the case elaborately on the question, whether plaintiff or the government had the title to the land. If the [215] doctrine now contented for is sound, the case should have proceeded no further on the suggestion, not denied, that the property was held for public use by a military officer under orders from the President.

The case of *Brown* v. *Huger*, 21 How., 305 [62 U. S., XVI., 125], is of a precisely similar character, for the possession of the military arsenal at Harper's Ferry, in which, while the fact of its possession by the United States was set out in the bill of exceptions, no attention is given to that fact in the opinion of this court, which consists of an elaborate examination of plaintiff's title, held to be insufficient.

These decisions have never been overruled. On the contrary, as late as the case of *Davis* v. *Gray*, 16 Wall., 204 [83 U. S., XXI., 447], the case of *Osborn* v. *Bank*, is cited with approval as establishing these among other propositions:

"Where the State is concerned, the State should be made a party, if it can be done. That it cannot be done, is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State, in all respects as if the State were a party to the record.

In deciding who are parties to the suit, the court will not look beyond the record. Making a state officer a party does not make the State a party, *although her law may have prompted his action, and the State may stand behind him as a real party in interest.* A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case."

Though not prepared to say now that the court can proceed against the officer in "all respects" as if the State were a party, this may be taken as intimating in a general way the views of the court at that time.

The cases of *The Siren*, 7 Wall., 152 [74 U. S., XIX., 129], and *The Davis*, 10 Wall., 15 [77 U. S., XIX., 875,] are instances where the court has held that property of the United States may be dealt with by subjecting it to maritime liens, where this can be done without making the United States a party.

This examination of the cases in this court establishes clearly this result: that the proposition that when an individual is sued in regard [216] to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it; and that in many others, where the record shows that the case as tried below actually and clearly presented that defense, it was neither urged by counsel nor considered by the court here, though, if it had been a good defense, it would have avoided the necessity of a long inquiry into plaintiff's title and of other perplexing questions, and have quickly disposed of the case. And we see no escape from the conclusion that, during all this period the court has held the principle to be unsound, and in the class of cases like the present, represented by *Wilcox* v. *Jackson*, *Brown* v. *Huger*, and *Grisar* v. *McDowell*, it was not thought necessary to re-examine a proposition so often and so clearly overruled in previous well considered decisions.

It is true that there are expressions in the opinion of the court in the case of *Carr* v. *U. S.*, 98 U. S., 433 [XXV., 209], which are relied on by counsel with much confidence, as asserting a different doctrine.

That was a case in which the United States had filed a bill in the Circuit Court for the District of California, to quiet title to the land on which a marine hospital had been built. To rebut the evidence of title offered by the plaintiffs, the defendant had relied on certain judgments rendered in the state courts, in which the unsuccessful parties set up title in the United States, under which they claimed. It appeared that the person who was District Attorney of the United States had defended these actions, and the question under discussion was, whether the United States was estopped by the proceedings so as to be unable to sustain the suit to quiet title. After stating the general doctrine that the United States cannot be sued without her consent, and the further proposition that no such consent can be given except by Congress, which is a sufficient reason why they cannot be concluded by an action to which they are not parties, the learned Justice who delivered the opinion proceeded to make some remarks as to cases in which actions would or would not lie against officers of the Government, in relation to property of the United States in their possession. As these remarks were not necessary to [217] the decision of the point then in question, as the action was equally inconclusive against the United States, whether the persons sued were officers of the Government or not, these remarks, if they have the meaning which counsel attribute to them, must rest for their weight as authority, on the high character of the Judge who delivered them and not on that of the court which decided the case.

That the United States are not bound by a judgment to which they are not parties, and that no officer of the Government can, by defending a suit against private persons, conclude the United States by the judgment in such case, was sufficient to decide that case, and was all that was decided.

The fact that the property, which is the subject of this controversy, is devoted to public uses, is strongly urged as a reason why those who are so using it under the authority of the United States shall not be sued for its possession, even by one who proves a clear title to that possession. In this connection many cases of imaginary evils have been suggested, if the contrary doctrine should prevail Among these are a supposed seizure of vessels of war, invasions of forts and arsenals of the United States.

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Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depends the rights of the individual or of the Government, and if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fail.

The cases already cited of *Meigs* v. *McClung*, *Wilcox* v. *Jackson*, *Georgia* v. *Madrazo*, *Grisar* v. *McDowell*, *Brown* v. *Huger*, and *Osborn* v. *The Bank of the United States*, necessarily involved this question, for the property recovered by the plaintiff in the case of *Meigs* v. *McClung* was a garrison and barracks then in use for such purposes by the officers of the United States who were sued. In the case of *Wilcox* v. *Jackson*, an action was brought to recover, among other things, a fort which had been in the occupation of the United States for 30 years, and which was then occupied by an officer of the Army of the United States and his command. In the case of *Osborn* v. *Bank*, the money sued for and recovered by the final de- [218] cree of this court was money claimed by the State of Ohio, as part of its public funds and devoted by the laws of that State to public uses in all the exigencies of the public service; so that the authorities we have examined, if they are worth anything, meet this objection as they meet the others which we have considered.

The objection is also inconsistent with the principle involved in the last two clauses of article 5 of the Amendments to the Constitution of the United States, whose language is: "That no person * * * shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

Conceding that the property in controversy in this case is devoted to a proper public use, and that this has been done by those having authority to establish a cemetery and a fort, the verdict of the jury finds that it is and was the private property of the plaintiff, and was taken without any process of law and without any compensation. Undoubtedly, those provisions of the Constitution are of that character which it is intended the courts shall enforce, when cases involving their operation and effect are brought before them. The instances in which the life and liberty of the citizen have been protected by the judicial writ of *habeas corpus* are too familiar to need citation, and many of these cases, indeed almost all of them, are those in which life or liberty was invaded by persons assuming to act under the authority of the Government. *Ex parte Milligan*, 4 Wall., 2 [71 U. S., XVIII., 281].

If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the Government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law and devoted to public use without just compensation?

Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the Government, must be determined. In such cases there is no safety for the citizen, [219] except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the Government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him, when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as *Chief Justice* Marshall says, to examine whether this authority is rightfully assumed, is the exercise of jurisdiction and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption, that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion.

But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?

In the case supposed, the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit and a cause of action cognizable in the court; a *case* within the meaning of that term, as employed in the Constitution and defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court, that the plaintiff may be able to prove the right which he asserts in his declaration.

What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff, a right to recover that which has been taken from him by force and violence and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery.

It is not pretended, as the case now stands, that the President had any lawful authority to do this, nor that the legislative body could give him any such authority, except upon payment of just compensation. The defense stands here [220] solely upon the absolute immunity from judicial inquiry of everyone who *asserts* authority from the executive branch of the Government, however clear it may be made that the executive possessed no such power. Not only that no such power is given, but that it is absolutely prohibited, both to the executive and the legislative, to deprive anyone of life, liberty or property without due process of law, or to take private property without just compensation.

These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the Government established by that Constitution. As we have already said, the writ of *habeas corpus* has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on

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the part of the executive and the legislative branches of the Government. See *Ex parte Milligan*, 4 Wall., 2 [71 U. S., XVIII., 281], and the case of *Kilbourn*, discharged from the custody of the Sergeant-at-Arms of the House of Representatives by *Chief Justice* Cartter. *Kilbourn* v. *Thompson*, 103 U. S., 168 [XXVI., 377].

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.

It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this court is crowded with controversies of the latter class.

Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, [221] that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without any lawful authority, without any process of law and without any compensation, because the President has ordered it and his officers are in possession?

If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights.

It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court: Stop here; I hold by order of the President, and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial function; though the United States is no party to the suit; though one of the three great branches of the Government, to which by the Constitution this duty has been assigned, has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen.

The evils supposed to grow out of the possible interference of judicial action with the exercise of powers of the Government essential to some of its most important operations, will be seen to be small indeed compared to this evil, and much diminished, if they do not wholly disappear, upon a recurrence to a few considerations.

One of these, of no little significance, is, that during the existence of the Government for now nearly a century under the present Constitution, with this principle and the practice under it well established, no injury from it has come to that Government. During this time at least two wars, so serious as to call into exercise all the powers and all the resources of the Government, have been conducted to a successful issue. One of these was a great civil war, such as the world has seldom known, which strained the powers of the National Govern- [222] ment to their utmost tension. In the course of this war, persons hostile to the Union did not hesitate to invoke the powers of the courts for their protection as citizens, in order to cripple the exercise of the authority necessary to put down the rebellion; yet no improper interference with the exercise of that authority was permitted or attempted by the courts. *Mississippi* v. *The President*, 4 Wall., 475 [71 U. S. XVIII., 437]; *Georgia* v. *Stanton*, 6 Wall., 50 [73 U. S., XVIII., 721]; *Same* v. *Grant*, Id., 241 [73 U. S., XVIII., 848]; *Ex parte Tarble*, 13 Wall., 397 [80 U. S., XX., 597].

Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the Government, as is decided by this court in the case of *Carr* v. *United States*, already referred to, the Government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery, to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff and the present plaintiff as defendant, the title of the United States could be judicially determined. Or, if satisfied that its title has been shown to be invalid, and it still desires to use the property or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by a judicial proceeding, in which a just compensation shall be ascertained and paid, according to the Constitution.

If it be said, that the proposition here established may subject the property, the officers of the United States, and the performance of their indispensable functions, to hostile proceedings in the state courts, the answer is, that no case can arise in a state court, where the interests, the property, the rights or the authority of the Federal Government may come in question, which cannot be removed into a court of the United States under existing laws. In all cases, [223] therefore, where such questions can arise, they are to be decided, at the option of the parties representing the United States, in courts which are the creation of the Federal Government.

The slightest consideration of the nature, the character, the organization and the powers of

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these courts will dispel any fear of serious injury to the Government, at their hands.

While by the Constitution the judicial department is recognized as one of the three great branches among which all the powers and functions of the Government are distributed, it is inherently the weakest of them all.

Dependent as its courts are for the enforcement of their judgments, upon officers appointed by the Executive and removable at his pleasure, with no patronage and no control of purse or sword, their power and influence rest solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guarantied by the Constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives.

From such a tribunal no well founded fear can be entertained of injustice to the Government, or purpose to obstruct or diminish its just authority.

The Circuit Court was competent to decide the issues in this case between the parties that were before it; in the principles on which these issues were decided no error has been found; *and its judgment is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Gray** delivered the following dissenting opinion:

The *Chief Justice*, *Mr. Justice* Bradley, *Mr. Justice* Woods and myself are unable to concur in the judgment of the majority of the court. The case so deeply affects the sovereignty of the United States, and its relations to the citizen, that it is fit to announce the grounds of our dissent.

The action is ejectment, originally brought [224] by George W. P. C. Lee against Frederick Kaufman and Richard P. Strong, in a court of the State of Virginia, to recover possession of a tract of land known as Arlington, of which the plaintiff alleged that he was seised in fee.

The whole tract, having been advertised for sale for non-payment of direct taxes lawfully assessed upon it, and having been selected for government use for war, military, charitable and educational purposes, by the President of the United States, under the power conferred on him by the Act of Congress of February 6, 1863, ch. 21, was accordingly, in 1864, bid off to the United States at the tax sale; and for many years has been and now is held and occupied by the United States, through Kaufman and Strong in charge thereof, under the certificate of sale of the tax commissioners, and for the purposes aforesaid, and also under orders of the Secretary of War, part of it for a military station, and the rest as a national cemetery for the burial of deceased soldiers and sailors. These facts were made to appear at three stages of the case:

First. They were stated in a petition filed by Kaufman and Strong in the state court, for the removal of the case into the Circuit Court of the United States, under section 643 of the Revised Statutes, on the ground that the defendants were officers of the United States, and holding the land by title derived from officers of the United States, acting under a revenue law of the United States, the validity of which was affected. That petition was granted and the case removed accordingly.

Second. They were stated in a suggestion and motion, filed by the Attorney-General in the Circuit Court of the United States before trial, protesting against the jurisdiction of the court, and moving for a stay of proceedings; which was demurred to by the plaintiff, and overruled by the court.

Third. They were proved by the evidence produced by each party at the trial, and were assumed in the instructions given as well as in those requested. One of the instructions requested by the defendants was as follows: "If the jury believe from the evidence, that the United States is in the possession of the property in controversy, through its officers and agents charged with the control of the same; that the defendants occupy the same only as [225] such officers and agents, in obedience to orders of the War Department of the United States, and making no claim of right to the title or possession thereof, except as such officers; that the United States is using the same as a national cemetery for the burial of deceased soldiers, and as a fort and reserve connected therewith, claiming the title thereto under the certificate of sale proved in this cause; then the verdict must be for the defendants." The court refused this instruction, and gave the following: "If the jury believe from the evidence that, at the institution of this suit, the premises in controversy were, or that any part thereof was, under the charge and in the occupation or possession of the defendants Strong and Kaufman, or either of them, under the direction of the Government of the United States or of any department or officer thereof, then such occupation or possession is sufficient to enable the plaintiff to maintain his action against them respectively, for the premises so occupied or possessed by them respectively."

The court submitted the case to the jury under further instructions, which permitted them to find for the plaintiff upon the ground that the certificate of sale for taxes was invalid as against him, and had vested no legal title in the United States. The jury returned a verdict, upon which judgment was rendered, that the plaintiff recover possession of the premises, partly against Kaufman and partly against Strong. Writs of error were sued out by the United States, and by Kaufman and Strong, and the case has been argued upon both these writs of error.

This is not an action of trespass to recover damages only. Nor is it an action to recover property violently and suddenly wrested from the owner by officers of the Government without its directions and without color of title in the Government. But it is brought to recover possession of land which the United States have for years held and still hold, for military and other public purposes, claiming title under a certificate of sale for direct taxes, which is declared by the Act of Congress of June 7, 1862, ch. 98, sec. 7, to be *prima facie* evidence of the regularity and validity of the sale and of the title of the purchaser, and which has been defined by this court as a "Public Act, which is the equivalent of office found." *Bennett* v. [226]

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Hunter, 9 Wall., 326, 336 [76 U. S., XIX., 672, 675].

The principles upon which we are of opinion that the court below had no authority to try the question of the validity of the title of the United States in this action, and that this court has, therefore, no authority to pass upon that question, may be briefly stated:

The Sovereign is not liable to be sued in any judicial tribunal without its consent. The Sovereign cannot hold property except by agents. To maintain an action for the recovery of possession of property held by the Sovereign through its agents, not claiming any title or right in themselves, but only as the representatives of the sovereign and in its behalf, is to maintain an action to recover possession of the property against the Sovereign; and to invade such possession of the agents, by execution or other judicial process, is to invade the possession of the Sovereign, and to violate the fundamental maxim that the Sovereign cannot be sued.

That maxim is not limited to a monarchy, but is of equal force in a republic. In the one, as in the other, it is essential to the common defense and general welfare, that the Sovereign should not, without its consent, be dispossessed, by judicial process, of forts, arsenals, military posts and ships of war, necessary to guard the national existence against insurrection and invasion; of custom-houses and revenue-cutters, employed in the collection of the revenue; or of light-houses and light-ships, established for the security of commerce with foreign Nations and among the different parts of the country.

These principles appear to us to be axioms of public law, which would need no reference to authorities in their support, were it not for the exceeding importance and interest of the case, the great ability with which it has been argued, and the difference of opinion that has been manifested as to the extent and application of the precedents.

The exemption of the United States from being impleaded without their consent is, as has often been affirmed by this court, as absolute as that of the Crown of England or any other Sovereign. In *Cohens* v. *Virginia*, 6 Wheat., 264, 411, *Chief Justice* Marshall said: "The universally received opinion is, that no suit can be commenced or prosecuted against the United [227] States." In *Beers* v. *Arkansas*, 20 How., 527, 529 [61 U. S., XV., 991, 992], *Chief Justice* Taney said: "It is an established principle of jurisprudence in all civilized nations, that the Sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals, or by another State; and as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it." In the same spirit *Mr. Justice* Davis, delivering the judgment of the court in *Nicholl* v. *United States*, 7 Wall., 122, 126 [74 U. S., XIX., 125, 127], said: "Every government has an inherent right to protect itself against suits; and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, applies to every sovereign power and, but for the protection which it affords, the government would be unable to perform the various duties for which it was created." See, also, *U. S.* v. *Clarke*, 8 Pet., 436, 444; *Cary* v. *Curtis*, 3 How., 236, 245, 256; *U. S.* v. *McLemore*, 4 Id., 286, 289; *Hill* v. *U. S.*, 9 Id., 386, 389; *Reeside* v. *Walker*, 11 Id., 272, 290; *De Groot* v. *U. S.*, 5 Wall., 419, 431 [72 U. S., XVIII., 700, 703]; *U. S.* v. *Eckford*, 6 Id., 484, 488 [73 U. S., XVIII., 920, 921]; *The Siren*, 7 Id., 152, 154 [74 U. S., XIX., 129, 130]; *The Davis*, 10 Id., 15, 20 [77 U. S., XIX., 875, 877]; *U. S.* v. *O'Keefe*, 11 Id., 178 [78 U. S., XX., 131]; *Case* v. *Terrell*, 11 Id., 199, 201 [78 U. S., XX., 134]; *Carr* v. *U. S.*, 98 U. S., 433, 437 [XXV., 209, 211]; *U. S.* v. *Thompson*, Id., 486, 489 [XXV., 194, 195]; *R. R. Co.* v. *Tennessee*, 101 Id., 337 [XXV., 960]; *R. R. Co.* v. *Alabama*, Id., 832 [XXV., 973].

The English authorities, from the earliest to the latest times, show that no action can be maintained to recover the title or possession of land held by the Crown by its officers or servants, and leave no doubt that in a case like the one before us, the proceedings would be stayed at the suggestion of the Attorney-General in behalf of the Crown.

Our citations will be confined to the time since *Magna Charta* declared that no man should be taken or imprisoned, or be disseised of his freehold or liberties or free customs, or be [228] outlawed or exiled or in any way destroyed, or be passed upon or condemned, but by the lawful judgment of his peers, or by the law of the land; which is the origin of the provision, embodied in the Fifth Amendment of the Constitution of the United States, that no man shall be deprived of life, liberty or property, without due process of law.

The earliest authority to be referred to is Bracton, who wrote in the reign of Henry III., and who, in the famous passage of his first book, affirms that the King ought not to be subject to man, but to God and to the law, because the law makes the King; and, therefore, the King should ascribe to the law what the law ascribes to him, namely: dominion and power, for there is no King where reigns will and not law. *Ipse autem rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem. Attribuat igitur rex legi, quod lex attribuit ei, videlicet, dominium et potestatem, non est enim rex, ubi dominatur voluntas et non lex.* Bract., 5 *b*.

Yet no one states more strongly than Bracton the exemption of the King from being sued without his consent in such a case as this; for he says that one who has been disseised by the King, or by his bailiffs in his name, *per dominum regem vel ballivos suos nomine suo*, or, as he elsewhere says, whom the King, or any one in his behalf or in his name, *aliquis pro eo vel nomine suo*, has ejected, cannot, even if the disseisin be manifest, prosecute an assise to recover possession of the land without the King's consent, but must await his pleasure whether the assise shall proceed or not, *expectanda erit voluntas domini regis quod procedat assisa vel non procedat.* Bract., 168 *b*, 171 *b*, 212 *a*.

Lord Coke tells us that before the Statute of

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Westminster I., 3 Edw. I., ch. 24, if an officer of the King, by mere color of his office, and not by the King's command, disseised a man of his freehold, the only remedy was by petition to the King; and that it was to relieve against this evil that the statute enacted, that no escheator, sheriff, or other bailiff of the King, "by color of his office, without special warrant or commandment, or authority certain pertaining to his office," should disseise any man of his freehold, and that, if he should do [229] so, the disseisee might at his election proceed either by petition to the King, or by assise of novel disseisin at the common law, and the officer should pay double damages to the plaintiff, and a heavy fine to the King, for doing injury in his name to the subject. 2 Inst., 206, 207. But when the entry of the officer was by the King's command, though without authority of law, that Statute had no application.

Accordingly, in Staundeforde's exposition of the King's Prerogative, ch. 22, it is laid down: "Petition is all the remedy the subject hath when the King seizeth his land, or taketh away his goods from him, having no title by order of his laws so to do, in which case the subject for his remedy is driven to sue unto his sovereign lord by way of petition; for other remedy hath he not." Staunde. Prerog., fol. 72 *b*. "Also, whereas, the King doth enter upon me, having no title by matter of record or otherwise, and put me out, and detains the possession from me, that I cannot have it again by entry without suit, I have then no remedy but only by petition. But if I be suffered to enter, my entry is lawful, and no intrusion. Or if the King grant over the lands to a stranger, then is my petition determined, and I may now enter or have my assise by order of the common law against the said stranger, being the King's patentee." "When His Highness seizeth by his absolute power, contrary to the order of his laws, although I have no remedy against him for it but by petition, for the dignity's sake of his person, yet when the cause is removed and a common person hath the possession, then is my assise revived, for now the patentee entereth by his own wrong and intrusion, and not by any title that the King giveth him, for the King had never title nor possession to give in that case." Fol. 74 *b*.

In the reign of Elizabeth, it was resolved by all the Judges of England, that "When the King was seised of any estate of inheritance or freehold by any matter of record, be his title by matter of record judicial or ministerial, or by conveyance of record, or by matter in fact and found by office of record, he who has right, could not, by the common law, have any traverse upon which he was to have *amoveas manum*, but was put to his petition of right (in nature of his real action which he could not have [230] against the King, because the King by his writ cannot command himself) to be restored to his freehold and inheritance;" unless, indeed, the right of the party aggrieved appeared by the same record, in which case he might by *monstrans de droit* obtain an *amoveas manum*. *Sadlers' Case*, 4 Rep., 54 *b*, 55 *a*.

Lord Hale enumerates, among the relative prerogatives of the Crown, the prerogative "of his possessions; that no man can enter upon him, but is driven to his suit by petition." Hale, Analysis of the Law, sec. 9.

The law laid down in the early authorities is stated in the same way in the Digest of *Ch. B.* Comyns, written in the first half of the last century, and in Chitty on the Prerogative of the Crown, published in 1820; and Mr. Chitty treats the action of ejectment as equivalent in this aspect to the ancient form of proceeding by assise. Com. Dig. Prerogative, D, 78; Chit. Prerog., 339-343 and *n. c.*

In *Queen* v. *Powell*, 1 Q. B., 352; *S. C.*, 4 Per. & Dav., 719, a writ of *mandamus* to admit to a copyhold tenement of a manor belonging to the Crown, having been directed to the steward alone, it was contended for the prosecutor that a previous decision, requiring the writ to be directed to the lord of the manor as well as to the steward, applied only to cases where the lord of the manor was a subject, and that, inasmuch as there could be no *mandamus* to the sovereign, the writ must go against the steward alone. But *Lord* Denman, with the concurrence of *Justices* Littledale, Williams and Coleridge, quashed the writ of *mandamus;* and, after observing that doubtless there could be no *mandamus* to the Sovereign, but that the interests of the Crown were to be as much guarded as those of the subject, said: "And if the interests of the Crown cannot so effectually be protected by a writ against the steward alone, it is a very strong reason to show that such a writ cannot be sustained. Indeed, if it were allowed, it is not certain of being effectual; for if the advisers of the Crown were of opinion that its interests might be affected, and were to advise the Sovereign either to order the steward not to admit the prosecutor of the *mandamus*, or to revoke the appointment of the steward, this court could not grant an attachment against the steward, and then the party does not get admitted. And, indeed, if we were to allow a [231] *mandamus* to the steward alone, and the writ were obeyed, the property of the Crown would be affected indirectly by the *mandamus* to the steward alone, when it cannot be affected directly by making the Sovereign a party to the *mandamus*." "But in the case where there is a complaint on the part of a subject against the Crown, in any matter whatever, the course is to proceed by petition of right, or else by *monstrans de droit*, or traverse of office, as the case may require. These proceedings have been recognized and acknowledged for many centuries. Such proceedings are now very much out of use; and few instances in modern times have occurred where they have been resorted to; but still they are what must be resorted to if any dispute arises. They are probably expensive and tedious, but these considerations are not sufficient for our dispensing with them; we have no more authority, for the sake of convenience, to lay them aside and introduce writs or other proceedings, which are usually adopted between subject and subject, amongst which these writs of *mandamus* are to be reckoned, than to introduce writs and other proceedings, now solely used in cases of prerogative, in causes between subject and subject."

In *Queen* v. *Comrs. of the Treasury*, L. R., 7 Q. B., 387, 394, in which the court refused to grant a writ of *mandamus* to the

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Lords Commissioners of the Treasury to pay over money in their hands as servants of the Crown, *Lord Ch. J.* Cockburn said that it did not follow, because the prosecutor had no remedy except that of applying by petition to the Crown, or by petition to Parliament, that the court could issue a writ of *mandamus;* and added: "I take it, with reference to that jurisdiction, we must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this court cannot claim, even in appearance, to have any power to command the Crown; the thing is out of the question. Over the Sovereign we can have no power. In like manner where the parties are acting as servants of the Crown and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction."

In *Doe* v. *Roe*, 8 Mees. & W., 579; *S. C.*, [232] Hurlst. & W., 159, which was an action of ejectment for a house and lands adjoining Hurst Castle, the declaration had been served upon one Watson and upon the Board of Ordnance. On motion of the Attorney-General, in behalf of the Crown, supported by affidavits that the castle was an hereditary possession of the Crown of England, and that the premises sought to be recovered were in possession of the Crown, by Watson, who had been placed, by authority of the Board of Ordnance, as master gunner in charge of the defenses of the castle, which commanded the passage of the Needles, the Court of Exchequer ordered the declaration to be set aside and all further proceedings stayed. It was contended for the plaintiff that, technically, the action was trespass against Roe; and that the argument on the other side would go the length of showing that in any case where the defendant in ejectment made an affidavit that the title of the Crown came into question, the plaintiff would have no resource but in his petition of right. Whereupon, the court made these observations: "*Lord* Abinger, *Ch. B.* The real question is: can an ejectment be tried, the effect of which may be to turn the Crown out of possession? Alderson, *B.* The declaration is served on a person occupying as the servant of the Crown; this case is not like the case put of lands held under the Woods and Forests; the present difficulty only arises when, supposing the plaintiff to succeed, the Crown would be turned out of possession." Hurlst. & W., 160. At the close of the argument, *Lord* Abinger said: "It is quite clear the court could not issue any process to turn the Crown out of possession; and the only doubt I had was, whether this property was not, by the operation of the Act of Parliament, in the possession, not of the Crown, but of the Board of Ordnance. But on looking more fully into the Act, my doubt is entirely removed." *Baron* Alderson said: "I am of the same opinion. No ejectment can be maintained against the Crown, to turn the Crown out of possession by the authority of the Crown itself." And *Baron* Rolfe (afterwards *Lord Chancellor* Cranworth) added: "The question may be tested thus: Suppose there were no trial, but judgment went against the casual ejector; then there would only be a writ [233] to turn the Crown out of possession, which clearly cannot be." 8 Mees. & W., 582, 583.

The same rule, as well as the essential distinction in actions brought against a servant of the Crown holding possession in behalf of the Crown, between an action of trespass to recover damages, which might be suffered to proceed (although the Crown might have it removed for that purpose into the Court of Exchequer), and an action of ejectment to recover possession of the land itself, which must be absolutely stayed on motion of the Attorney-General, is clearly recognized in two cases of trespass to recover damages against officers of the Crown, removed upon application of the Attorney-General into the Office of Pleas of the Exchequer for trial. *Cawthorne* v. *Campbell*, 1 Anst., 205, 215; *Atty-General* v. *Hallett*, 15 Mees. & W., 97.

In *Cawthorne* v. *Campbell*, *Ch. B.* Eyre, speaking of a case, decided in 1710, of an ejectment brought in the Court of Queen's Bench for lands which were part of the Queen's estate, said: "There was an application to this court to stay the proceedings, and the parties were heard upon it. The Attorney-General attended and, after the hearing, it was put off for a day or two. At length the entry is, that an injunction issue *pro domina regina.* So that the action was not removed, but simply an injunction went to stay the proceedings. And I think I can see why that was; if the action had been removed, the question could not have been tried even in the Office of Pleas, because you cannot try the Queen's title in an ejectment. The Queen was in possession; her hands must be removed by some other course of proceeding than an ejectment; and, therefore, it was fruitless to think of removing it, and it remained under an injunction."

So in *Atty-General* v. *Hallett*, a case of trespass *quare clausum fregit* in which the defendant pleaded that the Queen was seised in right of her Crown of the *locus in quo*, *Ch. B.* Pollock said: "The action of ejectment is *prima facie* an action merely between subject and subject, and relates to land; yet the prerogative of the Crown applies to that; and if the interest of the Crown is concerned, an action of ejectment may be removed into this court. It may be said, however, that that does not amount to an [234] authority, because the action does not go on; the reason of that is, that in this court an action of ejectment will not lie against the Crown. The party must proceed by a petition of right. In an action of ejectment, we remove it, although we thereby actually extinguish the action; and, therefore, that is rather an *a fortiori* argument for removing this cause, which is sought to be removed for the express purpose of going on with it." *Barons* Parke, Alderson and Platt concurred; and *Baron* Platt clearly distinguished the case of a defendant holding possession in behalf of the Crown, from that of a defendant claiming a right in himself only, though under a grant from the Crown, saying: "If the Queen herself is in possession, no subject can maintain ejectment against her; the only mode of proceeding is by petition of right. If the subject is in possession, claiming a right under the Crown, then the ejectment may be maintained; but, at the suggestion of the Attorney-General, the proceeding would be brought into this court."

There is a close analogy between these cases and the case at bar. Any action, personal or real, against officers of the Sovereign, who justify

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under a revenue law, may be removed in England into the Court of Exchequer, and under the Acts of Congress, into the Circuit Court of the United States. If it is an action of tort to recover damages only, it may there proceed to trial. But if it is an action to recover possession of land, which is in fact held by the Sovereign through its officers and agents, and that fact is in due form made known to the court, the proceedings must be stayed.

An action of ejectment brought, as this was, under the Code of Virginia of 1873, ch., 131, affects the title to land more than the action of ejectment in England. By that Code, the action may not only be brought as before, but it is also made a substitute for the writ of right and all other real actions. Secs. 1, 2, 88. It must be brought by and in the name of a person having a subsisting interest in the premises, and a right to recover the premises or the possession thereof; and against the person actually occupying the premises, or, if they are not occupied, against some person exercising acts of ownership therein, or claiming title thereto or [235] some interest therein. Secs. 4–6. The only plea allowed is the general issue, that the defendant is not guilty of unlawfully withholding the premises claimed. Sec. 13. The declaration must describe the premises with such certainty that from the description, possession can be delivered; and it must state and the verdict must find, whether the plaintiff's estate is in fee or for life and whose life, or for years and the duration of the term. Secs. 8, 9, 27. Judgment for the plaintiff is, that he recover the possession of the premises according to the verdict, if there is one, or, if on default or demurrer, according to the description in the declaration. Sec. 29. Several judgments may be recovered against several defendants occupying distinct parcels of the land. Sec. 17. And the judgment is conclusive as to the title or right of possession, established in the action, upon the party against whom it is rendered, and all persons claiming under him by title, accruing after the commencement of the action. Sec. 35.

The principle that no Sovereign can be sued without its consent, applies equally to foreign Sovereigns and to the Sovereign of the country in which the suit is brought. The exemption of the Sovereign is not less regarded by its own courts than by the courts of other Sovereigns. To repeat the words of *Chief Justice* Taney, already quoted: "It is an established principle of jurisprudence in all civilized Nations, that the Sovereign cannot be sued in its own courts or in any other, without its consent and permission."

In the leading case of *The Exchange*, 7 Cranch, 116, the exemption of a foreign Sovereign from being sued in our courts, was held to protect one of his public armed vessels from being libeled here in a court of admiralty by citizens of the United States, to whom she had belonged, and from whom she had been forcibly taken in a foreign port by his order. The District Attorney of the United States having filed a suggestion, verified by affidavit, that she was a public armed vessel of the Emperor of the French, and actually employed in his service at the time of entering our ports, the Circuit Court, disregarding the suggestion, entered a decree for the libelants. But upon an appeal taken by the Attorney of the United States, this court, without any inquiry into the title, reversed the decree and dismissed the libel; and *Chief Justice* [236] Marshall in delivering judgment said: "There seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the Attorney for the United States."

In *Vavasseur* v. *Krupp*, 9 Ch. D., 351, the Mikado of Japan, a sovereign prince, bought in Germany, shells, made there, but said to be infringements of an English patent. They were brought to England, in order to be put on board a ship of war belonging to the Mikado, and the patentee obtained an injunction against the agents of the Mikado and the persons in whose custody the shells were, restraining them from removing the shells. The Mikado then applied to be, and was made, a defendant in the suit. An order was made by Sir George Jessel, Master of the Rolls, and affirmed by the Court of Appeal, that, notwithstanding the injunction, the Mikado should be at liberty to remove the shells. *Lord Justice* James said: "I am of opinion that this attempt on the part of the plaintiff to interfere with the right of a foreign Sovereign to deal with his public property, is one of the boldest I have ever heard of as made in any court in this country." And, after stating the contention of the plaintiff that the shells were in the possession of persons in England who were minded to make, and did make, a use of them inconsistent with his patent, he further said: "If they were doing so, then they are liable in an action for damages, and the plaintiff may recover any damages that he may be entitled to. But that does not interfere with the right of the Sovereign of Japan, who now asks to be allowed to take his property." *Lord Justice* Brett said: "The goods were the property of the Mikado. They were his property as a Sovereign; they were the property of his country; and, therefore, he is in the position of a foreign Sovereign having property here." "If it is an infringement of the patent by the Mikado, you cannot sue him for that infringement. If it is an infringement by the agents, you may sue the agents for that infringement, but then it is the agents whom you sue." "The Mikado has a perfect right to have these goods; no court in this country can properly prevent him from having goods which are the public property of his own country."

In the case of *The Parlement Belge*, 5 P. D., 197, the Court of Appeal held that an unarmed [237] packet, belonging to the King of the Belgians, and in the hands of officers commissioned by him, and employed in carrying mails, and also in carrying merchandise and passengers for hire, was not liable to be seized in a suit *in rem* to recover damages for a collision. *Lord Justice* Brett, in a considered judgment, stated the real question to be "Whether every part of the public property of every sovereign authority in use for national purposes, is not as much exempt from the jurisdiction of every court, as is the person of every Sovereign;" and, after reviewing many American as well as English cases, announced the conclusion of the court thus: "As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each and every one declines to exercise, by means of any of its courts,

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any of its territorial jurisdiction over the person of any Sovereign or ambassador of any other State, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such Sovereign, ambassador or property be within its territory and, therefore, but for the common agreement, subject to its jurisdiction. This proposition would determine the first question in the present case, in favor of the protest, even if an action *in rem* were held to be a proceeding solely against property, and not a procedure directly or indirectly impleading the owner of the property to answer to the judgment of the court. But we cannot allow it to be supposed that, in our opinion, the owner of the property is not indirectly impleaded." After stating the mode of procedure in courts of admiralty, he continued: "To implead an independent Sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be so indirectly impleaded, any more than he could be directly impleaded. The case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any court."

It was argued at the bar that the petition of [238] right in England was in effect a suit against the Crown. But the petition of right could never be maintained except after an application to the King and his consent granted. The Sovereign thus retained the power of determining in advance in every case, whether it was consistent with the public interests to allow the suit to be brought and tried in the ordinary courts of justice. The petition might be presented either to the King in person, or in Parliament; and if sued in Parliament, it might be enacted and pass as an Act of Parliament. Staunde. Prerog., 72 *b*; Chit. Prerog., 346. The old form of proceeding by petition of right to the King was so tedious and expensive that it fell into disuse; and there is hardly an instance in which it was resorted to in England between the settlement of the Colonies and the Declaration of Independence, or for half a century afterwards. *Clayton* v. *Atty-Gen.*, 1 Coop. *temp.* Cottenham, 97, 120; *Queen* v. *Powell*, 1 Q. B., 353, 368, and 4 Per. & Dav., 719, 728, above quoted; *Canterbury* v. *Atty-Gen.*, 1 Phillips, 306, 327; *De Bode's Case*, 8 Q. B., 208, 273. The granting of the royal consent as a matter of course, is but of very modern introduction in England. *Eastern Archipelago Co.* v. *Queen*, 2 El. & Bl., 856, 914. And the Statute of 23 & 24 Vict., ch. 34, simplifying and regulating the proceedings, makes it the duty of the Secretary of State for the Home Department, to lay the petition before the Queen for her consideration, and to give her his advice upon it; and if upon his advice she refuses to grant her fiat, the suppliant is without remedy. *Irwin* v. *Grey*, 3 F. & F., 635, 637; *Tobin* v. *Queen*, 14 C. B. (N. S.), 505, 521, and 16 Id., 310, 368. In *U. S.* v. *O'Keefe*, 11 Wall., 178, 184 [78 U. S., XX., 131, 133], in which it was held that British subjects were included in the Act of Congress of July 27, 1868, ch. 276, allowing suits for the proceeds of captured and abandoned property to be brought in the Court of Claims "By aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts," this court, speaking of the English petition of right, said: "It is easy to see that cases might arise, involving political considerations, in which it would be eminently proper for the Sovereign to withhold his permission."

The English remedies of petition of right, *monstrans de droit*, and traverse of office, were [239] never introduced into this country as part of our common law; but in the American Colonies and States claims upon the Government were commonly made by petition to the Legislature. The inadequacy or the want of those remedies is no reason for maintaining a suit against the Sovereign, in a form which is usual between private citizens, but which has not been expressly granted to them as against the Sovereign. *Queen* v. *Powell*, above quoted; *Gibbons* v. *U. S.*, 8 Wall., 269 [75 U. S., XIX., 453].

In particular classes of cases, indeed, Congress has authorized suits in equity to be brought against the United States; as, for instance, in cases of delinquent receivers of public money against whom a warrant of distress has been issued, in cases of proprietors of land taken and sold to make certain improvements in the City of Washington (in which the bill is spoken of as "in the nature of a petition of right"), and in claims to share in the money received from Mexico under the Treaty of Guadalupe Hidalgo. See, *U. S.* v. *Nourse*, 6 Pet., 470, and 9 Id., 8; *Murray* v. *Hoboken Land Co.*, 18 How., 272, 284 [59 U. S., XV., 372, 377]; *Van Ness* v. *Washington*, 4 Pet., 232, 276, 277; *Clark* v. *Clark*, 17 How., 315, 320 [58 U. S., XV., 77, 79]. So it has often authorized suits to be brought against the United States to confirm claims, under grants from foreign governments, to lands since ceded to the United States. But in such a suit *Chief Justice* Marshall said: "As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some Act of Congress, or the court cannot exercise jurisdiction over it." *U. S.* v. *Clarke*, 8 Pet., 436, 444.

For more than sixty years after the adoption of the Constitution, no general provision was made by law, for determining claims against the United States; and in every Act concerning the Court of Claims, Congress has defined the classes of claims which might be made, the conditions on which they might be presented, the forms of proceeding and the effect to be given to the awards. The Act of February 24, 1855, ch. 122, which first established that court, required an Act of Congress to carry out each award. The Act of March 3, 1863, ch. 92, which dispensed with that requirement, authorized the sums due by the judgments of the Court of Claims, after presentation of a copy thereof to [240] the Secretary of the Treasury, and his estimate of an appropriation therefor, to be paid out of any general appropriation made by law for the satisfaction of private claims. Even under this Act the Court of Claims had so little of the nature of a judicial tribunal, that this court declined to entertain appeals from its decisions, although the statute expressly gave such an appeal. *Gordon* v. *U. S.*, 2 Wall., 561 [69 U. S., XVII., 921]; *S. C.*, 5 Am. Law Reg. (N. S.), 111. It is only since the Act of March 17, 1866,

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ch. 19, was repealed the provision which by necessary implication authorized the Secretary of the Treasury to revise the decisions of the Court of Claims, and of this court on appeal, that this court has considered and determined such appeals.

Under the existing statutes, the principal classes of demands submitted to the determination of the Court of Claims, are claims founded on laws of Congress, on regulations of the Executive Departments, and on contracts, express or implied, and claims referred to the court by Congress. Rev. Stat., sec. 1059. The proceeding by petition to Congress and reference by Congress to the Court of Claims, presents the nearest analogy that our law affords to the petition of right. No Act of Congress has conferred upon that court, or upon any other tribunal, general jurisdiction of suits against the United States to recover possession of real property, or to redress a tort. And the Act of Congress of June 11, 1864, ch. 117 (re-enacted in sec. 3753, R. S.), authorizing the Secretary of the Treasury to direct a stipulation, to the extent of the value of the interest of the United States, to be entered into for the discharge of any property owned or held by the United States, or in which the United States have or claim an interest, which has been seized or attached in any judicial proceeding under the laws of a State, expressly provides "That nothing herein contained shall be considered as recognizing or conceding any right to enforce by seizure, arrest, attachment, or any judicial process, any claim against any property of the United States, or against any property held, owned or employed by the United States, or by any department thereof, for any public use, or as waiving any objection to any proceeding instituted to enforce any such claim."

[241] In *Gibbons* v. *U. S.*, 8 Wall., 269 [75 U. S., XIX., 453], which was an attempt to maintain in the Court of Claims a suit against the Government as upon an implied contract, for unauthorized acts of its officers, which were in themselves torts, the court said: "The supposition that the Government will not pay its debts, or will not do justice, is not to be indulged;" and, after stating the reasons against the maintenance of the suit, concluded: "These reflections admonish us to be cautious that we do not permit the decisions of this court to become authority for the righting, in the Court of Claims, of all wrongs done to individuals by the officers of the General Government, though they may have been committed while serving that government, and in the belief that it was for its interest. In such cases, where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination." In *Langford* v. *U. S.*, 101 U. S., 341 [XXV., 1010], the remarks just quoted were repeated, and were applied to the case of a suit for the use and occupation of land which the United States, under a claim of title, had, through its Indian agents, taken possession of and since held, by force and against the will of the rightful owner.

If it is proper that the United States should allow themselves to be sued in such a case as this, public policy requires that it should rest with Congress to define the mode of proceeding, the conditions on which it may be maintained, and the manner in which the decision shall be enforced; none of which can be done if the citizen has an absolute right to maintain the action.

If the plaintiff is entitled to judgment, it can only be upon the ground that the United States are not a party to the record, and have no such relation to the action that their possession of the land demanded will prevent judgment against the defendants of record. If those defendants alone are to be held to be parties or interested, the plaintiff is entitled, as of right, to immediate execution as well as to judgment; and the court has no discretion to stay an execution between private parties on considerations of the interests of the public.

To maintain this action, independently of any legislation by Congress, is to declare that the exemption of the United States from being impleaded without their consent does not embrace lands held by a disputed title; to defeat the ex- [242] emption from judicial process in the very cases in which it is of the utmost importance to the public that it should be upheld; and to compel the United States to submit to the determination of courts and juries, the validity of their title to any land held and used for military, naval, commercial, revenue or police purposes.

The decision of this court, and the reasoning of the several judges in the case of *Chisholm* v. *Georgia*, 2 Dall., 419, in which a majority of the court held that, under the Constitution, as originally adopted, a suit could be maintained in this court against a State, by a citizen of another State, do not appear to us to furnish much aid in the determination of this case, for several reasons: 1. Each of the Judges who mentioned the subject declined to affirm that the United States could be sued. 2 Dall., 430, 469, 478. 2. The decision was based on a construction of the words of the Constitution, conferring jurisdiction of suits between "a State and citizens of another State." 3. That construction was set aside by the 11th Amendment of the Constitution, which declares that "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." 2 Dall., 480, *n.*; *Hollingsworth* v. *Virginia*, 3 Dall., 378.

In those cases in which judgments have since been rendered by this court against individuals, concerning money or property in which a State had an interest, either the money was in the personal possession of the defendants and not in the possession of the State, or the suit was to restrain the defendants by injunction, from doing acts in violation of the Constitution of the United States. Within one or both of these classes fall the cases of *U.S.* v. *Peters*, 5 Cranch, 115; *Osborn* v. *Bank*, 9 Wheat., 738; *Davis* v. *Gray*, 16 Wall., 203 [83 U. S., XXI., 447]; and *Board of Liquidation* v. *McComb*, 92 U. S., 531 [XXIII., 623].

In *U. S.* v. *Peters* [*supra*], in which a writ of *mandamus* was ordered to a District Court of the United States sitting in admiralty to issue an attachment against the executrices of David Rittenhouse to enforce obedience to a decree of that court for the payment of money (although [243] Rittenhouse had been Treasurer of the State of Pennsylvania, and the Legislature of that State had directed its Attorney-General to sue the

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executrices for the recovery of the money, and the Governor to protect them against any process of the Federal Courts), the judgment of this court, as stated by *Chief Justice*, Marshall, went upon the ground that it was apparent that Rittenhouse held the money in his own right, and that "The suit was not instituted against the State or its Treasurer, but against the executrices of David Rittenhouse, for the proceeds of a vessel condemned in the Court of Admiralty, which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it is unnecessary to give an opinion; but it certainly can never be alleged that a mere suggestion of title in a State to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title." The *Chief Justice* stated the conclusion of the court as follows: "Since, then, the State of Pennsylvania had neither possession of nor right to the property on which the sentence of the District Court was pronounced, and since the suit was neither commenced nor prosecuted against that State, there remains no pretext for the allegation that the case is within that amendment of the Constitution which has been cited; and, consequently, the State of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause."

The *Chief Justice* thus carefully avoided expressing an opinion upon a case in which the money sued for was in the possession of the State, or "the actual property of the State, however wrongfully acquired;" and his remark upon the effect of a mere suggestion of title in the State in a suit to recover "property in possession of an individual"—as well as his similar remark in *Osborn* v. *Bank*, 9 Wheat., 738, 870, as to the effect of a suggestion of title in a foreign Sovereign under like circumstances—can have no application where it is in due form pleaded or suggested and satisfactorily proved or admitted, [244] that the property is in the possession of the State or the Sovereign, under claim and color of title, though that possession is necessarily held in its behalf by its officers or servants—as appears by his own judgment in the case of *The Exchange*, as well as by the cases in the Court of Exchequer before cited.

In *Osborn* v. *Bank*, 9 Wheat., 738, the bill was originally filed by the Bank of the United States against the Auditor of the State of Ohio and a collector employed by him, to prevent them from levying a tax imposed by the Legislature of that State, in violation of the Constitution of the United States, upon the property of the bank; and they, after the service of the subpœna, forcibly took from the plaintiff's office the amount of the tax in money, and paid it over to the Treasurer of the State, who received it with notice of these facts, and kept it apart from other money belonging to the State, so that, in the view taken by the court, it had never come into the possession of the State, but could have been recovered from the Treasurer in an action of detinue. 9 Wheat., 833-836, 854, 858. By an amendment of the bill the Treasurer was made a defendant. Such were the facts upon which the court, by one of *Chief Justice* Marshall's most elaborate judgments, in which the case was admitted to be one of great difficulty, ordered the defendants to restore the money, and held that the fact that the State was not and could not be, without its consent, made a defendant, afforded no objection to granting such relief.

The *dictum* of the learned Justice who delivered the opinion in *Davis* v. *Gray* [*supra*], that in *Osborn* v. *Bank* it was decided that, in cases in which a State is concerned, "That it cannot be made a party, is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record," overstates the decision in *Osborn's Case;* goes beyond what was required for the decision of *Davis* v. *Gray*, in which the object of the suit and the whole effect of the decree, were to prevent the Governor and the Commissioner of the General Land-Office of the State of Texas from signing patents for lands of which the plaintiff had the title under a previous grant [245] from the State; and, as the State cannot hold money or property otherwise than by its officers and agents, would, if understood as laying down a universal rule, practically nullify the 11th Amendment of the Constitution.

In *Board of Liquidation* v. *McComb*, 92 U.S., 531 [XXIII., 623], in which an injunction was granted to restrain the board of liquidation, consisting of the Governor and other officers, of the State of Louisiana, from issuing or using, in violation of a previous contract of the State with the plaintiff, bonds of the State in their hands, the court said that the objections to proceeding by injunction were: "First, that it is, in effect, proceeding against the State itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers, in matters belonging to the proper jurisdiction of the latter." And the ground upon which the bill in that case, as well as in the previous cases of *Osborn* v. *Bank* and *Davis* v. *Gray*, was sustained, was defined to be, that when a plain official duty, requiring no exercise of discretion, is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it, notwithstanding the officer pleads the authority of an unconstitutional and, therefore, void law for the violation of his duty.

The case of *Georgia* v. *Madrazo*, 1 Pet., 110, does not appear to us to have any important bearing, except as tending to illustrate the distinction between the possession of the State by its agents, and the possession of the agents in their own right. The decision was, that where negro slaves were illegally taken from the owner on the high seas, and afterwards sold to a stranger, who, without the privity of the owner, imported them into the United States in violation of the Act of Congress of March 2, 1807, ch. 22, and they were here seized by an officer of the customs of the United States, and delivered to an agent appointed by the Governor of the State of Georgia in conformity with the Act of Congress, and some of them sold by order of the Governor of the State, and the [246]

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money obtained at the sale was, in the words of *Chief Justice* Marshall, "actually in the Treasury of the State, mixed up with its general funds," and the rest of the slaves remained in the hands of the agent of the State, "in possession of the Government," a libel in admiralty by the owner to recover possession of the money and slaves, though not brought against the State by name, but against the Governor in his official capacity, was a suit against the State and, therefore, by reason of the 11th Amendment of the Constitution, could not be maintained. See, also, *Ex parte Madrazzo*, 7 Pet., 627.

In the case, on which the plaintiff principally relies, of *Meigs* v. *M'Clung*, 9 Cranch, 11, in which a Circuit Court of the United States, and this court on writ of error, gave judgment for the plaintiff, in an action of ejectment for land held by the defendants as officers and under the authority of the United States, the full statement of their position, in the bill of exceptions, on page 13 of the report, clearly shows that the fact that they so held the land was not set up in defense, except as supplemental to the position that the legal title to the land was in the United States; and it does not appear to have been mentioned in argument. No objection to the exercise of jurisdiction was made by the defendants or by the United States, or noticed by the court. That the court understood the United States to desire a decision upon the merits, is further apparent from *Chief Justice* Marshall's summary towards the close of the opinion, "The land is certainly the property of the plaintiff below; and the United States cannot have intended to deprive him of it by violence and without compensation." Had the decision covered the question of jurisdiction, the *Chief Justice* would hardly have omitted to refer to it in *Osborn* v. *Bank*, above stated.

In *Wilcox* v. *Jackson*, 13 Pet., 498, in *Brown* v. *Huger*, 21 How., 305 [62 U. S., XVI., 125], and in *Grisar* v. *McDowell*, 6 Wall., 363 [73 U. S., XVIII., 863], which were also actions of ejectment against officers of the United States, the judgments were in favor of the defendants on the merits, no suggestion that the United States were so interested that the action could not be maintained was made by counsel or passed upon by this court, and that the court has not hitherto understood any such question to be settled by any or all of those cases is clearly shown by its more recent judgments.

[247]

In the case of *The Siren*, 7 Wall., 152 [74 U. S., XIX., 129], the court said: "It is a familiar doctrine of the common law, that the Sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen and, consequently, controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the Nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some Act of Congress. Such is the language of this court in *U. S.* v. *Clarke*, 8 Pet., 444. The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned Judge who tried this case, there is no distinction between suits against the Government directly, and suits against its property."

In the case of *The Davis*, 10 Wall., 15 [77 U. S., XIX., 875], the court, stating the doctrine somewhat less broadly, yet affirmed the proposition, as clearly established by authority, that "No suit *in rem* can be maintained against the property of the United States when it would be necessary to take such property out of the possession of the Government by any writ or process of the court;" and in discussing the question, what constitutes a possession which protects the property from the process of the court, said: "We are speaking now of a possession which can only be changed under process of the court, by bringing the officer of the court into collision with the officer of the Government, if the latter should choose to resist. The possession of the Government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the Government with the control of the property, coupled with its actual possession. This, we think, is a sufficiently liberal definition of the possession of the property by the Government to prevent any unseemly conflict between the court and the other departments of the Government, and which is consistent with the principle which exempts the Government from suit and its possession from disturbance, by virtue of judicial process."

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In *The Siren*, a claim for damages against a prize ship, for a collision on her way from the place of capture to the port of adjudication, was allowed out of the proceeds of her sale upon condemnation, because the Government was the actor in the suit to have her condemned. In *The Davis*, a claim was allowed for salvage of goods belonging to the United States in the hands of the master of a private vessel as a common carrier, because his possession was not the possession of the United States, and the United States could only obtain the goods by coming into court as claimant and actor. Each of those cases, as was pointed out in *Case* v. *Terrell*, 11 Wall., 199, 201 [78 U. S., XX., 134], was decided upon the ground that "The Government came into court of its own volition to assert its claim to the property, and could only do so on condition of recognizing the superior rights of others."

In *Carr* v. *U. S.*, 98 U. S., 433 [XXV., 209], in which it was decided that judgments in ejectment against officers of the Government, in possession in its behalf, of lands held for a marine hospital, did not bind nor estop the United States, it was said, in the opinion of the court: "We consider it to be a fundamental principle that the Government cannot be sued except by its own consent; and certainly no State can pass a law which would have any validity, for making the Government suable in its courts. It is conceded in *The Siren* [*supra*], and in *The Davis* [*supra*], that, without an Act of Congress no direct proceeding can be instituted against the Government or its property. And in the latter case it is justly observed that the possession of the Government can only exist through its

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officers; using that phrase in the sense of any person charged on behalf of the Government with the control of the property, coupled with actual possession.' If a proceeding would lie against the officers as individuals, in the case of a marine [249] hospital, it might be instituted with equal facility and right in reference to a postoffice or a custom-house, a prison or a fortification. In some cases (perhaps it was so in the present case) it might not be apparent until after suit brought that the possession attempted to be assailed was that of the Government; but when this is made apparent by the pleadings, or the proofs, the jurisdiction of the court ought to cease. Otherwise, the Government could always be compelled to come into court, and litigate with private parties in defense of its property."

The view on which this court appears to have constantly acted, which reconciles all its decisions and is in accord with the English authorities, is this: the objection to the exercise of jurisdiction over the Sovereign or his property, in an action in which he is not a party to the record, is in the nature of a personal objection, which, if not suggested by the Sovereign, may be presumed not to be intended to be insisted upon. If ejectment is brought by one citizen against another, the court *prima facie* has jurisdiction of the subject-matter and of the parties; and, if no objection is interposed in behalf of the Sovereign, proceeds to judgment between the parties before it. If the property is in the possession of the defendants and not of the Sovereign, an informal suggestion that it belongs to the Sovereign, will not defeat the action. But if the Sovereign, in proper form and by sufficient proof, makes known to the court that he insists upon his exemption from suit, and that the property sued for is held by the nominal defendants exclusively for him and on his behalf, as public property, the right of the plaintiff to prosecute the suit, and the authority of the court to exercise jurisdiction over it cease, and all further proceedings must be stayed.

In the case at bar, the United States interposed in the most solemn and appropriate manner. The Attorney-General, before the trial, following the course approved by this court in the case of *The Exchange*, and by the Court of Exchequer in the case of *Doe* v. *Roe*, and other cases, already referred to, filed a suggestion and motion in writing, in which, appearing only for this purpose, he states that the land has been for more than ten years and still is held, occupied and possessed by the United States, through their officers and agents charged in behalf of [250] the Government of the United States, with the control of the property, and who are in the actual possession thereof, as public property of the United States for public uses, in the exercise of their sovereign and constitutional powers, as a military station, and as a national cemetery established for the burial of deceased soldiers and sailors, known as the Arlington Cemetery, and for war, military, charitable and educational purposes, as set forth in the certificate of sale of the land for non-payment of direct taxes, lawfully assessed thereon, a copy of which is annexed to the suggestion. Wherefore, without submitting the rights of the Government of the United States to the jurisdiction of the court, but insisting that the court has no jurisdiction of the subject in controversy, he moves that the declaration may be set aside, and all the proceedings be stayed and dismissed, and for such other order as may be proper. The plaintiff, by demurring to this suggestion, admitted the truth of the facts stated by the Attorney-General.

After these facts had been thus formally brought to the notice of the court by the chief law officer of the United States, and had been admitted by the plaintiff, we are of opinion, that the court had no authority to proceed to trial and judgment; because the suit, which had been commenced against the individual defendants, was thenceforth prosecuted against the United States; because in ejectment, as in other actions at law, a court has no authority to render a judgment on which it has no power to issue execution; because, as was directly adjudged in *Carr* v. *U. S.* [*supra*], above cited, no judgment against the defendants can bind or estop the United States; because the possession of the defendants is, in fact and in law, the possession of the United States, and the defendants may at any moment be displaced and removed by the Executive, and other custodians appointed and installed in their stead; because to issue an execution against them would be to issue an execution against the United States, and to turn the United States out of possession of land held by the United States, under claim of title and color of right for public purposes; and because to maintain a suit which has that object and that result, is to violate the fundamental principle, that the Sovereign cannot be sued without its consent, and to encroach upon the powers intrusted by the Constitution to the Legislative [251] and Executive Departments of the Government.

The court having no authority to proceed with the suit, the judgment afterwards rendered for the plaintiff was erroneous. The United States, having the right to interpose, and having interposed in due form, had an equal right to sue out a writ of error to make their interposition effectual. This is plainly shown by the case of *The Exchange*, 7 Cranch, 120, 147, before cited. It follows that, upon the writ of error sued out by the United States, the judgment below should be reversed, and the case remanded with directions to set aside the verdict and to dismiss the action.

As to Kaufman and Strong, the court erred in compelling them to proceed to trial after the interposition of the United States; and in declining to instruct the jury, as they requested, that if the United States, through their officers and agents charged with the control of the same, were in the possession of the property in controversy, using it as a national cemetery for the burial of deceased soldiers, and as a fort and military reservation, claiming title under the certificate of sale proved in the case, and the defendants occupied the same only as such officers and agents, in obedience to orders of the War Department of the United States, and making no claim of right to the title or possession, except as such officers, the verdict must be for the defendants. Judgment of reversal should, therefore, also be entered upon the writ of error sued out by them.

Being of opinion, for the reasons above set forth, that the question of the validity of the title, under which the United States, through

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their officers and agents, hold the land, cannot be tried and determined in this action, we of course express no opinion upon that branch of the case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 726, 735, 755; 109 U. S., 452, 453, 461, 462, 463, 464; 111 U. S., 30; 114 U. S., 282, 288, 289.

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[315] MARY E. KIRK, Widow of R. M. PASTEUR, Deceased, and Natural Tutrix of EFFIE MAY PASTEUR, ET AL., *Appt.*,

v.

WILLIAM LYND ET AL.

(See S. C., 16 Otto, 315-319.)

Confiscation sale.

The purchaser of real property condemned under the Act of August 6, 1861, ch. 60, entitled "An Act to Confiscate Property Used for Insurrectionary Purposes," takes the fee.

[No. 1054.]

Submitted Oct. 26, 1882. Decided Dec. 4, 1882.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana

Richard M. Pasteur and Christopher N. Pasteur purchased, in 1859, a cotton press and warehouse situated in New Orleans. They remained in possession of this property until the month of November, 1863, when it was seized for confiscation by the officers of the United States, for having been employed in the Confederate service, in aid of the insurrection against the United States, contrary to the Act of Congress, passed on the 6th of August, 1861. Proceedings were taken in the Circuit Court of the United States for the confiscation and condemnation of this property thus seized, and a decree was made in December, 1865, which was followed by a sale of the property in January, 1866. Richard M. Pasteur died in 1874, above eight years from the sale. He left six children living. The mother of the three younger children filed this bill without joining the children of the first marriage. She claims an undivided fourth part of the property for them, and an account from the death of Pasteur, of fruits and revenues from the appellees, who hold under the purchaser at said sale.

The court sustained a demurrer and entered a decree dismissing the bill; whereupon the complainant appealed to this court.

Messrs. **R. S. Dennee** and *William Reed Mills*, for appellant.

Messrs. **John A. Campbell** and **Thomas L. Bayne**, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The single question in this case is, whether the purchaser of real property condemned under the Act of August 6, 1861, ch. 60, 12 Stat. at L., 319, "to confiscate property used for insurrectionary purposes," takes a fee, or only an estate for life. The Act provides that, if during an insurrection against the Government of the United States, after the President has declared [316] by Proclamation that the laws of the United States are opposed, and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals by law, any person shall purchase or acquire, sell or give, any property with intent to use or employ the same, or suffer the same to be used or employed, in aiding, abetting or promoting such insurrection or resistance to the laws, or any person engaged therein; or if any person, being the owner of any such property, shall knowingly use or employ or consent to the use or employment of the same, as aforesaid, all such property shall be lawful subject of capture and prize wherever found, and the President may cause the same to be seized, confiscated and condemned. Provision is then made for judicial proceedings of condemnation in the courts of the United States. The seizure and condemnation in the present case were because the property had been used and employed, with the knowledge and consent of the owner, in aid of the insurrection.

Express authority is vested in Congress by the Constitution to "make rules concerning captures on land and water." Art. I., sec. 8. The statute now in question is manifestly an exercise of that power. As was said by *Mr. Justice* Strong in *Miller* v. *U. S.*, 11 Wall., 308 [78 U. S., XX., 145], "It imposed no penalty. It declared nothing unlawful. It was aimed exclusively at the seizure and confiscation of property used to aid, abet and promote the rebellion, then a war, or to maintain the war against the government. It treated the property as the guilty subject." All private property used or intended to be used in aid of an insurrection, with the knowledge or consent of the owner, is made the lawful subject of capture and judicial condemnation; and this, not to punish the owner for any crime, but to weaken the insurrection. The offense for which the condemnation may be decreed is one that inheres in the property itself, and grows out of the fact that the property has become or is intended to become, with the approval of its owner, an instrument for the promotion of the ends of the insurrection. To justify a judicial sentence of condemnation, the consent of the owner to the hostile use of his property must be proven; but if it be proven condemnation is decreed, not because the owner has subjected himself to [317] punishment, but because the property has been devoted to the insurrection and must suffer the consequences. The property is the offending thing, and condemnation is decreed because its owner has voluntarily allowed it to become involved in the offense.

In war, the capture of property in the hands of the enemy, used or intended to be used for hostile purposes, is allowed by all civilized Nations, and this, whether the ownership be public or private. The title to movable property in hostile use, captured on land, passes to the captor as soon as the capture is complete; that is to say, as soon as the property is reduced to firm possession. The absolute title to immovable public property, owned by the enemy, does not pass until the war is ended and peace restored. Then, unless provision is made to the contrary by the Treaty of Peace or otherwise, the ownership is changed if the conquest is complete. In regulating the capture of private property,

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devoted to the use of an insurrection against the authority of the United States, Congress has provided for a judicial inquiry into the facts and a sentence of condemnation, before title can pass out of the owner. When the inquiry is had and the necessary sentence pronounced by the appropriate judicial tribunal, the title passes, by reason of the capture or conquest, the lawfulness of which has been established in an adversary proceeding against the property seized under the direction of the President, and subjected to the jurisdiction of the court designated by law for that purpose. The title acquired by the purchaser in this case was of that kind. The property bought had been seized under the authority of the statute, as property used in aid of an insurrection against the United States, with the consent of its owner. The fact of hostile use with the owner's consent was established and the requisite sentence of judicial condemnation entered. In this way the title of the United States by capture was perfected. That title, as against the owner and his heirs, was the fee. The defendants below, who are the defendants in error here, have succeeded to that title.

Property captured in war is not taken to punish its owner, any more than the life of a soldier slain in battle is taken to punish him. The property, as well as the life, is taken only as a means of lessening the warlike strength of the enemy. *Young* v. *U. S.*, 97 U. S., 39 [XXIV., [318] 992].

There is here no question of pardon and amnesty, as there was in the case of *Armstrong's Foundry*, 6 Wall., 769 [73 U. S., XVIII., 884], where it was held that the pardon of the owner, before a sentence of condemnation, relieved him from the consequences of his assent to the unlawful use of his property, so far as the United States were concerned, and might to that extent be used as a bar to further proceedings in the condemnation suit. But in that case the pardon was set up as a defense against the condemnation. Here there is nothing of the kind. The court, having the property in possession and proceeding against it, has decreed its condemnation. So long as this decree stands, it affords conclusive evidence of a perfected title in the United States, by a lawful capture, judicially ascertained and determined. To these proceedings, the ancestor of the heirs for whose benefit this suit is prosecuted was in law a party, and both he and they are bound by the adjudication. The judgment is one that cannot be collaterally impeached.

It is true that, in the case of *Armstrong's Foundry, supra*, it was said by *Chief Justice* Chase, in the opinion, that "The statute regarded the assent of the owner to the employment of his property in aid of the rebellion as an offense, and inflicted forfeiture as a penalty," but this language must be construed in connection with the facts then under consideration. There the question was, whether the pardon could be used as a bar to the pending proceedings for condemnation, and the effect of what was said was no more than to apply to that case the principle afterwards announced by the same learned *Chief Justice* in *U. S.* v. *Padelford*, 9 Wall., 543 [76 U. S., XIX., 792], and declare that the law made the proof of pardon of the owner a complete substitute for proof that he gave no consent to the use of his property in aid of the rebellion. The guilty consent of the owner to the unlawful use is necessary, to make the property a subject of lawful capture, and as the pardon was, under the rule in *Padelford's Case*, equivalent to proof that no such consent was given, the lawfulness of the capture could not be established and, consequently, as against the United States, there must be a judgment of acquittal.

The Act of July 17, 1862, ch. 95, 12 Stat. at [319] L., 589, proceeds upon an entirely different principle. That was, according to its title, "An Act to Suppress Insurrection, to Punish Treason and Rebellion, and to Seize and Confiscate the Property of Rebels." Its object was, not to authorize the capture of property used to promote an insurrection, but to confiscate the property of traitors. The seizure was to be made, not because the property was in law the offender, but because the owners were engaged in rebellion, and would not return to their allegiance to the United States. The object evidently was, not to make the property a lawful subject of capture and prize, as in the Act of 1861 [12 Stat. at L., 319], but to punish the owner for countenancing the rebellion. This distinction is recognized in all the cases where the matter has received consideration. The Justices who dissented from the judgment in *Miller* v. *U. S.*, *supra*, while arguing that the Act of 1862 was unconstitutional, impliedly admitted the validity of that of 1861, because it was directed against the property as the offending thing. It was, also, because the Act of 1862 was in the nature of a punishment of the owner for his treason, that the explanatory Resolution, No. 63, 12 Stat. at L., 627, was passed to meet the objections which had been suggested by the President. In this way the condemnation of real property under the Act of 1862 was confined to the natural life of the offending owner; but nothing was done with the Act of 1861, because that had reference only to the capture and condemnation of property for its unlawful use.

It follows that the court below was right in holding that the fee passed by the condemnation, and its judgment is, consequently, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

A. S. BADGER, Collector of Customs of the PORT OF NEW ORLEANS, *Plff. in Err.*,
v.
D. L. RANLETT & CO.

(See S. C., 16 Otto, 255-260.)

Duty Act—question not raised below.

*1. Cotton ties, each tie consisting of an iron strip and an iron buckle, imported in bundles, each bundle consisting of thirty strips and thirty buckles, each strip eleven feet long, the whole blackened, were held in this case to be subject to a duty of 35 per cent *ad valorem*, as "manufactures of iron, not otherwise provided for," under Schedule E of section 2504 of the Revised Statutes, and not to a duty of 1¼ cents per pound, under said schedule, as "band, hoop and scroll iron."

2. The question as to whether the articles were subject to some other rate of duty than one of those

*Head notes by *Mr. Justice* BLATCHFORD.

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two, not having been raised on the trial in the court below, cannot be raised by the plaintiff in error in this court.

[No. 586.]

Submitted Nov. 27, 1882. Decided Dec. 11, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

The history and facts of the case fully appear in the opinion of the court.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.*, for plaintiff in error.

Messrs. **William Wirt Howe** and **J. H. Kennard,** for defendants in error

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a writ of error, to reverse a judgment rendered against a Collector of Customs for the recovery of duties paid under protest. The firm of D. L. Ranlett & Co. imported into the Port of New Orleans, from Liverpool, England, in 1880, certain articles, entered, some as "bundles black iron cotton ties, thirty strips each [256] bundle, and thirty Kennedy buckles;" others as "bundles blacked iron cotton ties, arrow buckles, No. 4, thirty buckles and thirty strips to each bundle, eleven feet;" others as "bundles blacked iron cotton ties, Kennedy buckles, thirty buckles and thirty strips to each bundle, eleven feet." Having paid, under protest, the duty exacted by the Collector, which was 1½ cents per pound on the weight of the iron strips and the buckles, the importers, claiming that the lawful duty was 35 per cent *ad valorem*, appealed to the Secretary of the Treasury, who affirmed the decision of the Collector. This suit was then brought. The petition alleges that the imported goods were "manufactures of iron, *viz.:* certain invoices of black iron cotton ties," "in bundles of thirty strips each, cut to the required length of eleven feet, and sundry buckles," "being thirty buckles to each bundle of said ties;" that the proper duty was 35 per cent *ad valorem*, and no more, because the ties, composed of the strips and buckles in said bundles, constituted a manufacture of iron for a special and important purpose, and were "manufactures of iron not otherwise provided for;" and that, even if the strips of iron were not to be admitted at a duty of 35 per cent *ad valorem*, the duty on the buckles could not lawfully have exceeded that rate, while that exacted on them amounted to an excess of $750. The whole amount claimed to be recovered back was $3,762.

The question involved arises under section 2504 of the Revised Statutes, which, in Schedule E, imposes the following duties: "All band, hoop and scroll iron, from one half to six inches wide, under one eighth of an inch in thickness, and not thinner than number twenty, wire guage, one and one half cents per pound. * * * All other descriptions of rolled or hammered iron, not otherwise provided for, one cent and one fourth per pound. * * * Manufactures * * * not otherwise provided for, of * * * iron, * * * 35 *per centum ad valorem.*"

The bill of exceptions states that on the trial certain facts were "Conceded, as set forth in note of evidence and statement of facts filed in the cause in open court;" that "A sample of the articles of merchandise imported by plaintiffs, and described in the petition," was "produced [257] and exhibited to the jury;" that "Witnesses" were "produced on the part of the plaintiffs and on the part of the defendant;" that it was "Claimed on the part of the plaintiffs that the imported articles, for the recovery of a portion of the duties paid upon which, this suit was brought, should have been classed and subjected to duties as cotton ties, under the designation, 'manufactured articles not otherwise provided for;'" and that it was "Claimed on the part of the defendant that the said imported articles should have been classed and subjected to duties under the designation, 'band or hoop iron.'" The "note of evidence and statement of facts" sets forth that the plaintiffs introduced the entries of the goods, and then proceeds: "It was admitted that the allegations of petition were correct as to partnership of plaintiffs, ownership and importation of property, amount of same, and duties paid and protest, appeals and affirmance of Collector's decision, and that the only issue disputed by defendant is the question, which is the sole question to be decided, whether the articles of merchandise described in the petition are dutiable under Schedule E as hoop, band or scroll iron, or as 'manufactures of iron not otherwise provided for' in said schedule. In case the plaintiffs be entitled to recover, it is understood that the amount is $3,722.99."

At the request of the defendant, the court charged the jury, that "If the jury find from the evidence that the articles imported by the plaintiffs, consisted of iron bands, blackened, cut into lengths of 11 feet, and put up in bundles of thirty, with thirty buckles on one band, in each bundle, and not permanently attached, then the fact that the buckles accompany the bands will not prevent the bands from being included in and dutiable under the denomination of band iron." The court further charged the jury "That, the practical question to be determined by the jury is, whether the articles imported by plaintiffs are band, hoop or scroll iron; or, on the other hand, cotton ties;" that "This question must be determined by mercantile usage, as shown by the testimony in the cause; that, if the jury find from the evidence that said articles are cotton ties, and are known in commerce as such, then they are subject to a duty of 35 per cent *ad valorem;*" but that, "If the jury find that they are band, hoop or scroll [258] iron, and known in commerce as such, they are subject to a duty of one and a half cents a pound." The defendant excepted to said "last charge, and to each part of the same." The verdict was in these words: "We, the jury, find a verdict for the plaintiff in the sum of $3,722.99, and that sample on exhibition in court and in controversy is cotton ties." A judgment was entered for said amount.

The defendant contends that the court charged the jury, in substance, that if the goods were and were known as cotton ties, they could not be at the same time band iron; and that this was error. The argument is, that the term "band iron" may include an article known as a "cotton tie;" that to say, that one sort of band iron is known by the name of "cotton tie" is not to say that necessarily it is no longer band iron; that all that was done to the band iron was to cut it into lengths of eleven feet and blacken

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it; and that this is not to make a manufacture of iron not otherwise provided for, within the statute.

The charge complained of, must be considered in connection with all that occurred at the trial, as shown by the record. The "note of evidence and statement of facts" says that the only issue disputed by the defense, and the only question to be decided, was, whether the articles "described in the petition" are dutiable as "hoop, band or scroll iron," or as "manufactures of iron not otherwise provided for." The description in the petition says that the articles are iron cotton ties, in strips, each "cut to the required length of eleven feet," with a buckle to each strip. The record shows that there was evidence given on the trial, by witnesses for both parties, but on what subject does not appear, except that some evidence was given as to "mercantile usage." Evidence may have been given, as to whether the strips were cut in lengths from merchantable band iron, or cut in lengths in the process of original manufacture. The agreed [259] issue was, as to whether the articles, so far as the strips were concerned, were "band iron" or "manufactures of iron not otherwise provided for." The court placed the issue before the jury as being whether the articles, so far as the strips were concerned, were "band iron" or "cotton ties." Of course, the buckles were not band iron. The charge was to the effect that if the articles were known in commerce as "cotton ties," and were not known in commerce as "band iron," they were subject to a duty of 35 per cent *ad valorem*, as "manufactures of iron not otherwise provided for," and not to duty as "band iron."

The petition avers that the cotton ties, composed of the strips and buckles, "constitute a manufacture of iron for a special and important purpose." It is to be assumed that this fact was proved under the general issue pleaded. The verdict distinctly finds that the articles were "cotton ties," which is to be taken as a finding that the articles were not "band iron." Not being "band iron," they could not, under the issues tried, have been other than "manufactures of iron not otherwise provided for." The substance of the whole charge was, that if the jury found that the articles were "band iron," the correct duty had been imposed and the plaintiffs could not recover. The strips not being band iron, and the buckles, certainly, not being band iron, the proper duty was 35 per cent *ad valorem*.

The plaintiff in error further contends that the court erred in charging that if the articles were not "band iron", they were subject to a duty of 35 per cent *ad valorem*. The contention is, that if what appears to have been done in respect of the strips, to produce the article, amounted to a manufacture, it brought the article within the duty of 1¼ cents per pound, as falling under the head of "All other descriptions of rolled or hammered iron, not otherwise provided for." But, by the "note of evidence and statement of facts," the defendant admitted that the only question which he raised was whether the articles were "band iron," and so dutiable at 1¼ cents per pound, or whether they were dutiable at 35 per cent *ad valorem*, as "manufactures of iron not otherwise provided for." This is shown by the record to have been the only question tried. The plaintiff in error cannot here raise the question as to a duty of 1¼ [260] cents per pound, because it does not appear that he raised it on the trial. The bill of exceptions distinctly states that the only contention of the defendant on the trial was, that the articles were dutiable as "band or hoop iron."

We find no error in the record, and the judgment is affirmed.

In *Same* v. *Same*, No. 587, argued by same counsel, *Mr. Justice* **Blatchford** delivered the opinion of the court:

The questions presented in this case are the same as those in the other suit between the same parties, decided herewith and, for the reasons assigned in the opinion in that case, *the judgment in this case is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

HENRY FINK, U. S. Marshal for the EASTERN DISTRICT OF WISCONSIN, *Appt.*, [272]
v.
THOMAS O'NEIL.

(See S. C., 16 Otto, 272-285.)

Exemptions from execution, in favor of United States.

In cases of executions upon judgments in civil actions, the United States is subject to the same exemptions, including homestead exemptions, as apply to private persons by the law of the State in which the property levied on is found.

[No. 96.]

Argued Nov. 22, 1882. Decided Dec. 11, 1882.

APPEAL from the Circuit Court of the United States for the Eastern District of Wisconsin.

The history and facts of the case appear in the opinion of the court.

Mr. **William A. Maury**, *Asst. Atty-Gen.*, for appellant:

The exemption laws of the State cannot operate against the United States; (1) because it is an invariable rule that statutes which would derogate from the powers and prerogatives of government, or tend to diminish or restrain any of its rights and interests, cannot be held to apply to it unless it is expressly named *U. S.* v. *Lerron*, 20 Wall., 251 (87 U. S., XXII., 275); *Savings Bank* v. *U. S.*, 19 Wall., 239 (86 U. S., XXII., 82), and cases cited; Dwar., 523; Sedg. Stat. and Const. L., 105, 395, ed., 1857; and (2) because, section 916 R. S., while it adopts the state laws providing execution, does not adopt any restrictive legislation which is collateral to those laws, *Boyle* v. *Zacharie*, 6 Pet., 659; *Wayman* v. *Southard*, 10 Wheat., 1; and (3) because the provision of section 986, R. S., that executions sued out by the United States in any court thereof, in one State, may run and be executed in any other State or in any Territory, is repugnant to the idea that such process was intended to be affected by state exemptions of any kind under section 916.

It has been repeatedly held by this court, that the independence and sovereignty of the National Government could not co-exist with a

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power in the several States to defeat or embarrass the exercise of any of the powers delegated to it, and that "The States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government." *McCulloch* v. *Maryland*, 4 Wheat., 316; *Weston* v. *Charleston*, 2 Pet., 449; *Crandall* v. *Nevada*, 6 Wall., 36 (73 U. S., XVIII., 745); *Dobbins* v. *Comrs. of Erie Co.*, 16 Pet., 435; *vide*, also, *Collector* v. *Day*, 11 Wall., 113 (78 U. S., XX., 122), and *U. S.* v. *R. R. Co.*, 17 Wall., 322 (84 U. S., XXI., 597); *Wayman* v. *Southard*, 10 Wheat., 49; *Bank of U. S.* v. *Halstead*, 10 Wheat., 51; *Beers* v. *Haughton*, 9 Pet., 329.

If a State cannot lay a tax on the final process of the Federal Courts, by a parity of reasoning, it cannot withdraw property from the operation of such process.

The judicial power has heretofore been considered ample for the purposes of the Constitution, *Martin* v. *Hunter*, 1 Wheat., 304; *Tennessee* v. *Davis*, 100 U. S., 258 (XXV., 648); but we fear it must hereafter be regarded as a delusion, if it rests with the several States to say whether any and, if any, how much of the defendant's property may be seized under an execution issued by a Federal Court.

As was said of the power of taxation by the *Chief Justice* in *McCulloch* v. *Maryland*, 4 Wheat., 316, the admission of a power in a State to withdraw any property from the operation of a final process, is necessarily the admission of a power to do so without limit.

No counsel appeared for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

This is a bill in equity filed by the appellee, praying for a perpetual injunction to restrain the appellant, then United States Marshal for the district, from further proceeding under a *fi. fa.*, issued upon a judgment rendered in favor of the United States in the District Court for the Eastern District of Wisconsin, against the appellee and others, and which had been levied on real estate alleged to be the homestead of the appellee, and exempt under the laws of that State from sale on execution. The premises levied on are described in the bill as forty acres of land, with a dwelling-house and appurtenances thereon, occupied by the appellee as a residence for himself and family, consisting of his wife and seven children, the same being used for agricultural purposes, not included in any town, city or village plot, and alleged to be of the value of $6,000 and upwards; and it is averred that the cause of action upon which the judgment was rendered, was not for any debt or liability contracted prior to January 1, 1849.

To this bill there was filed a general demurrer, for want of equity, which being overruled, and the appellant declining to answer or plead, a decree was rendered, granting the relief prayed for, from which this appeal is prosecuted.

The provision of the Statute of Wisconsin on the subject of homestead exemptions, the benefit of which was secured to the appellee by the decree appealed from, is as follows:

"A homestead, to be selected by the owner thereof, consisting, when not included in any village or city, of any quantity of land, not exceeding forty acres, used for agricultural purposes, and when included in any city or village, of a quantity of land not exceeding one fourth of an acre, and the dwelling-house thereon and its appurtenances, owned and occupied by any resident of this State, shall be exempt from seizure or sale on execution, from the lien of every judgment, and from liability in any form for the debts of such owner, except laborers', mechanics' and purchase money liens, and mortgages lawfully executed, and taxes lawfully assessed, and except as otherwise specially provided in these statutes," etc. Rev. Stat. Wis., 1878, 783, ch. 130, sec. 2963. [273]

This statutory provision was enacted in express compliance with a constitutional injunction, wherein it was declared, in the 17th section of the Bill of Rights, that "The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws." *Phelps* v. *Rooney*, 9 Wis., 70-88.

And it has been the constant policy of the State in this legislation, as construed by many decisions of its Supreme Court, to favor by liberal interpretations, the exemptions in favor of the debtor. "For it cannot be denied," says that court, in *Hanson* v. *Edgar*, 34 Wis., 653-657, "That, in all the enactments found in our statute-books in regard to homestead exemption, the most sedulous care is manifest to secure the homestead to the debtor and to his wife and family, against all debts not expressly charged upon it."

We have found no case in which the question has been raised, or where there has been any expression of judicial opinion, whether the exemption would prevail or not, as to judgments in favor of the State; but we do not doubt, from the language of the constitutional and statutory provisions, and the rules of construction followed in other cases, that it would be held by its courts, if the question should be directly made, that the State, except as to taxes, which are expressly excepted, would be bound by the exemption.

In the case of *Doe* v. *Deavors*, 11 Ga., 79, it was decided by the Supreme Court of Georgia, in 1852, that the State was bound by Acts of the Legislature, exempting certain articles of personal property from levy and sale for debts, for the benefit of the wife and children of the debtor, so that they could not be seized and sold under execution for the payment of taxes. The court said, p. 89: "These laws are founded in a humane regard to the women and children of families. The preamble to the Act of 1822 announces the grounds on which the Legislature acted. '*Whereas*' (is its language), 'it does not comport with justice and expediency to deprive innocent and helpless women and children of the means of subsistence, be it, therefore, enacted,' etc. * * * In our judgment, the State falls within the operation of a public law, passed for the benefit of the poor, and the State is within the policy of our own legislation upon this subject-matter." [275]

Mr. Thompson, in his treatise on Homesteads and Exemptions, section 386, says: "In many of the States, this question is determined by the express provisions of statutes, which declare, in various terms, that nothing shall be exempt from execution where the debt, other than

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public taxes, is due the State, or where the debt is for public taxes legally assessed upon the homestead or other property; or where the demand is for a public wrong committed, punished by fine. But where the question has arisen, in the silence of statutes, the highest courts of the States, with two exceptions, have held otherwise."

The case of *Commonwealth* v. *Cook*, 8 Bush, 290, which is one of the exceptions referred to, is shown, however, to have been materially qualified by the decision in *Commonwealth* v. *Lay*, 12 Bush, 288. That of *Brooks* v. *State*, 54 Ga., 36, turned on the point that the exemption claimed, operated retrospectively, and was disallowed on the authority of *Gunn* v. *Barry*, 15 Wall., 610 [82 U. S., XXI., 212]. So that, in point of fact, the decisions of state courts upon the point are, practically, unanimous.

It is said, however, that the laws of the State creating these exemptions are not laws for the United States; and this is certainly true, unless they have been made such by Congress itself. This has not been an open question in this court since the decision in the cases of *Wayman* v. *Southard*, 10 Wheat., 1, and of *Bank* v. *Halstead*, 10 Wheat., 51. *Mr. Justice* Thompson, delivering the opinion of the court in the latter case, said: "An officer of the United States cannot, in the discharge of his duty, be governed and controlled by state laws, any further than such laws have been adopted and sanctioned by the legislative authority of the United States. And he does not, in such case, act under the authority of the state law, but under that of the United States, which adopts such law. An execution is the fruit and end of the suit, and is very aptly called the life of the law. The suit does not terminate with the judgment; and all proceedings on the execution are proceedings in the suit," etc. In *Wayman* [277] v. *Southard*, 10 Wheat., 49, *Chief Justice* Marshall had said that the proposition was "One of those political axioms, an attempt to demonstrate which would be a waste of argument not to be excused."

The question, therefore, is whether the United States, by an appropriate legislative Act, has adopted the laws of Wisconsin, exempting homesteads from execution and, if at all, whether they apply in cases of executions upon judgments in favor of the United States.

Section 916, Rev. Stat., is as follows: "The party recovering a judgment in any common law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted, which may be adopted by general rules of such circuit or district courts; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such State in relation to remedies upon judgments as aforesaid, by execution or otherwise."

This provision, in its present form, has been in force since June 1, 1872, and is part of the 6th section of the Act "to further the administration of justice," approved on that date. 17 Stat. at L., 196. It is the result of a policy that originated with the organization of our judicial system. The 14th section of the Judiciary Act of 1789, 1 Stat. at L., 81, provided that the courts of the United States should have "Power to issue writs of *scire facias*, *habeas corpus* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law;" and this was held to embrace executions upon judgments. *Wayman* v. *Southard* [*supra*]. But simultaneously with the Judiciary Act, September 29, 1789 [1 Stat. at L., 93], was passed the first "Act to regulate processes in the courts of the United States," in which it was enacted, "that, until further provision shall be made, and except where by this Act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each State respectively as are now used or allowed in the [278] Supreme Courts of the same."

This Act was temporary, and expired by its own limitation at the end of the next session of Congress. The Act of May 8, 1792 [1 Stat. at L., 274], provided that the forms of writs, executions and other process, and the forms and modes of proceeding in suits at common law should continue to be the same as authorized by the Act of 1789, "Subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court shall think proper, from time to time, by rule to prescribe to any circuit or district court concerning the same." 1 Stat. at L., 275. This legislation came under review in this court in the cases of *Wayman* v. *Southard*, and *Bank* v. *Halstead*, in the latter of which it is said, 10 Wheat., 60: "The general policy of all the laws on this subject is very apparent. It was intended to adopt and conform to the state process and proceedings as the general rule, but under such guards and checks as might be necessary to insure the due exercise of the powers of the courts of the United States. They have authority, therefore, from time to time, to alter the process in such manner as they shall deem expedient, and likewise to make additions thereto, which necessarily implies a power to enlarge the effect and operation of the process."

This discretionary power in the courts of the United States, was restricted by the Act of May 19, 1828, 4 Stat. at L., 278, so that thereafter writs of execution and other final process issued on judgments rendered in any of the courts of the United States and the proceedings thereupon, should be the same, except their style, in each State respectively, as were then used in the courts of such State; provided, however, that it should be in the power of the courts, if they saw fit in their discretion, by rule of court, so far to alter final process in said courts, as to conform the same to any change which might be adopted by the Legislatures of the respective States for the state courts.

It will be seen, from this provision, that it was thereafter prohibited to the courts of the United States, either to adopt or recognize any form of execution or give any effect to it, except such as was, at the time of the passage of the Act, or had subsequently become at the time of their [279]

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adoption, a writ authorized by the laws of the State. The same provision has ever since been continued in force, and is now embodied in section 916 of the Revised Statutes, already quoted.

In *Beers* v. *Haughton*, 9 Pet., 329, which was governed by the Act of 1828, it was held that "The words, 'the proceedings on the writs of execution and other final process,' must, from their very import, be construed to include all the laws which regulate the rights, duties and conduct of officers in the service of such process, according to its exigency, upon the person or property of the execution debtor, and also all the exemptions from arrest or imprisonment under such process created by those laws."

It is further to be observed that no distinction is made, in any of these statutes on the subject, between executions on judgments in favor of private parties, and on those in favor of the United States. And as there is no provision as to the effect of executions at all, except as contained in this legislation, it follows necessarily that the exemptions from levy and sale, under executions of one class, apply equally to all, including those on judgments recovered by the United States. The general power to issue process, originally conferred by section 14 of the Judiciary Act of 1789 [1 Stat. at L., 73], which now appears as section 716, Rev. Stat., as being in *pari materia* with that contained in section 916, must be construed as subject to the same limitations, especially as the general power is confined in express terms to writs not specifically provided for by statute, and hence, *ex ti termini*, embraces none included in the subsequent section. Besides, as was said by *Ch. J.* Marshall, in *Wayman* v. *Southard*, 10 Wheat., 1-24, "This section provides singly for issuing the writ, and prescribes no rule for the conduct of the officer while obeying its mandate."

As the Statute of Wisconsin, exempting homesteads from levy and sale upon executions, was in force at the time the Act of Congress of June 1, 1872 [17 Stat. at L., 196], took effect, and has remained so continuously from that time, it also follows that the exemption has thereby become a law of the United States within that State, and applies to executions issued upon judgments in civil causes recovered in their courts in their [280] own name and behalf, equally with those upon judgments rendered in favor of private parties. Laws of Wisconsin for 1848, pp. 40-41; Rev. Stat. Wis., 1871, sec. 23, p. 1548.

This conclusion cannot be avoided by the consideration which has been urged upon us, that the Process Acts do not limit the sovereign rights of the United States, upon the principle that the Sovereign is not bound by such laws, unless he is expressly named. These laws are the expression of the sovereign will on the subject, and are conclusive upon the judicial and executive officers to whom they are addressed; and as they forbid the issue of an execution in every case, except subject to the limitations which they mention, and as there is no authority to issue an execution in any case whatever, except as conferred by them, the sovereign right invoked is left without the means of vindication. The United States cannot enforce the collection of a debt from an unwilling debtor, except by judicial process. They must bring a suit and obtain a judgment. To reap the fruit of that judgment, they must cause an execution to issue. The courts have no inherent authority to take any one of these steps, except as it may have been conferred by the legislative department; for they can exercise no jurisdiction, except as the law confers and limits it. And if the laws in question do not permit an execution to issue upon a judgment in favor of the United States, except subject to the exemptions which apply to citizens, there are no others which confer authority to issue any execution at all. For, as was said by *Mr. Justice* Daniel, in *Cary* v. *Curtis*, 3 How., 236-245, "The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law."

This objection is also met expressly by the decision of this court in the case of *U. S.* v. *Knight*, 14 Pet., 301. It was there decided that the Act of May 19, 1828 [4 Stat. at L., 278], gives the debtors imprisoned under executions from the courts of the United States, at the suit of the United States, the privilege of jail limits in the several States, as they were fixed by the laws of the several States at the date of that Act. It was there objected, as here, that the provision of the statute did not embrace executions issued [281] on judgments rendered in favor of the United States, upon the ground that the United States are never to be considered as embraced in any statute, unless expressly named. *Mr. Justice* Barbour delivered the opinion of the court and said: "The words of this section being 'that writs of execution and other final process, issued on judgments and decrees rendered in any of the courts of the United States,' it is obvious that the language is sufficiently comprehensive to embrace them, unless they are to be excluded by a construction founded upon the principle just stated." Referring to the maxim, *Nullum tempus occurrit regi*, he says it rests on the ground that no laches shall be imputed to the Sovereign, but he adds, "Not upon any notion of prerogative; for even in England, where the doctrine is stated under the head of prerogative, this, in effect, means nothing more than that this exception is made from the statute for the public good; and the King represents the notion. The real ground is a great principle of public policy, which belongs alike to all governments, that the public interest should not be prejudiced by the negligence of public officers, to whose care they are confided. Without undertaking to lay down any general rule as applicable to cases of this kind, we feel satisfied that when, as in this case, a statute, which proposes only to regulate the mode of proceeding in suits, does not devest the public of any right, does not violate any principle of public policy; but, on the contrary, makes provisions, in accordance with the policy which the goverment has indicated by many Acts of previous legislation, to conform to state laws, in giving to persons imprisoned under their execution the privilege of jail limits; we shall best carry into effect the legislative intent, by construing the executions at the suit of the United States, to be embraced within the Act of 1828."

The same line of reasoning was adopted by this court in the case of *Green* v. *U. S.*, 9 Wall., 655 [76 U. S., XIX., 806]. It was there held that the Act of July 2, 1864 [13 Stat. at L., 244], which enacts that in courts of the United States

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there shall be no exclusion of any witness in civil actions, "because he is a party to or interested in the issue tried;" and the amendatory Act of March 3, 1865 [13 Stat. at L., 533], making certain exceptions to the rule, apply to civil actions in which the United States are a party, [282] as well as to those between private persons. It was argued by the Attorney-General, that the statutes were meant to give both parties an equal standing in court in respect to evidence; that the United States, not being able to testify, a party opposed to them should not be allowed to do so either; and that, independently of this, it was a rule of construction that "the King is not bound by any Act of Parliament, unless he be named therein by special and particular words." *Mr. Justice* Bradley, who delivered the opinion of the court, replying to this argument, said: "It is urged that the government is not bound by a law unless expressly named. We do not see why this rule of construction should apply to acts of legislation which lay down general rules of procedure in civil actions. The very fact that it is confined to *civil* actions would seem to show that Congress intended it to apply to actions in which the government is a party, as well as those between private parties. For the United States is a necessary party in all criminal actions which are excluded *ex vi termini*; and if it had been the intent to exclude all other actions in which the government is a party, it would have been more natural and more accurate to have expressly confined the law to actions in which the government is not a party, instead of confining it to *civil* actions. It would then have corresponded precisely with such intent. Expressed as it is, the intent seems to embrace, instead of excluding, civil actions in which the government is a party. Nothing adverse to this view can be gathered from the exceptions made in the Amendment passed in 1865."

And although it has been decided by the highest judicial tribunals in England, *Feather* v. *Queen*, 6 B. & S., 257; *Dixon* v. *London Small Arms Co.*, L. R., 1 App. Cas., 632, that the Sovereign is entitled to the use of a patented process or invention without compensation to the patentee, because the privilege granted by the letters patent is granted against the subjects only, and not against the Crown, a contrary doctrine was held by this court in *James* v. *Campbell*, 104 U. S., 356 [XXVI., 786], to prevail in this country. *Mr. Justice* Bradley, delivering the opinion of the court in that case, [283] said: "The United States has no such prerogative as that which is claimed by the Sovereigns of England, by which it can reserve to itself, either expressly or by implication, a superior dominion and use, in that which it grants by letters patent to those who entitle themselves to such grants. The Government of the United States, as well as the citizen, is subject to the Constitution; and when it grants a patent, the grantee is entitled to it as a matter of right, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor."

It is true that in the case of *U. S.* v. *Herron*, 20 Wall., 251 [87 U. S., XXII., 275], it was decided that a debt due to the United States is not barred by the debtor's discharge with certificate under the Bankrupt Act of 1867 [14 Stat. at L., 517]; but in that case *Mr. Justice* Clifford took pains, by a careful collation of numerous provisions of the statute, to show that the words "creditor or creditors," as contained in the Act, did not include the United States, adopting and extending the definition by *Mr. Justice* Blackburn, in *Woods* v. *De Mattos*, 3 Hurl. & C., 995, because used in the sense of persons having a claim which can be proved under the bankruptcy, and not required by the Act to be paid in full in preference of all others. But the Bankrupt Act furnished clear evidence of the policy of Congress, in reference to exemptions of property from sale for the payment of debts, by excepting from its operation personal property, necessary for the use of the family, to the amount of $500, and such other property as was exempt from execution by the laws of the United States, and of the state of the debtor's domicil. Rev. Stat., sec. 5045. And Congress, since May 20, 1862, 12 Stat. at L., 392, when it passed the first Act, providing for the acquisition of homesteads for actual settlers upon the public lands, made their exemption from sale on execution a permanent part of a national policy, by declaring that lands so acquired should not, "in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." Rev. Stat., sec. 2296; *Seymour* v. *Saunders*, 3 Dill. 437; *Russell* v. *Louth*, 21 Minn., 167.

If a contrary construction to the Process Acts, should be given, on the ground that they do not include the United States, which, although a litigant, continues, nevertheless, to exercise the [284] prerogatives of a Sovereign, it would follow that they might resort to any writ known to the common law, however antiquated or obsolete, and in defiance of the progress of enlightened legislation on that subject, revive all the hardships of imprisonment for debt, even without the liberty of local statutory jail limits. But that this is not within the meaning of these Acts of Congress, we have positive and plenary proof in section 1042 of the Revised Statutes. This was section 14 of the Act of June 1, 1872, 17 Stat. at L., 198. It provides that "When a poor convict, sentenced by any court of the United States to pay a fine or fine and cost, whether with or without imprisonment, has been confined in prison thirty days solely for the non-payment of such fine or fine and cost, he may make application in writing to any commissioner of the United States Court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and cost, and after notice to the District Attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter; and if on examination it shall appear to him that such convict is unable to pay such fine or fine and cost, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him" an oath, the form of which is set out, in which he swears that he has not any property, real or personal, to the amount of $20, except such as is by law exempt from being taken on civil precept for debt by the laws of the State where the oath is administered, and that he has no property in any way conveyed or concealed, or in any way

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disposed of, for his future use or benefit. "And thereupon," the statute proceeds, "such convict shall be discharged," etc. This section is repeated as section 5296, Rev. Stat. U. S., under the title, Remission of Fines, Penalties and Forfeitures.

Nothing can be more clear than this, as a recognition by Congress, that in case of executions upon judgments in civil actions, the United States are subject to the same exemptions as apply to private persons by the law of the State in which the property levied on is [285] found; and that, by this provision, in favor of poor convicts, it was intended, even in cases of sentences for fines for criminal offenses against the laws of the United States, that the execution against property for its collection, should be subjected to the same exemptions as in civil cases.

In the *Magdalen College Case*, 11 Coke, 66 *b*, *Lord* Coke, referring to *Lord Berkeley's Case*, Plowd., 246, declares that it was there held that the King was bound by the Statute *De Donis*, 13 Edw. I., because, for other reasons, "It was an Act of preservation of the possession of noblemen, gentlemen and others," and "the said Act," he continues, "shall not bind the King only, where he took an estate in his natural capacity, as to him and the heirs male of his body, but also when he claims an inheritance as King by his prerogative." By parity of reasoning, based on the declared public policy of States, where the People are the Sovereign, laws which are Acts of preservation of the home of the family, exclude the supposition of any adverse public interest, because none can be thought hostile to that, and the case is brought within the humane exception that identifies the public good with the private right, and declares "That general statutes, which provide necessary and profitable remedy for the maintenance of religion, the advancement of good learning and for the relief of the poor, shall be extended generally according to their words;" for civilization has no promise that is not nourished in the bosom of the secure and well ordered household.

The decree of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—85 Ind., 569; 44 Am. Rep., 50.

CHARLES H. VAN WYCK, *Appt.*,

v.

SHERMAN W. KNEVALS.

(See S. C., 16 Otto, 360-370.)

Preemption right on railroad land—location of route—withdrawing lands from market—forfeiture of company's right—deviation of route—power of State—power of Congress to authorize railroad in Territories.

1. The grant made to Kansas by the Act of Congress of July 23, 1866, ch., 212, for the use and benefit of the St. Joseph and Denver Railroad Company, took effect so as to cut off the right of preemption from subsequent settlers on the land, when the route of the road was "definitely fixed." No parties can subsequently acquire a preemption right to any portion of the land covered by the grant.

2. The route is definitely fixed, within the meaning of the Act of Congress, when the Company files with the Secretary of the Interior, a map of its lines, approved by its directors, designating the route of the proposed road.

3. It then becomes the duty of the Secretary of the Interior to withdraw from market the lands granted; but if he should neglect his duty the neglect would not impair the rights of the Company, however prejudicial it might prove to others.

4. Any forfeiture of the Company's right to the land, by its failure to complete the road, can be asserted only by the grantor, the United States, through judicial proceedings, or through the action of Congress.

5. A deviation of the road constructed, from the route laid down in the map, if the lands in controversy are within the required limit, whether that be measured from one line or the other, does not better the condition of one claiming a preemption right.

6. Congress can confer upon a corporation of a State the right to construct a road within any of the Territories of the United States; and it may be well doubted whether the State subsequently created out of the Territory, can put any impediment upon the enjoyment of such right. Any such interference would operate to devest the Company of its title to lands granted by the United States.

7. The existence of a patent for the land from the United States, which prevents a grantee of the railroad company from obtaining a strictly legal title, creates a cloud upon the title of the land, and furnishes ground for equitable relief.

[No. 1033.]

Submitted Nov. 29, 1882. Decided Dec. 11, 1882.

APPEAL from the Circuit Court of the United States for the District of Nebraska.

The bill in this case was filed in the court below, by the appellee, to recover certain lands alleged by him to be within the grant of public lands made to the St. Joseph and Denver City Railroad Company, under which he claims by the Act of July 23, 1866.

The defendant held under a patent issued to him November 15, 1871. The court below, upon the final hearing, entered a decree in favor of the complainant; whereupon, the defendant appealed to this court.

The following statement contains the principal facts of the case:

On the 23d of July, 1866, Congress passed an Act, a copy of which is annexed to the bill, the 1st section of which is as follows:

"That there be hereby granted to the State of Kansas, for the use and benefit of the St. Joseph and Denver City Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from Elwood, in Kansas, westwardly, *via* Maryville, in the same State, so as to effect a junction with the Union Pacific Railroad or any branch thereof not further west than the one hundredth meridian of west longitude, every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, to the point of intersection. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of preemption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior, to cause to be selected for the purpose aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land, in alternate sections or parts of sections designated by odd numbers, as shall be equal to such lands as the United

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States have sold, reserved or otherwise appropriated, or to which the rights of preemption or homestead settlements have attached as aforesaid, which lands, thus indicated by odd numbers, and selected by direction of the Secretary of the Interior, as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid."

Then follow several provisos which are not material here.

The 4th section provides:

"That, as soon as the Company shall file with the Secretary of the Interior, maps of its lines, designating the route thereof, it shall be the duty of the said Secretary to withdraw from the market the lands granted by this Act, in such manner as may be best calculated to effect the purposes of this Act and subserve the public interests."

The Company duly accepted the Act, and on the 25th March, 1870, filed the required map with the Secretary of the Interior, who accepted it. On the 26th of the same month he transmitted it to the Commissioner of the General Land-Office in a letter, in which, among other things, he directed that officer to "Instruct the proper local officers to withhold, from sale or other disposal, the odd numbered sections within the limits of twenty miles on each side of the road."

On the 8th of April, 1870, the Commissioner forwarded a copy of the map to the register and receiver of the land-office at Beatrice. It was not received by those officers until April 15. The Company built and completed sections of the road from time to time, until July 15, 1872, when it was completed to Hastings, where it made a junction with the Burlington and Missouri River Railroad in Nebraska; but the road has never been completed to any point on the Union Pacific, unless the said Burlington road is a branch thereof. The road so built was substantially on the line delineated on the map, and ran through Thayer and Nuckolls Counties, which are within the district of lands subject to sale at Beatrice. But, at a point about one mile east of the lands in question in this suit, and about seventy-five miles east of Hastings, the road, as constructed, departed from the proposed line as shown on the map; at a point opposite the lands here in controversy, the road as built was from forty to sixty rods from the line marked on the map; and from that point to Hastings it deflected from the line marked on the map, from one to three miles. The lands in dispute are within ten miles of the road as built, and of the line delineated on the map.

On the 13th of April, 1870, eighteen days after the map was filed with the Secretary, and two days before it reached the local office, the appellant entered the lands here in question at private entry at the office at Beatrice, and paid therefor one dollar and twenty-five cents per acre; and on the 15th of November, 1871, a patent was issued to him therefor. On the 15th of April, 1873, and not before, the Railroad Company filed its articles and other evidences of incorporation with the Secretary of State of Nebraska, but did not otherwise attempt to comply with the laws of that State in respect of foreign corporations extending their road into that State.

The original plaintiff and appellee here claims under the Railroad Company.

Messrs. **E. E. Brown** and *J. C. Watson*, for appellant.

Mr. **James M. Woolworth**, for appellee.

Mr. Justice **Field** delivered the opinion of the court:

The principal question for determination in this case is: when does the grant made to Kansas by the Act of Congress of the 23d of July, 1866, for the use and benefit of the St. Joseph and Denver Railroad Company in the construction of a railroad from Elwood, in that State, to its junction with the Union Pacific Railroad, or a branch thereof, take effect so as to cut off the right of preemption from subsequent settlers on the land? The grant is similar in its main features to numerous other grants of land made by Congress in aid of railroads, and contains the same limitations, or, rather, exceptions to it. It differs from some of the grants in that it is made to the State, and not directly to the Company to be benefited. The Act of Congress, however, provides, notwithstanding the designation of the State as grantee, that patents for the land shall be issued directly to the Company upon the [365] completion of every ten consecutive miles of the road. The grant is of ten alternate sections, designated by odd numbers, on each side of the proposed road, subject to the condition that if it appear, when the route of the road is "definitely fixed," that the United States have sold any section or a part thereof, or the right of preemption or homestead settlement has attached, or the same has been reserved by the United States for any purpose, the Secretary of the Interior shall cause an equal quantity of other lands to be selected from odd sections nearest those designated in lieu of the lands appropriated, which shall be held by the State for the same purpose. The grant is one *in præsenti*, except as its operation is affected by that condition; that is, it imports the transfer, subject to the limitations mentioned, of a present interest in the lands designated. The difficulty in immediately giving full operation to it, arises from the fact that the sections designated as granted are incapable of identification until the route of the road is "definitely fixed." When that route is thus established, the grant takes effect upon the sections by relation as of the date of the Act of Congress. In that sense we say that the grant is one *in præsenti*. It cuts off all claims, other than those mentioned, to any portion of the lands from the date of the Act, and passes the title as fully as though the sections had then been capable of identification. Nor is this operation of the grant affected by the fact that patents of the United States are subsequently, upon the certificate of the Governor, to be issued by the Secretary of the Interior, directly to the Company and not to the State. This is only a mode of devesting the State of her trust character and of passing the legal title held by her, to the party for whose benefit the grant was made. The legal title under the grant goes to the State, but the equitable right vests in the Company. The State cannot dispose of the lands; she simply holds them for the use and benefit of the Company; the Act of Congress providing how her trust shall be discharged and

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the legal title be conveyed to the Company. The Act says that the land granted "shall inure to the benefit of the said Company as follows," and then proceeds to declare that when the Governor of the State shall certify that a section of the road of ten consecutive miles is completed, [366] "in a good, substantial and permanent manner as a first-class railroad," the Secretary of the Interior shall issue to the Company patents for the sections of land granted, which lie opposite to and coterminous with the completed road, and that similar patents shall issue upon a like certificate upon the completion of every successive section of ten miles. It matters not, so far as subsequent settlers are concerned, in what manner the title, which has passed out of the United States, is transferred to the Company from the State. When the route of the road is "definitely fixed," no parties can subsequently acquire a preemption right to any portion of the lands covered by the grant. The right of the State and of the company is thenceforth perfect, as against subsequent claimants under the United States.

The inquiry then arises: when is the route of the road to be considered as "definitely fixed," so that the grant attaches to the adjoining sections? The complainant in the court below, who derives his title from the Company, contends that the route is definitely fixed, within the meaning of the Act of Congress, when the Company files with the Secretary of the Interior a map of its lines, approved by its directors, designating the route of the proposed road. On the other hand, the defendant, the appellant here, who acquired his interest by a subsequent settlement on the lands and a patent therefor, contends that the route cannot be deemed definitely fixed, so that the grant attaches to any particular sections and cuts off the right of settlement thereon, until the lands are withdrawn from market by order of the Secretary of the Interior, and notice of the order of withdrawal is communicated to the local land officers in the districts in which the lands are situated.

We are of opinion that the position of the complainant is the correct one. The route must be considered as "definitely fixed" when it has ceased to be the subject of change at the volition of the Company. Until the map is filed with the Secretary of the Interior, the Company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the Company and a map designating it is filed with the Secretary of the Interior and accepted by [367] that officer, the route is established; it is, in the language of the Act, "definitely fixed," and cannot be the subject of future change, so as to affect the grant, except upon legislative consent. No further action is required of the Company to establish the route. It then becomes the duty of the Secretary to withdraw the lands granted from market. But if he should neglect this duty, the neglect would not impair the rights of the Company, however prejudicial it might prove to others. Its rights are not made dependent upon the issue of the Secretary's order, or upon notice of the withdrawal being given to the local land officers. Congress, which possesses the absolute power of alienation of the public lands, has prescribed the period at which other parties than the grantee named, shall have the privilege of acquiring a right to portions of the lands specified, and neither the Secretary nor any other officer of the Land Department, can extend the period by requiring something to be done subsequently, and until done, continuing the right of parties to settle on the lands as previously. Otherwise, it would be in their power, by vexatious or dilatory proceedings, to defeat the Act of Congress, or at least seriously impair its benefit. Parties learning of the route established—and they would not fail to know it—might, between the filing of the map and the notice to the local land officers, take up the most valuable portions of the lands. Nearness to the proposed road would add to the value of the sections, and lead to a general settlement upon them.

This view of the law disposes of the claim of the defendant. A map designating the route of the proposed road, made by the engineers of the Company after careful surveys, and adopted by its directors, was filed on the 25th of March, 1870, with the Secretary of the Interior, who accepted it, and on the 28th of that month transmitted it to the Commissioner of the General Land-Office, with directions to instruct the proper local officers to withhold from sale, or other disposition, the odd numbered sections within the limits of twenty miles on each side of the route. On the 8th of April following, the Commissioner forwarded a copy of the map to the register and receiver of the land-office at Beatrice, in Nebraska, but it was not received by them until the 15th of that month. On the 13th the defendant entered at that office the land in question, at private entry, and paid the gov- [368] ernment price therefor. In November of the following year, a patent for it was issued to him. His entry, as thus seen, was after the map had been filed and the route "definitely fixed," and the grant had attached to the adjoining odd sections. It could, therefore, initiate no rights to the land, and the subsequent patent issued upon that entry conferred no valid title to the defendant as against the Company or parties claiming under it.

The defendant, having failed to establish the validity of his own title, attacks the right of the Company to the lands covered by the grant, alleging that the Company never completed the construction of the entire road for which the grant was made; that, after filing its map with the Secretary of the Interior, it changed, for part of the distance, the route of the road, and that it never complied with the conditions of the laws of Nebraska for the extension of its road within the limits of that State.

We do not deem these objections, when considered with the facts on which they are based, as having any force. There is to them a ready and conclusive answer. Assuming that the Burlington and Missouri River Railroad, with which the Company's road connected, was not, as averred by the complainant, a branch of the Union Pacific Railroad; and that, therefore, the Company's proposed road was not entirely completed, the fact remains that the Company constructed a portion of the proposed road, and that portion was accepted as completed, in the manner required by the Act of Congress. Patents for some of the adjoining sections were accordingly issued to the Company, and a right to all of them, not

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specially reserved by the condition of the grant, vested in it. So far as that portion of the road which was completed and accepted, is concerned, the contract of the Company was executed, and as to the lands patented, the transaction on the part of the government was closed, and the title of the Company perfected. The right of the Company to the remaining odd numbered sections adjoining the road completed and accepted, not reserved, is equally clear. If the whole of the proposed road has not been completed, any forfeiture consequent thereon can be asserted only by the grantor, the United [369] States, through judicial proceedings or through the action of Congress. *Schulenberg* v. *Harriman*, 21 Wall., 45 [88 U. S., XXII., 551]. A third party cannot take upon himself to enforce conditions attached to the grant when the government does not complain of their breach. The holder of an invalid title does not strengthen his position by showing how badly the Government has been treated with respect to the property.

As to the alleged deviation of the road constructed from the route laid down in the map, admitting such to be the fact, the defendant is in no position to complain of it; the lands in controversy are within the required limit, whether that be measured from one line or the other. A deviation of the route without the consent of Congress, so as to take the road beyond the lands granted, might, perhaps, raise the question whether the grant was not abandoned; but no such question is here presented. The deviation within the limits of the granted lands in no way infringed upon any rights of the defendant.

As to the want of compliance with the conditions imposed by the laws of Nebraska, allowing railroad companies organized in other States to extend and build their roads within its limits, it is sufficient to say, that when the grant was made to the Company, Nebraska was a Territory, and it was entirely competent for Congress to confer upon a corporation of any State the right to construct a road within any of the Territories of the United States. The grant of land and a right of way for the construction of a road to a designated point within the Territory was sufficient authority for the Company to construct the road to that point. It may be well doubted whether the State, subsequently created out of the Territory, could put any impediment upon the enjoyment of the right thus conferred. As we said in *R. R. Co.* v. *Baldwin*, "It could do so only on the same terms that it could refuse a recognition of its own previously granted right, for in such matters the State would succeed only to the authority of Congress over the Territory." 103 U. S., 426, 428 [XXVI., 578, 579]. It does not appear from anything before us that the State has ever attempted to interfere with the road or the Company for its delay in filing its articles of incorporation with the Secretary of State, or in complying with other provisions of law. And it hardly need be added that any such interference would not operate to devest the Company [370] of its title to lands granted by the United States.

It follows from what we have said, that when the defendant made his entry of the lands in controversy and obtained a patent therefor, the title had passed from the United States and, consequently, no right could be conferred upon him. Still, the patent gave color of title, and because of its issue, the officers of the Land Department have refused to give a patent to the Company embracing the land, holding, as may be inferred, the view for which the defendant contends, that his right to acquire a preemptive right by settlement, continued until notice of the order of the Secretary directing the withdrawal of the lands from market was received by the local land officers. The existence of the patent, therefore, embarrasses the assertion of the complainant's rights; that is, it prevents him from obtaining a strictly legal title which would enable him to recover possession of the premises by an action at law. The existence of the patent also creates a cloud upon the title of the land. Every instrument purporting by its terms to convey land from the original source of title, however invalid, creates a cloud upon the title, if it require extrinsic evidence to show its invalidity. *Pixley* v. *Huggins*, 15 Cal., 128.

The existence of the patent, therefore, under these circumstances, furnishes ground for equitable relief. That relief, however, should properly be limited to a decree declaring the equity of the complainant, the invalidity of the title of the defendant, and enjoining him from the assertion of any claim to the property under the patent; but, inasmuch as no objection is taken to the form of the decree as entered, which requires the defendant to execute a conveyance of the premises to the complainant, and as the execution of such a conveyance, amounting in fact to a release of his claim to the property, will accomplish all that could be legally effected, it is not considered necessary to order a modification of it. *The decree is, accordingly, affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—110 U. S., 38; 112 U. S., 726; 113 U. S., 635; 114 U. S., 375, 376.

MERCHANTS' AND MANUFACTURERS' NATIONAL BANK, OF PITTSBURGH, ET AL., *Appts.*,

v.

JOHN S. SLAGLE AND REUBEN MILLER, Trustees of ZUG & COMPANY, ET AL.

(See S. C., 16 Otto, 558-562.)

Review in bankrupt case—correction of distribution by trustees.

1. When the estate of a bankrupt passes to the trustees appointed under the provisions of section 5103 of the Revised Statutes, their action is subject to the revision and final control of the district court, whenever that is invoked in aid of the substantial rights of anyone interested in what they do.

2. The district court has power to correct the order of distribution made by the trustees, and its action is beyond judicial review, except by the circuit court.

[No. 90.]

Argued Nov. 17, 1882. Decided Dec. 11, 1882.

APPEAL from the Circuit Court of the United States for the Western District of Pennsylvania.

The bill in this case was filed in the court below, by the appellants, to secure a different

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distribution of the assets of certain bankrupts than had been ordered by the district court.

The court below having entered a decree dismissing the bill, the complainants appealed to this court.

The history and facts of the case more fully appear in the opinion of the court.

Messrs. **John Dalzell** and **J. F. Slagle**, for appellants.

Messrs. **George Shiras, Jr.**, *J. M. Stoner* and *S. Schoyer, Jr.*, for appellees.

Mr. Justice **Miller** delivered the opinion of the court:

Christopher Zug and Charles H. Zug, composing the partnership of Zug & Co., were, on their own petition of May 11, 1876, declared bankrupts by the District Court for the Western District of Pennsylvania.

At the first meeting of the creditors, John S. Slagle and Reuben Miller were appointed trustees, and Smith, Dunlap and Clarke, a committee of creditors under section 5108 of the Revised Statutes; which action of the creditors was duly approved by order of the District Court.

The trustees having disposed of the property of the bankrupts, of which the Sable Iron Works, sold for $130,000, was the principal item, and made out their final accounts of the copartnership assets and the individual assets, which was approved by the committee, made an order of distribution among the creditors.

Thereupon, William Coleman and others, creditors of Christopher Zug individually, applied to the district court and obtained a rule [559] on the trustees, to make report of their order for distribution and file it in that court, and took exceptions to said report, in which the separate creditors of Charles Zug joined, on the ground that the Sable Iron Works had never been partnership property, but that the title was held by the two Zugs as tenants in common, in the proportion of four fifths by Christopher and one fifth by Charles. On final hearing of these exceptions, they were sustained and an order made for the distribution of the proceeds of the sale of the iron works to the private creditors of the individuals who composed the partnership, on that basis.

An appeal was taken to the circuit court, from this order, which was dismissed on the ground that no appeal lay from such an order. At the same time, in a proceeding under the supervisory power of the circuit court, a full hearing was had on the merits, and the action of the district court affirmed.

From that order an appeal was taken to this court, which was dismissed on the ground that, being a proceeding under the supervisory power of the circuit court, it was not reviewable here. [*Nimick* v. *Coleman*], 95 U. S., 266 [XXIV., 447].

In that case it was urged that the district court, in assuming to control the trustees in the distribution of the fund in their hands, acted without jurisdiction, and that its order was void; to which this court responded by saying: "If, as is claimed, the district court acted without jurisdiction or in a manner not to bind the parties, its decree as made was void; and the aggrieved partnership creditors may very properly consider whether they cannot proceed in equity to call the trustees to a proper accounting and distribution. Upon that question, however, we express no opinion."

It is said that the suit now before us on appeal was commenced under this suggestion, in which the partnership creditors, calling into court the trustees and the individual creditors, seek to have the sum arising from the sale of the Sable Iron Works distributed among the former alone.

As this would require the order of the district court on that subject to be set aside and reversed, or disregarded as a nullity, we are compelled to consider, before we proceed further, if this can be done. All known modes of re- [560] view of that order have been exhausted. The appeal from it to the circuit court was dismissed, whether rightfully or not cannot, now be inquired into. On the petition of review, which was the legitimate mode of correcting the error if one existed, the circuit court affirmed the order of the district court, and from that decree, as we decided in *Nimick* v. *Coleman* [*supra*], there could be no further appeal.

It only remains to inquire if it was absolutely void, for want of jurisdiction in the district court to make it.

It is strenuously argued that when the estate of the bankrupt passes to the trustees appointed under the provisions of section 5108 of the Revised Statutes, the power of the district court as a court of bankruptcy, over them and over their proceedings, ceases, and that they become invested with a judicial function which is amenable to no other court. That as to collection and distribution of the bankrupt's assets, the case has been taken out of the category of bankrupt proceedings, and wholly withdrawn from the control of the District Court.

It is difficult to perceive any plausible reason for this idea.

The meeting of the creditors, which may appoint the trustees and the committee, must be one held after the court has made an adjudication of bankruptcy and ordered such a meeting. The resolution of the meeting for settling the estate under this section by trustees and a committee, and the appointment of the trustees and committee, must be presented to the court and be approved by it, or they are of no force.

The trustees are declared to have and to hold the property in the same manner and with the same powers and rights, in all respects, as the bankrupt would have had if no proceeding in bankruptcy had been taken, or as the assignee in bankruptcy would have done had such resolution not been passed, showing thus that their powers were compounded of that of the owner and of the ordinary assignee in bankruptcy.

The court, by order, is to direct all acts and things needful to be done to carry into effect the resolution of the creditors; and the winding up and settlement of any estate, under the provision of this section, shall be deemed to be proceedings in bankruptcy, and the trustees shall [561] have all the rights and powers of assignees in bankruptcy.

It further provides that the court may compel the production of witnesses, books and papers before the trustees, in the same manner as in other cases of bankruptcy, and that the bankrupt shall in like manner be entitled to his discharge.

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Under section 4972 of the Revised Statutes, "The jurisdiction of the district courts as courts of bankruptcy extends * * * to the collection of all the assets of the bankrupt; * * * to the adjustment of the various priorities and conflicting interests of all parties; * * * to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties, and due distribution of the assets among all his creditors; * * * to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy."

Is there anything in section 5103 in conflict with this comprehensive declaration of the powers of the district court over a case in bankruptcy, "until the final distribution and settlement of the estate?"

On the contrary, it is one of the express provisions of the latter section, that "the winding up and settlement of any estate under provisions of this section shall be deemed to be proceedings in bankruptcy," and the section is full of directions to the court to aid in this settlement, and the trustees are twice assimilated in their functions to those of an assignee in bankruptcy.

We are unable to see any judicial functions conferred on these trustees. Their powers, though somewhat enlarged, are in the main the same as those of the assignee, and are properly ministerial. It is true, they may do many things without an order of the court, which an assignee could not do, such as selling property, allowing claims, and compromising disputes about rights of property. We might even hold that their order of final distribution would be valid if uncontested. *Moors* v. *Albro*, 129 Mass., 9.

But in all this, we are of opinion that their action is subject to the revision and final control of the district court, whenever that is invoked in aid of the substantial rights of anyone [562] interested in what they do. It is inconceivable that Congress intended to create in them an *imperium in imperio*, whose actions, however wrong, could be reached by no tribunal whatever. And if any supervision of their acts is to be had at all, it is very clear that the district court is the one to whom that duty is confided.

A case, bearing a strong analogy to this, is that of *Wilmot* v. *Mudge*, 103 U.S., 217 [XXVI., 536], in which it was decided that a composition order, under the Act of June 22, 1874, was a bankruptcy proceeding and that, notwithstanding the Act declared that such a composition should be binding on all the creditors, it did not discharge the bankrupt from debts created by fraud; because the Act of 1874 was in *pari materia* with the general bankrupt law, and was not inconsistent with section 5117 of the Revised Statutes, in regard to debts created by fraud.

That was a stronger case than this, in favor of the argument that a composition was a proceeding which took the case out of the other provisions of the bankrupt law, for the statute which authorized it was passed long after the general law and after the revision.

In the present case, the trustee section is a part of the original statute of bankruptcy, and contains in itself the declaration that what is done under it is a part of the bankruptcy proceeding.

As we are satisfied that the district court, in correcting the order of distribution made by the trustees, acted within its powers, and as that order has passed beyond judicial review, except as it has already been had on petition to the circuit court, that order must govern the decision of this case, *and the decree of the Circuit Court dismissing the bill is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ROBERT P. DODGE, *Appt.*,
v.
FREEDMAN'S SAVINGS AND TRUST COMPANY.

(See S. C., 16 Otto, 445, 446.)

Foreclosure of mortgages in District of Columbia.

Section 808 of the Revised Statutes relating to the District of Columbia, applies to suits for the foreclosure of deeds of trust in the nature of mortgages to secure the payment of money, and authorizes a decree against the debtor defendant for the payment of the balance of the debt that may remain due after the application thereto of the proceeds of the sale of the trust property, and an order for execution thereof as at law.

[No. 110.]

Argued Dec. 4, 1882. Decided Dec. 11, 1882.

APPEAL from the Supreme Court of the District of Columbia.

The bill in this case was filed in the court below, by the appellee, to enforce a claim in the nature of a mortgage lien to certain lands in the District of Columbia. A decree was entered in favor of the complainant, and subsequently affirmed by this court. *Dodge* v. *F. S. & T. Co.*, 93 U. S., 379, XXIII., 920.

The lands were then sold and the proceeds applied on notes secured. The amount was insufficient, and the court below entered a personal decree against the defendant for $7,386.47, with interest and costs, being the balance remaining due on said notes; whereupon the defendant appealed to this court.

The question here is, whether the court below had power to enter a personal decree for the balance due.

Messrs. **John D. McPherson** and **Randall Hagner**, for appellant.

Messrs. **Wm. A. McKenney** and *Enoch Totten*, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

Section 808 of the Revised Statutes, relating to the District of Columbia, is as follows:

"Sec. 808. The proceeding to enforce any lien shall be by bill or petition in equity, and the decree, besides subjecting the thing upon which the lien has attached to the satisfaction of the plaintiff's demand against the defendant, shall adjudge that the plaintiff recover his demand against the defendant, and that he may have execution thereof as at law."

This statute applies to suits for the foreclosure of deeds of trust in the nature of mortgages to secure the payment of money, and authorizes a decree in favor of the plaintiff against the debtor defendant for the payment of the balance of the debt that may remain due after the

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application thereto of the proceeds of the sale of the trust property, and an order for execution thereof as at law. *This is such a decree in such a suit and it is, consequently, affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

TONY PACE, *Plff. in Err.*,
v.
STATE OF ALABAMA.

(See S. C., 16 Otto, 583-585.)

Fourteenth Constitutional Amendment—punishment of offense.

1. Section 4189 of the Code of Alabama, punishing adultery or fornication committed by a white person and a negro with each other, more severely than the same offense committed between persons of the same race and color is punished by that Code, does not made a discrimination against the colored person in the punishment designated, which conflicts with the clause of the 14th Amendment prohibiting a State from denying to any person within its jurisdiction the equal protection of the laws.

2. Section 4189 applies the same punishment to both offenders, the white and the black. The discrimination in the punishment prescribed is directed against the offense designated, and not against the person of any particular color or race.

[No. 908.]

Motion to advance submitted Dec. 13, 1882. Granted Dec. 18, 1882. Argued and submitted Jan. 16, 1883. Decided Jan. 29, 1883.

IN ERROR to the Supreme Court of Alabama.

The history and facts sufficiently appear in the

Statement of the case by *Mr. Justice* **Field**:

Section 4184 of the Code of Alabama provides that "If any man and woman live together in adultery or fornication, each of them must, on the first conviction of the offense, be fined not less than $100, and may also be imprisoned in the county jail, or sentenced to hard labor for the county for not more than six months. On the second conviction for the offense, with the same person, the offender must be fined not less than $300, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not more than twelve months; and for a third or any subsequent conviction with the same person, must be imprisoned in the penitentiary or sentenced to hard labor for the county for two years."

Section 4189 of the same Code declares that "If any white person and any negro, or the descendant of any negro to the third generation, inclusive, though one ancestor of each generation was a white person, intermarry or live in adultery or fornication with each other, each of them must, on conviction, be imprisoned in the penitentiary or sentenced to hard labor for the county for not less than two nor more than seven years."

[584] In November, 1881, the plaintiff in error, Tony Pace, a negro man, and Mary J. Cox, a white woman, were indicted under section 4189, in a Circuit Court of Alabama, for living together in a state of adultery or fornication, and were tried, convicted and sentenced, each to two years imprisonment in the state penitentiary. On appeal to the Supreme Court of the State, the judgment was affirmed, and he brought the case here on writ of error, insisting that the Act under which he was indicted and convicted, is in conflict with the concluding clause of the 1st section of the 14th Amendment of the Constitution, which declares that no State shall "deny to any person the equal protection of the laws."

Mr. **John R. Tompkins**, for plaintiff in error.

Mr. **Henry C. Tompkins**, *Atty-Gen. of Alabama*, for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

The counsel of the plaintiff in error compares sections 4184 and 4189 of the Code of Alabama, and assuming that the latter relates to the same offense as the former, and prescribes a greater punishment for it, because one of the parties is a negro or of negro descent, claims that a discrimination is made against the colored person in the punishment designated, which conflicts with the clause of the 14th Amendment, prohibiting a State from denying to any person within its jurisdiction the equal protection of the laws.

The counsel is, undoubtedly, correct in his view of the purpose of the clause of the Amendment in question, that it was to prevent hostile and discriminating state legislation against any person or class of persons. Equality of protection under the laws implies not only accessibility by each one, whatever his race, on the same terms with others, to the courts of the country for the security of his person and property, but that in the admistration of criminal justice he shall not be subjected, for the same offense, to any greater or different punishment. Such was the view of Congress in the re-enactment of the Civil Rights Act, after the adoption of the Amendment. That Act, after providing that all persons within the jurisdiction of the [585] United States shall have the same right, in every State and Territory, to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, declares that they shall be subject "To like punishment, pains, penalties, taxes, licenses and exactions of every kind and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding." 16 Stat. at L., 140, ch. 114, sec. 16.

The defect in the argument of counsel, consists in his assumption that any discrimination is made by the laws of Alabama in the punishment provided for the offense for which the plaintiff in error was indicted, when committed by a person of the African race and when committed by a white person. The two sections of the Code cited are entirely consistent. The one prescribes, generally, a punishment for an offense committed between persons of different sexes; the other prescribes a punishment for an offense which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race. Section 4184 equally includes the offense when the persons of the two sexes are both white and when they are both black. Section 4189 applies the same punishment to both offenders, the white and the black. Indeed, the

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offense against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

JOHN W. MINTURN ET AL., *Plfs. in Err.*, *v.* UNITED STATES.

(See S. C., 16 Otto, 437-445.)

Importer's bond—liability of sureties—payment of duties—negligence of officers.

*1. An importer of sugars entered them at the custom-house by a warehouse entry, under section 12 of the Act of August 30, 1842, 5 Stat. at L., 561, as amended by section 1 of the Act of August 6, 1846, 9 Stat. at L., 53, and gave a bond with a surety, conditioned that if the importer or his "assigns" should, within a specified time, withdraw them in the mode prescribed by law from the warehouse, and pay to the collector a sum specified "or the true amount when ascertained, of the duties imposed" by law upon the sugars, the bond should be void. The statute required the goods to be kept subject to the order of the importer, "upon payment of the proper duties," to be ascertained on entry, "and to be secured by a bond" of the importer, with surety. Afterwards the importer sold the sugars in bond, the purchaser agreeing to pay the duties as part of the purchase price, and gave to the purchaser a written authority to withdraw the sugars, on which they were withdrawn by the purchaser, but the full amount of the proper duties which was less than the sum specified in the condition of the bond, was not paid. In a suit on the bond, against the obligors, to recover the unpaid duties; held, that they were liable.

2. Although it was the usage of trade to sell goods in bond, and deliver them by an order for withdrawal, the purchaser paying the duties and withdrawing the goods, the obligors in the bond did not become merely sureties, with the goods as the primary security for the duties, and they were not released because the officers of the United States unlawfully parted with the possession of the goods without exacting payment of the duties.

3. The negligence of the officers of the United States does not affect the liability of either the principal or the surety in a bond to the United States.

[No. 121.]

Argued Dec. 7, 1882. Decided Dec. 18, 1882.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

This action was brought in the court below, by the defendant in error, on a warehouse bond.

A jury having been waived, the court found the facts of the case, and entered a judgment in favor of the plaintiff, for $3,096.11, being the amount of the unpaid duties with interest and costs; whereupon the defendants sued out this writ of error.

The facts of the case appear in the opinion of the court.

Messrs. **Evarts,** *Southmayd &* **Choate,** for the plaintiffs in error.

Mr. **William A. Maury,** *Asst. Atty-Gen.*, for the defendant in error.

*Head notes by *Mr. Justice* BLATCHFORD.

Mr. Justice **Blatchford** delivered the opinion of the court:

On August 2, 1865, the firm of Grinnel, Minturn & Co., being the owners of 580 packages of sugar, imported from abroad, entered them at the custom-house in New York by a warehouse entry, and thereupon the members of that firm, as principals, and one Clark, as surety, executed under their hands and seals and delivered to the collector a warehouse bond, conditioned that the bond should be void if the principals, "or either of them, their or either of their heirs, executors, administrators or assigns," should, "on or before the expiration of one year from the date of the importation" of the said goods, withdraw them, "in the mode prescribed by law, from the public store or bonded warehouse" where they might be deposited at the Port of New York, and pay to the collector for that port $23,787.99, "or the true amount, when ascertained, of the duties imposed," by laws then existing, or thereafter to be enacted, upon the said goods, etc. On the giving of the bond, the sugars were placed in the public store and in the custody of the collector, as provided by the warehousing statutes. On August 8, 1865, the owners sold to Gibson, Early & Co. all the sugars, the same being still in warehouse, and held by the collector for duties, under said statutes. By the terms of the sale, the goods were sold expressly subject to the payment of all duties thereon by Gibson, Early & Co. who assumed the payment of the duties as part of the agreed price of the goods on the sale, the price, less the duties so assumed, being paid in cash on delivery. The sellers made delivery of the goods in bond, subject to the duties, by writing and signing, on August 9, 1865, at the foot of the warehouse entry, the following consent: "We hereby authorize Gibson, Early & Co. to withdraw the sugars described in this entry. Grinnel, Minturn & Co." [439] It was not the custom to give any formal notice to the collector or any other officer of the customs, of such sales in bond, nor was any such notice given in this case. The authority to withdraw, in the form above stated, would be and was presented to the collector in due course before the withdrawal could be made by the purchaser. The total weight of the sugars, as returned by the government weighers, was 755,621 pounds, upon which the proper duty, at three cents per pound, was liquidated at $22,668.63. On August 11, 1865, Gibson, Early & Co. withdrew for transportation to Cincinnati, under the said authority from Grinnel, Minturn & Co., 325,011 pounds of the sugar, and paid $9,750.33 duties thereon. On August 29, 1865, they withdrew for consumption, in like manner, 48,618 pounds and paid $2,058.42 duties thereon. Afterwards, and before September 4, 1865, they sold to one Camp, the residue of the sugars, the same being then in warehouse, and being, by the terms of the sale, sold in bond, expressly subject to the payment of all duties thereon by Camp, who assumed the payment of said duties as part of the agreed price of the goods on the sale. A firm of custom-house brokers, Wylie & Wade, was employed by Camp to withdraw the sugars and to pay the duties thereon, and for that purpose was furnished by Camp with the amount of the duties, $10,859.88, in gold. On September 4, 1865, Gibson, Early & Co. made

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delivery to Camp of the residue of the sugars in bond, by writing and signing at the foot of the withdrawal entry made thereof by his said brokers, the following consent: "We authorize Wylie & Wade to withdraw the goods described in this entry. Gibson, Early & Co." No formal notice of this sale to Camp was given to the collector or any other officer of the customs. This last authority to withdraw was presented in due course by said brokers, when they desired to withdraw the goods. This was done on September 4, 1865, when they made a withdrawal entry of the residue of the sugars, the weight of which was 361,996 pounds. The duty at three cents per pound was $10,859.88. But the collector demanded as duties only $9,352.89, being at the rate of three cents per pound on 311,763 pounds, leaving due, as duties, $1,506.99. The goods were delivered to the brokers, and were of greater value than the duties chargeable on them. This was done without the knowledge or consent of Grinnel, Minturn & Co. The first knowledge or notice they had of the withdrawal without the payment of full duties, was a notice from the collector, December 6, 1867, as to the amount so remaining unpaid. Before that time the brokers had become insolvent, and Gibson, Early & Co. became insolvent before the trial of this suit. The United States having brought suit on the bond against the obligors in it, to recover the $1,506.99, with interest, a jury was duly waived, and the court, having found the foregoing facts, found the following conclusions of law: (1) that the facts constituted no bar to a recovery; (2) that, if the defendants were to be regarded as sureties, after the transfer of the title to the property in bond, instead of principals, they stood in no better position; (3) that the laches of the custom-house officers, in delivering the goods without collecting the whole of the duties, could not affect the plaintiffs, as the United States were never bound by the laches of their agents, nor could the defendants set up such laches as a discharge of their obligation; (4) that the plaintiffs were entitled to judgment. The defendants excepted to each of said conclusions of law, a judgment was rendered for the plaintiffs for $3,096.11, and the defendants brought this writ of error.

[440]

The court below also found, as facts, "That it was the established and uniform usage of trade in New York, at the times of said sales and deliveries and long before, for importers to make sales of imported goods, which were in warehouse in bond, the purchaser on such sales assuming the payment of the duties thereon, and being allowed and credited by the seller with the amount of the duties so assumed, as so much paid on account of or deducted from what would otherwise have been the purchase price; and for the seller to make delivery of said goods in bond, by signing a written consent to the withdrawal of said goods by the purchaser; and it was also in accordance with such usage and custom for successive sales and deliveries of goods in bond to be made, on similar terms and in the same manner, so long as any of such goods remained in warehouse, the last purchaser withdrawing the goods under the written consent so received by him upon and as the delivery thereof, and paying the duties thereon on such withdrawal; that the said custom and usage were, at the times aforesaid, well known and understood, and the established and settled practice at the custom-house in New York was to treat the party holding such consent for withdrawal, and him only, as the person entitled to withdraw and receive the goods on payment of the duties; and, upon the payment by him of the duties remaining due thereon, and not otherwise, to issue a written permit for the actual delivery to him of said goods out of warehouse; and that, during the period covered by the transactions hereinbefore set forth, the following regulations of the Treasury Department were in force, to wit: 'Art. 442. The entry for withdrawal of merchandise from warehouse for consumption, at port of original importation, shall be made by the party in whose name the merchandise was warehoused, or by some person duly authorized for the purpose by him, and in either case, shall be signed by the party making the withdrawal. This entry shall exhibit the marks and numbers of the packages, the description and quality of the goods, and the dutiable value of the same. On presentation to the proper officer in the collector's office, it shall be compared with the record, on the warehouse books, of the original warehouse entry; and, if found correct, be properly entered therein, the warehouse bond number indorsed thereon, and the amount of duties payable estimated. From the collector's office it shall then be taken by the importer to the naval office, where a similar comparison shall be made with the warehouse records of that office, and the estimate of duties verified and indorsed upon the duplicate entry. The amount of duties thus ascertained having been paid, a permit will be issued for the delivery of the goods. Art. 443. Merchandise in bulk, liquors, sugars, molasses, cocoa, pepper and other articles bought and sold by weight, when withdrawn for export or transportation, must be entered for such destination at the actual quantities on which duties were estimated at the time of arrival in the United States and, to secure this, weighers, measurers and gaugers will be required to mark on each package its contents, as determined by them on its entry for warehouse. On these quantities, the duties on export and transportation entries will be estimated. Goods withdrawn for consumption may be taken at average valuations, care being had that on the last withdrawal the entire balance of duty be collected. Art. 444. Should the final withdrawal entry be for export or transportation, and there be any difference between the actual duty and the amount to close the sum due on the warehouse entry, the excess, if any, shall be refunded on the last withdrawal for consumption, and the deficiency, if any, collected on amendment to said entry.'"

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The contention for the plaintiffs in error is, that, by the substitution for a credit system, in the payment of duties, of a deposit of the goods in warehouse, subject to a withdrawal for consumption only on the payment of duties, involving the holding by the United States of possession of the goods in the meantime, such possession became the primary security for the duties, and the obligors in the bond were thereafter merely sureties, and were wholly released because the officers of the United States parted with the possession of the goods without exacting payment of the duties.

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The Warehouse Act of August 6, 1846, 9 Stat. at L., 53, sec. 1, amendatory of section 12 of the Act of August 30, 1842, 5 Stat. at L., 561, provides that, on an entry of goods for warehousing, the goods shall be taken possession of by the collector, and deposited in the public stores, there to be kept, subject at all times to the order of the owner, importer, consignee or agent, "Upon payment of the proper duties and expenses, to be ascertained on due entry thereof for warehousing, and to be secured by a bond of the owner, importer or consignee, with surety or sureties to the satisfaction of the collector, in double the amount of said duties, and in such form as the Secretary of the Treasury shall prescribe." It is contended by the plaintiffs in error, that a private creditor, standing in the same relation to them and to the goods which the United States occupied under the warehousing system, as provided for by the statute and as practically administered, could not have voluntarily surrendered the goods which had been placed in his hands as security for the payment of the debt, and which were available for that purpose, without requiring payment of the debt, otherwise than with the consent of the plaintiffs in error, without discharging them from their liability; that the United States are entitled [443] to no other or higher right than a private creditor would be entitled to in the same case; and that the consent of the importers to the withdrawal of the goods by Gibson, Early & Co., was not a consent unconditionally to their delivery, or to their delivery without the payment of duties, but only to their withdrawal from warehouse in the manner and upon the terms and conditions prescribed by law and by the Treasury regulations and by usage, namely: after all duties thereon had been first paid, and not otherwise.

The warehousing statute, above cited, provides that warehoused goods shall be subject to the order of their owner, on payment of the duties. Therefore, no order of the plaintiffs in error could become operative to effect any rights of the United States, unless the duties on the goods to be affected by the order were paid. Moreover, the provision as to the deposit of the goods, and their retention till the duties on them are paid, is coupled with the provision for the securing of the duties by the bond. Evidently, the intention of the statute was, to superadd to the security of the holding of the goods, the security of the bond, so that, in case of a delivery of the goods by fraud, or mistake, or negligence in the officers of the Government, the security of the bond should remain. The form of the bond taken was such, that while, in connection with the regulations and the usage, commerce was favored by the privilege of dealing in warehoused goods, it was clearly intended to hold the obligors responsible if any purchaser from the importers should obtain the goods on their order without paying full duties. The condition is, that the bond shall be void if they or their "assigns" shall withdraw the goods and pay the "true amount" of duties. The bond is not to become void on any other condition, and it is not to become void, unless in addition to the withdrawal of the goods, the true amount of duties is paid. This view shows that the parties have contracted to be and remain principal debtors to the United States until the true amount of duties is paid, whatever fraud or negligence there may be in parting with the possession of the goods without the payment of the true amount of duties. There was no power in any officer of the Government to alter the terms or effect of this contract, and destroy the obligation of the bond, by giving up the goods without the payment of the duties. The same [444] statute required the holding of the goods and the taking of the bond. The cases in which it has been held that the United States had parted with rights, by reason of acts done to the prejudice of persons who had contracted with them, have all been cases where there was authority of law to do such acts. In *U. S.* v. *Hillegas*, 3 Wash. C. C., 75, it was held by *Mr. Justice* Washington, that acts of officers of the United States, acting within their proper spheres, and to be imputed to the United States and considered as the acts of the United States, in extending the time for the payment of the debt due from a principal in a bond, discharged the sureties in the same bond, they not having known of or consented to the extension. The same principle was applied by *Mr. Justice* Thompson, in *U. S.* v. *Tillotson*, 1 Paine, 306, to the case of the alteration of a contract by the United States without the consent of the sureties for its performance. But in the present case, the giving up of the goods without the payment of the duties was an act not only not unauthorized, but forbidden by the statute.

The question presented by this case is not a new one, in this court. In *Hart* v. *U. S.*, 95 U. S., 316 [XXIV., 479], in a suit brought by the United States against the principal and sureties, on a distiller's bond, to recover taxes on spirits distilled by the principal, the sureties pleaded that the taxes were a lien on the spirits, and that the collector, without the knowledge or assent of the sureties, and without first requiring the payment of the taxes thereon, permitted the principal to remove from the distillery warehouse, distilled spirits more than sufficient in value to pay the demand. This court held, that as, under the statute, no distilled spirits could be removed from the warehouse before payment of the tax, and no officer of the United States had authority to dispense with the requirement of the law, the United States were not bound by the acts of the collector; and the prior cases of *U. S.* v. *Kirkpatrick*, 9 Wheat., 720; *U. S.* v. *Van Zandt*, 11 Id., 184; *U. S.* v. *Nicholl*, 12 Id., 505; *Gibbons* v. *U. S.*, 8 Wall., 269 [75 U. S., XIX., 458]; and *Jones* v. *U. S.*, 18 Wall., 662 [85 U. S., XXI., 867], were cited as establishing that the Government is not responsible for the laches or the wrongful acts of [445] its officers; and it was said by the *Chief Justice* delivering the opinion of the court: "Here the surety was aware of the lien which the law gave as security for the payment of the tax. He also knew that, in order to retain this lien, the government must rely upon the diligence and honesty of its agents. If they performed their duties and preserved the security, it inured to his benefit as well as that of the Government; but if, by neglect or misconduct, they lost it, the Government did not come under obligations to make good the loss to him, or, what is the same thing, release him *pro tanto* from the obligation of his bond. As between himself and the Government, he took the risk of

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the effect of official negligence upon the security which the law provided for his protection against loss, by reason of the liability he assumed." These views are conclusive to show that the importers as well as their surety, are liable on the bond in this case. If the importers could be regarded as having always been, or as having at any time become, sureties only in respect of the duties, with the goods as the primary security (a position shown to be wholly untenable), it is well settled, by the decisions of this court, that the negligence of the officers of the Government does not affect the liability of a surety in a bond any more than it does that of his principal. *U. S.* v. *Kirkpatrick* [*supra*]; *U. S.* v. *Van Zandt* [*supra*]; *Dox* v. *Postmaster-General*, 1 Pet., 318.

The judgment of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

JOHN J. FITZPATRICK, Surviving Partner of FITZPATRICK BROTHERS. *Plff. in Err.*,

v.

CHARLES M. FLANNAGAN ET AL.

(See S. C., 16 Otto, 648-660.)

Amendment of affidavit for attachment—power of surviving partner—Mississippi Code—Statute of Frauds—writ of error, effect of.

1. Under section 1483 of the Code of Mississippi, which expressly authorizes amendments to defective affidavits, an affidavit for attachment may be amended by adding a new ground for the attachment.

2. Upon the death of one of the partners, unless a partnership creditor or the personal representatives of the deceased partner commence a proceeding to liquidate the affairs of the partnership, there is nothing to prevent the surviving partner from dealing with the partnership property as his own and, acting in good faith, he may make valid disposition of it.

3. Under the Mississippi Code, section 1420, a debtor, in insolvent or in failing circumstances, may give a preference to one or more of his creditors, if it be *bona fide* and with no intent to secure a benefit to himself.

4. A verbal promise, objectionable under the Statute of Frauds, may be made valid by being afterwards repeated in writing; and a subsequent promise, with full knowledge of the facts, is equivalent to an original promise made under similar circumstances.

5. A writ of error upon a final judgment brings up the whole record, including a judgment on a plea in abatement.

[No. 111.]

Argued Dec. 5, 1882. Decided Dec. 18, 1882.

IN ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

This was an action of *assumpsit*, commenced by attachment in the court below, by the defendants in error, to recover an alleged indebtedness amounting to $15,936.55. The preliminary trial of an issue raised as to the validity of the attachment, resulted in a verdict and judgment in favor of the plaintiffs with leave to the defendant to plead to the merits.

The trial on the merits resulted in a verdict and judgment in favor of the plaintiffs for $16,453.61; whereupon the defendant sued out this writ of error.

The facts of the case are fully stated by the court.

Messrs. **Alfred B. Pittman** and *W. B. Pittman*, for plaintiff in error.

Messrs. **Jefferson Chandler** and *William K. Ingersoll*, for defendants in error.

Mr. Justice **Matthews** delivered the opinion of the court: [649]

This is an action of *assumpsit*, commenced by the defendants in error by the issuing of a writ of attachment, according to the practice as prescribed by the laws of Mississippi, the plaintiffs below being citizens of Missouri. The process of attachment was founded on an affidavit, which set forth that the plaintiff in error, as the surviving partner of the firm of Fitzpatrick Brothers, composed of himself and his brother James C. Fitzpatrick, deceased, was the legal owner of the partnership property; that the defendant, as such survivor, was indebted to the plaintiffs in several sums, evidenced by partnership obligations, as well as in a sum of $6,000, for a debt contracted by James C. Fitzpatrick and Eugene A. Forbes, then partners under the name of Forbes & Fitzpatrick, and which had, on the dissolution of that firm, by the retirement of Forbes, been assumed by the firm of Fitzpatrick Bros., which debt was evidenced by the promissory note of Forbes & Fitzpatrick, held by the plaintiffs. The whole indebtedness, for which suit was brought, was alleged to amount to $15,936.55. The affidavit then charged that "The said John J. Fitzpatrick has property or rights in action which he conceals and unjustly refuses to apply to the payment of his debts, and that he has assigned or disposed of or is about to assign or dispose of his property or rights in action, or some part thereof, with intent to defraud his creditors, or give an unfair preference to some of them; and that he has converted or is about to convert his property into money or evidence of debt, with which to place it beyond the reach of his creditors." And suggesting that John McGinty, Edward McGinty and George M. Klein, Cashier of the Mississippi Valley Bank, are indebted to the defendant, or have property of his in their hands, etc., the affidavit prays for a summons against them as garnishees.

The statutory bond having been given, a writ of attachment was issued, which the marshal returned as served, by levying upon and taking possession of certain personal property, according to an inventory attached, as the property of the defendant; and that afterward Edward McGinty, having made claim that he was the owner of the property attached, and the same having been valued, and a claimant's bond given [650] and accepted, he had turned said goods over to said McGinty, and had summoned the defendant and the garnishees.

The defendant below then, in due time, filed a plea in abatement to the writ of attachment, denying the several grounds thereof as alleged in the affidavit; and on the same day the plaintiffs, by leave of court, filed an amendment to the affidavit, setting forth "that the firm of Fitzpatrick Brothers, composed of defendant and James C. Fitzpatrick, deceased, and of which he is the surviving partner, fraudulently

NOTE.—*Rights and powers of surviving partners.* See *note* to Moore v. Huntington, Admrx., 84 U. S., XXI., 642.

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contracted the debt or incurred the obligation for which suit has been brought." The granting of this leave to amend the affidavit was objected to by the defendant, and is the subject of an exception, and assigned for error. But section 1483 of the Code of Mississippi of 1871 expressly authorizes amendments to defective affidavits, and we see no objection on principle, under such a provision, to an amendment adding a new ground for the attachment. There was no claim on the part of the defendant of being taken by surprise or put to any disadvantage by reason of the amendment, and we fail to perceive how in any way he could have been prejudiced. In point of fact, he immediately filed his plea in abatement to the amended affidavit, traversing the additional allegations, and the cause, being at issue upon the pleas in abatement, was submitted to a jury, according to the practice authorized by the statute. There was a verdict finding "That the attachment herein was rightfully sued out," and the defendant thereupon had leave to plead to the merits, and filed with a plea of *non assumpsit* several special pleas, which it is not necessary now to notice. The cause having been tried by a jury upon these issues, there was a verdict and judgment for the plaintiff. The present writ of error brings up for review these proceedings and judgment, errors having been assigned upon bills of exception duly taken to the rulings of the court upon both trials.

Upon the trial of the issues of fact arising upon the pleas in abatement, evidence was introduced, as appears by the bill of exceptions, by the respective parties, tending to prove the following state of facts:

That in March, 1878, defendant had purchased [651] the interest of Forbes in the firm of Forbes & Fitzpatrick, wholesale grocers, forming with the latter the partnership of Fitzpatrick Bros., who, by the terms of the purchase, assumed the liabilities of Forbes & Fitzpatrick, including, among others, about $15,000 due to the plaintiffs. These liabilities, as was afterwards ascertained, exceeded the value of the assets of the original firm. Jas. C. Fitzpatrick died in September, 1878, leaving in the hands of the defendant, as surviving partner, the partnership property, and the concern insolvent. The defendant continued the business, sold out in part the old stock, purchased other goods to replenish it, to the amount of more than $12,000, partly on credit, partly for cash, putting the goods indiscriminately in stock with those on hand. During the existence of the firm of Fitzpatrick Bros., the firm paid part of the debt due to the plaintiffs, assumed by them, and contracted other indebtedness with them for goods bought and money loaned for about the same amount as that paid. The deceased partner, before his death, had drawn out of the partnership more than his interest therein and was indebted to it. On December 3, 1878, the defendant, being very much pressed to pay some maturing bills of the firm to the Mississippi Valley Bank, being debts created by the firm of Fitzpatrick Bros., borrowed $5,700 from John McGinty, giving his note, at one day's date, verbally promising to repay the amount speedily out of the assets of the late firm. This money was used by the defendant in paying partnership debts. Fitzpatrick Bros. owed John McGinty, besides, two notes, one for $2,500, and one for $5,200. Being unable to repay the borrowed money to John McGinty, the defendant, on December 19, 1878, sold to Edward McGinty, a relative of John McGinty, his entire stock of goods, amounting to $6,633.46, at cost and 10 per cent added, and the partnership accounts, amounting to $10,222.06, for which Edward McGinty paid $8,200 in cash, and assumed to pay obligations due in part from Fitzpatrick Bros., and in part from Fitzpatrick, the surviving partner, for commercial debts contracted by him since the death of his partner, to the amount of $6,974.16. This price was a full and fair value for the goods and accounts, and in fact Edward McGinty paid out several thousand dollars more on the debts assumed than he had collected out of the assets transferred.

This sale to Edward McGinty was made with the knowledge of John McGinty, who, in fact, [652] advanced the money to complete it, Edward being without means, and upon an understanding that the money should be paid to John McGinty on account of the debts due to him; and accordingly the $8,200 cash was returned to him in payment of the two notes for $2,500 and $5,700 respectively. Immediately after the sale, Fitzpatrick was employed by Edward McGinty as a clerk to carry on the business, at a salary of $2,500 per annum and, shortly afterwards, a partnership between them was advertised. The assets of the firm of Fitzpatrick Brothers on hand at the time of the death of J. C. Fitzpatrick, together with after-acquired goods and moneys, were applied indiscriminately by the defendant to the payment of debts of the firm and of those contracted by him in the subsequent course of business, and it appeared that he had paid as much at least on account of partnership debts, as he had realized from partnership assets, and that he had applied all the proceeds of the business, after paying its necessary expenses, to the payment of the debts of the late firm, and of his own, contracted in carrying on the business as surviving partner.

The second issue, upon the pleas in abatement, was upon the allegation of the affidavit, that "The defendant had assigned and disposed of or was then about to assign or dispose of his property or rights in action, or some part thereof, with intent to defraud his creditors, or give an unfair preference to some of them."

Upon the first branch of this issue, whether the defendant had disposed of any of his property with intent to defraud his creditors, the court charged the jury as follows:

"If you shall find from the evidence that the defendant sold or transferred any of the property or assets of the late firm of Fitzpatrick & Brothers, with intent to prevent the creditors of the firm of Fitzpatrick & Brothers, or any of them, from collecting their debts, such sale or disposition will sustain this ground of attachment. It was the duty of the defendant, as such surviving partner, to apply all of the assets of the firm to the payment of the debts due by the firm, and if he appropriated any part of them to the payment of his individual debts, it was a fraud upon the firm creditors, whether he so considered it or not, and if established by [653] the proof, will sustain this ground of attachment, as the law will presume that he intended the natural result of his act. The defendant

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being liable for the debts of the firm, could not, by borrowing money and paying the debts of the firm, create himself a creditor of the firm, or subrogate himself to the rights of the creditors as paid."

And to the giving of this instruction an exception was taken.

The ground on which this part of the charge appears to rest is, that a surviving partner, although invested with the legal title to the partnership property, on the dissolution of the firm, by the death of his copartner, is not the beneficial owner, but a mere trustee, to liquidate the partnership affairs, by selling the assets and applying them to the payment of the partnership debts; that the continuance of the business by means of the partnership assets is a breach of that trust; and, if it results in diverting any of the partnership property from the creditors of the firm, is a fraud upon them. And yet, upon that supposition, it deserves consideration, whether the allegation made in the affidavit as the ground of the attachment, that the defendant has disposed of his own property to defraud his creditors, can be supported by proof of a disposition of property belonging to the firm, in order to defraud the creditors of the firm; especially, in view of the result that, if the attachment is sustained, it not only subjects the partnership property, but also takes the individual property of the defendant from individual creditors, for the payment of the firm debt. The writ runs against his individual property alone, and upon the sole ground that he has sought fraudulently to withdraw it from the claims of his individual creditors. This incongruity is sufficient, at least, strongly to suggest the suspicion that the proceeding itself and the grounds on which it has been sustained, are based upon a misconception of the law which governs the case.

And this will be confirmed by a critical examination of the charge.

Upon the state of the evidence, as disclosed by the bill of exceptions, the jury may have [654] found that the defendant, as surviving partner, with the assent, either express or tacit, of the personal representatives of his deceased copartner, had been left in possession of the firm property for the purpose of continuing the business; that, in doing so, in good faith, he raised money upon the individual credit given him, on the faith of his possession and control of property, which he was allowed to deal with as his own, and applied it to the purpose of paying the debts due from the firm, of which he was the surviving partner; and yet, felt compelled, under this charge, to find that an appropriation out of the property which had come to him as such survivor, to repay such a loan, without any actual fraudulent intent, would be a fraud in law upon every creditor of the partnership, justifying a seizure, on attachment for that cause, of all his property, whether formerly belonging to the partnership or since acquired; and that, although his individual additions to his stock in trade were, at least, equal to what had been taken for the payment of individual debts.

It is fair to consider this charge, although not so qualified, in connection with the facts, in reference to which there was evidence, that the firm of Fitzpatrick Brothers and its individual members were insolvent, in the sense of not being able to pay their debts, during the whole period of its existence, and the additional fact that the deceased partner had, before his death, drawn from the partnership more than his interest therein, and was indebted to the firm.

The legal right of a partnership creditor to subject the partnership property to the payment of his debt, consists simply in the right to reduce his claim to judgment, and to sell the goods of his debtors on execution. His right to appropriate the partnership property specifically to the payment of his debt, in equity, in preference to creditors of an individual partner, is derived through the other partner, whose original right it is to have the partnership assets applied to the payment of partnership obligations. And this equity of the creditor subsists as long as that of the partner, through which it is derived, remains; that is, so long as the partner himself "Retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of his [655] equity, and enforce through it the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration." Such was the language of this court in *Case* v. *Beauregard*, 99 U. S., 119 [XXV., 370], in which *Mr. Justice* Strong, delivering its opinion, continued as follows. "It is indispensable, however, to such relief, when the creditors are, as in the present case, simple contract creditors, that the partnership property should be within the control of the court and, in the course of administration, brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. This is because neither the partners nor the joint creditors have any specific lien, nor is there any trust that can be enforced until the property has passed *in custodiam legis*." Hence it follows that, "If before the interposition of the court is asked, the property has ceased to belong to the partnership; if by a *bona fide* transfer, it has become the several property either of one partner or of a third person, the equities of the partners are extinguished and, consequently, the derivative equities of the creditors are at an end." In that case it was held, in respect to a firm admitted to be insolvent, that transfers made by the individual partners, of their interest in the partnership property, converted that property into individual property, terminated the equity of any partner to require the application thereof to the payment of the joint debts, and constituted a bar to a bill in equity filed by a partnership creditor to subject it to the payment of his debt; the relief prayed for being grounded on the claim that these transfers were in fraud of his rights as a creditor of the firm.

Another case between the same parties came again for consideration before the court, which reaffirmed the decision, and held that in such a case the bill might be properly filed by a creditor, without first reducing his claim to judgment. *Case* v. *Beauregard*, 101 U. S., 688 [XXV., 1004].

The same doctrine has been fully sanctioned by the Supreme Court of Mississippi in *Smallapp* v. *Currie*, 55 Miss., 597, where it is said, that "The doctrine that firm assets must first be applied to the payment of firm debts, and individual property to individual debts, is only

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a principle of administration adopted by the courts where, from any cause, they are called upon to wind up the firm business and find that the members have made no valid disposition of or charges upon its assets. Thus: where, upon a dissolution of the firm, by death or limitation or bankruptcy or from any other cause, the courts are called upon to wind up the concern, they adopt and enforce the principle stated; but the principle itself springs alone out of the obligation to do justice between the partners." In that case one of two partners, but with the assent of the other and without any fraudulent intent, transferred the whole business and stock of the firm to a third person in payment of an individual debt. A creditor of the partnership sued out a writ of attachment against them, and caused it to be levied on the goods in the possession of the purchaser, upon the ground that the transfer of the firm goods, in satisfaction of the individual debt of one of the partners, was fraudulent and void as against firm creditors. The right to do so was denied.

The same principle applies in case of a dissolution of the partnership. "It is competent," says *Mr. Justice* Story, Partnership, sec. 358, "for the partners, in cases of a voluntary dissolution, to agree that the joint property of the partnership shall belong to one of them; and if this agreement be *bona fide* and for a valuable consideration, it will transfer the whole property to such partner, wholly free from the claims of the joint creditors. The like result will arise from any stipulation to the same effect, in the original articles of copartnership, in cases of a dissolution by death or by any other personal incapacity."

And, in case of dissolution by the death of one of the partners, without any previous agreement as to the mode of liquidation, the only difference is, that the joint creditor may, at his election, institute proceedings, by filing a bill in equity against the personal representatives of the deceased partner and the survivors, to wind up the partnership business, to marshal the assets, and appropriate the partnership property to the payment of the joint debts. Story, Part., secs. 347, 362. Although, in Mississippi, it is denied that a court of equity has jurisdiction to entertain a suit on behalf of a firm creditor at large against a partnership, whether it be an existing one, or one that has ceased by limitation or by the withdrawal or death of one of the partners. *Roach* v. *Brannon*, 57 Miss., 490-500; *Freeman* v. *Stewart*, 41 Miss., 138.

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And unless a partnership creditor or the personal representatives of the deceased partner commence such a proceeding to liquidate the affairs of the partnership, there is nothing to prevent the surviving partner from dealing with the partnership property as his own and, acting in good faith, to make valid dispositions of it. *Locke* v. *Lewis*, 124 Mass., 1. And if, in like good faith, with the acquiescence of the personal representatives of the deceased partner, he uses the firm property to continue the business on his own account and in his own name, he does it without other liability than to be held accountable to the estate of his deceased partner for a share of the profits; or, as we have seen, upon a bill filed for that purpose, by the personal representatives of the deceased partner or a partnership creditor, to wind up the firm business and apply its assets to the payment of its debts. Any intermediate disposition of the property, made in good faith, even although it may have been specifically a part of the partnership assets, and even if it has been applied to the payment of his individual obligations, will be valid and effectual; and, without circumstances showing an actual intention to defraud, cannot be treated as a fraud in law upon partnership creditors. Accordingly, in *Roach* v. *Brannon*, 57 Miss., 490-500, the Supreme Court of Mississippi said: "If then, a firm creditor may sue out and levy an attachment upon firm assets in the hands of a surviving partner, upon what grounds must he proceed? Must he aver and prove one of the specific grounds of attachment laid down in the statute, or will it be sufficient to show that the surviving partner is acting in violation of that *quasi* trust imposed upon him by law for the benefit of firm creditors? We have no hesitation in saying that he must bring his case strictly within the letter of the statute."

The next assignment of error is based on an exception to the following instruction, being in continuation of that just considered:

"5. The latter clause of this issue is as to whether or not the disposition made by the defendant of the assets was with the intention of giving an unfair preference to some of his creditors over others. It is difficult to determine what particular acts will constitute such preference. I am of the opinion that the Legislature meant something by this expression, but it has never been construed by the Supreme Court of the State. In the absence of such construction, I will instruct you that when a debtor is insolvent, and knows that he will be unable for a great length of time to pay all his debts, and disposes of his means to one or more of his creditors, to the exclusion of others, and with the design that those unpaid shall remain so, it will constitute an unfair preference within the meaning of this clause of the statute. You will, therefore, apply this rule to the facts in proof under this issue."

[658]

The language of the Mississippi Code of 1871, describing one of the grounds for which an attachment might issue, was that "The debtor has assigned or disposed of, or is about to assign or dispose of, his property or rights in action, or some part thereof, with intent to defraud his creditors, or *give an unfair preference to some of them*." Code of 1871, sec. 1420. This provision, it is said, so far as it relates to an "unfair preference," was first introduced into the statutes of the State by the Code of 1857, art. 2, p. 372. It is said by the Supreme Court of Mississippi, in *Eldridge* v. *Phillipson*, 58 Miss., 270, that "The right of a debtor, insolvent or in failing circumstances, to give a preference to one or more of his creditors, if it be *bona fide* and with no intent to secure a benefit to himself, is a firmly established rule in the jurisprudence of this State," and many cases are cited, occurring both before and after the adoption of the Code of 1857, in support of the statement. It was well settled, therefore, that whatever else the prohibition against unfair preferences might be supposed to include, it certainly did not make all preferences illegal. But the necessary result of preferring one or more creditors by a debtor unable to pay all, would be that the rest should remain unpaid, and for an indefinite length of

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time; and as the preference is supposed to have been designed, it could well be said, in every such case, that the debtor making it also designed its natural and expected consequences. It follows, therefore, if the part of the charge of the court now under examination be correct, [659] that all preferences are unfair, and being unfair, are illegal, a conclusion which we have seen is opposed to the settled law of Mississippi.

In the case just referred to, of *Eddridge* v. *Phillipson*, the question was presented directly for decision for the first time to the Supreme Court of that State. It was then decided that no preference could be held to be unfair which, tested by the rules of law, is legal; and that as to be illegal it must be fraudulent, and as all fraudulent dispositions of his property by a debtor are prohibited in other words, the clause relating to unfair preferences is mere surplusage. This construction is confirmed by the fact that the words in question have been omitted from the Code of 1880 by the Legislature of Mississippi.

In our opinion, this interpretation of the statute is correct, and we accordingly adopt it. The ruling of the circuit court, to the contrary, we adjudge, therefore, to be erroneous.

The cause came on for further trial upon the issues raised by the pleas to the merits. Besides the general issue, the defendant pleaded, as to the note for $6,000, made by Forbes & Fitzpatrick, the defense of the Statute of Frauds, that the alleged promise was not in writing and, also, that the sole consideration therefor was the sale to him by Forbes, of his interest to the partnership of Forbes & Fitzpatrick, and that the promise to pay the same, as one of the debts of that firm, was procured from him by means of false and fraudulent misrepresentations made to him by Forbes, as to the value of that interest.

On the trial, as appears from the bill of exceptions, there was evidence tending to show that, although the original assumption by the firm of Fitzpatrick Brothers of the debts of Forbes & Fitzpatrick was verbal, yet, that afterwards it was repeated in writing in sundry letters by the defendant, written after he had full knowledge of the character and condition of the assets, property and business which he had purchased from Forbes.

The court instructed the jury as follows:

"The plea of the defendant alleges, as to the $6,000 note of Forbes & Fitzpatrick, that its payment was assumed as part consideration of a purchase by him from Eugene A. Forbes, and that said purchase was made on fraudulent mis- [660] representations as to the character and value of the things sold. If you believe this, and that the defendant was thereby injured, you will deduct from said note the amount of his damages by reason of such misrepresentations, unless you shall find that the defendant, after he had a full knowledge of the misrepresentations, continued to recognize his liability to plaintiffs, and promised to pay, after he had acquired such knowledge, in which case he will be estopped to make such defense."

To this portion of the charge an exception was taken, and instructions of an opposite tenor asked to be given, which were refused, but which it is not necessary to notice specially, as they are directly negatived by the instruction given, and are disposed of, if that be correct; and of its correctness we have no doubt. A subsequent promise, with full knowledge of the facts, is certainly equivalent to an original promise made under similar circumstances, and no one, acting with full knowledge, can justly say that he has been deceived by false representations. *Volenti non fit injuria.*

We are advised that, according to the practice in Mississippi, as authorized by its statutes (Code of Miss. of 1880, sec. 2434), hich, by sections 914 and 915, Rev. Stat., are adopted as the practice of the Circuit Court of the United States in that district, the proceeding which resulted in the verdict sustaining the attachment, and the verdict and judgment on the merits of the cause of action, are separate and, consequently, may be separately considered on error. The judgment on the plea in abatement is not final in the sense that it may be reviewed before the final determination of the cause; but a writ of error, upon the final judgment, brings up the whole record and subjects to review all the proceedings in the cause. *As we find no error in the personal judgment against the defendant, ascertaining the existence and amount of the debt due from him and awarding execution therefor, the same is, accordingly, affirmed; but the judgment overruling the pleas in abatement and sustaining the attachment is reversed and the cause is remanded, with instructions to set aside the verdict upon the issues arising upon the pleas in abatement of the writ of attachment, and to grant a new trial thereof.*

Judgment accordingly, with costs.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

EDWARD McGINTY, Claimant, etc., *Plf.* [661] *in Err.*,

v.

CHARLES M. FLANNAGAN ET AL.

(See S. C., 16 Otto, 661, 662.)

Partnership assets.

It is not a fraud upon partnership creditors, to apply to the payment of individual debts, goods belonging to the surviving partner, which never belonged to the partnership, but were his own individual property, merely because they had been mingled with the stock formerly belonging to the firm.

[No. 112.]

Argued Dec. 5, 1882. *Decided Dec 18, 1882.*

IN ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

For the history and facts of the case, see the opinion of the court and the preceding case of *Fitzpatrick* v. *Flannagan*, *ante*, 211.

Messrs. **Alfred B. Pittman** and *W. B. Pittman*, for plaintiff in error.

Messrs. **Jefferson Chandler** and *W. K. Ingersoll*, for defendants in error.

Mr. Justice **Matthews** delivered the opinion of the court:

This is an action which arose in the course of

NOTE.—*Rights and powers of surviving partners.* See *note* to Moore v. Huntington, Admrx., 84 U. S., XXI., 642.

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the proceedings in that of Flannagan against Fitzpatrick, the judgment in which has been in part reversed. Edward McGinty, the plaintiff in error, having in that cause appeared as a claimant of the property seized under the attachment, the same was delivered to him by the marshal, on taking a bond conditioned to pay to the plaintiffs in the attachment such damages as might be awarded against the claimant in case his claim should not be sustained, or, in that event, to return the goods to the marshal. Thereupon, in accordance with the statutory practice in such cases in Mississippi, an issue was joined between the plaintiffs in attachment and the claimant, to try their respective titles to the property. Upon this issue, evidence was submitted by the parties, tending to show substantially the same state of facts as appears in the principal case.

The court refused to give instructions asked on behalf of the defendant, and in lieu thereof, among others not necessary to be considered, gave the following:

"2. It was the duty of J. J. Fitzpatrick, as such surviving partner, to sell and convert into money the goods and property belonging to said firm, and to collect the debts due the firm, and first apply the same to the payment of the debts due by the firm and not to mingle the same with his own goods, so that they could not be [662] identified, he being by law created a trustee for this purpose; but if he mingled them with other goods, so that they could not be identified, he thereby rendered his own goods liable for the debts of the firm, or [as?] those originally owned by the firm; and if he applied the proceeds of the sale of such goods, either originally owned by the firm or those afterwards purchased and mixed up with them, so that they could not be identified, to the payment of his private debts, such disposition operated as a fraud upon the rights of the creditors of the firm of which he was surviving partner, and as to him rendered the sale void."

There was a verdict and judgment for the plaintiffs in the attachment, which are brought into review by this writ of error.

The charge above quoted goes further than that which was considered and adjudged to be erroneous in the principal case. For here the jury were instructed, that it was a fraud upon partnership creditors, to apply to the payment of individual debts goods belonging to the surviving partner, which never belonged to the partnership, but were his own individual property, merely because they had been mingled with the stock formerly belonging to the firm. This is an error, in any view that can be taken of the rights of the parties. Even on the supposition that the partnership stock was held under an express and positive trust for partnership creditors, equity would give the latter only so much of the fund as represented the partnership property, and would divide it as to values between the parties beneficially interested, even although the specific goods might not be separable.

This being so, it could hardly be charged, as a matter of law, that an appropriation of the mingled stock to the extent of a value no greater than would be allowed in equity to individual creditors, in marshaling the assets for distribution, between them and the creditors of the partnership, amounted to a fraud upon the latter.

For this, as well as for reasons stated in the opinion in the former case between the original parties, we hold this instruction to be erroneous.

The judgment is accordingly reversed and the cause remanded, with instructions to grant a new trial. Judgment reversed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

STATE OF GEORGIA, *Appt.*, [458]
v.
MORRIS K. JESUP, Surviving Trustee,
ET AL.

(See S. C., 16 Otto, 458-464.)

Case, when not reviewable—right of State.

*In a foreclosure suit pending in the circuit court, the mortgage property being in possession of its receivers, the State of Georgia presented a petition in which, declining to become a party to the suit, it asked that the receivers be required to withdraw from the possession of a part of the property in their hands, upon some of which executions for state taxes had been levied prior to their appointment. The petition was denied and dismissed. Held, that the action of the court could not be reviewed upon the appeal of the State, for the reason, if there were no others, that the order did not conclude any right it had in virtue of the executions, or of the levies made thereunder.

[No. 109.]

Argued Nov. 28, 29, 1882. Decided Dec. 18, 1882.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

The history and facts fully appear in the

Statement of the case by *Mr. Justice* **Harlan:**

The suit, out of which this appeal arises, was commenced on the 15th day of February, 1877, in the Circuit Court of the United States for the Southern District of Georgia, by Morris K. Jesup, a citizen of New York, and the surviving Trustee in a mortgage, or deed of trust, executed on the 20th day of December, 1867, by the Atlantic and Gulf Railroad Company, a Georgia Corporation, conveying to trustees and the survivor of them, its main line and certain branches, together with their appurtenances, rolling stock, equipment, etc., respectively, in trust to secure the payment of bonds, in a large amount, made by the Company, and payable on the first day of July, 1897, with interest semi-annually, at the rate of 7 per cent per annum. The deed contained the usual provisions requiring the trustees, upon default in the payment of the stipulated interest, to enforce the security for the benefit of the bondholders. The bill asked for the appointment of receivers, and, accordingly, on the 20th day of February, 1877, an order was entered, appointing receivers of the entire property and effects of the railroad company embraced in the deed of trust or mortgage, with power, and charged with the duty, to manage and operate the same, subject to the orders and directions of the court. The receivers took possession and, subsequently, the order of February 20, 1877, made at chambers, was renewed and confirmed by an order of

*Head note by *Mr. Justice* HARLAN.

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court entered on the 20th day of April, 1877.

A supplemental bill was afterwards filed, enlarging the scope of the suit and asking a decree of foreclosure and sale.

On the 3d day of June, 1879, the railroad and [459] its branches, with their respective appurtenances, being then in the actual possession of and operated by the receivers, under the direction of the Circuit Court of the United States, the State of Georgia, by its Attorney-General, presented a petition, stating that, prior to the appointment of the receivers, executions had issued from the office of its Comptroller-General against the Railroad Company for taxes, alleged to be due the State, the validity of which taxes was contested by the Company, and the issue arising thereon was then pending before the courts of the State; that two of such causes, those involving the validity of the taxes for the years 1874 and 1875, were taken by the Corporation upon writ of error to the Supreme Court of the United States, in which court, at its (then) last Term, a judgment was rendered sustaining the right of the State to the taxes in question; that executions were also issued by the State against the Company for the years 1876, 1877 and 1878; but as the grounds of defense were the same in each, the latter were allowed to rest and abide the decision in the two former causes, except that the execution for 1876 was in the hands of the sheriff, and had been levied upon certain property of the Company before the appointment of the receivers in the foreclosure suit.

The prayer of the petition was, that the State be allowed to establish these facts by reference to the records and proceedings in this cause, and also by the records and proceedings in the state courts and the Supreme Court of the United States, "For the purpose, and the purpose alone, of showing, as the State claims, that this honorable court has no jurisdiction under the law, by its process of the appointment of receivers or otherwise, to hinder, delay or prevent the execution of the process provided by the law of the State for the collection of its revenue." "The said State of Georgia," the petition proceeds, "in obedience to that comity and respect that should govern her courts towards those of another concurrent jurisdiction, and to promote that harmony which should ever prevail between herself, as one of the members of this Union, and the Federal Government, respectfully insists that she cannot be required, in order to obtain her rights in the premises, to become a party complainant or defendant in the [460] litigation now pending before this honorable court, because, as she maintains: 1. This court has no jurisdiction, by the powers of injunction or otherwise, to hinder, delay or prevent the collection of her revenue. 2. As the record shows that certain executions had been levied by the sheriff in obedience to process from the state courts, upon which issues had been joined by the defendant Corporation, their jurisdiction could not be affected by a suit filed subsequently in the courts of the United States (and) the appointment of receivers, and a sale by the latter jurisdiction would be inoperative and void. 3. It is against public policy to require a state, in the collection of her revenue, to await the slow and tedious process necessary to determine the numerous issues made in this cause between private litigants." The prayer of the State was, that the court pass such an order as would fully protect its rights in the premises.

The record contains no part of the proceedings in the causes in the state courts to which the State's petition referred. All that it contains in the way of documents or papers relating to taxes against the Company, are certain executions from the office of the Comptroller-General of Georgia, with the returns thereon, *viz.:* an execution for the taxes of 1874, amounting to $32,764.10, returned by the sheriff, levied October 6, 1874, "Upon lots number 23 and 24, Atlantic ward, City of Savannah, county and State aforesaid, and will sell the said described property on the first Tuesday in November, 1874, before the court-house door, in terms of the law;" an execution for the taxes of 1875, amounting to $8,754.55, returned levied, November 15, 1875, "Upon the buildings known as the machine-shop, locomotive house, and car shop, situate, lying and being at the Atlantic and Gulf Railroad depot in the City of Savannah, county and State aforesaid, and will advertise and sell the same, in terms of the law, the property of the defendant;" the execution for the taxes for 1876 for $9,080.31, $18,160.62 penalty for default in paying the tax, returned, as levied, January 8, 1877, upon lots 23, 24, 33 and 36, in Savannah; the execution for taxes for 1877, amounting to $9,333.12, and $27,990.36, as a penalty for non-payment of taxes and costs, the last execution being returned, "Property, by order and decree of the United States Court, in the hands of receivers;" and execution for taxes of 1878 for $7,070.26, and $21,228.78, as penal- [461] ty for non-payment of taxes and costs. Upon this last execution no return appears to have been made.

On the 6th day of June, 1879, this order was made in the court below:

"The State of Georgia, having petitioned for leave to proceed with certain executions for taxes, after argument and consideration, it is ordered and decreed that the said petition of the State of Georgia be denied, and the same is hereby dismissed."

On the same day a final decree of foreclosure was made, by which, among other things, it was, in substance, declared that the Company was indebted to the State in the following principal sums for taxes: for 1874, $32,764.71; for 1875, $8,754.55; for 1876, $9,080.31; for 1877, $12,441.16; for 1878, $7,076.26; in all, the sum of $70,116.99; the sums specified in the several executions for taxes, omitting the penalties claimed in those for 1876, 1877 and 1878. It was further declared that the Company was liable for the principal of such tax as might be assessed by the Comptroller-General of the State for the year 1879; that such taxes were prior to all other liens, except judicial costs, and should be paid out of the proceeds of sale and any balance of money and assets in the hands of the receiver, next after the payment of such costs; and that neither penalties nor interest were due on the taxes for any of the aforesaid years.

Afterwards, on the 22d of August, 1879, the State presented to the court its petition for appeal, as follows: "The State of Georgia having filed a petition denying the jurisdiction of said Circuit Court of the United States, and claiming the right of said State to proceed with said

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executions, notwithstanding the property of said defendant Corporation was in the possession and control of said court, through receivers appointed thereby, and the said circuit court having passed a decree, so far as the rights and claims of said State in the premises were concerned, denying and refusing said claim set up, and said State of Georgia, being advised that she has a good and valid cause of appeal, now comes * * * and prays this honorable court to grant an appeal in said cause to the Supreme Court of the United States, on such terms and conditions [462] as required by law." The appeal thus prayed was allowed.

Messrs. **Clifford Anderson,** *Atty-Gen. of Georgia,* **Robert N. Ely** and **Robert Toombs,** for appellant.

Messrs. **Walter S. Chisholm** and **Robert Falligant,** for appellees.

Mr. Justice **Harlan** delivered the opinion of the court:

It does not seem incumbent upon this court to determine some of the questions, however important or interesting as abstract propositions, which counsel have pressed upon its attention. The case, as presented by the record, is within a very narrow compass, as is evident from the statement, already made, of the history and nature of the litigation, out of which the present appeal arises.

The action of the court below is assailed by the State upon numerous grounds, separately stated in the assignment of errors. They are, however, all comprehended in the general proposition that the court erred in denying and dismissing the State's petition, filed June 8, 1879; thereby, it is claimed, adjudging that the sheriff could not, pending the possession and control by the receivers of the property, rightfully proceed with the executions for taxes; and, in decreeing that the State is not entitled to penalties on its taxes for the years named in the final decree of foreclosure.

Touching the first of these propositions, it may be observed, that if it was not a matter wholly within the discretion of the circuit court to permit the State to become a party to the foreclosure suit, it is clear that the State did not ask to become, nor was it, in any form, made a party to that suit. It is equally clear that it could not have been made a party without its consent. While questioning, with great distinctness of language, the jurisdiction of the circuit court to take possession, by its receivers, of the property previously levied on in satisfaction of the several executions for taxes, the State avowed its unwillingness to submit its rights, in the matter of taxes, to the adjudication of any court of the United States. It, therefore, assumed such a position with reference to the foreclosure suit, that, while asking an order to be entered discharging the receivers as to the property levied on, and as to that pro- [463] posed to be levied on, for taxes, it would not be bound by any ruling the court might make. Still, a proper respect for the State seemed to require that the court should, in some form, indicate its opinion touching the formal suggestion that it had overstepped the limits of its jurisdiction, accompanied by a request that the court would revise its proceedings, and not allow the sheriff, having in his hands executions for taxes, to be embarrassed by the actual possession and control, by the receivers of the circuit court, of the property of the Railroad Company. The court below was of opinion that it had jurisdiction to do what had been done, and that it ought not to make any such order as that suggested by the State. But it, nevertheless, directed that the principal sums, claimed by the State for taxes, should be paid out of the proceeds of the sale of the mortgage property, next after paying judicial costs. It declined to make any provision for the payment of penalties or interest upon taxes. The record shows that the principal sums declared to be due the State have been received by it. The action of the circuit court was based, in part, upon what were regarded as the settled doctrines of the Supreme Court of Georgia, in respect of the right, under execution, in the ordinary form, and not specially molded for that purpose, to seize and sell, at different sales, separate portions of a railroad, operated under franchises conferred by the State for purposes of travel and transportation. Without stopping to consider those or any other questions of law supposed to be raised by the State's petition, it is sufficient to say that the order, denying and dismissing that petition, is not one which the State can ask this court to review upon its appeal; this, for the reason already indicated, if there were no other, that the order did not conclude the State, it being no party to the suit, as to any right acquired in virtue of the executions for taxes. It was not an adjudication or judicial determination of those rights as between the State and the parties to the foreclosure suit. If, by law, the levies, in behalf of the State, were valid to the extent of creating a prior lien in its favor for taxes, or for the penalties or interest thereon, as to which questions we express no opinion, that priority was not affected or displaced by the subsequent possession of the property by the receivers in the foreclosure [464] suit. In no legal sense has the State been injured by the order dismissing its petition. It may not, therefore, claim, as matter of right, that this court shall, upon this appeal, review the action of the court below in declining to surrender possession of the property covered by the levies under the executions for taxes.

In reference to that part of the final decree of foreclosure, declaring, as between the parties before the court, that the State was not entitled to penalties or interest on its taxes, we remark, that if the State, not being a party to the suit, could have appealed therefrom, it has not done so. The petition of August 22, 1879, plainly imports that the appeal prayed for was only from the order of June 6, 1879, denying and dismissing the petition of June 8, 1879. It is, therefore, not competent for this court, upon the present appeal, to review that portion of the final decree relating to penalties and interest on taxes. Whether the State is concluded by any action subsequently taken by it under that decree, or whether the State was or is entitled to penalties and interest on its taxes, are questions which do not arise upon this appeal, and are not intended to be decided.

For these reasons the decree must, on this appeal, be affirmed. It is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 563; 108 U. S., 449.

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[391] CATHARINE S. LANSDALE, Admrx. of NOAH STINCHCOMB, Deceased, *Appt.*

v.

ADDISON M. SMITH, LETITIA ALLEN AND SUSAN G. HALL.

(See S. C., 16 Otto, 391-395.)

Laches, a defense in equity—demurrer.

*1. Courts of equity deny relief to those who delay for an unreasonable length of time in asserting their claims.

2. If the case, as stated by the bill, appears to be one which a court of equity, on account of the statements of the claim or the laches of complainant, will refuse to aid, the defendant may resist it by demurrer.

[No. 117.]

Argued Dec. 6, 1882. Decided Dec. 18, 1882.

APPEAL from the Supreme Court of the District of Columbia.

The history and facts of the case appear in the opinion of the court.

Messrs. **H. O. Claughton,** *Thomas J. Miller, C. G. Lee, R. B. Lewis* and *C. P. Culver,* for appellant.

Messrs. **Job Barnard** and *James S. Edwards,* for appellees.

Mr. Justice **Harlan** delivered the opinion of the court:

It has been a recognized doctrine of courts in equity, from the very beginning of their jurisdiction, to withhold relief from those who have delayed for an unreasonable length of time in asserting their claims. *Elmendorf* v. *Taylor,* 10 Wheat., 168; *Piatt* v. *Vattier,* 9 Pet., 416; *Maxwell* v. *Kennedy,* 8 How., 222; *Badger* v. *Badger,* 2 Wall., 94 [69 U. S., XVII., 838]; *Cholmondeley* v. *Clinton,* 2 Jac. & W., 1; 2 Story, Eq. Jur., sec. 1520. In *Wagner* v. *Baird,* 7 How., 259, it was said that long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and is not to be excused except by showing some actual hindrance or impediment, caused by the fraud or concealment of the party in possession. The case must be one which appeals to the conscience of the Chancellor.

And, contrary to the view pressed in argument, a defense grounded upon the staleness of the claim asserted, or upon the gross laches of the party asserting it, may be made by demurrer, not, necessarily, by plea or answer. A different rule has been announced by some authors, and in some adjudged cases; generally, however, upon the authority of the case of [392] *The Earl of Deloraine* v. *Browne, etc.,* 3 Bro. Ch. 633. *Lord* Thurlow, who decided that case, is reported to have declared, when overruling a demurrer to a bill charging fraudulent representations as to the value of an estate, and praying an account of rents, profits, etc., that his action was based upon the ground that length of time *proprio jure,* was no reason for a demurrer; that it was only a conclusion from facts, showing acquiescence, and was not matter of law; and that he could not allow a party to avail himself of an inference from facts on a demurrer. But in *Hovenden* v. *Lord Annesley,* 2 Sch. & L., 607, decided in 1806, *Lord* Redesdale expressed his disapproval of the decision of *Lord* Thurlow, as reported by Brown, and said that it was rendered in a hurry, when the latter was about to surrender the seals, and when much injury might have been done to parties had judgments not been given before the latter retired from office. The rule, as announced in *Hovenden* v. *Lord Annesley,* was, "That when a party does not by his bill bring himself within the rule of the court, the other party may by demurrer, demand judgment, whether he ought to be compelled to answer. If the case of the plaintiff, as stated in the bill, [392] will not entitle him to a decree, the judgment of the court may be required by demurrer, whether the defendant ought to be compelled to answer the bill." That, the court said, was matter of the law of a court of equity, to be determined according to its rules and principles.

Such is, undoubtedly, the established doctrine of this court as announced in many cases. In *Maxwell* v. *Kennedy, supra,* the court, speaking by *Chief Justice* Taney, approved the rule as announced by *Lord* Redesdale. After referring to *Piatt* v. *Vattier, supra,* and to *McKnight* v. *Taylor,* 1 How., 168, and *Bowman* v. *Wathen,* Id., 189, it was said, that "The proper rule of pleading would seem to be that when the case stated by the bill appears to be one in which a court of equity will refuse its aid, the defendant should be permitted to resist it by demurrer. And as the laches of the complainant in asserting his claim is a bar in equity, if that objection is apparent on the bill itself, there can be no good reason for requiring a plea or answer to bring it to the notice of the court." In the more recent case of *Badger* v. *Badger, supra,* the court, speaking by *Mr. Justice* Grier, said [394] that a party, who makes an appeal to the conscience of the Chancellor, "Should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the Chancellor may justly refuse to consider his case, on his own showing, without inquiry whether there is a demurrer or formal plea of the Statute of Limitations contained in the answer." *Rhode Island* v. *Massachusetts,* 15 Pet., 272.

These principles are decisive of the case before us.

By duly recorded deed of July 18, 1818, signed by John P. Van Ness, his wife uniting in the conveyance, and by Noah Stinchcomb, the former conveyed to the latter, at a fixed annual rent, lot 3, square 455, in the City of Washington, to have and to hold, etc., unto Stinchcomb, his executors, administrators and assigns, for the term of ninety years, renewable forever. Stinchcomb entered under the deed, made valuable improvements upon the lot, and remained in possession until the year 1833 or 1834, when Van Ness repossessed himself of the premises, in virtue of a clause in the deed in these words:

*Head notes by *Mr. Justice* HARLAN.

NOTE.—*Equity; limitations of action in.* See *note* to Thomas v. Harvie, 23 U. S. (10 Wheat.), 146.

Relief denied from lapse of time in equity. See *note* to Pratt v. Carroll, 12 U. S. (8 Cranch), 471.

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"*Provided, always*, that if the said rent or any part thereof shall be in arrear and unpaid for the space of thirty days next after the time at which the same is reserved to be paid, as above, being first lawfully demanded, that then it shall and may be lawful to and for the said John, his heirs and assigns, into the demised premises or any part thereof, in the name of the whole, to re-enter, and the same to have again, repossess, occupy and enjoy, *as in his or their former estate*, until all such arrearages of rent, with legal interest from the time at which said rent shall have become payable, and all and every cost, charge and expense incurred by reason of the non-payment of said rent shall be lawfully satisfied and paid, or make distress therefor, at his or their option."

Stinchcomb died on the 11th day of February, 1841, without, so far as the bill discloses, making any effort to repossess himself of the property. Van Ness died in 184–, and, upon the division of his estate, the lot in question was assigned to Matilda E. Van Ness, one of his heirs at law, by whom it was subsequently conveyed to Wm. G. Deal and others. The present defendants hold the premises by virtue of the before mentioned assignment and the deed of Matilda E. Van Ness and her assigns.

The complainant, as administrator of Stinchcomb, having offered and now offering to pay all rents, interest, charges and costs, which may have accrued upon the property, asks a decree permitting her to redeem the same, and ordering an account, which will show, as well the principal and interest of rents in arrear due defendants, as the rents and profits received by the latter since they entered into possession, setting off the one against the other.

Such is, substantially, the case made by the bill; and such is the relief asked, notwithstanding suit was delayed until after the expiration of about forty-five years from the re-entry of Van Ness, "as in his * * * former estate," and until more than thirty years had elapsed after his death and the assignment of the lot in question to one of his heirs at law.

The case is plainly one of gross laches on the part of Stinchcomb and those claiming under him. His right under the deed of 1818, to repossess himself of the premises, by paying rents and charges in arrear, accrued the moment Van Ness re-entered in 1838 or 1834. But this right could not last forever. Its assertion could not be safely neglected for an unreasonable length of time. The bill discloses no plausible, much less sufficient, explanation of the long delay ensuing, after 1838, without any movement upon the part of Stinchcomb, his representatives or heirs, to recover the property, by discharging the rents and charges in arrear, and re-entering, as might have been done, in pursuance of the provisions of the deed of 1818. On the contrary, the facts set out in the bill justify the conclusion either that Stinchcomb elected, in his lifetime, to abandon all claim upon the property and leave Van Ness in possession, as in his former estate, or that his claim was, in some way, satisfactorily arranged or discharged. The complainant and those whom she represents have slept too long upon their rights. The peace of society and the security of property demand that the presumption of right, arising from a great lapse of time, without the assertion of an adverse claim, should not be disturbed. In such cases, sound discretion requires that the court should withhold relief.

Some reference has been made to the decisions of the Supreme Court of Maryland, the laws of which State, as they existed on the 27th day of February, 1801, except as since modified or repealed by Congress, continue in force in this District. It is only necessary to say that the principles to which we have referred have been steadily upheld by the Supreme Court of Maryland, not upon the ground of any changes in the law of that State since 1801, but in deference to the established doctrines governing courts of equity in giving relief to those who [395] seek the enforcement of antiquated demands. *Hepburn's Case*, 3 Bland, Ch., 95; *Hawkins* v. *Chapman*, 26 Md., 88; *Nelson* v. *Hagerstown Bk.*, 27 Id., 51; *Syester* v. *Brewer*, Id., 288; *Frazier* v. *Gelston*, 35 Id., 296.

For the reasons given, we are of opinion that the court below properly sustained the demurrer, and dismissed the bill for want of equity.

The decree is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—19 N. W. Rep., 599.

THOMAS RUSSELL, Collector of Customs, *Plff. in Err.*,

v.

ROBERT B. WILLIAMS, JR., ET AL., Partners, under the Firm Name of WILLIAMS & HALL.

(See S. C., 16 Otto, 623-629.)

Duty Act—general commercial regulation.

*1. The Customs Act of 1870, 16 Stat. at L., 262, enacted that, in lieu of the duties then imposed by law, certain duties specified should thereafter be imposed on certain enumerated articles. Held, that this enactment did not have the effect to repeal, as to such articles, the provisions of the Act of 1865, 13 Stat. at L., 498, which declared that there should be paid on all goods produced in countries east of the Cape of Good Hope, when imported from countries west of the cape, a duty of 10 per cent *ad valorem* in addition to the duties imposed thereon when imported directly from the place of production.

2. The latter provision was a general commercial regulation, made to encourage direct importation from countries east of the cape, as well as to benefit American shipping, and was applicable without regard to the regular duties imposed for purposes of revenue, and even where the articles were otherwise entirely free of duty.

[No. 105.]

Submitted Nov. 23, 1882. Decided Dec. 18, 1882.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

The case is stated by the court.

Mr. **Samuel F. Phillips**, *Solicitor-Gen.*, for plaintiff in error.

Mr. **Charles Levi Woodbury**, for defendants in error.

Mr. Justice **Bradley** delivered the opinion of the court:

*Head notes by *Mr. Justice* BRADLEY.

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This is an action brought for the recovery of duties alleged to have been illegally imposed. [624] The following is the agreed statement of facts, so far as necessary to understand the case.

The plaintiffs, in February and April, 1871, imported into the Port of Boston from Liverpool 988 packages of tea, and entered the same in warehouse under bond. At various subsequent dates, the plaintiff withdrew these teas for consumption. These teas were produced in China. The defendant assessed and plaintiffs paid to the defendant as Collector of Customs, duties thereon at the rate of fifteen cents per pound, and in addition a duty of 10 per cent *ad valorem*, paying the latter amount under protest. The defendant assessed and exacted the duty of fifteen cents per pound under the provisions of section 21 of the Act of July 14, 1870, 16 Stat. at L., 256, which provides that after the 31st day of December, 1870, in lieu of the duties now imposed by law on the articles hereinafter enumerated or provided for, imported from foreign countries, there shall be levied, collected and paid the following duties and rates of duties, that is to say, on teas of all kinds, fifteen cents per pound. The defendant assessed and exacted the additional duty of 10 per cent *ad valorem* under the provision of section 6 of the Act of March 3, 1865, 13 Stat. at L., 491, which provides that "There shall be hereafter collected and paid on all goods, wares and merchandise of the growth or produce of countries (east) of the Cape of Good Hope (except raw cotton and raw silk as reeled from the cocoon, or not further advanced than tram, thrown, or organsine) when imported from places west of the Cape of Good Hope, a duty of ten per cent *ad valorem*, in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production."

The circuit court gave judgment for the plaintiff, and the case is brought here by writ of error. The sole question is, whether the additional duty of 10 per cent *ad valorem* was or was not lawfully exacted; and this depends on the question whether the provision of the Act of 1865, for the payment of 10 per cent on goods produced in countries east of the Cape of Good Hope when imported from places west of the Cape, was a general commercial regulation for the encouragement of direct trade with those [625] countries, as well as for the benefit of American shipping, or whether it was intended simply as an increase of duties for purposes of revenue. If the former, it would be independent of the duties imposed on the articles, and would not be repealed by a modification of them; if the latter, the result might be different. We are of opinion that it was intended as a general regulation of commerce. The object of the law was to favor direct importation from countries east of the Cape, without regard to the amount of duties imposed on the articles imported. These might be more, or might be less, or might be nothing; yet, the 10 per cent *ad valorem* was to be paid if the articles were imported from places west of the Cape. This would incidentally benefit our own shipping, as that principally employed in the direct trade; whereas, importation of the same goods to European ports, and thence to this country, would generally be made in foreign vessels.

The law in various forms has been in existence since 1861. The successive enactments were as follows:

(Stat. August 5, 1861, ch. 45, sec. 3): "That all articles, goods, wares and merchandise imported from beyond the Cape of Good Hope in foreign vessels, not entitled by reciprocal treaties to be exempt from discriminating duties, tonnage and other charges, and all other articles, goods, wares and merchandise not imported direct from the place of their growth or production, or in foreign vessels, entitled by reciprocal treaties to be exempt from discriminating duties, tonnage and other charges, shall be subject to pay, in addition to the duties imposed by this Act, ten per centum *ad valorem; Provided*, That this rule shall not apply to goods, wares and merchandise imported from beyond the Cape of Good Hope in American vessels." 12 Stat. at L., 292.

(Stat. July 14, 1862, ch. 163, sec. 14): "That, from and after the day and year aforesaid, there shall be levied, collected and paid on all goods, wares and merchandise of the growth or produce of countries beyond the Cape of Good Hope, when imported from places this side of the Cape of Good Hope, a duty of ten per cent *ad valorem*, and in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production." 12 Stat. at L., 557.

The Act of March 3, 1863, ch. 77, sec. 2 [12 [626] Stat. at L., 742], simply exempted from the operation of the law, cotton and raw silk as reeled from the cocoon.

The 18th section of the new Tariff Act of June 30, 1864, ch. 171 [13 Stat. at L., 216], repealed and re-enacted the Cape Law of 1862, only changing the words "beyond the Cape" to "east of the Cape," and the words "this side" to "west."

The Act of March 3, 1865, ch. 80, sec. 6, which is the law now under consideration, is set out in the statement of facts. This statute remained in force until supplied by the 3d section of the Tariff Act of 1872, which was couched in the same terms (only adding wool to the excepted articles), and is still in force.

It will be observed that the first of these laws (that passed in 1861) imposed the additional 10 per cent *ad valorem* on goods imported in foreign vessels from beyond the Cape, unless they were exempt from discriminating duties by reciprocal treaty, and goods imported in American ships were *ex industria* exempted from the burden. But it is obvious that this law would have failed to reach the object intended, since it would have been a dead letter in all cases where we had reciprocal treaties with other Nations, placing their ships on an equality with our own. The next enactment, therefore, left out the reference to foreign ships and propounded the regulation in the form which has ever since been substantially followed. It imposed the additional 10 per cent *ad valorem* on the products of countries beyond or east of the Cape of Good Hope, when imported from places this side, or west of, the Cape. By this means the direct trade was distinctly favored and, without expressly making any discrimination between domestic and foreign vessels, the desired encouragement in favor of the former was substantially attained.

It will also be observed that the provision was

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successively renewed in the different customs laws without regard to the modifications made in the duties themselves, or the changes made in the free list.

It was very early contended by importers that the law was not intended to affect goods which were on the free list, and exempt from any duty; a position somewhat plausible from the words of the law, which were these: "A duty of 10 per cent *ad valorem*, in addition to the duties [627] now imposed on any such articles." It was argued that the 10 per cent could not be said to be "*in addition* to the duties now imposed," where no duties were imposed. But such a construction would evidently have defeated the purpose of the law; and accordingly, it was decided by this court in the case of *Hadden* v. *Collector*, 5 Wall., 107 [72 U. S., XVIII., 518], that the Act of 1862 (which was then under consideration) did apply to goods which at the date of the Act were duty free, as well as to those which were subject to duty. Reliance was placed in that case, it is true, on the literal phraseology of the law; but the judgment of the court was in conformity with the clear intent of the Legislature, as we have supposed it to be.

The same conclusion was come to in the case of *Sturges* v. *Collector*, 12 Wall., 19 [79 U. S., XX., 255], in expounding the Act of 1865, the one now before us. The court, speaking through *Mr. Justice* Clifford, referred to the evident purpose of Congress, not only to augment the revenue, but to make a discrimination "in favor of the direct trade." Pp. 26, 27.

In conformity with the principle of these decisions, we are of opinion that the law in question continues in force in reference to all goods not expressly exempted from its provisions, whether dutiable or free, and whether new duties imposed are declared to be in lieu of all other duties or not. Such a declaration is a mere formula to indicate that the duties newly imposed are to take the place of and supersede the previous duties specially imposed in the tariff schedules, and not to abrogate any general commercial regulations not expressly mentioned. The duties on tea have been several times changed since 1861; but, in our view, these changes have only had reference to the ordinary duties imposed for the purposes of revenue only, and not to the standing regulation which we are considering. In 1861, the regular duty on tea was fixed at fifteen cents per pound; in 1864, at twenty-five cents; in 1870, at fifteen cents; and in 1872 it was placed with coffee on the free list. In 1861, 1864 and 1870, the duty was fixed in the general tariff laws of those years respectively; the first two of which also contain the Cape clause discriminating in favor of direct importation. The Tariff Act of 1870 did not re-enact this clause, but neither was it repealed; it re- [628] mained in force as enacted in 1865, until re-enacted in the general Tariff Act of 1872. We do not think that it was necessary to re-enact it in 1870, in order to make it operative upon those imports within its scope, the duties on which were revised by that Act. The object of that revision was to readjust the regular schedule of duties not to interfere with the Cape Rule as a regulation of commerce, or any other general regulation not expressly mentioned or referred to in the Act, and not repugnant to its provisions. Both laws could stand together without repugnancy. The Cape Rule contained in the Act of 1865 could only be regarded as repealed by implication, if repealed at all; and, considering the object and purpose of the rule, such an implication was not necessarily involved in the Act of 1870 and, therefore, will not be inferred.

It is urged, however, that the case of *Gautier* v. *Arthur*, 104 U. S., 345 [XXVI., 773], decides adversely to the view now expressed. But an examination of that case will show that the principle of construction which we have suggested was approved in the opinion of the court. That was the case of plumbago imported in a French vessel direct from Ceylon in 1873. The Act of June 6, 1872 [17 Stat. at L., 230], had exempted plumbago from all duty, but the 17th section of the Act of 1864 had imposed a discriminating duty of 10 per cent *ad valorem*, in addition to the duties imposed by law on all goods imported in foreign vessels, except where by treaty such vessels were entitled to the same privileges as American vessels. The court intimated that if the Act of 1872 had done nothing more than to exempt the article from duty, the Act of 1864 would still be operative. The court, in its opinion, says: "A construction of the section, in harmony with this view, is not an unreasonable one. In our judgment it best carries out the purposes of the Act imposing a discrimination; and it conforms to the construction which this court, in *Hadden* v. *Collector*, reported in the 5th of Wallace, gave to the succeeding section of the same Act." The opinion then goes on to notice that the Act of 1872 does contain something more; that the general repealing clause repeals all Acts and parts of Acts inconsistent with its provisions, excepting certain other Acts, among which the discriminating section of the Act of 1864 is not mentioned; and the opinion adds: "Both from the general lan- [629] guage of the repealing clause and the enumeration of the provisions of Acts excepted from it, we are forced to conclude that it was the intention of Congress to put an end, so far as the free list in the 5th section of the Act of 1872 is concerned, to the operation of the discriminating Act of 1864." It is only necessary to observe that the Act of July 14, 1870 [16 Stat. at L., 256], on which the defendants in error rely in respect to the duty on teas, contained no such repealing clause. We do not see, therefore, that the case of *Gautier* v. *Arthur*, contravenes the conclusion to which we have come.

The judgment of the Circuit Court must be reversed and the cause remanded, with directions to award a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JULIUS N. ST. CLAIR ET AL., *Plffs. in Err.*,
v.
WILLIAM M. COX.

(See S. C., 16 Otto, 350-360.)

State judgments, when valid—service of process—service on foreign corporation—service on agent.

1. Judgments of the state courts establishing personal demands have validity or import verity only

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where they have been rendered upon personal citation of the party, or of those empowered to receive process for him, or upon his voluntary appearance.

2. This doctrine applies, in all its force, to personal judgments of state courts against foreign corporations. Serving process on their agents in other States, for matters within the sphere of their agency, is, in effect, serving process on them, if the service be upon such agents as may be properly deemed representatives of the foreign corporation.

3. The service of a copy of the writ, as a summons, upon an agent of a foreign corporation, is not sufficient to give jurisdiction to a state court to render a personal judgment against it, unless it appears in the record that the corporation is engaged in business in the State, and the agent be appointed to act there.

4. The transaction of business by a corporation in the State, appearing, a certificate of service by the proper officer on a person who is its agent there, is sufficient *prima facie* evidence that the agent represented the company in the business. But the corporation may, when the record is offered as evidence in another State, show that the agent stood in no such representative character to the company as would justify the service of the writ on him.

[No. 71.

Submitted Nov. 7, 1882. Decided Dec. 18, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of Michigan.

The history of the case and a statement of the facts appear in the opinion of the court.

Mr. C. S. Walker, for plaintiffs in error.

Messrs. **Don M. Dickinson**, *H. M. Duffield* and *Levi T. Griffin*, for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

This action was brought by the plaintiff in the court below, to recover the amount due on two promissory notes of the defendants, each for the sum of $2,500, bearing date on the 2d of August, 1877, and payable five months after date to the order of the Winthrop Mining Company, at the German National Bank, in Chicago, with interest at the rate of 7 per cent per annum. [351]

To the action the defendants set up various defenses and, among others, substantially these: that the consideration of the notes had failed; that they were given with two others of like tenor and amount to the Winthrop Mining Company, a corporation created under the laws of Illinois, in part payment for ore and other property sold to the defendants upon a representation as to its quantity, which proved to be incorrect; that only a portion of the quantity sold was ever delivered, and that the value of the deficiency exceeded the amount of the notes in suit; that at the commencement of the action, and before the transfer of the notes to the plaintiff, the Winthrop Mining Company was indebted to the defendants in a large sum, *viz.*: $10,000, upon a judgment recovered by them in the Circuit Court of Marquette County, in the State of Michigan, and that the notes were transferred to him after their maturity and dishonor, and after he had notice of the defenses to them.

On the trial, evidence was given by the defendants tending to show that the plaintiff was not a *bona fide* holder of the notes for value. A certified copy of that judgment was also produced by them and offered in evidence, but on his objection that it had not been shown that the court had obtained jurisdiction of the parties it was excluded, and to the exclusion an exception was taken. The jury found for him for the full amount claimed, and judgment having been entered thereon, the defendants brought the case here for review. The ruling of the court below in excluding the record constitutes the only error assigned.

The judgment of the Circuit Court in Michigan was rendered in an action commenced by attachment. If the plaintiffs in that action were, at its commencement, residents of the State, of which some doubt is expressed by counsel, the jurisdiction of the court, under the writ, to dispose of the property attached cannot be doubted, so far as was necessary to satisfy their demand. No question was raised as to the validity of the judgment to that extent. The objection to it was as evidence that the amount rendered was an existing obligation or debt against the company. If the court had not acquired jurisdiction over the company, the judgment established nothing as to its liability, beyond the amount which the proceeds of the property discharged. There was no appearance of the company in the action, and judgment against it was rendered for $6,450 by default. The officer, to whom the writ of attachment was issued, returned that, by virtue of it, he had seized and attached certain specified personal property of the defendant, and had also served a copy of the writ, with a copy of the inventory of the property attached, on the defendant, "By delivering the same to Henry J. Colwell, Esq., agent of the said Winthrop Mining Company, personally, in said county." [352]

The laws of Michigan provide for attaching property of absconding, fraudulent and non-resident debtors and of foreign corporations. They require that the writ issued to the sheriff, or other officer by whom it is to be served, shall direct him to attach the property of the defendant, and to summon him if he be found within the county, and also to serve on him a copy of the attachment and of the inventory of the property attached. They also declare that where a copy of the writ of attachment has been personally served on the defendant, the same proceedings may be had thereon in the suit in all respects as upon the return of an original writ of summons personally served, where suit is commenced by such summons. 2 Comp. Laws, 1871, secs. 6397, 6413.

They also provide, in the chapter regulating proceedings by and against corporations, that "Suits against corporations may be commenced by original writ of summons, or by declaration, in the same manner that personal actions may be commenced against individuals; and such writ or a copy of such declaration, in any suit against a corporation, may be served on the presiding officer, the cashier, the secretary or the treasurer thereof; or, if there be no such officer, or none can be found, such service may be made on such other officer or member of such corporation, or in such other manner as the court in which such suit is brought may direct;" and that "In suits commenced by attachment in favor of a resident of this State against any corporation created by or under the laws of any other State, government, or country, if a copy of such attachment, and of the inventory of property attached, shall have been personally served on any officer, member, clerk, or agent of such corporation within this State, the same proceedings shall be thereupon had, and with [353]

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like effect, as in case of an attachment against a natural person, which shall have been returned served in like manner upon the defendant." 2 Comp. Laws, 1871, secs. 6544, 6550.

The courts of the United States only regard judgments of the state courts establishing personal demands as having validity or as importing verity where they have been rendered upon personal citation of the party, or, what is the same thing, of those empowered to receive process for him, or upon his voluntary appearance.

In *Pennoyer* v. *Neff* we had occasion to consider at length the manner in which state courts can acquire jurisdiction to render a personal judgment against non-residents, which would be received as evidence in the Federal courts; and we held that personal service of citation on the party or his voluntary appearance was, with some exceptions, essential to the jurisdiction of the court. The exceptions related to those cases where proceedings are taken in a State to determine the *status* of one of its citizens towards a non-resident, or where a party has agreed to accept a notification to others or service on them as citation to himself. 95 U. S., 714 [XXIV., 565].

The doctrine of that case applies, in all its force, to personal judgments of state courts against foreign corporations. The courts rendering them must have acquired jurisdiction over the party by personal service or voluntary appearance, whether the party be a corporation or a natural person. There is only this difference: a corporation being an artificial being can act only through agents, and only through them can be reached, and process must, therefore, be served upon them. In the State where a corporation is formed, it is not difficult to ascertain who are authorized to represent and act for it. Its charter or the statutes of the State will indicate in whose hands the control and management of its affairs are placed. Directors are readily found, as also the officers appointed by them to manage its business. But the moment the boundary of the State is passed, difficulties arise; it is [354] not so easy to determine who represent the corporation there and under what circumstances service on them will bind it.

Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the State by which it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot, as said by *Chief Justice* Taney, migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves his State, prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and to authorize them legislation was necessary.

In *M'Queen* v. *Middletown Mfg. Co.*, decided in 1819, the Supreme Court of New York, in considering the question whether the law of that State authorized an attachment against the property of a foreign corporation, expressed the opinion that a foreign corporation could not be sued in the State, and gave as a reason that the process must be served on the head or principal officer within the jurisdiction of the sovereignty where the artificial body existed; observing that, if the president of a bank went to New York from another State he would not represent the corporation there; and that "His functions and his character would not accompany him when he moved beyond the jurisdiction of the government under whose laws he derived this character." 16 Johns., 6. The opinion thus expressed was not, perhaps, necessary to the decision of the case; but, nevertheless, it has been accepted as correctly stating the law. It was cited with approval by the Supreme Court of Massachusetts, in 1834, in *Peckham* v. *North Parish in Haverhill*, the court adding that all foreign corporations were without the jurisdiction of the process of the courts of the Commonwealth. 16 Pick., 286. Similar expressions of opinion are found in numerous decisions, accompanied sometimes with suggestions that the doctrine might be otherwise if the foreign corporation sent its officer to reside in the State, and transact business there on its account. [355] *Libbey* v. *Hodgdon*, 9 N. H., 397; *Moulin* v. *Ins. Co.*, 4 Zab. (N. J.), 228.

This doctrine of the exemption of a corporation from suit in a State other than that of its creation, was the cause of much inconvenience and often of manifest injustice. The great increase in the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked. Corporations now enter into all the industries of the country. The business of banking, mining, manufacturing, transportation and insurance is almost entirely carried on by them, and a large portion of the wealth of the country is in their hands. Incorporated under the laws of one State, they carry on the most extensive operations in other States. To meet and obviate this inconvenience and injustice, the Legislatures of several States interposed and provided for service of process on officers and agents of foreign corporations doing business therein. Whilst the theoretical and legal view, that the domicil of a corporation is only in the State where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other States and opened offices and carried on its business there, it was, in effect, as much represented by them there as in the State of its creation. As it was protected by the laws of those States, allowed to carry on its business within their borders and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred.

All there is in the legal residence of a corporation in the State of its creation, consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without as well as within the State. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it, in the States for which they are respectively appointed, when it is called to legal responsibility for their transactions.

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[356] The case is unlike that of suits against individuals. They can act by themselves, and upon them process can be directly served, but a corporation can only act and be reached through agents. Serving process on its agents in other States, for matters within the sphere of their agency, is, in effect, serving process on it as much so as if such agents resided in the State where it was created.

A corporation of one State cannot do business in another State without the latter's consent, express or implied, and that consent may be accompanied with such conditions as it may think proper to impose. As said by this court in *Ins. Co.* v. *French*, "These conditions must be deemed valid and effectual by other States and by this court, provided they are not repugnant to the Constitution or laws of the United States nor inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense." 18 How., 407 [59 U. S., XV., 452]; *Paul* v. *Virginia*, 8 Wall., 181 [75 U. S., XIX., 360].

The State may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that, in any litigation arising out of its transactions in the State, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a State permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the State are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. The decision [357] of this court in the case of *Ins. Co.* v. *French*, to which we have already referred, sustains these views.

The State of Michigan permits foreign corporations to transact business within her limits. Either by express enactment, as in the case of insurance companies, or by her acquiescence, they are as free to engage in all legitimate business as corporations of her own creation. Her statutes expressly provide for suits being brought by them in her courts; and for suits by attachment being brought against them in favor of residents of the State. And in these attachment suits they authorize the service of a copy of the writ of attachment, with a copy of the inventory of the property attached, on "any officer, member, clerk or agent of such corporation" within the State, and give to a personal service of a copy of the writ and of the inventory on one of these persons the force and effect of personal service of a summons on a defendant in suits commenced by summons.

It thus seems that a writ of foreign attachment in that State is made to serve a double purpose: as a command to the officer to attach property of the corporation and as a summons to the latter to appear in the suit. We do not, however, understand the laws as authorizing the service of a copy of the writ, as a summons, upon an agent of a foreign corporation unless the corporation be engaged in business in the State, and the agent be appointed to act there. We so construe the words "agent of such corporation within this State." They do not sanction service upon an officer or agent of the corporation who resides in another State, and is only casually in the State, and not charged with any business of the corporation there. The decision in *Newell* v. *R. Co.*, reported in 19 Mich., 336, supports this view, although that was the case of an attempted service of a declaration as the commencement of the suit. The defendant was a Canadian corporation owning and operating a railroad from Suspension Bridge in Canada to the Detroit line at Windsor, opposite Detroit, and carrying passengers in connection with the Michigan Central Railroad Company, upon tickets sold by such companies respectively. The suit was commenced in Michigan, the declaration alleging a contract by the defendant to carry the plaintiff over its road, and its violation of the contract by removing him from its cars at an intermediate station. [358] The declaration was served upon Joseph Price, the treasurer of the corporation, who was only casually in the State. The corporation appeared specially to object to the jurisdiction of the court, and pleaded that it was a foreign corporation, and had no place of business or agent or officer in the State, or attorney to receive service of legal process, or to appear for it; and that Joseph Price was not in the State at the time of service on him, on any official business of the corporation. The plaintiff having demurred to this plea, the court held the service insufficient. "The corporate entity," said the court, "could, by no possibility, enter the State; and it could do nothing more in that direction than to cause itself to be represented here by its officers or agents. Such representation would, however, necessarily imply something more than the mere presence here of a person possessing, when in Canada, the relation to the company of an officer or agent. To involve the representation of the company here, the supposed representative would have to hold or enjoy in this State an actual present official or representative *status*. He would be required to be here as an agent or officer of the corporation, and not as an isolated individual. If he should drop the official or representative character at the frontier, if he should bring that character no further than the territorial boundary of the government to whose laws the corporate body itself and, consequently, the official positions of its officers also, would be constantly indebted for existence, it could not, with propriety, be maintained that he continued to possess such character by force of our statute. Admitting, therefore, for the purpose of this suit, that in given cases the foreign corporation would be bound by service on its treasurer in Michigan, this

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could only be so when the treasurer, *the then official, the officer then in a manner impersonating the company, should be served.* Joseph Price was not here as the treasurer of the defendants. He did not then represent them. His act in coming was not the act of the company, nor was his remaining, the business or act of any besides himself. He had no principal and he was not an agent. He had no official *status* or representative character in this State."

According to the view thus expressed by the [359] Supreme Court of Michigan, service upon an agent of a foreign corporation will not be deemed sufficient unless he represents the corporation in the State. This representation implies that the corporation does business, or has business in the State, for the transaction of which it sends or appoints an agent there. If the agent occupies no representative character with respect to the business of the corporation in the State, a judgment rendered upon service on him would hardly be considered in other tribunals as possessing any probative force. In a case where similar service was made in New York upon an officer of a corporation of New Jersey accidentally in the former State, the Supreme Court of New Jersey said, that a law of another State which sanctioned such service upon an officer accidentally within its jurisdiction, was "so contrary to natural justice and to the principles of international law, that the courts of other States ought not to sanction it." *Moulin* v. *Ins. Co.*, 4 Zab. (N. J.), 234.

Without considering whether authorizing service of a copy of a writ of attachment as a summons on some of the persons named in the statute, a member, for instance, of the foreign corporation, that is, a mere stockholder, is not a departure from the principle of natural justice mentioned in *Lafayette Ins. Co.* v. *French*, which forbids condemnation without citation, it is sufficient to observe that we are of opinion that when service is made within the State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record, either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the court, that the corporation was engaged in business in the State. The transaction of business by the corporation in the State, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another State, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate *em-* [360] *ployé*, or to a particular transaction, or that his agency had ceased when the matter in suit arose.

In the record, a copy of which was offered in evidence in this case, there was nothing to show, so far as we can see, that the Winthrop Mining Company was engaged in business in the State when service was made on Colwell. The return of the officer, on which alone reliance was placed to sustain the jurisdiction of the state court, gave no information on the subject. It did not, therefore, appear even *prima facie* that Colwell stood in any such representative character to the company as would justify the service of a copy of the writ on him. The certificate of the sheriff, in the absence of this fact in the record, was insufficient to give the court jurisdiction to render a personal judgment against the foreign corporation. The record was, therefore, properly excluded.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 545; 33 Hun, 560; 55 Vt., 492; 45 Am. Rep., 685.

JOHN STEEL ET AL., *Plffs. in Err.*, [447]

v.

ST. LOUIS SMELTING AND REFINING COMPANY.

(See S. C., 16 Otto, 447-457.)

Location of mining lands—decision of Land Department—ejectment—effect of patent—assailing collaterally—estoppel.

1. Land embraced within a town site on the public domain, when unoccupied, is not exempt from location and sale for mining purposes; its exemption is only from settlement and sale under the preemption laws of the United States.

2. The Land Department, in issuing a patent, must necessarily consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation.

3. In actions of ejectment, the legal title must prevail. The patent of the United States passes that title.

4. The patent, like the deed of an individual, is inoperative if the government never owned the property, or had previously conveyed it, or had dedicated it to uses which precluded its sale.

5. The validity of a patent of the government to land cannot be assailed collaterally, because false and perjured testimony may have been used to secure it, any more than a judgment of a court of justice can be assailed collaterally on like ground; the remedy is only by regular judicial proceedings, taken in the name of the government for that special purpose.

6. The principle that one should be estopped from asserting a right to property upon which he has, by his conduct, misled another, who supposed himself to be the owner, to make expenditures, cannot be invoked by one who, at the time the improvements were made, was acquainted with the true character of his own title, or with the fact that he had none.

[No. 957.]

Submitted Dec. 4, 1882. Decided Dec. 18, 1882.

IN ERROR to the Circuit Court of the United States for the District of Colorado.

The history and facts of the case fully appear in the opinion of the court.

Mr. **Thomas A. Green,** for plaintiffs in error.

Messrs. **Alexander F. Britton, Walter H. Smith** and **James H. McGowan,** for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

This was an action by the St. Louis Smelting and Refining Company, a Corporation created

NOTE.—*Patents for land may be set aside for fraud.* See *note* to Miller v. Kerr, 20 U. S. (7 Wheat.), 1.

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under the laws of Missouri, against Steel and others, to recover the possession of certain real property in the City of Leadville, Colorado. It [448] was commenced in one of the courts of the State and on motion of the defendants was removed to the Circuit Court of the United States. The complaint is in the usual form in actions for the recovery of land, according to the practice prevailing in Colorado. It alleges that the plaintiff was duly incorporated, with power to purchase and hold real estate; that it is the owner in fee and entitled to the possession of the premises mentioned, which are described, and that the defendants wrongfully withhold them from the plaintiff to its damage of $1,000. The plaintiff, therefore, prays judgment for the possession of the premises and for the damages mentioned.

The defendants filed an answer to the complaint, which appears to have been amended several times; the questions presented for our consideration having arisen upon the demurrer to the third amended answer. That answer denied the material allegations of the complaint and set up several special defenses, and a counter claim for the value of the improvements put on the premises. The plaintiff demurred to these defenses and to the counter claim. The demurrer was sustained to the defenses and overruled to the counter claim. The defendants elected to stand on their defenses, and final judgment was accordingly entered on the demurrer for the plaintiff for the possession of the premises. To review this judgment, the case is brought by the defendants to this court.

The amended answer averred that the defendants were the owners of the land in controversy "by superiority of possessory title and priority of actual possession" of the premises as part of a town site on the public domain of the United States, located and occupied since June, 1860; that the title of the plaintiff was derived from one Thomas Starr, to whom a patent was issued by the United States, bearing date on the 29th of March, 1879, embracing the premises in controversy; and the special defenses set up were, that the patent was void; that fraud, bribery, perjury and subornation of perjury were used to obtain it; and that Starr, the patentee, was estopped by his conduct from asserting title to the premises.

The patent, which is subsequently stated to be a mineral patent, by which is meant that it was issued upon a claim for mineral land, is averred to be void on these grounds: that the [449] land which it embraces was part of the town site of Leadville when the claim originated, and was thus reserved from sale by the laws of Congress; that the land included in the town site was neither mineral nor agricultural; and that the patentee, Starr, was not a citizen of the United States and had not declared his intention to become one when the patent was issued. These grounds are accompanied with a detail of the facts upon which they are founded, but they are sufficiently stated for the disposition of the questions arising upon them.

Land embraced within a town site on the public domain, when unoccupied, is not exempt from location and sale for mining purposes; its exemption is only from settlement and sale under the preemption laws of the United States. Some of the most valuable mines in the country are within the limits of incorporated cities, which have grown up on what was, on its first settlement, part of the public domain; and many such mines were located and patented after a regular municipal government had been established. Such is the case with some of the famous mines of Virginia City, in Nevada. Indeed, the discovery of a rich mine in any quarter is usually followed by a large settlement in its immediate neighborhood, and the consequent organization of some form of local government for the protection of its members. Exploration in the vicinity for other mines is pushed, in such case, by newcomers, with vigor, and is often rewarded with the discovery of valuable claims. To such claims, though within the limits of what may be termed the site of the settlement or new town, the miner acquires as good a right as though his discovery was in a wilderness, removed from all settlements, and he is equally entitled to a patent for them.

It is the policy of the country to encourage the development of its mineral resources. The Act of July 26, 1866 [14 Stat. at L., 251], declared that all mineral deposits on lands belonging to the United States, were free and open to exploration, and the lands in which they are found, to occupation and purchase by citizens of the United States and those who had declared their intention to become such, subject to regulations prescribed by law, and to the rules and customs of miners, in their several mining districts, so far as the same were applicable and not inconsistent with the laws of the United [450] States. This declaration of the freedom of mining lands to exploration and occupation was repeated in the Act of Congress of May 10, 1872 [17 Stat. at L., 91], and is contained in the Revised Statutes, sec. 2319. Both Acts provided for the acquisition of title, by patent, to mineral lands: the first Act, to such as constituted lode claims; the second, to such as constituted placer claims.

The Acts of Congress relating to town sites recognize the possession of mining claims within their limits, and forbid the acquisition of any mine of gold, silver, cinnabar or copper within them under proceedings by which title to other lands there situated is secured, thus leaving the mineral deposits within town sites open to exploration, and the land in which they are found, to occupation and purchase, in the same manner as such deposits are elsewhere explored and possessed and the lands containing them are acquired. R. S., secs. 2386, 2392.

Whenever, therefore, mines are found in lands belonging to the United States, whether within or without town sites, they may be claimed and worked, provided existing rights of others, from prior occupation, are not interfered with. Whether there are rights thus interfered with, which should preclude the location of the miner and the issue of a patent to him or his successor in interest, is, when not subjected under the law of Congress to the local tribunals, a matter properly cognizable by the Land Department, when application is made to it for a patent; and the inquiry thus presented must necessarily involve a consideration of the character of the land to which title is sought, whether it be mineral, for which a pa-

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tent may issue, or agricultural, for which a patent should be withheld, and also as to the citizenship of the applicant.

We have so often had occasion to speak of the land department, the object of its creation and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to por- [451] tions of the public domain is obtained, and to see that the requirements of different Acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions.

In *Johnson* v. *Towsley*, the effect of the action of that department was the subject of special consideration. And the court applied the general doctrine, "That when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others," and said, speaking by *Mr. Justice* Miller, "That the action of the land office in issuing a patent for any of the public land, subject to sale by preemption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated, and in all courts, and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained." 13 Wall., 83 [80 U. S., XX., 486].

In *French* v. *Fyan*, a patent had been issued to the State of Missouri for swamp and overflowed land, under the Act of September 28, 1850. In an action of ejectment, by a party claiming title under a grant to a railroad company, which would have carried the title if the land were not swamp and overflowed, parol testimony was offered to prove that it was not land of that character, and thus to impeach the validity of the patent. The court below held that the patent concluded the question, and rejected the testimony. The case being brought here the ruling was sustained. This court, speaking through *Mr. Justice* Miller, said: "We are of opinion that, in this action at law, it would be a departure from sound principle, and contrary to well considered judgments in this court, and in others of high authority, to permit the va- [452] lidity of the patent to the State to be subjected to the test of the verdict of a jury, on such oral testimony as might be brought before it. It would be substituting the jury or the court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey." 98 U. S., 172 [XXIII., 813].

In *Quinby* v. *Conlan*, decided at the last Term, we said: "It would lead to endless litigation, and be fruitful of evil, if a supervisory power were vested in the courts over the action of the numerous officers of the land department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, *in a proper proceeding*, interfere and refuse to give effect to their action. On this subject we have repeatedly, and with emphasis, expressed our opinion, and the matter should be deemed settled." 104 U. S., 426 [XXVI., 802]; see, also, *Vance* v. *Burbank*, 101 U. S., 514 [XXV., 929].

It is among the elementary principles of the law that, in actions of ejectment, the legal title must prevail. The patent of the United States passes that title. Whoever holds it must recover against those who have only unrealized hopes to obtain it, or claims which it is the exclusive province of a court of equity to enforce. However great these may be, they constitute no defense in an action at law based upon the patent. That instrument must first be got out of the way, or its enforcement enjoined, before others, having mere equitable rights, can gain or hold possession of the lands it covers. This is so well established, so completely embedded in the law of ejectment, that no one ought to be misled by any argument to the contrary.

It need hardly be said that we are here speaking of a patent issued in a case where the land department had jurisdiction to act, the lands forming part of the public domain, and the law having provided for their sale. If they never were the property of the United States, or if no [453] legislation authorized their sale, or if they had been previously disposed of or reserved from sale, the patent would be inoperative to pass the title, and objection to it could be taken on these grounds at any time and in any form of action. In that respect the patent would be like the deed of an individual, which would be inoperative if he never owned the property, or had previously conveyed it, or had dedicated it to uses which precluded its sale. And, of course, in both cases it is always open to show that the instrument was never executed by the parties whose signatures are attached to it, but is a simulated document. Where ejectment is founded upon either of these instruments, the patent of the government or the deed of an individual, the question being which of the parties has the legal title, it is irrelevant to introduce evidence to show that one of them ought to have had it, and might be able to get it, by a proceeding in some other tribunal or in some other form of action.

As to the allegations that fraud, bribery, perjury and subornation of perjury were used to obtain the patent to Starr, only a few words need be said. The bribery and subornation of perjury are alleged to have been committed by him in inducing parties to make false affidavits

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respecting the claim patented to be laid before the land department; and the perjury alleged consisted in his own affidavit as to his citizenship, the possession and working, by himself or grantors, of the claim for which the patent was issued, and the absence of a town site, embracing the land, and of improvements thereon. The fraud alleged is not a specific charge by itself, but is made in connection with the affidavit of the patentee and his procurement of the false affidavits of others. The charges amount to this: that false and perjured testimony was used to influence the officers of the land department. There is no allegation of improper conduct on the part of those officers. The answer to this ground of defense is that, it is not admissible in an action at law. The validity of a patent of the government cannot be assailed collaterally because false and perjured testimony may have been used to secure it, any more than a judgment of a court of justice can be assailed collaterally on like ground. If a judgment has been obtained by such means, the remedy of the aggrieved party is to apply for a new trial, or [454] take an appeal to a higher court; and if the testimony was accompanied with acts which prevented him from presenting to the court the merits of his case, or by which the jurisdiction of the court was imposed upon, he may also institute some direct proceeding to reach the judgment. *U. S.* v. *Flint*, 4 Sawy., 42; *U. S.* v. *Throckmorton*, 98 U. S., 61 [XXV., 93]; *Vance* v. *Burbank*, 101 U. S., 514 [XXV., 929]. Until set aside or enjoined, it must, of course, stand against a collateral attack, with the efficacy attending judgments founded upon unimpeachable evidence. So with a patent for land of the United States, which is the result of the judgment upon the right of the patentee by that department of the government, to which the alienation of the public lands is confided, the remedy of the aggrieved party must be sought by him in a court of equity, if he possess such an equitable right to the premises as would give him the title if the patent were out of the way. If he occupy with respect to the land no such position as this, he can only apply to the officers of the government to take measures in its name to vacate the patent or limit its operation. It cannot be vacated or limited in proceedings where it comes collaterally in question. It cannot be vacated or limited by the officers themselves; their power over the land is ended when the patent is issued and placed on the records of the department. This can be accomplished only by regular judicial proceedings, taken in the name of the government for that special purpose.

It does not follow that the officers of the government would take such proceedings, even if the charges of fraud and of the use of false testimony in obtaining the patent were true. They might be satisfied that the patentee was entitled to the patent upon other testimony, or, that further proceedings would result in a similar conclusion, and that, therefore, it would be unwise to reopen the matter. In any event, whether the officers of the government have been misled by the testimony produced before them or not, the conclusions reached by them are not to be submitted for consideration to every jury before which the patent may be offered in evidence on the trial of an action. As we said in the case of *Smelting Co.* v. *Kemp:* "It is this unassailable character (of the patent) which gives to it its chief, indeed, its only value, as a [455] means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the land department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence." 104 U. S., 641 [XXVI., 877].

It remains to notice the defense of estoppel. The answer of the defendants alleges that Starr, the patentee, was living in Leadville from 1860 until the patent was issued to him in 1879, and was cognizant of the improvements made and of the large sums of money expended on the premises; that he and his grantors fraudulently remained quiet in respect to their ownership of mining claims there; and, from August, 1870, to the time of their application for a patent, never made known, either to the City of Leadville or to the defendants, that he or they claimed a right to any portion of the land; that other parties who made similar claims, and united with him in securing the patent, also stood by and remained quiet; that the defendants expended the sum of $5,000 in making improvements on the premises in controversy under the claim that they constituted part of a town site on the public domain; that there was no mining on the land, and that no notice was given that would lead the defendants to suppose that there had been any mineral location made by him and his associates; that Starr published the notice of his application for a patent only in a weekly paper of Leadville, and that the description of the consolidated claim was so defective that only a skilled engineer could tell where the land was situated; and that after the defendants discovered that the notice of the patent embraced lands in the city, they were as- [456] sured that they should not be disturbed in their possessions, and that only a nominal sum would be demanded from them, not exceeding $25 a lot; and that, relying upon said assurance, the defendants continued making improvements.

These allegations are very far from establishing such an equity in the defendants as to estop the patentee and those claiming under him, from asserting the legal title to the premises. These matters could not operate to estop the government in any disposition of the land it might choose to make. Its power of alienation could not be affected until the defendants had performed all the acts required by law to acquire a vested interest in the land, and it is not pretended that they took any steps to secure such an interest. Whatever right, therefore, the government possessed, to use or dispose of the property, freed from any claim of the defendants, it could pass to its grantee.

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The principle invoked is, that one should be estopped from asserting a right to property, upon which he has, by his conduct, misled another, who supposed himself to be the owner, to make expenditures. It is often applied where one owning an estate, stands by and sees another erect improvements on it in the belief that he has the title or an interest in it, and does not interfere to prevent the work, or inform the party of his own title. There is in such conduct a manifest intention to deceive, or such gross negligence as to amount to constructive fraud. The owner, therefore, in such a case, will not be permitted afterwards to assert his title and recover the property, at least without making compensation for the improvements. But this salutary principle cannot be invoked by one who, at the time the improvements were made, was acquainted with the true character of his own title or with the fact that he had none. *Brant* v. *Coal and Iron Co.*, 93 U. S., 327 [XXIII., 927]; *Henshaw* v. *Bissell*, 18 Wall., 271 [85 U. S., XXI., 840]. It will not be pretended that the defendants did not understand all about the title to the land; they knew that it was vested in the United States. And we must presume that the patentee gave notice of his purpose to acquire it, such as the law required. The mode and manner of obtaining a patent for mining lands are minutely pre-
[457] scribed by the Acts of Congress. Among other things, the applicant must file his application under them, in the proper land office, showing a compliance with the laws, together with a plat and the field notes of his claim or claims in common, made by or under the direction of the Surveyor-General of the United States, showing their boundaries; and he must, also, and previously to the filing of the application, post a copy of the plat, with a notice of his intended application, in a conspicuous place on the land. It is a conclusion, from the issuing of the patent, that this requirement was complied with and, therefore, it cannot be said here that the patentee did not give notice of his purpose. This notice, as justly observed by the court below, was, of itself, a warning to all who were upon the land and were about to erect improvements upon it, that the patentee was applying for a patent, and thus seeking to obtain the title. And the answer admits that the defendants did ascertain the fact of the application, for they aver a subsequent promise of the applicant to give them a title when the patent was acquired. Under these circumstances, the alleged estoppel, like the other matters urged to defeat the action, must fail.

Though the various matters of fraud, perjury and subornation of perjury, alleged as a defense, are to be taken as true for the purpose of this decision, they are not to be taken as true for any other purpose. What we decide is, that if true, they are not available in this form of action, and that any relief against the patent founded upon them must be sought in another way, and by a direct proceeding.

We have thus considered the propositions of law presented by the record and the matters urged by counsel in his argument, so far as we have deemed them entitled to notice. They disclose nothing which would justify interference with the action of the court below. *Its judgment, therefore, is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—39 Ohio St., 377; 48 Am. Rep., 467.

THE E. E. BOLLES WOODEN WARE COMPANY, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C., 16 Otto, 432-437.)

Damages for cutting timber—willful trespasser—purchaser from — unintentional trespass — vendee.

*In an action for timber cut and carried away from the land of plaintiff, the measure of damages is:

1. Where the defendant is a knowing and willful trespasser, the full value of the property at the time and place of demand; or, of suit brought, with no deduction for labor and expense of the defendant.

2. Where the defendant is an unintentional or mistaken trespasser, or his innocent vendee, the value at the time of conversion, less what the labor and expense of defendant and his vendor have added to its value.

3. Where defendant is a purchaser without notice of wrong from a willful trespasser, the value at the time of such purchase.

[No. 94.]

Argued Nov. 21, 1882. Decided Dec. 18, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin, and on a certificate of division in opinion between the Judges of said court.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **Samuel D. Hastings, Jr.**, and *L. S. Dixon*, for plaintiff in error.

Mr. **William A. Maury**, *Asst. Atty-Gen.*, for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Circuit Court for the Eastern District of Wisconsin, founded on a certificate of division of opinion between the Judges holding that court.

The facts, as certified, out of which this dif- [433]
ference of opinion arose, appear in an action in the nature of trover, brought by the United States for the value of two hundred and forty-two cords of ash timber, or wood suitable for manufacturing purposes, cut and removed from that part of the public lands known as the reservation of the Oneida Tribe of Indians, in the State of Wisconsin. This timber was knowingly and wrongfully taken from the land by Indians, and carried by them some distance to the Town of Depere, and there sold to the defendant, which was not chargeable with any intentional wrong or misconduct or bad faith in the purchase.

The timber on the ground, after it was felled, was worth twenty-five cents per cord, or $60.71 for the whole and, at the Town of Depere, where defendant bought and received it, $3.50 per cord, or $850 for the whole quantity. The question on which the Judges divided was,

*Head notes by *Mr. Justice* MILLER.

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whether the liability of the defendant should be measured by the first or the last of these valuations.

It was the opinion of the Circuit Judge that the latter was the proper rule of damages, and judgment was rendered against the defendant for that sum.

We cannot follow counsel for the plaintiff in error through the examination of all the cases, both in England and this country, which his commendable research has enabled him to place upon the brief. In the English courts the decisions have in the main grown out of coal taken from the mine, and in such cases the principle seems to be established in those courts, that when suit is brought for the value of the coal so taken, and it has been the result of an honest mistake as to the true ownership of the mine, and the taking was not a willful trespass, the rule of damages is the value of the coal as it was in the mine before it was disturbed, and not its value when dug out and delivered at the mouth of the mine. *Martin* v. *Porter*, 5 Mees. & W., 351; *Morgan* v. *Powell*, 3 Ad. & El. (N. S.), 278; *Wood* v. *Morewood*, 3 Ad. & El., 446; *Hilton* v. *Woods*, L. R., 4 Eq., 438; *Jegon* v. *Vivian*, L. R., 6 Ch., 760.

The doctrine of the English courts on this subject is probably as well stated by *Lord* Hatherly in the House of Lords, in the case of *Livingston* v. *Rawyards Coal Co.*, L. R., 5 App. Cas., [434] 33, as anywhere else. He said: "There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle, or, I would rather say, will assert its authority to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done, as would have been justly made to him if the parties had been working by agreement." But "When once we arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him *in specie*."

There seems to us to be no doubt that in the case of a willful trespass, the rule as stated above is the law of damages, both in England and in this country, though in some of the state courts the milder rule has been applied even to this class of cases. Such are some that are cited from Wisconsin. *Single* v. *Schneider*, 24 Wis., 299; *Weymouth* v. *R. R. Co.*, 17 Wis., 550.

On the other hand, the weight of authority, in this country as well as in England, favors the doctrine that, where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern, or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition.

Winchester v. *Craig*, 33 Mich., 205, contains a full examination of the authorities on the point. *Heard* v. *James*, 49 Miss., 236; *Baker* v. *Wheeler*, 8 Wend., 505; *Baldwin* v. *Porter*, 12 Conn., 484.

While these principles are sufficient to enable us to fix a measure of damages in both classes of torts where the original trespasser is defendant, there remains a third class where a purchaser from him is sued, as in this case, for the conversion of the property to his own use. In such case, if the first taker of the property were [435] guilty of no willful wrong, the rule can in no case be more stringent against the defendant who purchased of him than against his vendor.

But the case before us is one where, by reason of the willful wrong of the party who committed the trespass, he was liable, under the rule we have supposed to be established, for the value of the timber at Depere the moment before he sold it; and the question to be decided is, whether the defendant who purchased it then, with no notice that the property belonged to the United States and with no intention to do wrong, must respond by the same rule of damages as his vendor should if he had been sued.

It seems to us that he must. The timber, at all stages of the conversion, was the property of plaintiff. Its purchase by defendant did not devest the title nor the right of possession. The recovery of any sum whatever is based upon that proposition. This right, at the moment preceding the purchase by defendant at Depere, was perfect, with no right in anyone to set up a claim for work and labor bestowed on it by the wrong-doer. It is also plain that by purchase from the wrong-doer defendant did not acquire any better title to the property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of *caveat emptor* applies, and hence the right of recovery in plaintiff.

On what ground then can it be maintained that the right to recover against him should not be just what it was against his vendor the moment before he interfered and acquired possession? If the case were one which concerned additional value placed upon the property by the work or labor of the defendant after he had purchased, the same rule might be applied as in case of the inadvertent trespasser.

But here he has added nothing to its value. He acquired possession of property of the United States at Depere, which, at that place and in its then condition, is worth $850, and he wants to satisfy the claim of the Government by the payment of $60. He founds his right to do this, not on the ground that anything *he* has added to the property has increased its value by the amount of the difference between these two sums, but on the proposition that in purchasing [436] the property, he purchased of the wrong-doer a right to deduct what the labor of the latter had added to its value.

If, as in the case of an unintentional trespasser, such right existed, of course defendant would have bought it and stood in his shoes; but, as in the present case, of an intentional trespasser, who had no such right to sell, the defendant could purchase none.

Such is the distinction taken in the Roman

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law, as stated in the Institutes of Justinian, *lib.* II., title I., sec. 34.

After speaking of a painting by one man on the tablet of another, and holding it to be absurd that the work of an Apelles or Parrhasius should go without compensation to the owner of a worthless tablet, if the painter had possession fairly, he says, as translated by Dr. Cooper: "But if he, *or any other*, shall have taken away the tablet feloniously, it is evident the owner may prosecute by action of theft."

The case of *Nesbitt* v. *Lumber Co.*, 21 Minn., 491, is directly in point here. The Supreme Court of Minnesota says: "The defendant claims that because they (the logs) were enhanced in value by the labor of the original wrong-doer in cutting them, and the expense of transporting them to Anoka, the plaintiff is not entitled to recover the enhanced value, that is, that he is not entitled to recover the full value at the time and place of conversion." That was a case, like this, where the defendant was the innocent purchaser of the logs from the willful wrong-doer, and where, as in this case, the transportation of them to a market was the largest item in their value at the time of conversion by defendant; but the court overruled the proposition and affirmed a judgment for the value at Anoka, the place of sale.

To establish any other principle in such a case as this, would be very disastrous to the interest of the public in the immense forest lands of the Government. It has long been a matter of complaint that the depredations upon these lands are rapidly destroying the finest forests in the world. Unlike the individual owner, who, by fencing and vigilant attention, can protect his valuable trees, the Government has no ade-
[437] quate defense against this great evil. Its liberality in allowing trees to be cut on its land for mining, agricultural and other specified uses, has been used to screen the lawless depredator who destroys and sells for profit.

To hold that when the Government finds its own property in hands but one remove from these willful trespassers, and asserts its right to such property by the slow processes of the law, the holder can set up a claim for the value which has been added to the property by the guilty party in the act of cutting down the trees and removing the timber, is to give encouragement and reward to the wrong-doer, by providing a safe market for what he has stolen and compensation for the labor he has been compelled to do, to make his theft effectual and profitable.

We concur with the Circuit Judge in this case, and the judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—20 N. W. Rep., 156.

Ex Parte:

[371] In the Matter of NEWTON MARTIN CURTIS, *Petitioner.*

(See S. C., 16 Otto, 371-379.)

Act as to money for political purposes—jurisdiction in criminal cases.

1. The 6th section of the Act of August 15, 1876, ch. 287, prohibiting officers or *employés* of the United States from requesting, giving to or receiving from any other officer or *employé* of the government any money or property or other thing of value for political purposes, under a penalty of being discharged and, on conviction fined, is constitutional.

2. The jurisdiction of this court, to review the judgments of the inferior courts of the United States in criminal cases by *habeas corpus*, is limited to the single question of the power of the court to commit the prisoner for the act of which he has been convicted.

[No. 6 Orig.]

Argued Oct. 24, 25, 1882. Decided Dec. 18, 1882.

PETITION for a writ of *habeas corpus.*

The writ of *habeas corpus* is asked for in this case by the petitioner, in order to relieve him from imprisonment under a judgment of the Circuit Court of the United States for the Southern District of New York; that judgment having been rendered upon his conviction under an indictment charging him, an *employé* of the United States, with having received money, etc., for political purposes, from other *employés* of the Government, contrary to the Statute of 1876, chapter 287, section 6, 19 Stat. at L., 169; Rich. Supp., 245.

A further statement of the case appears in the opinion of the court.

Messrs. **Edwin B. Smith,** *T. H. N. McPherson, William Stanley* and *Stephen G. Clarke,* for petitioner:

The Constitution contains no clause and no grant of power, upon which such a law, passed for such a purpose, can rest.

If Congress can, because of his employment, make criminal any act of a federal *employé*, outside the discharge of official duty, it may do so as to every act of his life. Either the nature of the relation and the duties it imposes, must define and circumscribe the power of regulation and dictation by the superior, or else it is without limitation.

The subject-matter sets the bounds, which Congress may not pass.

No act, committed within a State, can be made an offense against the United States, "Unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States."

U. S. v. *Fox*, 95 U. S., 672 (XXIV., 539); *Tennessee* v. *Davis*, 100 U. S., 260 (XXV., 649).

Gen. Curtis is not charged with receiving this money in the course of nor in violation of official duty.

It is because the transaction has no relation to official duty, that it is something with which the Federal Government has, properly, nothing to do.

Not having any relation to the execution of a power of Congress, nor to any "matter within the jurisdiction of the United States," *U. S.* v. *Fox*, 95 U. S., 672 (XXIV., 539), Congress has no right to command in respect to it, and ought not to be obeyed.

This act is the sole instance, in the entire legislation of the country, of basing a conviction of crime upon the mere fact of the relation of the offender or the party injured to the United States.

1 Abb. U. S., ch. 5, tit. Crimes, pp. 406-461.

In every other instance, the purpose has been to guard and promote the interests of the United States. If, incidentally, the functionary (mail-carrier for instance) is protected in the

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discharge of his duty, it is simply in order that he may discharge the duty devolved upon him; not that the individual may be exempted from physical pain or mental annoyance.

Osborn v. *U. S. Bank*, 9 Wheat., 865, bottom; *U. S.* v. *Harvey*, 8 Law Rep., 77; *U. S.* v. *Parsons*, 2 Blatchf., 104, 108; *U. S.* v. *Gay*, 2 Gall., 359; *U. S.* v. *Hart*, Pet. C. C., 390; *U. S.* v. *Kirby*, 7 Wall., 482 (74 U. S., XIX., 278); *U. S.* v. *Sander*, 6 McLean, 598, 601.

Neither the United States, nor any State, can constitutionally pass such a law as this, because it violates mutual right.

Speaking of these rights, Cooley, *J.*, says: "There are some things too plain to be written," even in a Constitution.

People v. *Hurlbut*, 24 Mich., 107; 2 Webster's Works, 392; 1 Bl. Com., 124; 2 Story's Life, 278, letter to Dr. Lieber; *Calder* v. *Bull*, 3 Dall., 388, top; *Wilkinson* v. *Leland*, 2 Pet., 657; *Bartemeyer* v. *Iowa*, 18 Wall, 132 (85 U. S., XXI., 930].

In the last mentioned case, Miller, *J.*, mentions, as existing outside of constitutions, those "general principles supposed to limit all legislative power."

Merrill v. *Sherburne*, 1 N. H., 213; *People* v. *Supervisors*, 4 Barb., 74; *Benson* v. *Mayor*, 10 Barb., 244; *Powers* v. *Bergen*, 6 N. Y., 366; *Goshen* v. *Stonington*, 4 Conn., 209; *Lee* v. *State*, 26 Ark., 265.

Messrs. **Everett P. Wheeler, Frederick W. Whitridge** and **Samuel F. Phillips**, *Solicitor-Gen., contra:*

Political office is merely a trust which is to be conferred upon whatever conditions the Government chooses to impose. If the conditions are unacceptable to the office holder, he is under no obligation to take the office, and he has no constitutional or other right to require the conditions of the trust he accepts to be subsequently altered or removed. In the language of the court below, "No citizen is required to hold a public office, and if he is unwilling to do so upon such conditions as are prescribed by that department of the Government which creates the office, fixes its tenure and incidents, it is his duty to resign."

12 Fed. Rep., 824.

In considering the propriety of this law, it may, however, be desirable to examine other laws of Congress which, in greater or less degree, also affect individuals, by interference with their individual action in certain cases, and which thus afford a practical construction of the Constitution upon the points here involved.

Section 243, Rev. Stat., restricts the right of any person appointed to the office of Secretary of the Treasury, or First Comptroller, or First Auditor, or Treasurer or Register, to directly or indirectly be interested in trade or commerce, or be owner of any sea vessel or any public property, or be concerned in the purchase or disposal of any public securities of any State or of the United States, or take or apply to his own use any emolument or gain for negotiating or transacting any business in the treasury department, other than what shall be allowed by law. Any person so offending shall be guilty of a high misdemeanor, fined and removed from office.

Section 243, Rev. Stat., restricts the right of every clerk employed in the treasury department to carry on any trade or business in the funds or debts of the United States or of any States, or in any kind of public property, or to take or apply to his own use any emolument or gain for negotiating or transacting any business in the department, and it provides that, if he does so, he shall be deemed guilty of a misdemeanor and punished by a fine of $500 and removed from office.

Section 329, Rev. Stat., restricts the right of the Comptroller of the Currency, either directly or indirectly, to be interested in any association issuing national currency under the laws of the United States.

Section 452, Rev. Stat., restricts the right of the officers, clerks and *employés* in the General Land-Office from directly or indirectly having or becoming interested in the purchase of any public land.

Section 1358, Rev. Stat., restricts the right of officers of certain prisons to be interested in any way in any contract on account of such prisons.

Section 1546, Rev. Stat., restricts the right of any officer or *employé* of the Government to request any workman in the navy yard to contribute or pay any money for political purposes.

Section 1688, Rev. Stat., restricts the right of persons employed in the diplomatic service of the United States to wear certain kinds of clothing not authorized by Congress.

Section 1784, Rev. Stat., restricts the right of certain officers of the United States to be presented with gifts by other officers, or to make such gifts, or to subscribe to or ask subscriptions for the purchase of such gifts.

Section 1789, Rev. Stat., restricts the right of revenue officers to engage in certain trades or business.

Section 2078, Rev. Stat., restricts the right of certain persons to trade with the Indians.

Section 5498, Rev. Stat., restricts the rights of all officers of the United States Government from acting as the agent or attorney for the prosecution of any claim against the United States.

Each of these statutes restricts the right of the individual to do what he pleases, or interferes with his disposition of his private property, in the same manner as the statute here under consideration. In each of these cases and in every similar case, such rights of the individual are properly restricted under the Constitution, because the general welfare requires that such restriction shall be imposed; and it is confidently submitted that neither any one of them, nor the law in question, improperly deprives the individual of any of his legal or constitutional rights.

2. The law is within the implied powers of Congress, and is expressly authorized by Article I, section 8 of the Constitution.

That article gives Congress power "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department of office thereof."

McCulloch v. *Maryland*, 4 Wheat., 415; *Martin* v. *Hunter*, 1 Wheat., 304; Story, Const., sec. 1251.

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These powers may be applied at the discretion of Congress, when it is necessary, if proper means be employed.

Anderson v. *Dunn*, 6 Wheat., 215; *McCulloch* v. *Maryland*, 4 Wheat., 316; *Low* v. *R. R. Co.*, 52 Cal., 63; *Metropolitan Bank* v. *Van Dyke*, 27 N. Y., 400; *In re Jackson*, 14 Blatchf., 245-249; *McCulloch* v. *Maryland*, 4 Wheat., 421, 423; *Legal Tender Cases*, 12 Wall., 539 (79 U. S., XX., 308); *Hepburn* v. *Griswold*, 8 Wall., 604 (75 U. S., XIX., 513).

The power to pass this law is a corollary of the power to create offices.

The Legislature can abolish or change an office created by it, and extend or abridge the terms of its incumbents.

In re Bulger, 45 Cal., 553; *Collins* v. *Tracy*, 36 Tex., 546.

The power to pass this law follows from the power conferred upon Congress to regulate elections.

Const. Art. I, sec. 4; *Ex parte Siebold*, 100 U. S., 371 (XXV., 717).

Indictments under the statute against bribery have been sustained by the courts.

U. S. R. S., sec. 5511; *U. S.* v. *Hendrick*, 2 Sawy., 476; *U. S.* v. *O'Neill*, 2 Sawy., 481; *U. S.* v. *Johnson*, 2 Sawy., 482.

The constitutionality of the law is to be affirmed, unless it is shown to be clearly in violation of the Provisions of the Constitution.

Cooley, Const. L., 200; *Legal Tender Cases*, 12 Wall., 457 (79 U. S., XX., 287); *Commonwealth* v. *Smith*, 4 Binn., 123; *Munn* v. *Illinois*, 94 U. S., 113 (XXIV., 77); *Fletcher* v. *Peck*, 6 Cranch, 87; *People* v. *Supervisors of Orange*, 17 N.Y., 241; *Bertholf* v. *O'Reilly*, 74 N. Y., 514.

The meaning and object of the statute, therefore, being clear, as it is not prohibited by the Constitution nor repugnant to its spirit; as it is within the implied powers of Congress; as it is a necessary attendant upon the power to regulate elections and create offices and as it imposes a regulation necessary to the public welfare, its enactment is within the discretion of Congress. It is, therefore, constitutional, and the writ should be dismissed, and the petitioner remanded to custody.

Mr. Chief Justice **Waite** delivered the opinion of the court:

In the Act of August 15, 1876, making appropriations for the legislative, executive and judicial expenses of the Government, ch. 287, 19 Stat. at L., 143; 1 Supp. R. S., 245, the following appears as section 6:

"Section 6. That all executive officers or *employés* of the United States not appointed by the President, with the advice and consent of the Senate, are prohibited from requesting, giving to or receiving from any other officer or *employé* of the Government, any money or property or other thing of value, for political purposes; and any such officer or *employé*, who shall offend against the provisions of this section, shall be at once discharged from the service of the United States; and he shall also be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not exceeding $500.

Curtis, the petitioner, an *employé* of the United States, was indicted in the Circuit Court for the Southern District of New York, and convicted under this Act for receiving money for political purposes from other *employés* of the Government. Upon his conviction, he was sentenced to pay a fine and stand committed until payment was made. Under this sentence he was taken into custody by the marshal, and on his application a writ of *habeas corpus* was issued by one of the Justices of this court in vacation, returnable here at the present Term, to inquire into the validity of his detention. The important question presented on the return to the writ so issued is, whether the Act under which the conviction was had is constitutional.

The Act is not one to prohibit all contributions of money or property, by the designated [372] officers and *employés* of the United States, for political purposes. Neither does it prohibit them altogether from receiving or soliciting money or property for such purposes. It simply forbids their receiving from or giving to each other. Beyond this no restrictions are placed on any of their political privileges.

That the Government of the United States is one of delegated powers only, and that its authority is defined and limited by the Constitution, are no longer open questions; but express authority is given Congress by the Constitution to make all laws necessary and proper to carry into effect the powers that are delegated. Art. I., sec. 8. Within the legitimate scope of this grant, Congress is permitted to determine for itself what is necessary and what is proper.

The Act now in question is one regulating in some particulars the conduct of certain officers and *employés* of the United States. It rests on the same principle as that originally passed in 1789 [1 Stat. at L., 67] at the first session of the first Congress, which makes it unlawful for certain officers of the treasury department to engage in the business of trade or commerce, or to own a sea vessel, or to purchase public lands or other public property, or to be concerned in the purchase or disposal of the public securities of a State, or of the United States (Rev. Stat., sec. 243); and that passed in 1791 [1 Stat. at L., 215], which makes it an offense for a clerk in the same department to carry on trade or business in the funds or debts of the States or of the United States, or in any kind of public property (*Id.*, sec. 244); and that passed in 1812 [2 Stat. at L., 788]; which makes it unlawful for a judge appointed under the authority of the United States to exercise the profession of counsel or attorney, or to be engaged in the practice of the law (*Id.*, sec. 713); and that passed in 1853 [10 Stat. at L., 170], which prohibits every officer of the United States, or person holding any place of trust or profit, or discharging any official function under or in connection with any Executive Department of the Government of the United States, or under the Senate or House of Representatives, from acting as an agent or attorney for the prosecution of any claim against the United States (*Id.*, sec. 5498); and that passed in 1863 [12 Stat. at L., 765], prohibiting members of Congress from practicing in the Court of Claims (*Id.*, sec. 1058); and that passed in 1867 [14 Stat. at L., 492], punishing, by dis- [373] missal from service, an officer or *employé* of the Government who requires or requests any working man in a navy yard to contribute or pay any money for political purposes (*Id.*, sec. 1546); and that passed in 1868 [2 Stat. at L., 484], pro-

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hibiting members of Congress from being interested in contracts with the United States (*Id.*, sec. 3739); and another passed in 1870 [16 Stat. at L., 63], which provides that no officer, clerk or *employé* in the Government of the United States shall solicit contributions from other officers, clerk or *employés* for a gift to those in a superior official position, and that no officials or clerical superiors shall receive any gift or present as a contribution to them from persons in Government employ getting a less salary than themselves, and that no officer or clerk shall make a donation as a gift or present to any official superior (*Id.*, sec. 1784). Many others of a kindred character might be referred to, but these are enough to show what has been the practice in the Legislative Department of the Government from its organization and, so far as we know, this is the first time the constitutionality of such legislation has ever been presented for judicial determination.

The evident purpose of Congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly, such a purpose is within the just scope of legislative power, and it is not easy to see why the Act now under consideration does not come fairly within the legitimate means to such an end. It is true, as is claimed by the counsel for the petitioner, political assessments upon office holders are not prohibited. The managers of political campaigns, not in the employ of the United States, are just as free now to call on those in office for money to be used for political purposes as ever they were, and those in office can contribute as liberally as they please, provided their payments are not made to any of the prohibited officers or *employés*. What we are now considering is not whether Congress has gone as far as it may, but whether that which has been done is within the constitutional limits upon its legislative discretion.

A feeling of independence under the law conduces to faithful public service, and nothing tends more to take away this feeling than a [374] dread of dismissal. If contributions from those in public employment may be solicited by others in official authority, it is easy to see that what begins as a request may end as a demand, and that a failure to meet the demand may be treated by those having the power of removal, as a breach of some supposed duty, growing out of the political relations of the parties. Contributions secured under such circumstances will quite as likely be made to avoid the consequences of the personal displeasure of a superior, as to promote the political views of the contributor; to avoid a discharge from service, not to exercise a political privilege. The law contemplates no restrictions upon either giving or receiving, except so far as may be necessary to protect, in some degree, those in the public service against exactions through fear of personal loss. This purpose of the restriction, and the principle on which it rests, are most distinctly manifested in section 1546, *supra;* the re-enactment in the Revised Statutes of section 3, of the Act making appropriations for the naval service for the year ending June 30, 1868, 14 Stat. at L., 492, ch. 172, which subjected an officer or *employé* of the Government to dismissal if he required or requested a workingman in a navy yard to contribute or pay any money for political purposes, and prohibited the removal or discharge of a workingman for his political opinions; and in section 1784, the re-enactment of the Act of February 1, 1870, ch. 11, 16 Stat. at L., 63, "To protect officials in public employ," by providing for the summary discharge of those who make or solicit contributions for presents to superior officers. No one can for a moment doubt that in both these statutes the object was to protect the classes of officials and *employés* provided for, from being compelled to make contributions for such purposes through fear of dismissal if they refused. It is true that dismissal from service is the only penalty imposed, but this penalty is given for doing what is made a wrongful act. If it is constitutional to prohibit the Act, the kind or degree of punishment to be inflicted for disregarding the prohibition is clearly within the discretion of Congress, provided it be not cruel or unusual.

If there were no other reasons for legislation of this character than such as relate to the protection of those in the public service against unjust exactions, its constitutionality would, in our opinion, be clear; but there are others, to our minds, equally good. If persons in public [375] employ may be called on by those in authority to contribute from their personal income to the expenses of political campaigns, and a refusal may lead to putting good men out of the service, liberal payments may be made the ground for keeping poor ones in. So, too, if a part of the compensation received for public services must be contributed for political purposes, it is easy to see that an increase of compensation may be required to provide the means to make the contribution, and that in this way the Government itself may be made to furnish, indirectly, the money to defray the expenses of keeping the political party in power that happens to have for the time being the control of the public patronage. Political parties must almost necessarily exist under a republican form of government, and when public employment depends to any considerable extent on party success, those in office will naturally be desirous of keeping the party to which they belong in power. The statute we are now considering does not interfere with this. The apparent end of Congress will be accomplished if it prevents those in power from requiring help for such purposes, as a condition to continued employment.

We deem it unnecessary to pursue the subject further. In our opinion the statute under which the petitioner was convicted is constitutional. The other objections which have been urged to the detention cannot be considered in this form of proceeding. Our inquiries in this class of cases are limited to such objections as relate to the authority of the court to render the judgment by which the prisoner is held. We have no general power to review the judgments of the inferior courts of the United States in criminal cases, by the use of the writ of *habeas corpus* or otherwise. Our jurisdiction is limited to the single question of the power of the court to commit the prisoner for the act of which he

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has been convicted. *Ex parte Lange*, 18 Wall., 163 [85 U. S., XXI., 872]; *Ex parte Rowland*, 104 U. S., 604 [XXV., 861].

The commitment in this case was lawful and the petitioner is, consequently, remanded to the custody of the Marshal for the Southern District of New York.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[376] *Mr. Justice* **Bradley**, dissenting:

I cannot concur in the opinion of the court in this case. The law under which the petitioner is imprisoned makes it a penal offense for any executive officer or *employé* of the United States, not appointed by advice of the Senate (an unimportant distinction, so far as the power to make the law is concerned), to request, give to or receive from any other officer or *employé* of the Government any money or property or other thing of value, for political purposes; thus, in effect, making it a condition of accepting any employment under the Government, that a man shall not, even voluntarily and of his own free will, contribute in any way through or by the hands of any other *employé* of the Government, to the political cause which he desires to aid and promote. I do not believe that Congress has any right to impose such a condition upon any citizen of the United States. The offices of the Government do not belong to the legislative department, to dispose of on any conditions it may choose to impose. The Legislature creates most of the offices, it is true, and provides compensation for the discharge of their duties; but that is its duty to do, in order to establish a complete organization of the functions of government. When established, the offices are or ought to be open to all. They belong to the United States and not to Congress, and every citizen, having the proper qualifications, has the right to accept office and to be a candidate therefor. This is a fundamental right of which the Legislature cannot deprive the citizen, nor clog its exercise with conditions that are repugnant to his other fundamental rights. Such a condition I regard that imposed by the law in question to be. It prevents the citizen from co-operating with other citizens of his own choice in the promotion of his political views. To take an interest in public affairs, and to further and promote those principles which are believed to be vital or important to the general welfare, is every citizen's duty. It is a just complaint that so many good men abstain from taking such an interest. Amongst the necessary and proper means for promoting political views, or any other views, are association and contribution of money or for that purpose, both to aid discussion and to disseminate information and sound doctrine. To deny to a man the privilege of associating and [377] making joint contributions with such other citizens as he may choose, is an unjust restraint of his right to propagate and promote his views on public affairs. The freedom of speech and of the press, and that of assembling together to consult upon and discuss matters of public interest, and to join in petitioning for a redress of grievances, are expressly secured by the Constitution. The spirit of this clause covers and embraces the right of every citizen to engage in such discussions, and to promote the views of himself and his associates freely, without being trammeled by inconvenient restrictions. Such restrictions, in my judgment, are imposed by the law in question. Every person accepting any, the most insignificant, employment under the Government must withdraw himself from all societies and associations having for object the promotion of political information or opinions. For if one officer may continue his connection, others may do the same, and thus it can hardly fail to happen that some of them will give and some receive funds, mutually contributed for the purposes of the association. Congress might just as well, so far as the power is concerned, impose, as a condition of taking any employment under the Government, entire silence on political subjects, and a prohibition of all conversation thereon between government *employés*. Nay, it might as well prohibit the discussion of religious questions, or the mutual contribution of funds for missionary or other religious purposes. In former times, when the slavery question was agitated, this would have been a very convenient law to repress all discussion of the subject on either side of Mason and Dixon's line. At the present time, any efficient connection with an association in favor of a prohibitory liquor law, or of a protective tariff, or of greenback currency, or even for the repression of political assessments, would render any government official obnoxious to the penalties of the law under consideration. For all these questions have become political in their character, and any contributions in aid of the cause would be contributions for political purposes. The whole thing seems to me absurd. Neither men's mouths nor their purses can be constitutionally tied up in that way. The truth is that public opinion is oftentimes like a pendulum, swinging backward and forward to extreme lengths. We are not unfrequently in [378] danger of becoming purists, instead of wise reformers, in particular directions; and hastily pass inconsiderate laws which overreach the mark they are aimed at, or conflict with rights and privileges that a sober mind would regard as indisputable. It seems to me that the present law, taken in all its breadth, is one of this kind.

The Legislature may, undoubtedly, pass laws excluding from particular offices those who are engaged in pursuits incompatible with the faithful discharge of the duties of such offices. That is quite another thing.

The Legislature may make laws ever so stringent to prevent the corrupt use of money in elections, or in political matters generally, or to prevent what are called political assessments on government *employés*, or any other exercise of undue influence over them by government officials or others. That would be all right. That would clearly be within the province of legislation.

It is urged that the law in question is intended, so far as it goes, to effect this very thing. Probably it is. But the end does not always sanctify the means. What I contend is, that in adopting this particular mode of restraining an acknowledged evil, Congress has overstepped its legitimate powers, and interfered with the substantial rights of the citizen. It is not lawful to do evil that good may come. There are plenty of ways in which wrong may be suppressed without resorting to wrongful measures to do it. No doubt it would often greatly tend to prevent the

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spread of a contagious and deadly epidemic, if those first taken should be immediately sacrificed to the public good. But such a mode of preventing the evil would hardly be regarded as legitimate in a Christian country.

I have no wish to discuss the subject at length, but simply to express the general grounds on which I think the legislation in question is *ultra vires*. Though as much opposed as anyone to the evil sought to be remedied, I do not think the mode adopted is a legitimate or constitutional one, because it interferes too much with the freedom of the citizen in the pursuit of lawful and proper ends. If similar laws have been passed before, that does not make it right. The [379] question is, whether the present law, with its sweeping provisions, is within the just powers of Congress. As I do not think it is, I dissent from the opinion of the majority of the court.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 180; 114 U. S., 421.

INDEPENDENT SCHOOL DISTRICT OF ACKLEY, HARDIN COUNTY, IOWA, *Plff. in Err.*,

v.

F. G. HALL.

(See S. C., 16 Otto, 428, 429.)

Assignment of errors—filing same.

1. A failure to annex to or return with a writ of error an assignment of errors, as required by section 997 of the Revised Statutes, is no ground for dismissal for want of jurisdiction.
2. If the assignment is filed in accordance with the requirements of paragraph 4, Rule 21, it will ordinarily be enough.

[No. 725.]

Submitted Dec. 4, 1882. Decided Dec. 18, 1882.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

On motions to dismiss and affirm.

Messrs. **Alexander T. Britton,** *C. C. Nourse* and *Walter H. Smith*, for defendant in error, in support of motions.

Mr. **Galusha Parsons,** for plaintiff in error, *contra.*

[429] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

These motions are denied. A failure to annex to or return with a writ of error an assignment of errors, as required by section 997 of the Revised Statutes, is no ground for dismissal for want of jurisdiction. If an assignment is filed in accordance with the requirements of paragraph 4, Rule 21, it will ordinarily be enough.

There is not in this case such a color of right to a dismissal as to make it proper for us to consider the motion to affirm. *Whitney* v. *Cook*, 99 U. S., 607 [XXV., 446].

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ALBERT GRANT, *Appt.*,

v.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY.

(See S. C., 16 Otto, 429-432.)

Final decree, what is—decree in foreclosure.

1. A decree to be final, so as to give this court jurisdiction on appeal, must terminate the litigation of the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the decree it had already rendered.
2. A decree in a foreclosure suit, which does not order a sale of the property, but overrules the defense set forth in a cross-bill, and declares that the appellee is the owner of the debt secured, and refers the case to an auditor to ascertain the amount due thereon, the existence, amounts and priorities of liens, and the claims for taxes, is not a final decree.

[No. 1086.]

Submitted Nov. 20, 1882. Decided Dec. 18, 1882.

APPEAL from the Supreme Court of the District of Columbia.

The history and facts of the case sufficiently appear in the opinion of the court.

On motion to dismiss.

Messrs. **William F. Mattingly** and **Richard T. Merrick,** for appellee, in support of motion.

Messrs. **William A. Meloy,** *Benjamin F. Butler* and *H. W. Blair*, for appellant, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an appeal from the following decree in a suit for the foreclosure of certain deeds of trust in the nature of mortgages to secure the payment of money:

"The cause came on to be heard upon the pleadings and proofs therein and having been submitted by the counsel of the respective parties and duly considered by the court, and it appearing to the court that said defendant, Albert Grant, is not entitled to any relief under his cross-bill in this cause; that the plaintiff is the holder and owner of the several obligations of said Grant, secured by the deeds of trust on the real estate prayed in the original bill of complaint herein to be sold for the payment of the indebtedness thereon, and mentioned and set forth in the 3d, 4th, 5th, 6th, 7th and 8th paragraphs of said bill; that said Grant has made [430] default in the payment of his said obligations, on which he is indebted to the plaintiff in large sums of money, with long arrearages of interest: that said Grant has not paid taxes on said real estate for a number of years, and the same are in arrears for upwards of $20,000; that said indebtedness of said defendant Grant to the plaintiff largely exceeds the value of said real estate, and that the plaintiff has no personal security for its said debt; it is, this second day of March, A. D. 1882, ordered, adjudged, and decreed that this cause be, and the same hereby is, referred to the auditor of the court to state the account between the plaintiff and the defendant, Albert Grant; the amount due under said several deeds of trust on said real estate prayed to be sold in

NOTE.—*What is final decree or judgment of state or other court from which appeal lies.* See *note* to Gibbons v. Ogden, 19 U. S. (6 Wheat.), 448.

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said bill; the amounts due said judgment and mechanics' lien creditors referred to in said bill; whether the same are liens upon any of said real estate; the relative priorities of the claims of said creditors and the plaintiff, and the value of the said real estate, all from the proofs in this cause, except as to said mechanics' lien, and report the same to this court. And said auditor shall further ascertain and report to thiscourt the amount due for taxes in arrears on said real estate, and whether the same or any part thereof has been sold for taxes, and if so, when, for what taxes, for what amount and to whom."

To this was added an order appointing a receiver to take possession of the property, make leases, etc.

A motion is now made to dismiss, because the decree appealed from is not a final decree.

The rule is well settled that a decree to be final, within the meaning of that term as used in the Acts of Congress giving this court jurisdiction on appeal, must terminate the litigation of the parties on the merits of the case, so that if there should be an affirmance here, the court [431] below would have nothing to do but to execute the decree it had already rendered. This subject was considered at the present Term in *Bostwick* v. *Brinkerhoff* [*ante*, 73], where a large number of cases are cited. It has also been many times decided that a decree of sale in a foreclosure suit, which settles all the rights of the parties and leaves nothing to be done but to make the sale and pay out the proceeds, is a final decree for the purposes of an appeal. *Ray* v. *Law*, 8 Cranch, 179; *Whiting* v. *Bank*, 13 Pet., 15; *Bronson* v. *R. R. Co.*, 2 Black, 531 [67 U. S., XVII., 360]; *Green* v. *Fisk*, 103 U. S., 520 [XXVI., 486]. But in *R. R. Co.* v. *Swasey*, 23 Wall., 409 [90 U. S., XXIII., 137], it was held that "To justify such a sale, without consent, the amount due upon the debt must be determined. * * * Until this is done, the rights of the parties are not all settled. Final process for the collection of money cannot issue until the amount to be paid or collected by the process, if not paid, has been adjudged." In this, the court but followed the principle acted on in *Barnard* v. *Gibson*, 7 How., 656; *Humiston* v. *Stainthorp*, 2 Wall., 106 [69 U. S., XVII., 905]; *Crawford* v. *Points*, 13 How., 11, and many other cases.

The present decree is not final according to this rule. It does not order a sale of the property. It overrules the defense of the appellant as set forth in his cross-bill, and declares that the appellee is the holder and owner of the debt secured by the deeds of trust, but refers the case to an auditor to ascertain the amount due upon the debt, the amount due certain judgment and lien creditors, the existence and priorities of liens and the claims for taxes. It is true that the court finds the amount due the appellee largely exceeds the value of the property, but this is only as a foundation for the order appointing the receiver. If, in point of fact, it is not true, the finding will not conclude the parties in the final closing up of the suit. The order for the delivery of the property is only in aid of the foreclosure proceedings, and to subject the income pending the suit, to the payment of any sum that may in the end be found to be due. If anything remains, either of the income or of the proceeds of the sale after the mortgage or trust debts are satisfied, it will go to the appellant, notwithstanding what has been decreed. There is no order as in *Forgay* v. *Conrad*, 6 How., 201; *Thompson* v. *Dean*, 7 Wall., 346 [74 U. S., XIX., 95], and other cases of a like character, adjudging the [432] property to belong absolutely to the appellee, and ordering immediate delivery of possession. In *Forgay* v. *Conrad*, *supra*, which is a leading case on this question, it was expressly said by *Chief Justice* Taney (p. 204) that the rule did not extend to cases where property was directed to be delivered to a receiver. The reason is that the possession of the receiver is that of the court, and he holds, pending the suit, for the benefit of whomsoever it shall in the end be found to concern. Neither the title nor the rights of the parties are changed by his possession. He acts as the representative of the court in keeping the property so that it may be subjected to any decree that shall finally be rendered against it.

It follows that the appeal must be dismissed; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Dissenting, *Mr. Justice* **Miller.**

Cited—108 U. S., 28, 242.

CITY OF PARKERSBURG, *Appt.*,
v.
ISABELLA BROWN ET AL.

(See S. C., 16 Otto, 487-504.)

West Virginia Act authorizing municipal bonds —when void as not for public object—estoppel —obligation of city—reclaiming property—decree.

*1. The Act of the Legislature of West Virginia, passed December 15, 1868, ch. 118, authorizing the City of Parkersburg to issue its bonds for the purpose of lending the same to persons engaged in manufacturing, was invalid, and the bonds issued under it are void, as against the City.

2. As the consideration for bonds to the amount of $20,000, issued by the City to M., under said Act, he executed to J., as trustee, a deed conveying to J certain real estate and personal property, in trust to secure the payment by M., to the City of semi-annual interest on $20,000, and of annual installments on the principal, with a power of sale in case of default. The bonds were payable to M., or order. He indorsed them in blank and sold them to the plaintiffs, who bought them for value, in good faith. M paid to the City one installment of interest. The City made five payments of interest on the bonds. It took into its possession the property and refused to make further payments of interest. In a suit in equity brought by the holders of the bonds against the City, *Held:*

(1) The bonds were void because the necessary amount to pay the principal and interest of them was to be raised by taxation, and such taxation was not taxation for a public object, and the Constitution of the State did not authorize such taxation, and the Legislature had no power to pass said Act.

(2) The payment of interest on the bonds by the City did not, nor did the acts of its officers or agents in dealing with the property, operate, by way of estoppel or ratification, to make the City liable on the bonds, there having been a total want of power to issue them originally.

(3) The bill having prayed for a receiver of the property, but none having been applied for, and the suit not having been brought to a hearing for nearly three years, and the City having been allowed to control and manage the property meantime, and M., being a party to the suit, and making

*Head notes by *Mr. Justice* BLATCHFORD.

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no defense; and the City having acted in good faith and with reasonable discretion, in taking care of the property and disposing of some of it, the receipt of the property by the City did not create an obligation on its part to pay the bonds.

(4) M., had a right to reclaim the property and to call on the City to account for it, in disaffirmance of the illegal contract, the transaction being merely *malum prohibitum*, and the City being the principal offender. Such right passed to the plaintiffs as an incident to the bonds.

(5) A decree was ordered declaring that the City, in issuing the bonds, exceeded its lawful powers, and that they cannot be enforced as obligations of the City; and providing for a sale of the remaining property, and the taking of an account between the City and the property, crediting the City with the sums it had paid in good faith to acquire, protect, preserve and dispose of the property; and for insurance and taxes, and the amount it had paid in paying the coupons it had paid; and charging it with what it had received, but not charging it with any sum for loss of or damage to or depreciation of the property, and the distribution among the plaintiffs of the net proceeds of the sale and the net amount of money, if any, remaining in the hands of the City, received from M., or from the sales by it of any of the property received by it.

[No. 124.]

Argued Dec. 12, 13, 1882. Decided Jan. 8, 1883.

APPEAL from the Circuit Court of the United States for the District of West Virginia.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **William A. Cook** and **C. C. Cole**, for appellant:

The Act of the Legislature of West Virginia, passed on the 15th day of December, 1868, purports to authorize the city council to issue and loan its bonds in furtherance of a private enterprise.

It is presumed that the legislative intent was to empower the collection of a tax for the ultimate payment of these bonds should it become necessary. This is in excess of the legislative power of taxation, and it follows that the Act and bonds are void.

Loan Association v. *Topeka*, 20 Wall., 655 (87 U. S., XXII., 455); *Allen* v. *Inhab. of Jay*, 60 Me., 124; *Lowell* v. *Boston*, 111 Mass., 454; *State* v. *Osawkee*, 14 Kan., 418; *Weismer* v. *Vil. of Douglas*, 64 N. Y., 91; *Crampton* v. *Zabriskie*, 101 U. S., 601 (XXV., 1070).

The bonds in question were issued in violation of the provisions of the 8th section of the 10th article of the Constitution of the State of West Virginia, adopted on the 22d day of August, 1872.

List v. *Wheeling*, 7 W. Va., 501; *Aspinwall* v. *Comrs.*, 22 How., 364 (63 U. S., XVI., 296).

If the statute confers no power to issue the bonds, there can be no *bona fide* holding and no estoppel.

Thomas v. *Richmond*, 12 Wall., 355 (79 U. S., XX., 457); *Loan Asso.* v. *Topeka*, 20 Wall., 655 (87 U. S., XXII., 455); *Ottawa* v. *Perkins*, 94 U. S., 260 (XXIV., 154); *Township of Oakland* v. *Skinner*, 94 U. S., 255 (XXIV., 125); *U. S.* v. *Macon Co.*, 99 U. S., 582 (XXV., 381); *Anthony* v. *Co. of Jasper*, 101 U. S., 693 (XXV., 1005); *Wells* v. *Supervisors*, 102 U. S., 625 (XXVI., 122); *Ogden* v. *Co. of Davies*, 102 U. S., 634 (XXVI., 263); 1 Dill. Mun. Corp., sec. 381.

The City cannot be charged as a trustee of the property.

A municipal corporation may take and hold in trust the property for purposes germane to its creation and existence, but not for private purposes merely. Nor can it be compelled to execute such a trust.

Vidal v. *Girard* 2 How., 128; *Mayor* v. *Ray*, 19 Wall., 468 (86 U. S., XXII., 164); *In the Matter of Howe*, 1 Paige, 214; Ang. and Ames, Corp., sec. 168; 1 Dill. Mun. Corp., secs. 437-443, inclusive, and *notes; Jackson* v. *Hartwell*, 8 Johns., 422; 2 Kent, Com., 280; *Sutton* v. *Cole*, 3 Pick., 232; *Chapin* v. *School Dist.* 35 N. H., 445; *Berrian* v. *Mayor*, 4 Rob. (N. Y.), 553. *Herzo* v. *San Francisco*, 33 Cal., 134.

Messrs. **Charles Marshall, B. M. Ambler,** *William A. Fisher* and *W. W. Van Winkle*, for appellees:

If these bonds were void, the City had no right to touch the security, because only persons interested in the bonds could resort to that property.

If accountable as trustee, the City is certainly liable for the amount at which she appraised the property when she assumed the trusts.

Brown v. *Lambert* 33 Grat., 256.

We submit that it is too late for the City to deny its liability to pay the equivalent of the bonds, even if the bonds be void *ab initio*.

The defense of *ultra vires* is not allowed to prevail where it would defeat the ends of justice or work a legal wrong.

R. R. Co. v. *McCarthy*, 96 U. S., 258 (XXV., 693).

But the City, having power to purchase under its charter, arranged as a new contract to pay the bonds.

The obligation to do justice rests upon all persons, natural or artificial, and if the county obtains the money or property of others without authority, the law will compel restitution or compensation.

Marsh v. *Fulton Co.*, 10 Wall., 676 (77 U. S., XIX., 1040); *Argenti* v. *San Francisco*, 16 Cal., 255; Dill. Mun. Corp., 3d ed., sec. 460.

A city is compelled to refund money raised by her from the sale of void bonds.

Louisiana v. *Wood*, 102 U. S., 294 (XXVI., 153); *Paul* v. *Kenosha*, 22 Wis., 266.

Where bonds are issued to cover a valid debt, although the bonds were *ultra vires* and void, yet the indebtedness must be paid.

Hitchcock v. *Galveston*, 96 U. S., 341 (XXIV., 659).

Where the corporation has received the consideration, it is estopped to dispute the valldity of the bonds.

Pendleton Co. v. *Amy*, 13 Wall., 297 (80 U. S., XX., 579); Dill. Mun. Corp., secs. 460, 260, 261, 524, 938, 939, 458.

In the exercise of powers regarding property, a corporation stands (in Va.) upon the same footing as individuals.

R. F. & P. R. R. Co. v. *Richmond*, 26 Gratt., 83-95.

Mr. Justice **Blatchford** delivered the opinion of the court:

On the 15th of December, 1868, the Legislature of West Virginia passed an Act which provided as follows (ch. 118):

"Section 1. That the Mayor and Council of of the City of Parkersburg are hereby authorized and empowered to issue the bonds of said City to an amount not exceeding $200,000, for the purpose of lending the same to manufacturers carry-

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ing on business in or near the said City, in the said County of Wood. The said bonds shall run twenty years, and bear interest at the rate of six [489] per centum per annum; and they shall be issued upon the recommendation of the following named persons, who shall be considered the trustees of said loan, that is to say: * * * who shall have power to fill all vacancies that may occur in their number. They shall have power to make loans of said bonds to good, solvent companies or individuals, on the following terms, that is to say: when persons engaged in manufacturing, shall have invested in their business thirty-five (35) per cent of the amount proposed to be employed in the business of manufacturing, clear of all liabilities, to be shown to said trustees by affidavits of the applicants, or by other satisfactory evidence; and when such proof is furnished, then said trustees, five members concurring, may lend to such applicants such amounts of said bonds as they may deem proper and judicious, not, however, to exceed sixty-five per cent of the capital proposed to be used in manufacturing by the applicant; *Provided, however*, When such loans shall be made, the interest thereon shall be paid by the borrower semi-annually to the treasurer of said City; and five per cent of the principal shall be paid annually to the said City by the borrower, to be placed to the account of the sinking fund of said City, until the several loans are paid in full. The said loans shall be secured by deed of trust or mortgage on real estate, or by other satisfactory security, sanctioned by said trustees. *And provided, also*, That no bonds shall be issued under this section until a majority of the qualified voters of said City concur in the same, by voting for or against the same, at an election to be held for that purpose."

On the 17th of April, 1869, an election was held in the City of Parkersburg, under authority of an ordinance passed by the mayor and city council of said City, "Upon the proposition to authorize the said city council to issue bonds of the said City, to the amount of $200,000 to be loaned to manufacturers under the provisions of said law and said ordinance." At said election 441 votes were cast in favor of said proposition and 19 against it.

On the 6th of September, 1870, a communication having been received by the city council from M. J. O'Brien & Brother in regard to the erection of a manufacturing establishment and marine railway within the city limits, it was "*Resolved*, that the council agree when the trustees of the improvement loan certify that the Messrs. O'Brien & Bro. have satisfac- [490] torily secured the bonds loaned to them and complied with the Act of the Legislature authorizing the loan of said bonds, that they will release said parties from city taxation on their property, to the amount of bonds invested in the same, not exceeding $20,000; *provided, however*, the release shall extend so long as the said property shall be used or operated as a manufacturing establishment and marine railway, but not in any event to exceed twenty years."

Nothing further was done on the subject until after section 8 of article 10 of the new Constitution of West Virginia went into operation on the 22d of August, 1872, which was as follows: "8. No county, city, school district or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted, in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; nor without, at the same time, providing for the collection of a direct annual tax sufficient to pay, annually, the interest on such debt, and the principal thereof within, and not exceeding thirty-four years; *Provided*, That no debt shall be contracted under this section, unless all questions connected with the same shall have been first submitted to a vote of the people, and have received three fifths of all the votes cast for and against the same."

On the 22d of April, 1873, the city council adopted the following resolution: "Be it resolved by the Mayor and Council of the City of Parkersburg, that, in the event of the firm of M. J. O'Brien & Brother taking from the City a loan of twenty thousand ($20,000) dollars of its bonds authorized under former resolution, dated September 6, 1870, for manufacturing purposes, and paying punctually the interest thereon and five per cent (5) of the principal for sixteen years, the said firm be released from any further payments and the balance of said bonds be paid by the City, and the said M. J. O'Brien & Brother are released from making a marine railway."

At a meeting of the city council on the 13th of May, 1873, the trustees of said loan made a [491] report, showing that they had adopted the following resolution: "Whereas, M. J. O'Brien and W. S. O'Brien, composing the firm of M. J. O'Brien & Brother, are desirous of obtaining a loan of the bonds of the City, under and by authority of an Act of the Legislature of West Virginia, passed December 15, 1868, for manufacturing purposes, to the amount of $20,000, for the purpose of aiding them in the erection of a foundry and machine works in the City of Parkersburg; and whereas, for the purpose of erecting these works, they have bought of Mrs. Joanna Wait, widow of Walton Wait, deceased, and also from her as the guardian of Bettie C. Wait, infant heir of Walton Waite, deceased, lot No. 80 in said City of Parkersburg, on Kanawha Street being 85 by 170 feet, and have received a conveyance from her of said lot, both as the widow of said Walton Wait and as the guardian of said Bettie C. Wait; and whereas, it appears, by a schedule of personal property of said M. J. O'Brien & Brother, verified by affidavit, and now in the hands of the city attorney, that said M. J. O'Brien & Brother are the owners of $15,000 worth of personal property in their works at Volcano, free of incumbrance, we, therefore, recommend to the City Council of the City of Parkersburg, upon the said M. J. and W. S. O'Brien and their wives executing a deed of trust to the said City on the said $15,000 worth of personal property, as well as upon the said lot No. 80, the city council to take from Mrs. Joanna Wait, or some one for her, bank stock, with power of attorney to dispose of the same, or solvent bonds, to the amount of $5,000, as security that said Joanna Wait, guardian, will

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obtain from the Circuit Court of Wood County, within two years, authority to convey to M. J. and W. S. O'Brien the said lot No. 80, for and on behalf of said ward, and when said authority is obtained, and said deed made, said stock or bonds to be given up, then the city council may deliver to said M. J. and W. S. O'Brien, upon the deposit of the aforesaid collaterals, $10,000 of said city bonds; and when said M. J. and W. S. O'Brien have put a building or buildings on said lot ready for the roof, costing not less than $8,000 when completed, shown by bills rendered and authenticated for same to the council, and when said Joanna Wait, guardian of said Bettie C. Wait, by the authority of the said Circuit Court of Wood County, has conveyed for and on behalf of her said ward the said lot No. 80, free of incumbrance, to said O'Brien & Brother, or made a further deposit [492] of bank stock or bonds to the amount of $8,000, under the conditions aforesaid, as security that she will obtain such authority within two years from the date hereof, and make said conveyance, which shall be held by said City as security for the payment of said bonds and interest until said deed is made by authority of said court, then said city council may deliver to said M. J. O'Brien & Brother the remaining $10,000, of said bonds; and said city council shall take as a further security for the payment of said bonds and interest, from said M. J. O'Brien & Brother, to be deposited with the city treasurer, their insurance policies, amounting to $14,500, transferred to the said City, on their machinery, stock, etc., at Volcano; and when their buildings on said lot are completed, and the machinery thereon erected, then the said M. J. O'Brien & Brother shall have the whole insured to the amount of $15,000, and keep the same so insured for the benefit and security of said City on account of said loan."

At the same time the city attorney presented to the council a trust-deed executed by "said O'Brien & Brother," which was accepted, and it was resolved "That, upon the execution of the trust by M. J. O'Brien & Bro., the clerk is authorized to issue immediately $10,000, part of city bonds, as agreed upon by the resolution of the 22d of April, 1873."

The trust-deed, which was executed by the two O'Briens and their wives, and acknowledged by them on the 13th of May, 1873, and recorded on the 18th of June, 1873, was in these words: "This deed, made the 13th day of May, A. D. 1873, by M. J. O'Brien and P. F. O'Brien, his wife, and W. S. O'Brien and Jane C. C. O'Brien, his wife, parties of the first part, and Okey Johnson, trustee, party of the second part, witnesseth: that for and in consideration of one dollar in hand paid by the said trustee to the parties of the first part, the receipt whereof is hereby acknowledged, the said parties of the first part hereby grant unto the party of the second part all, etc., of the following property, to wit: all that certain lot of ground situate on Kanawha Street, in the City of Parkersburg, known as lot No. 80 on the plat of said town, and being the same lot conveyed by Joanna M. Wait, guardian of Bettie C. Wait, and Joanna M. Wait in her own right, to the said parties of the first part, by deed dated the 12th day of May, 1873, and all the personal property mentioned in Schedule A, and hereunto annexed and made part of the parcel of this deed, said [493] property now situated at Volcano, in the County of Wood, and valued at $15,040.38, which said last named property is permitted to remain in the possession of the parties of the first part, and to be removed from Volcano aforesaid and placed in the building or buildings to be erected by said parties on the lot aforesaid, until the same shall be required by the party of the second part, upon being made as hereinafter specified, that is to say: Whereas, an Act passed December 15, 1868, by the Legislature of West Virginia, authorizing the Mayor and City Council of the City of Parkersburg to lend its bonds for manufacturing purposes, to which Act reference may be had for a more explicit understanding of the provisions; and whereas, the parties of the first part have negotiated with the said City for a loan of its bonds to the amount of $20,000, according to the provisions set forth in an ordinance passed by the said city council the 22d day of April, 1873, whereby it is, among other things, provided that if the parties of the first part shall punctually pay the interest on the aforesaid sum of $20,000, and five per centum of the principal for sixteen years, the said parties of the first part shall be released from any further payment, which said ordinance was authorized under a former ordinance, dated September 6, 1870, to both of which ordinances reference may be had for a fuller understanding thereof, and are made part hereof, which negotiation for the aforesaid loan of $20,000 of the bonds of the said City is made on the part of said City, pursuant to a recommendation in writing made by the trustees of said loan, as provided in said Act of the Legislature, to which recommendation in writing reference may be had for a fuller understanding thereof, and is made part hereof, in trust to secure the faithful performance by the parties of the first part, in their payment of the aforesaid interest on said $20,000, and the payment of the five per centum of the principal, as specified in the aforesaid ordinance passed the 22d day of April, 1873. And if any default shall be made herein, then the party of the second part, as trustee aforesaid, shall proceed to sell the property hereby conveyed, pursuant to the provisions of chapter 72 of the Code of West Virginia, and the Acts amendatory thereto." Exhibit A, annexed to the trust-deed, contained a list by items of the personal property, with a valuation opposite each item, the same being principally machinery and tools. Attached to it was an affidavit made by M. J. O'Brien, setting forth that M. J. O'Brien & Brother owned all the property free of incumbrance, and that [494] each item was worth the sum set down opposite to it, and that the whole was then worth $15,000.

On the 10th of June, 1873, an order was adopted by the council, reciting the statute, and the election, and the prior proceedings of the trustees of the loan and of the council, and the presentation of the deed of trust and the deposit of the $5,000 security, and of the insurance policies before provided for; and then ordered that the said security was satisfactory, and that $10,000 of the bonds of the City be delivered to M. J. O'Brien & Brother "forthwith, under the conditions of and in accordance with" the said Act "and the orders made September

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6, 1870, and April 22, 1873, made and intended to be made by authority of said Act of Legislature, and to be controlled by and construed according to its provisions," and further ordered that when Mrs. Wait should make the deed to lot No. 80, the $5,000 security should be given up.

Thereupon $10,000 of the bonds were delivered to the O'Briens. Each bond was a certificate of indebtedness for $500, payable to M. J. O'Brien & Brother, or order, dated June 1, 1873, sealed with the seal of the City and signed by the mayor and the clerk, payable June 1, 1893, at Parkersburg, with interest at the rate of six per cent per annum, payable semi-annually, June 1 and December 1, in the City of New York. Coupons payable to bearer for each payment of interest were attached. Each bond contained this statement: "This certificate is issued by authority of the Act of the General Assembly of the State of West Virginia, passed December 15, 1868."

On the 9th of September, 1873, the city council passed the following order: "It appearing to the satisfaction of the council that M. J. O'Brien & Brother have their buildings, which, when completed, will cost more than $8,000, now up and ready to be roofed, and have, therefore, complied with the recommendation of the manufacturers' loan and the former orders of the council in that respect, it is ordered that as soon as Mrs. Joanna Wait, or some one for her, shall deposit with the city treasurer bonds to the amount of $8,000, or bank stock, with [495] power of attorney to dispose of the same, as collateral security that she will obtain within two years from the 18th of May, 1873, the authority from the Circuit Court of Wood County to make for and on behalf of her ward, Bettie C. Wait, a deed to said M. J. O'Brien & Brother, for lot No. 80 in the City of Parkersburg, that the Mayor of the City of Parkersburg is directed to deliver, properly signed by himself and attested by the clerk of the council, the remaining ($10,000) ten thousand dollars of the bonds of the City of Parkersburg, as provided for by former orders of this council." The second lot of $10,000 of the bonds were thereupon issued to M. J. O'Brien & Brother, the bonds being in the same form as the others. No other proceedings of the city council appear as to the issuing of the bonds.

The bonds were all of them indorsed in blank by M. J. O'Brien & Brother, and were sold by them at 80 cents on the dollar, $10,000 in June, 1873, and $10,000 in September, 1873. The appellees are the owners of the entire $20,000 of bonds and are *bona fide* holders of them. The O'Briens paid to the City the $600 of interest falling due December 1, 1873, and the City paid the coupons due that day. The O'Briens paid no more. The City paid the coupons which fell due in June and in December, 1874, and in June and December, 1875. It paid no more.

The coupons which fell due June 1 and December 1, 1876, not having been paid, the plaintiff, Isabella Brown, owning $5,000 of the bonds, filed this bill on behalf of herself and all other holders of the bonds who should unite in the suit, setting forth the said Act of December, 1868, the election, the action of the trustees of the loan and of the city council, the giving of the security, the execution and recording of the deed of trust, and the issuing of the first $10,000 of bonds. Her $5,000 of bonds are part of those bonds. The bill sets forth the proceeding for the issuing of the rest of the bonds and their actual issue. It avers that the holders of all of the bonds are *bona fide* holders for value. The defendants in the suit are the City of Parkersburg, the two O'Briens and their wives, and the assignee in bankruptcy of the O'Briens.

In November, 1873, the O'Briens and their wives executed to said Johnson a deed for said [496] lot No. 80 and for another lot, in trust to secure one Leach for his indorsement of a promissory note of the O'Briens for $3,000, with power to sell the land in case the note should not be paid. On the 9th of November, 1874, Johnson sold lot No. 80 and its appurtenances at auction, under said last named trust-deed, to the City of Parkersburg, and, on the 8th of December, 1874, executed to the city a deed of it, which recited that the sale of the lot was "subject to a trust thereon in favor of the City of Parkersburg for $20,000," and that the sale was for $300, and conveyed the lot and its buildings and appurtenances to the City, "subject to the lien of the said City aforesaid."

The bill sets forth said sale and conveyance, and avers that the City has, since said purchase, claimed said real estate as being its property, and has rented it, and is now claiming it and exercising to some extent rights of ownership over it; that after the deed from the O'Briens to Johnson was executed, they were adjudged bankrupt, and their assignee in bankruptcy was permitted, without objection on the part of the City, to take possession of the movable tools and machinery covered by said deed; that said chattels were sold by said assignee to various purchasers, and became scattered and deteriorated in value; that some were sold subject to the claim of the City, and others without such reservation; that the City continued to pay the interest on the bonds until the maturity of the coupons which became due June 1, 1876, when it refused to pay them, and has paid no more and refuses to recognize the obligations of the bonds and coupons, on the ground that they were issued by the City without lawful authority; and that the City has neglected the real estate and the improvements and fixed machinery on it, and the buildings are unoccupied and unprotected, lying open to the weather and to depredations, and no care is used in protecting the buildings and machinery, and many valuable parts of the machinery have thus been lost. The bill alleges that the deed of trust to the City was executed for the purpose of securing the holders of the bonds and coupons, and they are the parties beneficially interested in the same, and the City is a trustee of all the property mentioned in the deed, for the holders of the bonds; that the City was bound to care for the property and protect the title to it for the benefit of [497] the *cestuis que trust*, and especially as it had induced them to purchase the bonds, as well in reliance on the deed as on the credit of the City; that the City was, as trustee, bound to interpose to prevent the sale of the chattels by the assignee in bankruptcy, and to place the property in the charge of a responsible custodian, and protect it from depredation; and that, in failing to exercise such care and in permitting such sale, the City has violated the duties assumed by it from

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its acceptance of the deed, and has became liable to account to the holders of the bonds for all the loss and injury which has occurred to said real estate and chattels by reason of such neglect; and that the owners of the bonds are entitled to the interposition of a court of equity for the care and protection of the property, and to a decree for the sale of such of it as remains upon the premises mentioned in the deed to the City, and for the sale of the real estate, and a decree against the City requiring it to account for and pay over to the holders of the bonds all such moneys as have been lost to them from such neglect, and to pay to them any balance which may remain due to them after applying all sums which may result from such sales and accounting. The prayer of the bill, as originally filed, is for the appointment of a receiver to take charge of the property, and the appointment of a trustee to make sale of it, and the distribution of the proceeds of sale among the owners of the bonds and coupons, and that the City account for and pay over to them the value of the chattels so lost or sold, and for such loss as has resulted by reason of such neglect of duty on the part of the City in the care of the property, and the rents and profits received by the City from the property; and that the City and the O'Briens pay to the owners of the bonds any deficiency in the principal and interest thereof which may remain after the payment of the sums resulting from the sales and accounting aforesaid.

The City answered the bill, setting up various defenses. One is, that a majority of the qualified voters of the City did not vote at said election in favor of authorizing the issuing of bonds under the Act of 1868. Another is, that the voters voted on the question of authorizing the [498] issue of bonds generally under the Act, and not on the question of issuing the particular bonds. Another is, that the issuing of said bonds had not been authorized prior to the 22d of August, 1872, when said section 8 of article 10 of the new Constitution of West Virginia became operative; that said section governed in the issuing of said bonds; and that they were issued in violation thereof, in that the payment thereof was not provided for at the time of the issuing thereof, as required by said section, and all questions connected with the same were not first submitted to a vote of the people, as therein required, and said bonds are void. Another is, that the Act of 1868 was in violation of the Constitution of the State. Another is, that, at the time of the passage of said Act, the City had and now has no property out of which it could pay any such bonds, except such funds as it is or may be authorized by law to raise by taxation. Another is, that the bonds were issued in aid of a private enterprise, for individual profit, and not for a public purpose; that it is in excess of the constitutional power of the Legislature of the State to authorize taxation for the purpose of paying said bonds, unless that power was clearly conferred on it by the Constitution of the State; that no such power was conferred on it by the Constitution of the State in force at the time of the passage of said Act or the one now in force; that the said Act is void for want of power in the Legislature to pass it; and that the bonds issued under it are void. Another is, that the bonds are void because they were issued in violation of section 9 of article 10 of the Constitution of the State in force at the time they were issued, which provides that the Legislature may, by law, authorize the corporate authorities of cities to assess and collect taxes for corporate purposes; that said provision amounts to a prohibition against assessing and collecting taxes for any other than a corporate purpose; and that said bonds, being issued for a private and not for a corporate purpose, are void. The answer alleges that if any property covered by the deed of trust was sold by the assignee in bankruptcy, it was sold by him subject to said deed of trust. It denies the allegations of the bill as to the neglect of the City to protect and care for the buildings and machinery. It avers that it is not chargeable with the care of the property, but that it has taken as good care of the same as was possible under the circumstances, and has used all due diligence [499] to rent it. It denies that the deed of trust was executed to secure the holders of the bonds and coupons, and denies that the City was or is a trustee for them of the property covered by the deed, and denies that it induced any person to take the bonds. It avers that it is not competent for the City to act as trustee in such a matter, wholly foreign to the purpose of its creation; that it has paid out, as interest on the bonds and expenses attending the issuing of them, and taxes on the property, more than it has received from all sources on account of the property; and that the plaintiff has a plain and adequate remedy in a court of law. It denies the right of the complainant to any decree against it for any sum in any event, whether the court shall deem the complainant entitled to a sale of the property mentioned in the deed of trust or otherwise. Finally, the answer says that if the court shall be of opinion that it has any jurisdiction in the premises, or that the complainant is entitled to resort to the property for the payment of the bonds or the interest thereon, the City is willing to submit to any order to be made by the court in relation to the disposition of the property, upon the court pronouncing the bonds void and the City not liable on account thereof; but it prays that, in any order to be made, the City may be decreed to receive out of the proceeds of any sale of the property the sum it has so expended above its receipts.

The bill was taken as confessed as to all the defendants except the City. The holders of all the bonds were made parties complainant. Proofs were taken on both sides. The bill was then amended so as to aver also that the City is estopped, by her conduct, to deny the validity of her indebtedness according to the tenor and effect of the bonds and coupons, and so as to add to the prayer for relief the following: "Or that the said City of Parkersburg may be decreed to pay the said bonds and coupons according to the tenor thereof, and especially that a decree may be passed for the payment of the overdue coupons upon the said bonds." The bill was further amended so as to allege that even if the City was not chargeable as trustee from the time of the execution of the deed of trust, it is chargeable with all the duties and liabilities of a trustee, in regard to all of the property, from the respective times at which [500] it actually took possession of the same; and the grantee in the deed of trust was made a defend-

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ant and appeared. The case was brought to a hearing, and a decree was made, which states that the court is of opinion that the City is indebted for the bonds and coupons and is responsible for their payment according to their tenor and effect; that the $20,000 of bonds are held by the several complainants in amounts severally specified, and that there are due to them severally certain specified sums for interest coupons due and unpaid upon the bonds (being interest from and including June 1, 1876, to and including June 1, 1879), with interest from the date of the decree; and then decrees that the complainants are entitled to have the bonds held by them respectively paid by the City at the maturity of the same, with interest payable at the times and in the manner stated in the interest coupons attached to the bonds, and that the complainants respectively recover against the City for the several sums so set out as due for interest on the bonds, and interest on the same from the date of the decree, and costs, and have execution therefor. From this decree the City has appealed to this court.

The bill, as filed, asked for equitable relief, and sought to charge the City as a trustee and to reach the property covered by the deed of trust. The relief granted by the decree was a simple money judgment against the City, for the interest due on the bonds at the date of the decree, based on the legal liability of the City to pay the bonds and coupons. For this there was a plain, adequate and complete remedy at law, in each bondholder, if the City was thus liable. So that the decree made could not be sustained, in any event.

But we are of opinion that, within the principles decided by this court in the case of *Loan Association* v. *Topeka*, 20 Wall., 655 [87 U. S., XXII., 455], the bonds in question here are void. The Act of 1868 authorizes the bonds to be issued as the bonds of the City. The principal and interest are to be paid by the City. The bonds are to be lent to persons engaged in manufacturing. Those persons are to pay the interest on the "loans" semi-annually to the treasurer of the City, and are also to pay annually to the City five per cent of the principal, to go into the sinking fund of the City, till the [501] "loans" are paid in full. No fund is provided or designated out of which the City is to pay the principal or interest of the bonds. What the "borrower," as the Act calls him, is to so pay to the City, is not such a fund. The City is to pay the principal and interest of the bonds, according to their tenor, whether the "borrower" pays the City or not. No other source of payment being provided for the City, the implication is that the City is to raise the necessary amount by taxation. It has, by section 15 of the Act of March 17, 1860, authority to levy and collect an annual tax on the real estate and personal property and tithables in the City, and upon all other subjects of taxation under the revenue laws of the State, which taxes are to be for the use of the City. A legitimate use of the moneys so raised by taxation is to pay the debts of the City. Taxation to pay the bonds in question is not taxation for a public object. It is taxation which takes the private property of one person for the private use of another person. There is, in the Act of 1860, a provision that the tax shall not exceed a given percentage of the assessed value of the property, or so much on every tithable, but it does not appear that a tax for these bonds would exceed the limit. Therefore, the inference that it was intended, by the Act of 1868, that such taxation as should be necessary to pay the bonds should be resorted to, must remain in full effect. There was no provision in the Constitution of West Virginia of 1862 authorizing the levying of taxes to be used to aid private persons in conducting a private manufacturing business. This being so, the Legislature had no power to enact the Act of 1868.

There having been a total want of power to issue the bonds originally, under any circumstances, and not a mere failure to comply with prescribed requirements or conditions, the case is not one for applying to the City, under any state of facts, any doctrine of estoppel or ratification, by reason of its having paid some installments of interest on the bonds; *Loan Association* v. *Topeka, ubi supra;* or by reason of any of the acts of its officers or agents in dealing with the property covered by the deed of trust. No such acts can give validity to the statute or to the bonds, however they may affect the *status* of the property dealt with, or the relation of the City to such property.

But it is contended by the appellees that, independently of the original validity of the bonds, [502] the City is liable to pay them, because it misled and prejudiced their holders and prevented them from resorting to the security, or because it received the full value of the bonds in consideration of paying them. It is urged that, if the bonds were void, the City had no right to meddle with the security. There has, however, never been any impediment to a resort by the holders of the bonds to proceedings to have the property covered by the deed of trust administered for and appropriated to their benefit, as representing the O'Briens in respect to such property, and as subrogated to the rights of the O'Briens to have the property devoted to the payment of the principal and interest of the bonds, in view of their being void. The only misleading or prejudice was that the holders of the bonds, mistaking the law, supposed them to be valid obligations of the City. As to the receipt of property by the City, it received certain property, but it did not thereby enter into any obligation, even if it could have done so, to pay these bonds. The evidence shows that the City has endeavored, in a proper way and with a due regard to the interests of the O'Briens and of those interested under the O'Briens, to preserve and protect the property and realize from it as much as could be realized. The bill in this case was filed in December, 1876. The case was heard in September, 1879. The bill prayed for a receiver of the property, yet none was appointed or applied for, so far as appears. The sales by the City, of movable property, which are complained of, took place after this suit was brought. The plaintiffs have chosen to leave all the property in the hands of the City up to this time. The City has acted in good faith, and with reasonable discretion, in regard to the property, throughout. No valuation placed upon the property, real or personal, or any part of it, by way of estimate or opinion, at the time the City took possession of it, or at any time since, can be taken, on the evidence in this case, as the measure of

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any liability of the City on the bonds or in respect of the property. Neither the O'Briens nor the plaintiffs interposed to control the property, but left the City to control and manage it. There are not about the acts of the City, in regard to the property, any elements which can constitute [503] the City a trustee of the property, with the duties imposed on a trustee. No trust arose in favor of the plaintiffs out of the deed of trust to Johnson. The trust thereby created was one to secure the payment by the O'Briens to the City of the interest on $20,000 and of the principal of that sum. The plaintiffs could not enforce that trust in the place of the City. It was a void trust, because the consideration of it was the issuing of the void bonds. Nor did the purchase by the City, of the property, which it bought subject to the trust, validate the original trust or create a new one.

But, notwithstanding the invalidity of the bonds and of the trust, the O'Briens had a right to reclaim the property and to call on the City to account for it. The enforcement of such right is not in affirmance of the illegal contract, but is in disaffirmance of it, and seeks to prevent the City from retaining the benefit which it has derived from the unlawful act. 2 Com. Cont., 109. There was no illegality in the mere putting of the property by the O'Briens in the hands of the City. To deny a remedy to reclaim it, is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the City was the principal offender. In such a case the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received. *White* v. *Bank*, 22 Pick., 181; *Moreville* v. *American Tr. Soc.*, 123 Mass., 129; *Davis* v. *R. R. Co.*, 131 Mass., 258, 275; and cases there cited. The O'Briens having indorsed and sold the bonds, the holders of the bonds succeeded to such right of the O'Briens, as an incident to the ownership of the bonds. The O'Briens suffered the City to take possession of and administer the property. They were made parties to this suit originally and have made no defense to it. The right which the plaintiffs so have to call on the City to render an account of the property, is one which can be properly adjudicated in this suit in equity. It involves the taking of an account, the sale under the direction of the court of what remains of the property, and the ascertainment of the proper charges [504] to be allowed to the City against the moneys it has received and against the proceeds of sale. There can be no doubt that the City is entitled to be credited the sums it has paid in good faith to acquire, protect, preserve and dispose of the property, and for insurance and taxes, and the amount it has paid in paying the coupons it has paid, and that it is to be charged with what it has received. But it is not to be charged with any sum for loss of or damage to or depreciation of the property. The remaining property must be sold under the direction of the court below and an account be stated on the foregoing principles, and the net proceeds of the sale and the net amount of money, if any, in the hands of the City, must be distributed among the plaintiffs. *The decree of the Circuit Court must be reversed, with costs, and the case be remanded to that court*, with instructions to enter a decree declaring that the City, in issuing the bonds, exceeded its lawful powers, and that they cannot be enforced as obligations of the City; and providing for a sale of the remaining property, real and personal, under the direction of the court, and the taking of an account between the City and the property, on the basis stated in this opinion; and the application, in conformity with this opinion, of the net proceeds of the sale, and of the net amount of money, if any, remaining in the hands of the City, received from the O'Briens or from the sales by it of any of the property received by it; and for such further proceedings in the case as may be in conformity with this opinion.

We have not deemed it necessary to consider the question whether the bonds were void as having been issued in violation of section 8 of article 10 of the Constitution of West Virginia of 1872, or the question whether the Act of 1868 required a vote by the voters of the City on each loan of bonds to be made, or the question whether the Act of 1868 was observed in other respects, in issuing the bonds.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 360, 575; 108 U. S., 287; 113 U. S., 6, 388.

WILLIAM L. HEMINGWAY, Treasurer of the STATE OF MISSISSIPPI, and SYLVESTER GWINN, Auditor of Public Accounts of said STATE, and *ex officio* the LEVEE BOARD OF MISSISSIPPI, DISTRICT NUMBER ONE, *Appts.*,

v.

JEPHTHAH W. STANSELL, Surviving Partner of the Late Firm of PARTEE & STANSELL.

(See S. C., 16 Otto, 399-408.)

Levee Commissioners, action against—valid contract by—settlement and receipt, when is accord and satisfaction.

*1. A board of commissioners (one from each of five counties, having been incorporated by a state statute to construct and maintain levees, with authority to make contracts for the doing of the work, and having made such a contract, and been sued in equity thereon, in the district in which the domicil of the board was established by its Act of incorporation, by persons residing out of the district, a subsequent statute of the State abolished the offices of the commissioners, and constituted the Treasurer and the Auditor of Accounts of the State *ex officio* the Levee Board, with the declared purpose "To substitute the Treasurer and Auditor in place of the Board of Levee Commissioners now in office;" and a bill of revivor was filed against them by leave of the court. Held, that the suit might be prosecuted against the new Board, although both the Treasurer and the Auditor resided out of the district; and that an appeal from a final decree for the plaintiff might be taken by the Treasurer and Auditor, describing themselves by their individual names, and as such officers, and as *ex officio* the Levee Board.

2. A board of commissioners, authorized by statute to make contracts for the building of levees, and to borrow money, issue bonds and sell and negotiate them in any market, but not at a greater rate of discount than ten per cent, may make a contract for the

*Head notes by *Mr. Justice* GRAY.

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work at certain prices by the cubic yard, payable in such bonds; and may afterwards amend that contract by inserting "at the rate of ninety cents on the dollar," and issue bonds to the contractors accordingly, upon being satisfied that such was the agreement actually made between the parties; although the work is actually done by subcontractors for lower prices in cash.

3. A Board of Levee Commissioners made a settlement with contractors employed to do the work on certain levees, by which it paid them a certain sum and took a receipt in full of all demands. The parties afterwards executed an agreement under seal, reciting the settlement and receipt in full of all demands, a complaint of the contractors that injustice had been done them in that settlement, and the desire of the Board to do full justice; and stipulating that two engineers, one designated by each party, should measure the work done, and render to the parties an estimate of the amount due to the contractors for such work according to the original contract; that if this should differ from the amount already paid, the difference should be paid or refunded accordingly; and that these two engineers and a third, to be agreed on by them, should be arbitrators for the adjustment of all questions of difference; that in the adjustment of questions pertaining to the measurement, the contractors should have the privilege of introducing all proper evidence, and the Board of rebutting that evidence; and that, before proceeding with the measurement, the contractors should give written notice to the Board of the points to be proved and the character of the evidence to be offered. The contractors thereupon gave notice of their intention to introduce proof of several matters, some of which did not concern the measurement; to which the engineer of the Board objected; and the arbitration fell through. Held, that the settlement and receipt bound the contractors as an accord and satisfaction, and they could not maintain a suit upon the original contract to recover further compensation for the work.

[No. 298.]

Submitted Dec. 4, 1882. Decided Jan. 8, 1883.

APPEAL from the District Court of the United States for the Northern District of Mississippi.

The history and facts of the case appear in the opinion of the court.

Mr. **H. P. Branham,** for appellants.

Mr. **Henry T. Ellett,** for appellee.

Mr. Justice **Gray** delivered the opinion of the court:

This is an appeal by "William L. Hemingway, Treasurer of the State of Mississippi, and Sylvester Gwinn, Auditor of said State, and *ex officio* the Levee Board of Mississippi, District Number One," from a final decree of the District Court of the United States for the Northern District of Mississippi, upon a bill in equity for the specific performance of a contract, filed in that court on the 28d of February, 1873, by Hiram A. Partee, a citizen of Tennessee, and Jephthah W. Stansell, a citizen of Arkansas, copartners under the name of Partee & Stansell (of whom the appellee is the survivor), against the Levee Board of Mississippi, District Number One, and the five persons constituting that Board.

By an Act of the Legislature of the State of Mississippi of March 17th, 1871, entitled "An Act to Redeem and Protect from Overflow from the River Mississippi, Certain Bottom Lands Herein Described," this Board, consisting of commissioners to be appointed by the Supervisors of Tunica and four other counties respectively, was incorporated for the purpose of constructing, repairing and maintaining levees along a part of the Mississippi River; its domicil was fixed at the county seat of Tunica County, in the Northern District of Mississippi; and it was authorized to appoint a secretary and treasurer, and to let out and contract for the construction of the works, and to issue negotiable bonds to the amount of $1,000,000, and [401] to sell and negotiate them in any market, but not at a greater rate of discount than 10 per cent.

This suit was brought upon a contract made by the Board with the plaintiffs for the construction of certain levees. While it was pending, on the 11th of April, 1876, the Legislature of Mississippi passed an Act, entitled An Act to Abolish the Levee Board of District Number One and to Pay the Debts of said Board;" and enacting that the offices of commissioners, secretary and treasurer of Levee District Number One, as existing under the Statute of 1871, be abolished; and that the Auditor of Public Accounts and the Treasurer of the State be constituted and appointed the Levee Board of District Number One, *ex officio*, and discharge all the duties of the Levee Board and of the secretary and treasurer of the same; "It being the intent and purpose of this Act to substitute the Auditor of the State and the Treasurer thereof, *ex officio*, as such commissioners, secretary and treasurer, in place and stead of the board of levee commissioners, secretary and treasurer of Levee District Number One, now in office; and that "The Auditor and Treasurer shall have full power to settle up, under the laws now in force, the unfinished business of the said Levee Board of District Number One, and to pay any outstanding liabilities of the same in such funds as may be applicable to the same."

The defendant thereupon moved to dismiss the bill, because by this statute the Levee Board had been abolished, and was no longer capable of suing or being sued. The court overruled this motion, and allowed the plaintiffs to file a bill of revivor against the Auditor and Treasurer, both of whom resided at Jackson in the Southern District of Mississippi, as constituting the Levee Board of District Number One, and, after due pleadings and proofs, entered the final decree against the Levee Board, from which this appeal is taken.

The appellee now moves to dismiss the appeal, because it is the appeal of Hemingway and Gwinn only, and not of the Levee Board. But we are of opinion that this motion, and the motion made in the court below to dismiss the bill, are equally groundless.

The Statute of 1876, while it abolished the offices of the commissioners who previously con- [402] stituted the Corporation of the Levee Board, did not dissolve or extinguish the Corporation, but merely substituted the State Treasurer and the Auditor of Accounts as the members of that Corporation. The suit might, therefore, be prosecuted against the Levee Board as a Corporation, notwithstanding the change in its members; and a bill of revivor having been allowed to be filed for that purpose, it need not be considered whether any revivor was requisite. The fact that the new members reside in another district is immaterial. A court which has once acquired jurisdiction of a suit does not lose it by a change of domicil of the parties, and may, when the suit is of a nature that survives, bring in the representatives or successors of a party who has died or ceased to exist, without regard to their domicil.

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The Levee Board, being the defendant in the suit, might appeal from the final decree; and the appeal taken by Hemingway and Gwinn, describing themselves not only by their individual names and as Treasurer and Auditor respectively, but also as, *ex officio*, the Levee Board, is the appeal of the Board.

It follows that the motion to dismiss the bill because of the passage of the Statute of 1876 was rightly denied by the court below; and that the motion to dismiss the appeal must be overruled by this court.

The evidence shows that the Board, under the authority conferred by its Act of incorporation, advertised for written bids for contracts to do the work; that the plaintiffs made a bid accordingly for the work on certain parts of the levees at specified prices by the cubic yard, payable in bonds at ninety cents to the dollar, or 10 per cent discount; that this bid was accepted by the Board, and on the 28th of September, 1871, a contract in writing was signed by the parties, by which the plaintiffs agreed to do the work according to the specifications, and to the satisfaction and acceptance, of the chief engineer of the Board; the Board agreed to pay them in bonds the prices named in the bid, four fifths on monthly estimates by its engineer of the relative value of the work done, and the rest on the final completion of the work, the engineer's acceptance thereof, and estimate of the quantity, character and value of the work done, and the plaintiffs' release under seal of all demands arising under the contract; and it was mutually [403] agreed that the decision of the chief engineer should be final and conclusive in any dispute which might arise between the parties to this contract. It further appears that afterwards, and to carry out the intention of the parties at the time of signing the contract, the Board, at the plaintiffs' request, caused to be interlined therein, after the word "bonds," the words "at the rate of ninety cents on the dollar;" and that monthly, during the progress of the work, four fifths of the engineer's estimates of the amount of work done were paid for, at the prices stipulated in the contract, in bonds at that rate.

The Board, in its answer and by a cross-bill, contended that the plaintiffs had been largely overpaid, because the prices agreed on greatly exceeded the prices at which the work could be done, and was done by subcontractors, for cash; and because the issue of bonds at ninety cents on the dollar in payment of those prices was in effect a negotiation of the bonds at a greater rate of discount than 10 per cent. But the Board had authority to make contracts and, consequently, to agree upon the compensation for the work; being authorized to issue bonds, it might issue them directly to the plaintiffs; and the prices agreed to be paid, as well as the rate at which the bonds should be taken, corresponded to the original bid made by the plaintiffs and accepted by the Board, as well as to the terms deliberately adopted in the formal contract. The suggestion that this course was pursued with the purpose of fraudulently evading the restriction of the statute, is unsupported by proof; and there is no evidence that the funds necessary to repair the levees could have been obtained in any other manner. This position of the Levee Board, therefore, cannot be maintained, and to that extent the decree of the district court must be affirmed.

But the remaining question in the case presents greater difficulties. The facts, as disclosed by the record, appear to us to be as follows:

After the plaintiffs had completed the work, W. R. Kirkpatrick, the chief engineer of the Board, who had superintended the work, made a final estimate of its quantity, character and value. The Board, being dissatisfied with his [404] estimate, discharged him, and caused the work to be re-measured by B. Mickle, a special engineer (afterwards appointed chief engineer), whose estimates showed a much smaller sum to be due to the plaintiffs. The Board, thereupon, refused to pay the amount due according to Kirkpatrick's estimates, and, after some controversy and negotiation, settled the claim by paying the plaintiffs $47,800, the amount found due by Mickle, and the plaintiffs signed and gave them a receipt in these terms: "Memphis, June 18, 1872. Received of A. R. Howe, Treasurer Mississippi Levee Board District Number One, forty-seven thousand eight hundred dollars on account of work on levee, the same being in full of all demands to date."

The plaintiffs in their bill allege that this receipt was fraudulently and oppressively extorted by the Levee Board, and was signed by the plaintiffs under protest. But the only evidence to support their allegation is the testimony of Stansell himself, and he on cross-examination admitted that he did not know much about the matter, as Partee attended to the money transactions of the firm; and his testimony is met and controlled by the explicit denial in the answer of the Board upon the oath of two of its members, as well as by the recitals of an agreement under seal, made between the Board of the first part and the plaintiffs of the second part on the 4th of October, 1872, the important portions of which are as follows: "Whereas, said party of the first part have heretofore made full and complete settlement for all work done on said levee by said party of the second part, as evidenced by their receipt acknowledging the same; and said party of the second part do now come forward and complain that injustice was done them in said settlement; and it being the desire of the party of the first part to do full justice to all men, it is hereby agreed that the party of the second part shall designate an engineer, who shall proceed with the chief engineer of this Board to measure all work done by said party of the second part on said levee, and render to the parties to this agreement an estimate of the amount due to the party of the second part for such work, according to the contracts entered into for the completion of the same. And it is further agreed that, should said estimate exceed the estimate made by the special engineer of this Board in the month of June, 1872, the party of [405] the first part shall pay to said Partee and Stansell, party of the second part, the amount of such excess, and all the expenses of this measurement shall be borne by the Board. But if the said estimate shall be less than the estimate of the said special engineer in June, 1872, then said party of the second part shall refund to said party of the first part the amount of such deficit, and pay all the expenses of this measurement." "It is further agreed that the party of

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the second part shall designate an engineer, which engineer shall suggest a third engineer, who shall be acceptable to the chief engineer of this Board, and the said engineers so selected shall, with the chief engineer of this Board, constitute a board of arbitrament for the adjustment of all questions of difference, the agreement of any two to be final. In the adjustment of questions pertaining to this measurement, the contractors shall have the privilege of introducing all proper evidence, oral or written, of notes, profiles, or other evidence; which testimony may be rebutted by the president of the Board, this testimony being allowed, to give the engineer information as to the fills or any other facts not perceptible to the engineers; to which testimony the engineers shall give such weight as they may think the same entitled to receive."

On the 12th of December, 1872, the parties signed a further agreement, stating that Mickle on the part of the Levee Board, George B. Fleece on the part of the plaintiffs, and R. L. Cobb, designated by Fleece with the consent of Mickle, constitute the board of arbitrament referred to in the agreement of October 4, 1872; and establishing rules to govern that board in adjusting all matters brought before them, one of which rules was as follows: "Inasmuch, as, by the terms of said agreement, the first party can only rebut the testimony introduced by the second party, it is agreed that the said second party shall, before further proceeding with the measurement, notify the first party in writing what points they expect to prove and the character of the evidence proposed, so that the said first party may be ready with the rebutting evidence."

On the same day, the plaintiffs gave notice in writing to the Levee Board that they would introduce proof before the board of arbitration upon twelve different matters, including these [406] three: "4. The clause in the contract touching shrinkage, its meaning, and the adjudication of that question by the chief engineer of your Board prior to and about simultaneous with the signing of the original contract." "9. The damage done to us by the repeated refinishing of work under orders of your engineers." "11. The delay of a final estimate, of various payments, and the damage to us arising therefrom."

On the next day, Mickle wrote a letter to Fleece, beginning thus: "In arranging the preliminaries to our organization as a board of arbitrament on the question of difference between the Levee Board of this district and Messrs. Partee and Stansell, I am notified that claims will be made and testimony offered clearly in contravention of the terms of the agreement from which our authority is to emanate, and as such proceeding would render our decision unsatisfactory and void, I cannot proceed further in the matter unless it is distinctly understood that the following provisions of the contracts and agreements entered into by the said parties, and on which our authority is understood to be based, shall be strictly observed." He proceeded to point out that the agreement of October, 4, 1872, did not permit any evidence to be introduced except in relation to the measurement of levees; and also stated the substance of the following provisions in the specifications annexed to the original contract: "Nothing will be paid for settling, but its cost will be included in the price paid for the levee, as estimated up to true grade. If the levee be found deficient in height, slopes, or base, or not to have the full settling on top and slopes, the contractor must go over it immediately and correct all deficiencies, when the engineer in charge will run a test level over it to see that all is right." "All damage or injury to the work, resulting from flood or other cause, shall be sustained by the contractor until finished and received by the chief engineer; and no work shall be received until fully and completely finished in accordance with the above specifications."

To this letter Fleece immediately replied, contending that the board of arbitrament was already organized, and declining to discuss in advance any point likely to come before it. A correspondence of six weeks ensued between [407] Mickle and Fleece, in the course of which, after much dispute upon the question whether Cobb had been in due form accepted as one of the arbitrators, Fleece designated him anew in writing, Mickle declined to accept him, Fleece offered Mickle the choice of either of several other persons in Cobb's stead, and the correspondence ended in Mickle's insisting on the objections made in his letter of December 13, 1872, and in the plaintiffs' abandoning the arbitration.

The court below was of opinion that the receipt in full of the 18th of June had been wholly set aside by the agreement of the 4th of October, and that the arbitration under this agreement had failed by the fault of the defendant; and entered a decree for the plaintiffs according to the final estimate of Kirkpatrick.

We cannot concur either in the reasons or in the result. In our view, the effect of the agreement of the 4th of October, 1872, was to recognize that there had been a settlement in full between the parties, or the amount due from the Levee Board to the plaintiffs, which bound both parties as an accord and satisfaction; and to agree to open that settlement to this extent only: three engineers, to be appointed as therein provided, should measure the work done by the plaintiffs. If their estimate should differ from the estimate of Mickle, according to which the settlement had been made, the difference should be paid by the Board or refunded by the plaintiffs. The stipulation that the three engineers should "constitute a board of arbitrament for the adjustment of all questions of difference" was necessarily limited to questions of difference in relation to the subject to be referred to them. If such measurement by the arbitrators should not modify the estimate of work done, or if the arbitration should fail without fault of the Levee Board, the settlement stood.

The evidence, the substance of which is above recited, satisfies us that the arbitration did not fail by any fault on the part of the Levee Board, but by reason of the persistent attempts of the plaintiffs, against the steady opposition of the Levee Board, to introduce evidence before the board of arbitrament, not limited to the question of measurement, which was the only matter to be submitted to this Board, but touching other [408] matters which had been concluded by the contracts executed and the settlement made between the parties.

The result is, that the decree below must be re-

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versed and the case remanded with directions to enter a decree dismissing the bill.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[578] TOWN OF ELGIN, *Plff. in Err.*,
v.
SAMUEL MARSHALL ET AL.

(See S. C., 16 Otto, 578-583.)

Jurisdiction as to amount—collateral effect of judgment.

1. This court has no jurisdiction to review a judgment upon coupons for less than $5,000, although the bonds from which the coupons were detached exceeded that sum, and although the point actually litigated and determined in the action was the validity of the bonds, and the judgment would, as between these parties, in any subsequent action upon other coupons, or upon the bonds themselves, be conclusive as an estoppel.

2. Sections 691 and 692, Rev. Stat., which, as amended by section 3 of the Act of February 16, 1875, ch. 77, limit the jurisdiction of this court to those cases where the matter in dispute, exclusive of costs, exceeds the sum or value of $5,000, have reference to the matter which is directly in dispute, in the particular cause in which the judgment or decree sought to be reviewed has been rendered, and do not permit this court, for the purpose of determining such sum or value, to estimate its collateral effect in a subsequent suit between the same or other parties.

[No. 803.]

Submitted Dec. 8, 1882. Decided Jan. 8, 1883.

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **Gordon E. Cole,** for plaintiff in error.

Messrs. **S. U. Pinney** and *Thomas Wilson*, for defendants in error.

Mr. Justice **Matthews** delivered the opinion of the court:

This action was brought by the defendants in error, being citizens of Wisconsin, against the plaintiff in error, to recover the amount due upon certain coupons or interest warrants, detached from municipal bonds, alleged to have been issued by the Town of Elgin, in aid of a railroad company. The defense set up was that the bonds and coupons were void, the statute, under the assumed authority of which they had been issued, being, as was alleged, unconstitutional. The cause was tried by the court without the intervention of a jury, and it is part of the finding of the court that, at the time of rendering the judgment, the defendants in error were the owner of the bonds and coupons mentioned in the complaint, and judgment is given for the amount, $1,660.75, due thereon, being for the interest on fifteen bonds of $500 each.

The case has been fully presented in argument upon its merits, as they appear from the findings of the court, but as we consider ourselves obliged to dismiss the writ of error, for want of jurisdiction, we have considered no other question.

This question is anticipated by the counsel [579] for the plaintiff in error, who, while admitting that the amount sued for, and for which judgment was recovered, is less than $5,000, yet maintains that the value of the matter in dispute is in excess of that sum, because the defendants in error, being the holders and owners of the bonds, to the amount of $7,500, have obtained, by the present judgment, an adjudication, conclusive upon the plaintiff in error, as an estoppel, of its liability to pay the entire amount of the principal sum.

It is true that the point actually litigated and determined in this action was the validity of the bonds, and as between these parties, in any subsequent action upon other coupons, or upon the bonds themselves, this judgment, according to the principles stated in *Cromwell* v. *Sac Co.*, 94 U. S., 351 [XXIV., 195], might, and as to all questions actually adjudged, would be conclusive as an estoppel.

And accordingly, the plaintiff in error, in support of the jurisdiction of this court, relies on what was said in *Troy* v. *Evans*, 97 U. S., 1 [XXIV., 941], that, "*Prima facie*, the judgment against a defendant in an action for money is the measure of our jurisdiction in his behalf. This *prima facie* case continues until the contrary is shown; and if jurisdiction is invoked because of the collateral effect a judgment may have in another action, it must appear that the judgment conclusively settles the rights of the parties in a matter actually in dispute, the sum or value of which exceeds the required amount." The point was not involved in the decision of that case, as the writ of error was in fact dismissed, and what was said, in the opinion, seems to have been rather intended as a concession for the sake of argument, than as a statement of a conclusion of law. The inference now sought to be drawn from it we are not able to adopt. In our opinion, sections 691 and 692, Rev. Stat., which limit the jurisdiction of this court, on writs of error and appeal, to review final judgments in civil actions and final decrees in cases of equity and admiralty and maritime jurisdiction, to those where the matter in dispute, exclusive of costs, exceeds the sum or value of $5,000, have reference to the matter which is directly in dispute, in the particular cause in which the judgment or decree, sought to be reviewed, has been rendered, and [580] do not permit us, for the purpose of determining its sum or value, to estimate its collateral effect in a subsequent suit between the same or other parties.

The rule, it is true, is an arbitrary one, as it is based upon a fixed amount, representing pecuniary value and, for that reason, excludes the jurisdiction of this court, in cases which involve rights that, because they are priceless, have no measure in money; *Lee* v. *Lee*, 8 Pet., 44; *Pratt* v. *Fitzhugh*, 1 Black, 271 [66 U. S., XVII., 206]; *Barry* v. *Mercein*, 5 How., 103; *Sparrow* v. *Strong*, 3 Wall., 97 [70 U. S., XVIII., 49]; but, as it draws the boundary line of jurisdiction, it is to be construed with strictness and rigor. As jurisdiction cannot be conferred by consent of parties, but must be given by the law, so it ought not to be extended by doubtful constructions.

NOTE.—*Jurisdiction of U. S. Supreme Court depends on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

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Undoubtedly, Congress, in establishing a rule for determining the appellate jurisdiction of this court, among other reasons of convenience that dictated the adoption of the money value of the matter in dispute, had in view that it was precise and definite. Ordinarily, it would appear in the pleadings and judgment, where the claim must be stated and determined; but where the recovery of specific property, real or personal, is sought, affidavits of value were permitted, from the beginning, as a suitable mode of ascertaining the fact, and bringing it upon the record. *Williamson* v. *Kincaid*, 4 Dall., 20; *Course* v. *Stead*, 4 Dall., 22; *U. S.* v. *Brig Union*, 4 Cranch, 216. But the fact of value in excess of the limit must affirmatively appear in the record, as thus constituted, as it is essential to the existence and exercise of jurisdiction. This court will not proceed in any case, unless its right and duty to do so are apparent upon the face of this record.

The language of the rule limits, by its own force, the required valuation to the matter in dispute, in the particular action or suit in which the jurisdiction is invoked; and it plainly excludes, by a necessary implication, any estimate of value as to any matter not actually the subject of that litigation. It would be, clearly, a violation of the rule, to add to the value of the matter determined any estimate in money, by reason of the probative force of the judgment [581] itself in some subsequent proceeding. That would often depend upon contingencies, and might be mere conjecture and speculation, while the statute evidently contemplated an actual and present value in money, determined by a mere inspection of the record. The value of the judgment, as an estoppel, depends upon whether it could be used in evidence in a subsequent action between the same parties; and yet, before the principal sum, in the present case, or any future installments of interest shall have become due, the bonds may have been transferred to a stranger, for or against whom the present judgment would not be evidence. And in every such case, it would arise as a jurisdictional question, not how much is the value of the matter finally determined between the parties to the suit, but also, whether and in what circumstances and to what extent the judgment will conclude other controversies thereafter to arise between them, and thus require the trial and adjudication of issuable matter, both of law and fact, entirely extraneous to the actual litigation, and altogether in anticipation of further controversies, that may never arise. It is not the actual value of the judgment sought to be reviewed which confers jurisdiction, otherwise it might be required to hear evidence that it could not be collected; but it is the nominal or apparent sum or value of the subject-matter of the judgment. It is impossible to foresee into what mazes of speculation and conjecture we may not be led by a departure from the simplicity of the statutory provision.

Accordingly, this court has uniformly been strict to adhere to and enforce it.

In *Grant* v. *M'Kee*, 1 Pet., 248, it refused to take jurisdiction, because the value of the premises, the title to which was involved in that action, was less than the jurisdictional limit, although they were part of a larger tract, held under one title, on which the recovery in ejectment had been obtained against several tenants, whose rights all depended on the same questions.

Stinson v. *Dousman*, 20 How., 461 [61 U. S., XV., 966], was an action at law for the recovery of rent, where the claim and judgment against the defendant below were less than the amount required to give this court jurisdiction on a writ of [582] error; but in giving judgment for the plaintiff below, for any sum at all, the court necessarily passed upon a defense of the defendant, set up by way of answer in the nature of a counterclaim, insisting upon an equitable right to a conveyance of the land, out of which it was alleged the rent issued, and the value of which was in excess of the limit required for the jurisdiction of the court. The effect of the judgment was to adjust the legal and equitable claims of the parties to the subject of the suit, which was, not merely the amount of the rent claimed, but the title of the respective parties to the land. On that ground alone the jurisdiction of the court was upheld.

Gray v. *Blanchard*, 97 U. S., 564 [XXIV., 1108], and *Tinstman* v. *Nat. Bk.*, 100 U. S., 6 [XXV., 530], are instances of the strict application of the rule limiting the jurisdiction to the amount actually in dispute in the suit; of which a similar example is found in *Parker* v. *Morrill* [*ante*, 72], decided at the present Term.

Indeed, so strictly has it been applied, that, in cases where, although the entire matter in dispute in the suit exceeds in value the jurisdictional limit, nevertheless, if there are several and separate interests in that sum, belonging to distinct parties and constituting distinct causes of action, although actually united in one suit and growing out of the same transaction, the jurisdiction of the court has been constantly denied. We have had occasion to repeat and apply this principle in several cases at the present Term. *Ex parte R. R. Co.* [*ante*, 78]; *Adams* v. *Crittenden* [*ante*, 99]; *Loan & Trust Co.* v. *Waterman* [*ante*, 115]; *Schwed* v. *Smith* [*ante*, 156]. In some of these cases, the value of the matter in dispute, actually determined against the party invoking our appellate jurisdiction, actually was largely in excess of its limit, and yet its exercise was forbidden, because it was divided into distinct claims, no one of which was sufficient of itself to entitle either party to an appeal, although the decision in one was necessarily the same in all, because rendered upon precisely the same state of facts. *Russell* v. *Stansell*, 105 U. S., 303 [XXVI., 989].

To entertain jurisdiction in the present case would be, in our opinion, to unsettle the principle of construction by which, in all the cases referred to, this court has been guided. *The* [583] *writ of error is, accordingly, dismissed for want of jurisdiction.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 310, 565; 109 U. S., 108.

Town of Plainview, Plff. in Err., v. *Samuel Marshall* et al.

Argued by same counsel and decided at same time.

Mr. Justice **Matthews** delivered the opinion of the court:

This case does not differ in any material re-

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spect from that of the *Town of Elgin* v. *Marshall* [*ante*, 249], in which the writ of error has been dismissed for want of jurisdiction, the value of the matter in dispute being less than $5,000. *For the same reason the writ of error in this case must also be dismissed; and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[596] TOWN OF RED ROCK, *Plff. in Err.*,
v.
JACOB A. HENRY.

(See S. C., 16 Otto, 596-605.)

Repeal of statute by implication—railroad aid laws—unconstitutional Act.

1. When an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two Acts are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it; and the intention of the Legislature to repeal must be clear and manifest.

2. Where two Acts are passed, one to authorize the towns in a certain group of counties to aid in the construction of one line of railroad, and the other to authorize the towns in another group of counties to aid in the construction of another line of road, and one county is common to both groups, the later Act does not repeal the older Act, either totally or partially as to such county.

3. Where a railroad company has fully complied with all the conditions upon which a town had agreed to issue bonds to it, any attempt by the Legislature to forbid their issue is unconstitutional and void.

[No. 134.]

Submitted Dec. 14, 1882. Decided Jan. 8, 1883.

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

The history and facts appear in the

Statement of the case by *Mr. Justice* **Woods:**

The Legislature of the State of Minnesota, on March 6, 1868, passed an Act entitled "An Act to Authorize the Towns in Fillmore, Mower, Freeborn, Faribault, Martin and Jackson Counties, to Issue Bonds to Aid in the Construction of any Railroad Running into or through Said Counties." The first three sections of this Act, which are the only ones material to this case, were as follows:

"Section 1. Each town in the Counties of Fillmore, Mower, Freeborn, Faribault, Martin and Jackson is authorized to issue bonds as hereinafter provided, to aid in the construction of any railroad running into or proposed to be built through either or all of the counties aforesaid.

Sec. 2. Said bonds shall be issued in sums of not less than one hundred dollars each, may bear interest at a rate not exceeding ten per cent per annum, payable annually, and shall run for a period not exceeding ten years from their respective dates. They shall be signed by the chairman of the board of supervisors, and countersigned by the town clerk of such towns; and the principal and interest, as they become due, shall be payable to the person or corporation to whom they shall be issued or bearer, on presentation to the town treasurer.

Sec. 3. Any town in either of the aforesaid counties may, at any usual or regularly called special meeting, by vote of a majority of the legal voters of such town present and voting, fix the amount and size of bonds to be issued by such town, the rate of interest and the date of payment of all and any thereof, and the person or corporation to whom the same shall be issued and made payable, and the time at which, and the terms and conditions upon which, the same will be issued; and such town may, at such meeting, by vote, delegate all or any of the foregoing powers to the board of supervisors, or any committee appointed by the town." [597]

Afterwards, on February 27, 1869, this Act was amended by substituting thirty instead of ten years, as the limit of time at or within which the bonds were to be made payable.

While this law, thus amended, was in force, to wit: on May 9, 1869, the Southern Minnesota Railroad Company, by Clark W. Thompson, its general manager, made the following proposition to certain towns in the Counties of Mower and Fillmore, among which was the Town of Red Rock, the plaintiff in error:

"I propose, in the name of the Southern Minnesota Railroad Company, to build and put in operation the Southern Minnesota Railroad, from its present terminus in Fillmore County to some point on the Minnesota Central Railroad, on or before the thirty-first day of December, one thousand eight hundred and seventy-two, on the following conditions, to wit:

That the following towns in Fillmore and Mower Counties shall vote and certify to the Southern Minnesota Railroad Company the following amount of bonds of their respective towns, payable in twenty years, with seven per cent annual interest: Fillmore, fifteen thousand dollars; Spring Valley, twenty-five thousand dollars; Frankfort, fifteen thousand dollars; Grand Meadow, fifteen thousand dollars; Red Rock, twenty-five thousand dollars, and Walthan, fifteen thousand dollars; the bonds not to be delivered, and the interest not to commence, until said completed road shall reach the town, or some point as far west as the eastern line of the town, voting the aid, if said road shall be done by the time specified."

On May 15, 1869, a special meeting of the legal voters of the Town of Red Rock was held, at which the following resolutions were passed by a majority of the legal voters present and voting at said meeting:

"*Resolved*, That, under the provisions of an Act of the Legislature of the State of Minnesota, entitled 'An Act to Authorize the Counties of Fillmore, Mower, Freeborn, Faribault, Martin and Jackson to Issue Bonds to Aid in the Construction of any Railroad Running into or through Said Counties', the Supervisors of the Town of Red Rock, Mower County, Minnesota, and their successors in office be and are hereby authorized and required to issue and deliver the Southern Minnesota Railroad Company the bonds of said Town, with interest coupons attached, to the amount of twenty-five thousand dollars, such bonds to bear interest at the rate of seven per cent per annum, payable annually; such bonds to be issued in denominations of not less than one thousand dollars each, and to be payable in twenty years from their date, and to be signed by the chairman of said Board of Su- [598]

NOTE.—*Repeal of statute by implication.* See *note* to U. S. v. Henderson, 78 U. S., XX., 225.

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pervisors and attested by the clerk of said Town, whenever said railroad company shall have completed its said road, from its present termination, Fillmore County, to some point within one hundred rods of the southeast corner of the northeast quarter of section nine in township one hundred and three north of range seventeen west, and shall have established a regular freight and passenger depot and are doing business therefrom.

Resolved, That the bonds shall not be issued or delivered to said company, and no obligation incurred by said Town by voting of this resolution, unless said company shall have completed said road to said point by the thirty-first day of December, one thousand eight hundred and seventy-two."

Prior to the issue of the bonds mentioned in these resolutions, the railroad company never formally agreed in writing to the terms and conditions on which the bonds were voted, but in the fall of 1869 it located its road between the points and upon the line mentioned in the resolution of the Town of Red Rock above set forth; and in December of that year let the contract for constructing that portion of its line so located, and the work of construction was at once begun and was carried on during the winter, spring and summer of the year 1870.

Before the close of the summer, and more than two years before the time fixed in the resolution of the Town of Red Rock, the railroad company had complied with all the terms and conditions of that resolution, and had completed its road between the points and upon the line prescribed in the resolution, and had built the depot, and was "doing business thereupon."

Whereupon, in pursuance of the proposition made to the railroad company in said resolution of May 15, 1869, the Town of Red Rock, on March 9, 1871, issued to the Southern Minnesota Railroad Company twenty-five bonds of $1,000 each, falling due in twenty years. The bonds referred on their face to the law of the [599] State and the vote of the legal voters of the Town of Red Rock, by which it was supposed the issue of the bonds was authorized, and they recited that the railroad company had fully performed the conditions upon which the Town had promised to issue the bonds.

After the issue of the said bonds, and before the maturity of the first coupons thereunto attached, the Southern Minnesota Railroad Company, which was then the holder of said bonds and coupons, sold, transferred and delivered the bonds, with all the coupons appertaining thereto attached to the same, to the plaintiff, for the consideration of $900 in money for each of said bonds, such price then being the full market value of the same, which money was forthwith paid by the plaintiff to the said company. At the time of such purchase and payment of such money, the plaintiff had no knowledge of any of the special Acts of Legislature hereinafter mentioned, and no knowledge of the proceedings of the electors or other authorities of the said Town of Red Rock, except what he derived from the recitals contained in the said bonds.

This suit was brought upon coupons which had fallen due since the defendant in error became the holder of the bonds.

The defense set up on the trial in the circuit court was this: that, before the railroad company had fully complied with the conditions upon which the Town of Red Rock had proposed to issue its bonds, to wit: on March 5, 1870, the Legislature of Minnesota passed an Act, the sections of which pertinent to this case are as follows:

"Sec. 1. Each township and village, town and incorporated city in the Counties of Mower, Dodge, Goodhue and Dakota, by a vote of a majority of the supervisors of any township, or of the majority of the city council of any such village, town or city, as hereinafter provided, may create and issue its bonds with interest coupons attached, to aid in the construction of any railroad running into or proposed to be built through either or all of the counties aforesaid.

Sec. 2. The majority of the supervisors of any township, or the majority of the village, town or city council of any such village, town or city in the aforesaid counties, may fix the amount and size of the bonds to be issued by said township, village, town or city, the rate of interest and the date of payment of all or any part thereof, and the person or corporation to whom the same shall be issued and made payable, and the time at which, and the terms and conditions upon which the same shall be issued to such corporation.

Sec. 3. Before the bonds are issued in any [600] township or incorporated village, town or city, the question of issuing them shall be submitted to the legal voters thereof by the supervisors of said township or by the council of said village, town or city. And the supervisors of townships and common councils of said villages, towns and cities are hereby authorized to appoint and call special elections for such purposes, which elections shall be called and conducted in such form and manner as elections are usually conducted in such townships, villages, towns or cities."

The Act further provided that if the majority of the voters at such election voted for the issue of the bonds, the said supervisors or the said common council should cause the bonds to be delivered to the railroad company whenever it should have complied with the terms and conditions upon which the bonds were to be issued.

Afterwards, to wit: on March 2, 1871, and before the bonds in controversy were issued, the Legislature amended the 1st section of the Act, so as to make it read as follows:

"Sec. 1. Each township, village, town and incorporated city in the counties of Mower, Dodge and Goodhue, by a vote of a majority of the supervisors of any township or of the majority of the city council of any such village, town or city, subject to the approval and ratification of the legal voters of said township, village, town or city, as hereinafter provided, may create and issue its bonds, with interest coupons attached, to aid in the construction of any railroad running into or proposed to be built through either or all the counties aforesaid."

This was followed by a repealing section, as follows:

"Sec. 2. All Acts and parts of Acts inconsistent with this Act are hereby repealed."

The contention of the Town of Red Rock in the circuit court was that the Act of 1868, under which it was claimed that the bonds had

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been issued, had been repealed by the above mentioned Acts of 1870 and 1871. Upon this question the Judges of the Circuit Court were divided in opinion. In accordance with the opinion of the presiding Judge, judgment was rendered in favor of the plaintiff, and the question upon which the Judges differed was certified to this court for its decision.

[601] *Mr.* **Gordon E. Cole**, for plaintiff in error.

Messrs. **W. P. Clough** and *E. G. Rogers*, for defendant in error.

Mr. Justice **Woods** delivered the opinion of the court:

The Statute of March 5, 1870, is an affirmative Act, and contains no express repeal of the Act of March 6, 1868. The question is, therefore, whether the former Act repeals the latter by implication. The leaning of the courts is against repeals by implication. *U. S.* v. *Tynen*, 11 Wall., 88 [78 U. S., XX., 153], and if it be possible to reconcile two statutes, one will not be held to repeal the other. *McCool* v. *Smith*, 1 Black, 459 [66 U. S., XVII., 218].

It was held by this court, in the case of *Wood* v. *U. S.*, 16 Pet., 342, that a repeal by implication must be by "Necessary implication; for it is not sufficient to establish that subsequent laws cover some or even all the cases provided for by it, for they may be merely affirmative or cumulative or auxiliary."

In the case of *U. S.* v. *Tynen*, *ubi supra*, it was declared by *Mr. Justice* Field, speaking for the court, that "It is when the later Act plainly shows that it was intended as a substitute for the former Act, that it will operate as a repeal of that Act."

So in the case of *Henderson's Tobacco*, 11 Wall., 652 [78 U. S., XX., 235], this court said, *Mr. Justice* Strong delivering its opinion, that "When the powers and directions under the several Acts are such as may well subsist together, an implication of repeal cannot well be allowed."

In the case of *King* v. *Cornell* [*ante*, 60], decided at the present Term, the *Chief Justice*, expressing the opinion of the court, on this point said: "While repeals by implication are not favored, it is well settled that when two Acts are not in all respects repugnant, if the later Act covers the whole subject of the earlier and embraces new provisions which plainly show that the last was intended as a substitute for the first, it will operate as a repeal." See, also, *Murdock* v. *Memphis*, 20 Wall., 590 [87 U. S., XXII., 429].

The result of the authorities cited is, that when an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two Acts are in irreconcilable conflict, or unless the later statute covers the [602] whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the Legislature to repeal must be clear and manifest.

Guided by this rule, we are to settle the question upon which the Judges of the Circuit Court were divided in opinion.

It must be conceded that while the Act of 1868 requires only the vote of a majority of the legal voters of the town before the bonds authorized thereby could be lawfully issued, the Act of 1870 requires a vote of a majority of the supervisors, as well as a vote of the majority of the legal voters, to warrant the issue of bonds under its authority. It is, therefore, clear, that the conditions upon which the towns of Mower County were authorized to issue their bonds were different under the two Acts. Nevertheless, we are of opinion that the latter Act was neither repugnant to nor was it intended as a substitute for the former. This, we think, will appear from the following considerations:

The Act of 1868 authorized the issue of bonds by the towns of five counties, namely: Fillmore, Mower, Freeborn, Faribault, Martin and Jackson. The map of Minnesota discloses the fact that they form a part of the southern tier of the counties of the State and, beginning at the Mississippi River, extend in a right line from east to west in the order named in the Act. It appears from the record that, prior to the passage of the Act of 1868, the Southern Minnesota Railroad Company was chartered and empowered to construct and use a railroad from the Mississippi River westward across the State of Minnesota to its western boundary. This fact makes it reasonably clear that the object of the Act of 1868 was to authorize the towns of the counties named, to issue their bonds in aid of the construction of that line of railroad.

The Act of 1870 authorizes the towns, etc., of the Counties of Mower, Dodge, Goodhue and Dakota, to issue bonds to aid in the construction of any railroad running into or proposed to be built through either or all of said counties. The map shows that these counties, beginning with Mower, on the southern boundary of the State, extend in a line northwardly to the Mississippi River opposite St. Paul. It is, therefore, reasonably clear that the purpose of this law was to aid in the construction of a line of railroad [603] running north and south through these counties. It is true that each of the Acts authorizes the towns to issue bonds in aid of any railroad running into either of the counties named therein, but this fact is consistent with the general purpose of the Act as above indicated.

We have, therefore, two Acts, one passed to to authorize the towns in a certain group of counties to aid in the construction of one line of railroad, and the other to authorize the towns in another group of counties to aid in the construction of another line of road, and the County of Mower happens to be common to both groups.

When we consider the different objects which it is reasonably clear the Legislature had in view in the passage of these two Acts, it is a fair construction to hold that it was not the intention of the Legislature, by the passage of the later Act, to repeal the older Act, either totally or partially.

It is not contended that the supposed repeal affected any of the counties named in the first Act, except the County of Mower. If the method of authorizing the issue of bonds in that Act was an unsafe and vicious one, which the Legislature intended to change, why did it not repeal the Act as to other counties, and apply to them also the restrictions contained in the later Act?

It would not be an unwarranted construction of the two Acts to hold that bonds, issued in aid of an east and west line of railroad, passing through the counties named in the Act of March 6, 1868, should be issued in conformity with that

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Act, and that bonds issued in aid of a north and south line of railroad, running through the counties named in the Act of March 5, 1870, should be issued in conformity with the latter Act.

We think that the circumstance that the County of Mower happens to be in both groups of counties, does not show a purpose on the part of the Legislature to repeal the first Act, so far as it affects that county.

The language of the Act of 1868 might have been sufficient to authorize the towns in Mower County to issue bonds in aid of a north and south line of railroad, but it was necessary to pass an Act to authorize the towns in the Counties of Dodge, Goodhue and Dakota to issue bonds in aid of such a road. In passing this [604] Act, the County of Mower was included, doubtless, for the purpose of making clear and unquestionable the authority of towns in that county to issue bonds for the same purpose.

We, therefore, find no repugnance between the statutes, nor do we find the later Act to be a revision of the entire subject covered by the older Act, nor to be intended as a substitute for it. There is, therefore, no repeal.

There is another consideration which is entitled, in our opinion, to some weight, and that is, that, before the Act of 1870 was passed, the railroad company had made considerable progress in performing the conditions upon which the Town of Red Rock had agreed to issue its bonds. It had located its line of road according to the proposition made by the Town, and had for more than two months been engaged in constructing its road upon that line. It is true it was under no binding contract with the Town to go on and complete the line, but it had unmistakably manifested its purpose to do so, and had expended and was expending large sums of money in an effort to comply with the conditions upon which the Town had agreed to issue its bonds. If, under these circumstances, the Legislature had withdrawn the authority of the Town to issue its bonds, or had imposed new conditions upon the issue, it would have been an act of bad faith. If possible, we should give such a construction to the Act of the Legislature as would relieve the State from such an imputation. *Broughton* v. *Pensacola*, 93 U. S., 266 [XXIII., 896].

The amendatory Act of March 2, 1871, with its repealing clause, can have no effect on this controversy. That Act was passed more than six months after the railroad had fully complied with all the conditions upon which the Town of Red Rock had agreed to issue its bonds. It was too late then for the Legislature to interfere. The railroad company was entitled to the bonds, and any attempt by the Legislature to forbid their issue would have been unconstitutional and void.

The burden is on the plaintiff in error to make it appear that the Act of March, 1868, which authorized the issue of the bonds, the coupons of which are in suit, was repealed by the subsequent Act of 1870. In view of the considerations which we have stated, we are of opin- [605] ion that the repeal has not been satisfactorily shown. On the contrary, we think it reasonably clear that no repeal of the former Act was intended by the passage of the Act of 1870.

As this view coincides with the opinion of the presiding Judge in the Circuit Court, upon which the judgment of that court was based, it follows *that the judgment should be affirmed; and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 145; 113 U. S., 560.

JOSHUA C. PIERCE ET AL., Copartners, as PIERCE, SIMMONS & Co., [546]

v.

OLE A. INDSETH.

(See S. C., 16 Otto, 546-551.)

Seal, what is—of notary—protest of bill of exchange—proof of foreign laws.

1. The seal of a public officer is sufficient, in the absence of positive law prescribing otherwise, if impressed upon the paper itself in such a manner as to be readily identified upon inspection.
2. The court will take judicial notice of the seals of notaries public, even of foreign countries.
3. On the questions of timely and sufficient presentation and protest, the law of the place where a foreign bill of exchange is payable governs, and not the law of the place where it is drawn.
4. The general rule as to the proof of foreign laws is, that statute law must be proved by a copy properly authenticated, and the unwritten law must be proved by those acquainted with the law. But this rule may be varied by statute.

[No. 106.]

Argued Nov. 23, 24, 1882. Decided Jan. 8, 1883.

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

The history and facts fully appear in the Statement of the case by *Mr. Justice* **Field:**

This is an action by the plaintiff in the court below, Ole A. Indseth, against the defendants, composing the firm of Pierce, Simmons & Co., on a foreign bill of exchange, payable at sight to his order, drawn by them at Red Wing, in Minnesota, on the Christiana Bank, in Norway, which is as follows:

"*Exchange* 1,544$\frac{19}{100}$ kroner, *per stamp*, 2c.
PIERCE, SIMMONS & Co., BANKERS,
Red Wing, Minnesota, February 1, 1877.

At sight of this original of exchange (duplicate unpaid) pay to the order of O. A. Indseth, fifteen thousand four hundred and forty-one $\frac{19}{100}$ *kroner*, value received, and charge same to account of Sk. P. I. & Co., Chicago, as per advice from them.

PIERCE, SIMMONS & Co.
TO CHRISTIANA BANK OF KREDIT KASSE.
Christiana, Norway.'

The value of these *kroners* in our money was $4,469.25.

Indseth resided at the time near Eidsvold, in Norway, and the bill was purchased by his agent in Minnesota, who forwarded it to him. He received it February 27, 1877, and retained it in his possession until April 12 following, when he presented it to the bank for payment, which was refused. He then caused the bill to be protested by a notary of Norway for non-payment. The drawers were notified of its non- [547] payment by letter from the plaintiff, which they received at Red Wing as early as May 15, 1877, and also by the original certificate of pro-

NOTE.—*Foreign laws, how proved.* See *note* to Ennis v. Smith, 53 U. S. (12 How.), 400.

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test of the notary, which, with a translation, was, at that time, shown to one of them by the agent of the plaintiff, to whom the document was sent for that purpose.

It appears from the findings of the court below, that the drawers had no money to their credit with the Christiana Bank when the bill was drawn, but depended for its acceptance and payment upon advices to the bank by Skow, Peterson, Isberg & Co., bankers, at Chicago. That firm failed and made an assignment on the 21st of March, 1877. It had, however, from February 28 to that date, inclusive, to its credit with the bank, money sufficient to pay the bill, but no portion of it had been set apart for that purpose, and it has been since paid to the assignee of the firm. On the 15th of February, 1877, the drawers wrote to the payee a letter stating that, fearing their draft might not be paid, they had caused a cable dispatch to be sent to Christiana directing payment, but there was no evidence that the bank received such a dispatch, if sent, or gave them any credit on it.

Eidsvold, at or near which the plaintiff resided, is distant about fifty miles from Christiana, the place where the bank was situated, and between them there was daily communication by mail and by railway.

In proof of the presentment of the bill to the bank and the latter's refusal to pay the same, a copy of the notary's certificate of protest was given in evidence by the plaintiff, the defendants having stipulated for the admission of a copy with the like effect as the original, which was needed elsewhere. Subsequently, the defendants themselves produced the original for the purpose of showing its character, insisting, at the time, that it had no authenticity as the act of the notary, and was not, therefore, competent evidence of the presentation and non-payment of the bill.

To meet the objection of unnecessary delay in presenting the bill, the plaintiff gave in evidence, against the objection of the defendants, the deposition of a lawyer of Norway as to the law of that country respecting the presentation of bills of exchange for payment. Exception [548] was taken to the ruling of the court in its admission. It appeared, from the deposition, that by the law of Norway, the holder of a foreign bill of exchange, payable at sight, is allowed a year after its date within which to present it to the drawee for payment; and that the drawer is not relieved from liability, if the presentation be not made within the year, unless he can prove that, owing to the delay, he has suffered a loss in his accounts with the drawee.

Evidence was offered by the defendants, to show that the plaintiff, himself, had admitted his negligence in presenting the bill; but on objection of counsel it was excluded, to which ruling an exception was taken.

The court found in favor of the plaintiff for the full amount of the bill, and judgment having been entered on the finding, the case was brought to this court for review.

Mr. **Charles E. Flandrau,** for plaintiffs in error.

Mr. **Edward C. Palmer,** for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

The certificate of the protest of the bill of exchange by the notary in Norway was properly received in evidence. It is in due form and bears what purports to be the seal of the notary. The seal, it is true, is impressed directly on the paper by a die with which ink was used. This is evident from inspection of the original, which has been transmitted to us from the court below for our personal examination.

The use of wax or some other adhesive substance, upon which the seal of a public officer may be impressed, has long since ceased to be regarded as important. It is enough, in the absence of positive law prescribing otherwise, that the impress of the seal is made upon the paper itself in such a manner as to be readily identified upon inspection.

The language used in *Pillow* v. *Roberts*, reported in 13 Howard [472], as to the sufficiency of a seal of a court impressed upon paper instead of wax or a wafer, is applicable here. Said the court, speaking by *Mr. Justice* Grier: "Formerly, wax was the most convenient and the only material used to receive and retain the impression of the seal. Hence it was said: *Sigillum est cera impressa; quia cera, sine impressione non est sigillum.* But this is not an allegation that an impression without wax is not a [549] seal, and for this reason courts have held that an impression made on wafers or other adhesive substances capable of receiving an impression, will come within the definition of '*cera impressa.*' If, then, wax be construed to be merely a general term including within it any substance capable of receiving and retaining the impression of a seal, we cannot perceive why paper, if it have that capacity, should not as well be included in the category. The simple and powerful machine now used to impress public seals, does not require any soft or adhesive substance to receive or retain their impression. The impression made by such a power on paper, is as well defined, as durable, and less likely to be destroyed or defaced by vermin, accident or intention than that made on wax. It is the seal which authenticates, and not the substance on which it is impressed; and where the court can recognize its identity, they should not be called upon to analyze the material which exhibits it."

Here there is no difficulty in identifying the seal. The impression, which is circular in form, has within its rim the words "Notarial Seal, Christiana." Besides, the court will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world. We thus recognize the seal to the document in question, as that of the notary in Norway, and as such authenticating the certificate of protest and entitling it to full faith and credit. Greenl. Ev., sec. 5; Story, Bills, sec. 277; *Townsley* v. *Sumrall*, 2 Pet., 179; *Chanoine* v. *Fowler*, 3 Wend., 173; *Carter* v. *Burley*, 9 N. H., 559, 568; *Halliday* v. *McDougall*, 20 Wend., 81.

The certificate being admitted proved the presentation of the bill to the bank on the 12th of April, 1870, and its non-payment. That this presentation was made within the period allowed by the law of Norway appears from the deposition of a lawyer of that country, taken under a commission from the court. That law allowed a year after the issue of the bill for its

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presentation; and on the question of timely presentation the law of the place where a foreign bill of exchange is payable governs, and [550] not the law of the place where it is drawn. In giving a bill upon a person in a foreign country, the drawer is deemed to act with reference to the law of that country, and to accept such conditions as it provides with respect to the presentment of the bill for acceptance and payment. Thus, where days of grace on bills are different in the two countries, the rule of the place of payment must be followed. In England and the United States three days of grace are usually allowed; in France there are none, and in some places the number of days varies from three to thirty. Whatever is required by law to be done at the place upon which the bill is drawn, to constitute a sufficient presentment either in time or manner, must be done according to that law; and whatever time is permitted within which the presentment may be made by that law, the holder may take without losing his rights upon the drawer, in case the bill is not paid. So, also, if the bill be dishonored, the protest by the notary must be made according to the laws of the place. It sometimes happens that the several parties to a bill, as drawers or indorsers, reside in different countries, and much embarrassment might arise in such cases if the protest was required to conform to the laws of each of the countries. One protest is sufficient, and that must be in accordance with the laws of the place where the bill is payable.

In this case, the bill having been protested, the drawers were notified of its dishonor by letter from the payee, received by them on the 15th of May following, and also by personal delivery at about the same time of the original certificate of the protest, with a translation of it into English, to one of the drawers by an agent of the payee, to whom they were transmitted for that purpose. No question is made that this notice was not sufficient to charge the drawers.

The testimony of the lawyer of Norway, as to the law of that country was admissible under the Statute of Minnesota, which provides that "The existence and the tenor or effect of all foreign laws may be proved as facts by parol evidence, but if it appears that the law in question is contained in a written statute or code, the court may, in its discretion, reject any evidence of such law that is not accompanied by a copy thereof."

[551] The general rule, as to the proof of foreign laws, is that the law which is written, that is, statute law, must be proved by a copy properly authenticated; and that the unwritten law must be proved by the testimony of experts, that is, by those acquainted with the law. *Ennis* v. *Smith*, 14 How., 426. But this rule may be varied by statute, and that of Minnesota leaves it to the discretion of the judge to require the production of a copy of the written law when the fact appears that the law in question is in writing. The discretion of the Judge here was not improperly exercised, even if in such case his action would be the subject of review, as contended by counsel.

The admission of the payee, that he had been negligent in presenting the bill was properly excluded. His negligence in that respect could not have affected his legal rights, if, in point of fact, the bill was presented within the time allowed by the laws of Norway.

We have thus far assumed that the drawers were entitled to notice of the presentation and non-payment of the bill. But it may be doubted whether such was the fact. They had no funds with the bank in Norway when the bill was drawn or at any other time, and they relied for its payment upon the advices of third parties. Although such third parties had funds at the bank after the bill had been received by the payee in Norway, there is no evidence that they ever advised the bank to pay the bill out of such funds. It is found by the court that the bank never set apart any portion of them to meet the bill. The cable dispatch of the drawers, of which the letter of February 15 speaks, if it ever reached the bank, does not appear to have induced it to give them any credit. In the most favorable view, therefore, which could be taken of the position of the drawers, we see nothing which relieves them from liability.

The judgment is, therefore, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

LUCY C. FLAGLOR GAY, ARTHUR W. WINDETT AND CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, *Appts.*,

v.

CATHARINE PARPART.

(See S. C., 16 Otto, 679-699.)

Proof of deed—conveyance to provide for illegitimate children—partition at law and in equity—conveyance by master—when title passes—deeds inter partes, *when conclusive—purchasers with notice*, pendente lite.

*1. When an instrument concerning real estate is acknowledged or proved so as to be admitted to record and read in evidence, the burden of proof is on the party denying its execution, and the fact that a person whose name is signed as a witness to its execution is alive and is not called to testify, leaves a strong inference that its execution cannot be disproved.

2. When a man who has married a woman and become the father of two children by her, makes to her an assignment of a mortgage, after she discovers that he had a wife living from whom he had no divorce, the assignment is a meritorious act and not impeachable for immorality of consideration.

3. The difference between a judgment and writ of partition at common law, and a partition by decree in chancery, as it affects the title, is, that the former operates by way of delivery of possession and estoppel, while in the latter the transfer of title can be effected only by the execution of conveyances between the parties, which may be decreed by the court and compelled by attachment.

4. In some of the States of the Union, the chancery courts have been authorized to make such conveyances by master commissioners, or it has been enacted that the decree itself shall operate as such conveyance.

5. But where in a partition in equity no such decree for conveyance has been made, and no such statute exists, the proceeding is incomplete, and while it may be effectual as a division and allotment of the property, no title passes, and that remains as it was before.

6. Where such a decree undertook to declare the nature of the estate of each co-tenant, and does it erroneously, and where deeds have been made three

*Head notes by *Mr. Justice* MILLER.

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days after *inter partes* which do not follow this erroneous decree, and where, twelve years afterwards, a bill in chancery is brought to perfect the partition by compelling conveyances in accordance with the erroneous declaration of the original decree, it is open to the court, on this new bill; to inquire into the equities of the parties arising out of the surrounding circumstances, and to refuse to decree conveyances in accord with the title as found by the former decree, when it is inequitable to do so.

7. If such former decree was made by consent of the party against whom the error was committed, and without any valuable consideration, and no one is interested but volunteers, or those who have purchased with full notice of the facts, no such decree for conveyance will be made, but the parties will be left to rely for their title on the conveyances which were interchangeably made to each other in accordance with the allotments to the parties.

8. No person can be an innocent purchaser for value under the first decree, who bought while the suit to enforce it was pending, and who was attorney for the plaintiff in that suit throughout, and whose purchase was from such plaintiff.

[No. 99.]

Argued Nov. 22, 23, 1882. Decided Jan. 8, 1883.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **Edward S. Isham, Arthur W. Windett,** *Lyman Trumbull* and *C. F. Peck,* for appellants.

Messrs. **Lawrence Proudfoot** and **John S. Miller,** for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court for the Northern District of Illinois.

The issues raised by the pleadings are so well stated in the opinion of the District Judge, sitting in the circuit court on rendering the decree, that we cannot do better than to state them in his language.

"By the original bill the complainant, Elizabeth Flaglor, charged that she was the sole surviving child of Charles D. Flaglor, deceased; that one Augustus Garrett died in the City of Chicago some time in the year 1848, seised of lot 25, in block 9, in the Fort Dearborn addition to Chicago, together with a large amount of other real estate, leaving Eliza Garrett his widow, and no children nor descendants of a child or children, and leaving a will, which was duly probated in Cook County, whereof said widow, Eliza Garrett, James Crow and Thomas G. Crow were duly appointed executors, in which will said Garrett duly disposed of and devised his estate, and among other devisees in said will was the said Charles D. Flaglor; that in the year 1851 a bill for partition was filed in the Circuit Court of Cook County by said Eliza Garrett, James Crow and Thomas G. Crow against Letitia Flaglor, Frederick T. Flaglor and Charles D. Flaglor, and Lucy Louisa Flaglor and Elizabeth Flaglor, children of said Charles D., all of whom, it was alleged, were interested in said will; that, upon the answers of the defendants to said bill, proofs taken, and the report of commissions, a decree was entered that partition be made of the real estate of which said Augustus Garrett died seised, among the persons to whom the same was devised by said will, and said lot 25, in block 9, was allotted and set apart to said Letitia Flaglor during her life, remainder over to said Charles D. Flaglor for his life, remainder in fee to his children him surviving, and on failure of children him surviving, the fee to said James Crow and Thomas G. Crow; that the parties entered into possession of the several [681] parcels of real estate as set apart to them, and executed and delivered to each other, interchangeably, deeds of conveyance so as to invest each of the parties to said bill with the title in severalty to the portions of said estate so set apart and allotted to them, and also a certain written contract in regard to the interests of the children of said Charles D. in the property set off to said Letitia and Charles D.

The bill then alleged the death of said Letitia and Charles D. Flaglor, and that complainant, Elizabeth, was the sole surviving child of said Charles D., and entitled as such to an estate in fee to the lands so set off and allotted by said decree to said Letitia and Charles D.; and prayed that said James and Thomas G. Crow, as surviving executors of the will of said Garrett, be required to execute proper deeds of conveyance of the fee to said lot 25 to said complainant, Elizabeth; and that said Jessell and the other tenants in possession account for and pay over to complainant the rents, issues and profits of said lot by them received after the death of said Charles.

The bill also charged that said Charles D. Flaglor, on or about the 19th day of August, 1857, made and executed to Frederick T. Flaglor, his father, a certain mortgage deed of said lot 25, to secure the payment of the sum of $20,000, on the first day of November, 1867, together with interest thereon at the rate of six per cent per annum, payable annually, and that said defendant Catharine Reid was the holder of said mortgage.

Soon after filing the original bill, the said Elizabeth Flaglor, complainant, died, leaving a will, whereby she devised all her estate to her mother, Lucy C. Flaglor, and by order of court, said Lucy C., who has since intermarried with one Gay, was made complainant, and the suit has since proceeded in her name. James and Thomas G. Crow were served with process, but made no defense. Jessell appeared and answered. Catharine Reid, being a non-resident, was brought into court by publication, under the Statute of Illinois, and such steps were taken that the case on the original bill was brought to hearing before the Superior Court of Cook County, at the August Term, 1872, and a decree made directing said James and Thomas G. Crow, as executors, to convey to complainant the title in [682] them, as surviving executors and trustees of Augustus Garrett; and that Jessell, who was a tenant of the premises under an unexpired lease from said Charles D. Flaglor, surrender possession to complainant; and that the defendant, Catharine Reid, release the said mortgage made by said Charles D. to Frederick T. Flaglor; and that said mortgage be held void as against the estate of said complainant in said premises. In October, 1873, said Catharine Reid, by the name of Catharine Parpart (she having intermarried with Lewis Parpart), appeared in said cause, and on her motion said decree was opened and she was let in to defend in said cause, whereupon she filed her answer.

And afterwards, on the first day of February, 1875, she filed her cross-bill, alleging that said Charles D. Flaglor made and delivered said mortgage in fee to his father, Frederick T. Flag-

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lor, and that said Frederick T., on the first day of August, 1868, duly assigned said mortgage and the indebtedness thereby secured, to her, the said Catharine, and that the same was then held and owned by her, and that the whole of the principal sum of $20,000, together with interest from the 2d day of June, 1868, remained unpaid. To this cross-bill Arthur W. Windett, the Connecticut Mutual Life Insurance Company and others were made defendants, and a foreclosure of said mortgage was prayed. To this cross-bill answers were filed by Mr. Windett and the Connecticut Mutual Life Insurance Company, alleging, in substance, that, by the will of Augustus Garrett, said Charles D. Flaglor was only devised a life estate after the death of his mother, Letitia Flaglor, in the lands devised to him by said will, and that it was agreed between said Eliza Garrett, widow, and James Crow, Thomas G. Crow and said Letitia Flaglor, Frederick T. Flaglor, her husband, and said Charles D., that a partition should be made among them of the property devised by said will; and that by such partition only a remainder for life, after the death of said Letitia, should be vested in said Charles D.; and that on his death the fee of the property so allotted to said Letitia and Charles should go to the children of said Charles D.; that, in pursuance of said agreement, the bill for partition was filed in the Cook County Circuit Court, and that said Charles by his answer [683] appeared and consented to a decree; and that the decree in said partition cause was made in pursuance of such consent; and that said Charles was bound thereby and precluded from asserting or claiming any other than a life estate in said lands and that said Frederick T. Flaglor and said Catharine Reid were bound by such decree; that said mortgage was given by said Charles to said Frederick without consideration, and that said Catharine was not a *bona fide* assignee for good or valuable consideration; and that said mortgage only conveyed the life estate of said Charles D. in the mortgaged premises.

Before the answer of the Insurance Company was filed, the cause was, on petition of said Company, removed to this court; and on the 5th of November, 1877, the said Catharine, by leave of this court, filed her amended cross-bill, alleging that all the title and interest of Mr. Windett and the Insurance Company and the other defendants were acquired after and were subject and subordinate to the said mortgage held by her, and further alleged that said Charles was, by the will of said Garrett, given an estate in fee after the death of his mother Letitia; that no agreement was ever made by Charles to accept an estate for life, and that the fee should go to his children; that said Charles never consented to said decree in said partition case awarding him only a life estate in the property set off to him; that the deeds made interchangeably between the devisees of Garrett and the contract between said parties made at the same time, were not made in pursuance of or for the purpose of satisfying said decree; that said Charles had never ratified said decree nor accepted a life estate in lieu of a fee in the lands set off to him, and that said decree was fraudulent and void as against said Charles.

"The answers of Mr. Windett and the Insurance Company to the amended cross-bill denied all frauds or mistake in the decree in the partition suit, and insisted that Charles and the cross-complainant were bound thereby, and also insisted that said decree was in accordance with and in furtherance of the interest of the will of said Garrett, so far as it related to the estate of said Charles in the lands allotted to him."

After a full hearing on these issues upon the [684] pleadings, documents and other testimony, the circuit court rendered a decree in favor of Catharine Parpart. By this decree, the validity of the mortgage set out in the cross bill and its assignment to her were established, and a decree rendered in her favor for the amount of the bond, with interest, declaring it to be a lien on the property in controversy paramount to that of all other parties to the litigation, and that unless it was paid the property would be sold for the purpose of raising the money to satisfy the mortgage debt.

From this decree, Arthur W. Windett, Lucy Flaglor Gay and the Connecticut Mutual Life Insurance Company took an appeal, which brings it before us for review. The case, as it presents itself to us, concerns the interest of no other parties but these, and is limited to the proceeding growing out of the cross-bill.

Two questions are raised by these issues, namely: the validity of the mortgage made by Charles D. Flaglor to Frederick T. Flaglor, his father, and of the assignment of that mortgage to Mrs. Parpart, then Catharine Reid, and if this be decided in her favor, the further question, whether, at the time that Charles Flaglor made the mortgage, he held a fee simple to the property mortgaged or only a life estate.

As the least difficult of these questions, and the one which in the natural order of discussion should be first disposed of, we will consider the validity of the mortgage and its assignment.

There is but little question raised that as between Charles D. Flaglor, mortgagor, and his father, Frederick Flaglor, the transaction was an unexceptionable one. At that time, whether the estate was a fee simple or a life estate, certain transactions took place between them by which Charles became indebted to his father in the sum of $20,000. This sum the father seemed disposed to permit to remain in the hands of his son on the security of a mortgage on this property. He, accordingly, in the year 1857, took from Charles his bond for that sum, payable ten years after date, with annual interest at the rate of six per cent, secured by this mortgage. The interest was promptly paid, notwithstanding the death of Charles in 1858, up to the death of his father in 1865. There is no reason, therefore, to doubt the validity of the mortgage as between these two.

As regards the assignment of the bond and mortgage by Frederick Flaglor to the present [685] appellee, it is assailed on several grounds, which resolve themselves into a denial of the execution of the assignment and the immorality of the consideration on which it was made.

The assignment itself is on a separate piece of paper from the mortgage and the bond, and the signature is made by the cross mark of Flaglor instead of being in his own handwriting. As Flaglor was a man of some education, and it is shown that about that time he was in the habit of writing letters and signing his own name to them, that circumstance is deemed suspicious.

The relations at that time existing between

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him and Catharine Reid, which will be hereafter considered, are supposed to increase the force of these suspicions; also the fact that the bond and mortgage were permitted to remain in his possession.

In answer to this, it is to be considered that Flaglor was a very old man, easily shaken by illness, and it was probably during some such attack, when he might not have been able to write, that he determined to do the act of justice which dictated this assignment. Original specimens of his signature, written within a short time of this transaction and produced to this court, show a shaky and difficult handwriting and lead to the conclusion that if he was ill it would be extremely natural to have somebody write his name, which he authenticated by making a cross under it.

Its execution is attested, as sealed and delivered in his presence, by W. J. McDonald as a witness, and the original paper produced before us shows that the name of Flaglor is in the same handwriting as that in the body of the instrument, which is apparently that of the witness.

There is another consideration, however, of very great weight, in favor of the validity of the assignment. Its execution was proved shortly after the date it bears, before a justice of the peace, in accordance with the laws of the State of New York, where Flaglor then resided, and the certificate of this fact, with that of the clerk of the proper court, were such that by the laws of Illinois it was admitted to record in the County of Cook of that State, and is by that law *prima facie* evidence of its execution by Flaglor. When this assignment and certificate were produced in evidence, the *onus* of proving that [686] it was not the act and deed of Flaglor devolved on the appellants. The witness, W. J. McDonald, was living at the time that the deposition of the appellee was taken in New York to prove the execution of the paper. McDonald was competent to prove what was done in regard to the execution of the assignment, and the fact that the appellants, with a knowledge of the case made by the certificate of acknowledgment and the positive testimony of Catharine Reid, did not call the man whose name was affixed to the paper, as a witness to its execution, leaves but little doubt that it could not be thus successfully impeached.

Reverting to the question of the consideration moving Flaglor to make this assignment, the facts seem to be that Catharine Reid had been for several years a domestic in the family of Frederick Flaglor while he was married to and living with a second wife, and she left his service while Frederick and his wife were yet living together at Newburg, in the State of New York. Not long after this Flaglor separated from his wife and went to live in St. John, New Brunswick. After being there some time, he wrote to Catharine Reid that he was not in good health and needed somebody to take care of him, and requested her to come and do so. With this request she complied and, according to her testimony, after she got there he informed her that he had a divorce from his wife and requested her to marry him. The certificate of the clergyman of St. John, with both her signature and his to the fact, leave no doubt that they were married in that place on the 23d day of January, 1862.

The fruits of this marriage were two children, both girls. They returned to Newburg a year or so after this, and there she ascertained that Flaglor had not been divorced from his wife and, of course, understood at once that her children were illegitimate and that their father was liable to a prosecution for bigamy. Flaglor, at that time, as we have said, was a very old man, and it does not appear that he and this family of his had any other means of support than the interest accruing on this mortgage.

Notwithstanding the assault made upon Catharine Reid in reference to her chastity, and the probability of illicit intercourse with Flaglor previous to this marriage, and the fact much relied on that she had an undue influence over him at the time the assignment was made, we cannot doubt that in executing and delivering [687] to her that assignment he did a meritorious act, honorable and just, as the only atonement he could make for the deception he had practiced upon her, and as placing in her hands the means of supporting the children of whom he was the father. It was not the case of a contract for future illicit intercourse, of the class which the authorities hold to be against public policy, but an appropriate means of providing for the support of a woman whom he had married while he had a wife living, and of the children resulting from that marriage.

We are satisfied from these considerations that the mortgage in question was a valid instrument in the hands of the appellee, Catharine Parpart, and a lien upon such interest in the property which it conveyed as Charles D. Flaglor had at the time he made it.

As we have already said, the question on this branch of the subject is, whether Charles D. Flaglor, at the time he made the mortgage, owned a fee simple in the property conveyed by it, or a life estate. Such interest as he had came to him primarily by the will of Augustus Garrett.

The first six sections of this will mention the beneficiaries of his bounty as regards the *income* of his estate until the death of his wife Eliza, Mary Banks and Letitia Flaglor, and throws very little light upon the question we are considering. The 7th section, which provides for the final disposition of his property after their decease, contains the language to be construed. It reads as follows: "Upon the death of my wife Eliza, and of Mary Banks and Letitia Flaglor, I direct that the whole of my estate shall then be equally divided between Charles D. Flaglor, son of said Letitia, if he or his legitimate children survive said Letitia (in case he be dead, his legitimate children shall take as their father would if alive), and the said James Crow, and the said Thomas G. Crow, each taking one third of the whole. But if Charles D. Flaglor be at that time dead, leaving no legitimate children, the whole of my said estate shall be divided between the said James Crow and Thomas G. Crow. In all cases the heirs and devisees of the said James Crow and the said Thomas G. Crow, respectively, shall succeed to the right and portion which their ancestor and decedent would have received had he been alive, and in all cases the heirs and dev- [688] isees of the said James and Thomas, respectively, and the children (legitimate) of said Charles D. Flaglor, shall only succeed to and take the

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share or portion of income and of estate in general which their ancestor or decedent would have had, taking *per stirpes* and not *per capita*."

[550] The precise question here raised has been repeatedly before the courts of Illinois, as has the whole subject of Charles Flaglor's interest under this will, and we think it may be affirmed, that by several well considered opinions of the Supreme Court of that State, a construction has been established which gives to Charles Flaglor, on the death of his mother, Letitia, a fee simple estate under that will. Indeed, we do not understand counsel here to seriously controvert that such is a true construction of that instrument, and as this accords with our own, we adopt it without further discussion.

On the death of Mr. Garrett, his will was admitted to probate on the 28th day of February, 1849, and his widow, Eliza Garrett, having renounced the benefits of its provisions, asserted her right to dower, whereby she became entitled to one half of the estate. In 1851, long before her death or that of any of these devisees, the parties interested determined to have a partition by a proceeding in chancery in the Circuit Court of Cook County. In that proceeding the property, which is now in controversy, was allotted to the share which went to Letitia Flaglor during her life, and after her death, to Charles D. Flaglor.

Under the construction of the will which we have just adopted, Charles D. Flaglor was, at the time of making the mortgage to his father, the owner of the estate in fee of the property conveyed by it, and there could be no doubt that the mortgage constituted a lien paramount to everything else in the way of a claim or title to the property.

The appellants here rely upon the decree of partition to which we have alluded, and on certain deeds and agreements alleged to have been made by Charles D. Flaglor in connection therewith, as establishing and limiting his interest in this property to a life estate, with remainder in fee to his children on his death, and whether this contention be well founded or not, presents

[689] the main controversy in the case. That decree of partition, dividing the estate into three parts, does unquestionably declare "That the real estate by said commissioners set off and allotted to Letitia Flaglor, Charles D. Flaglor, and his children, if he die leaving any child or children, be and the same is hereby set off and allotted and the income thereof to the said Letitia Flaglor during her life, and the said Charles Flaglor, if he survive said Letitia, during his life, and the child or children of said Charles D., if he die leaving any child or children, in fee."

The first thing which suggests itself as proper to be considered in the solution of this question is, to ascertain what was the law of the State of Illinois on the subject of partition at the date of that decree. Looking at the statutes of the State as we find them in the revision of 1880, with references to the sources from which this revision is taken, we find that they made provision distinctly for two modes of effecting a partition, one of which, as declared by the Statutes of 1845, was by bill in chancery as heretofore, and the other by petition to the circuit court of the proper county. Very little is said on the subject of partition in chancery, as the provisions of the statutes are more specifically directed to the forms of proceeding by petition in the proper court.

The proceeding in the case which we are now to consider declares itself on its face to be a proceeding in chancery, and the Supreme Court of the State, in the case of *Wadhams* v. *Gay*, 73 Ill., 415, in reference to this very decree, declares it to be so. We take it for granted that the Statute of Illinois, in making this provision and in leaving the parties to proceed by bill in chancery, intended thereby to give to a proceeding in such case the same force and effect which a partition in chancery had in the High Court of Chancery of England, and that the proceeding should in the main conform to the chancery practice as thus established. As we understand that system, it did not deal with or decide questions of controverted title. Its purpose was to make division among the parties before the court, of real estate in which those parties had interests or estates that were not in controversy as among themselves.

It was another principle of the chancery jurisdiction in partition, that a decree itself did not transfer or convey title even after the allotment of the respective shares of each of the parties to the proceeding, but that the legal title re-

[690] mained as it was before.

In this respect, a decree in chancery was unlike the writ of partition at the common law, which in such cases operated on the title only by way of estoppel. In the chancery proceeding, however, this difficulty was remedied by a decree that the parties should make the necessary conveyances to each other, which, if they refused, they could be compelled to do by attachment, imprisonment and other powers of the court over them in person.

In many of the States of the Union, where the equity powers of the courts have been aided by statutes to get rid of the difficulty of compelling parties in person to execute conveyances, the court has been authorized to appoint a commissioner, who should execute the conveyances in the names of the parties. In other cases, the statute has declared that such a decree itself shall operate as a conveyance of the title.

At the time that the decree was rendered in the Superior Court of Cook County, which we are considering, we are not aware that any statute existed which gave such effect to the decree of the chancery court in partition. We find by the Revised Statutes to which we have alluded, section 29, on partition, that in the year 1861, ten years after this decree was passed, it was enacted that in suits for the partition of real estate, whether by bill in chancery or by petition, the court may investigate the question of conflicting or controverted titles and remove clouds on the title of any of the premises sought to be partitioned, and invest titles by their decrees in the parties to whom the premises are allotted, without the forms of conveyance of "infants, unknown heirs, and other parties to the suit." Other powers are also conferred on the courts in such cases.

In the case of *Whaley* v. *Dawson*, 2 Sch. & Lef., 367, *Lord* Redesdale says: "Partition at law and in equity are different things. The first operates by a judgment of a court of law, and delivering up possession in pursuance of it; which concludes all the parties to it. Partition in equity proceeds upon conveyances, to be ex-

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ecuted by the parties, and if the parties be not competent to execute the conveyances, the partition cannot be effectually had."

And in his work on Pleadings in Chancery, [691] he gives this clear statement of the nature of the equity jurisdiction in partition:

"In the case of the partition of an estate, if the titles of the parties are in any degree complicated, the difficulties which have occurred in proceeding at the common law have led to applications to courts of equity for partition, which are effected by first ascertaining the right of the several persons interested, and then issuing a commission to make the partition required, and upon the return of the commission and confirmation of that return by the court, the partition is finally completed by mutual conveyances of the allotment made to the several parties. But if the *infancy of any of the parties*, or other circumstances, prevent such mutual conveyances, the decree can only extend to make partition, give possession, and order enjoyment accordingly, until effectual conveyances can be made.

If the defect arise from infancy, the infant must have a day to show cause against the decree after attaining twenty-one; and if no cause be shown, or if the cause shown should not be allowed, the decree may then be extended to compel mutual conveyances. If a contingent remainder, not capable of being barred or destroyed, should have been limited to a person not in being, the conveyance must be delayed until such person shall come into being, or until the contingency shall be determined, in either of which cases a supplemental bill will be necessary to carry the decree into execution." Mitf. Pl., Jerem. ed., 120; see, *Atty-Gen.* v. *Hamilton*, 1 Madd., 214; *Cartwright* v. *Pultney*, 2 Atk., 380; Story, Eq. Jur., secs. 652, 653.

Mr. Adams, in his admirable condensation of the equity jurisdiction, says: "The confirmation (of the commissioner's report) does not, like the judgment on a writ of partition, operate on the actual ownership of the land, so as to devest the parties of their individual shares and re-invest them with corresponding estates in their respective allotments, but it requires to be perfected by conveyances; and the next step, therefore, after confirmation of the return, is a decree that the plaintiffs and defendants do respectively convey to each other their respective shares, and deliver up the deeds relating thereto; and that, in the meantime, the allotted por- [692] tions shall respectively be held in severalty." Ad. Eq., 231.

This is precisely what was done in this case, except that no day in court was given to the infant children of Charles D. Flaglor, nor any decree for conveyances by them or by the other parties to the suit.

That decree, therefore, did no more than to make a division and allotment of the land, and had no effect upon the actual ownership or upon the title of the parties, and did not even contain an order for possession in severalty.

We must, therefore, look to the conveyances, which were made three days after this decree was entered, for any limitation of Charles D. Flaglor's interest to an estate for life in the share allotted to him and his mother, if any such there be.

In reply to this view of the effect of the decree, it is said that it was a consent decree, and must be held binding on Charles Flaglor by reason of that consent. It is certainly true that on the face of the proceeding, as evidenced by the bill of Eliza Garrett and the two Crows and the answer of Charles and Letitia Flaglor, the partition was one previously agreed on by all these parties, and the bill itself gives a schedule of the different parcels of the property to be allotted by the decree to each of the three interests concerned in it. The bill also sets forth, very explicitly, the interest of Charles D. Flaglor as being a life estate, with remainder in fee to his children, two of whom were then alive.

To this bill an answer on behalf of Frederick T. Flaglor, Letitia Flaglor and Charles D. Flaglor was filed by their solicitors, Arnold and Lay. It might admit of some question whether this answer was intended to admit that the estate of Charles D. Flaglor was merely a life estate; but as the Supreme Court of Illinois, in the case of *Flaglor* v. *Crow*, 40 Ill., 414, has decided that it showed consent, we assume it to be so.

Waiving at present the question on which there is much conflicting testimony, whether Charles D. Flaglor authorized these attorneys to assent for him to that construction of his interest in the property, we remark that the decree itself was incomplete and did not purport to transfer the title between parties, nor did it [693] order or direct that such conveyance should be made in accordance with its provisions. This decree, however, was entered of record on May 26, 1851, and deeds were made *inter partes* on May 29. These deeds do not refer to the decree in any manner, nor do the deeds of the other parties to Letitia and Charles Flaglor profess to describe their interests in the property; and the deed as found in the record from the Crows is to Charles Flaglor alone, and none of the deeds mention the children of Charles Flaglor.

The agreement of the same date was executed by all the parties to the partition, except the children of Charles D. Flaglor, and seems to have two purposes, explanatory of the deeds of conveyance made at the same time. The first of these purposes was to declare the proportion of the debts of the estate of Augustus Garrett which should be charged upon the interest of each of the parties, and the second to make some explanation of the relations to the estate of Charles D. Flaglor and his children.

The purpose of the provision on this latter subject was to have Letitia and Charles D. Flaglor and Frederick "To save and keep harmless the shares and portions of the estate allotted to Eliza Garrett, James Crow and Thomas G. Crow from all claim or claims which any child or children of Charles D. Flaglor may have or become entitled to under the said will or decree of any court now made or hereafter to be made." There is also a previous reference in said instrument to the interests of the children and descendants of Charles D. Flaglor which, under said will, such children or descendants may have or at any time be entitled to

This court agrees with counsel for appellee that there is nothing in these deeds or this contemporary agreement by which Charles Flaglor agrees or binds himself or consents that his interest in the property is a life estate. The deeds of conveyance are absolutely silent on the subject and do not mention the children at

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all, but convey the estate to Letitia and Charles Flaglor. The explanatory agreement was evidently intended to refer this question to the true construction of the will, mentioning the rights of the children to be such as they may have under that will and guarantying Eliza Garrett and [694] the Crows against the effect of such construction of it as would make his interest a life estate, with remainder to his children.

Assuming, then, that these conveyances *inter partes* were made as a part of the partition proceedings, they fail to carry into effect that part of them which declares, as between Charles D. Flaglor and his children, that his estate was an estate for life. It was undoubtedly in this view of the subject that, after the death of Charles Flaglor and his mother, the advisers of Elizabeth Flaglor, the only surviving child of Charles, caused the commencement of the suit in chancery, in her name, of which the present cross-bill has become a part.

This bill of Elizabeth, upon its face, recites the proceedings in the original partition suit and the cotemporary conveyances and agreement and the death of Letitia and Charles Flaglor and one child of Charles Flaglor, and considering the imperfection and insufficiency of all these proceedings to vest in the complainant, the surviving child of Charles Flaglor, the title to the real estate allotted to him and his mother in the decree, it demands of all the other parties to make such conveyance as will perfect her title, and it prays for an account of rents and profits from those who have had the property in possession. To this bill Catharine Reid, now Catharine Parpart, was made a defendant under allegations setting out the mortgage on which the present decree was rendered, and alleging it to be a cloud on the title of complainant, Elizabeth, and praying that it be held to be no lien on the property.

Much of the argument of counsel in this case and the testimony on which the case was heard in the court below, has relation, on both sides, to the question, whether Charles D. Flaglor authorized his attorneys to give the consent to the limitation of his estate which is found in his answer to the original partition suit.

It is not to be denied that the testimony on this subject is conflicting, as were also his declarations and actions about the time of the rendition of that decree. We do not deem it material to the case before us to decide this question, because, as neither the decree itself, nor the deeds made three days after, nor the article of agreement assented to by the parties at the same time, made any actual transfer of title different from that which resulted from the will of [695] Augustus Garrett; and as the very purpose of Elizabeth Flaglor's suit is to effect that which was not done by that decree, the only effect which the consent of Charles Flaglor to it could have, if he ever consented, would be to have estopped him, or some one claiming under him, from contesting the force of the decree.

In this view of the subject, it is important to recur to what took place very soon after this decree was rendered. As soon as Charles Flaglor became aware of the construction which was put upon the decree as regards his estate in the property, he filed his bill of review, on the 16th day of April, 1853, in the proper court, to set aside and correct it, so far as it concerned that matter. To this bill his mother and father and two children were made defendants. A decree was rendered on the 11th day of April, 1854, in which the former decree in that respect was reversed, and the one sixth allotted to the Flaglors was declared to be vested in Letitia Flaglor, for and during the term of her natural life, with remainder in fee to Charles if he survived said Letitia. This decree remained in full force until after the death of both Letitia Flaglor and Charles Flaglor, when, in April, 1866, a writ of error was sued out from the Supreme Court of Illinois in the name of Elizabeth Flaglor, by James Link, her next friend, on which the decree on the bill of review was reversed, on the sole ground that the original decree of partition was by consent and that such consent cured all errors.

It will be observed that the decree on the bill of review remained in force for over 12 years, that during two years of that time Charles Flaglor had come into the seisin of the fee simple estate, which both that decree and the will declared to be in him, and that it was during this period that the mortgage was made by him on which the decree we are now considering is founded.

Very shortly after this reversal in the Supreme Court, the original bill in the present case was filed by Elizabeth Flaglor, which was prosecuted in her name until August, 1867, when she died, leaving a will by which she devised all her property to her mother, Lucy C. Flaglor, now Lucy Flaglor Gay, one of the present appellants.

Early in 1872 the suit was revived in the name [696] of Lucy Flaglor, and by amended bills in her name and by the cross-bill of Catharine Parpart, formerly Catharine Reid, the issues in regard to the controversy now before us were finally raised.

No person now interested in this controversy obtained any interest whatever in this property by any purchase or by any transaction by which they parted with money or other valuable consideration until the purchase by Arthur W. Windett from Lucy Flaglor after her bill of revivor had been filed, and no one else but him and the Connecticut Mutual Life Insurance Company, another one of the appellants, have ever parted with anything of value on the faith of any of the transactions previously recited, except it be Frederick T. Flaglor, who loaned his son Charles the money on the mortgage now in question.

It is impossible to see how the doctrine of the estoppel can operate in favor of any of these appellants. Such interest as Elizabeth Flaglor and Lucy Flaglor, her mother, had or acquired was by inheritance or devise. Neither of them ever paid a dollar or parted with anything of value, or did anything to their detriment by reason of any act or deed of Charles D. Flaglor, nor by reason of the original decree of partition and the deeds made under it. The one was his child and took under his rights; the other was his wife and the mother of his child, and took under her will. Windett is, therefore, the first person who can pretend to have parted with any consideration for the title which he asserts to this property, and the Insurance Company holds under him. But both these parties became purchasers and acquired their interests during the pendency of this suit, and were bound to know

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that they purchased subject to its result. The existence of the mortgage which they now contest was recited in the original bill by Elizabeth Flaglor, and in the bills of revivor and supplemental bills filed by Lucy Flaglor, and Catharine Parpart was a party to all those bills, and her right to a paramount lien was referred to and she was made a party in regard to it in them all.

It is urged in favor of the appellants that a decree *pro confesso*, by a default on the publication of notice, was made against Catharine Parpart, declaring her claim invalid, and that very soon after this and before that default was set aside, [697] Windett received his deed from Lucy Flaglor. It is strenuously urged that this fact confers upon him the character of an innocent purchaser for value, and removes him from the category of a purchaser *pendente lite*. But this argument is not sound.

The decree *pro confesso*, taken without any actual service on Parpart, could, within a period fixed by the laws of Illinois, be set aside upon her appearance and motion to that effect; and it was so done in this instance, and she was permitted to come in and file her answer and cross-bill.

Mr. Windett was bound to know, when he purchased, the inconclusive character of the decree *pro confesso* on which he now relies, and that it was not in his power and that of Lucy Flaglor to defeat the right which the law gave to the absent defendant and render it of no avail by this transfer of title. In addition to this, it is impossible, in any light, to regard Mr. Windett as an innocent purchaser, since he was the attorney and counselor in that suit of Elizabeth Flaglor during her lifetime, and of Lucy Flaglor afterwards, and so remains to the present hour. It is also in evidence that he was well aware of the existence of the mortgage and its possession by Catharine, and at one time had promised it should be paid, and at another time had entered into negotiations for its purchase, all of which was prior to the date of the deed from Lucy Flaglor under which he now asserts title.

The Connecticut Mutual Life Insurance Company also acquired its interest *pendente lite*. That interest arises under a mortgage given by Windett to secure the loan of money, and it appears by the record that in addition to this mortgage they took other security, in consequence of the uncertain condition of the title. They have also the security of Mr. Windett's personal obligation.

The only party in the litigation before us, who has any just claim to the protection of an innocent purchaser without notice, is the appellee, Catharine Parpart. The mortgage which she now holds was given to Frederick Flaglor by his son Charles, for which the father gave full value at the time when Charles stood seised of the estate in fee simple to the property in controversy, according to every source of information open to anyone upon inquiry. Under the will [698] of Augustus Garrett, the title of Charles was clear; under the conveyances made between parties subsequent to the decree of partition and the cotemporary agreement, it was clear. The decree itself, the only thing which cast any shadow upon that title, had, upon bill of review, been set aside in that respect, and the title of Charles declared to be an estate in fee, and the remainder of the decree stood affirmed as a division of the property. Under these circumstances, the right of Frederick Flaglor to feel secure in taking the mortgage on the property which he did from his son Charles, in the faith that he was secured by a good title, is much stronger than that of Mr. Windett and the Insurance Company, purchasing during the existence of the litigation which pointed out clearly the defect in their title.

Without deciding whether Charles Flaglor ever gave his consent to the original decree, we remark, in the first place, as we have said before, that that decree did not *propria vigore* transfer title from or to anyone. In that suit, as between Charles D. Flaglor and his children, there were no adversary proceedings, and such decree as was had being dependent upon consent, did not operate as a judicial decision by the court of the rights of Charles and his children. There was, therefore, neither a judgment of the court nor any valuable consideration passing from the children to Charles to bind him to such consent, beyond that of an ordinary, gratuitous promise, which may be retracted before it is performed. The deeds and the agreement made three days after the decree show that if, at any time, Charles Flaglor had given his temporary consent to the decree, he had determined so far to retract as to keep the matter in his own power, and the bill of review and the decree which he obtained upon that review, and all his subsequent conduct in regard to the property, left no doubt in the minds of anyone that he had determined to assert his full right of ownership in fee simple under the will.

It is in the face of all these circumstances that, many years after her father's death and many years after the execution of the mortgage in this suit, proceedings were commenced in the name of Elizabeth Flaglor, then a child, to secure the benefit which her advisers supposed the original decree of partition conferred on her.

Under all the circumstances of this case, the diligence with which Charles D. Flaglor repudiated the supposed consent and had it set aside [699] by a regular bill of review; the long period of twelve or fifteen years in which the matter was permitted to lie in that condition; the fact that the daughter and her mother are all volunteers, and that Windett is a purchaser with notice of the litigation and taking part in it as an attorney in the case, and the Insurance Company holding their interest also with full notice of the facts, we think it would be inequitable to make a decree now to do what was left undone in a former decree, and which seems to have been so left by the intention of the parties to it. We cannot better express ourselves than in the following language from the opinion of the court in the case before referred to:

"We do not regard that it militates with the doctrine of the conclusive effect of what is *res judicata*, that where there is an incomplete decree, and it is ineffective for want of the provision of any means for its execution, and an application is made to a court of equity to supply the imperfection, so as to render the decree effective, then it is admissible to look at the real nature and character of the decree as it may appear in the light of surrounding circumstances, for the purpose of determining whether there

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is such an equitable ground for action as will move a court of equity to interpose. Equity will penetrate beyond the covering of form and look at the substance of a transaction, and treat it as it really and in essence is, however it may seem. In outward semblance this partition decree is a decision of court upon the relative rights of Charles D. Flaglor and his children under the will of Garrett. In essential character it is but the judicially recorded supposed agreement of Flaglor. And upon an appeal to equity by original bill to lend its assistance for carrying it into execution, because of an omission in the decree in providing any means of its execution, it would seem reasonable that the same rule of the court's action should obtain as in case of any solemn agreement under seal; and where there are manifest the elements of injustice, mistake, surprise, misapprehension, *and want of consideration*, to remain passive." *Wadhams* v. *Gay*, 73 Ill., 414.

The decree of the Circuit Court must be affirmed; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[536] UNITED STATES, *Plff. in Errr.*,

v.

PATRICK DENVIR ET AL.

(See S. C., 16 Otto, 536, 537.)

Disbursing officer, when chargeable with interest.

*Where an officer of the Government has money committed to his charge, with the duty of disbursing it as required, he cannot be charged with interest until it is shown that he has converted it to his own use or failed to pay when occasion required, or to transfer or pay to the Government on some lawful order.

[No. 104.]

Argued Nov. 23, 1882. Decided Jan. 8, 1883.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

The history and facts of the case appear in the opinion of the court.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.*, for plaintiff in error.

Mr. B. F. Butler, for defendants in error.

Mr. Justice **Miller** delivered the opinion of the court:

The United States recovered a judgment in the Circuit Court for the District of Massachusetts against Denvir, on his bond, given as surety for the faithful performance by David F. Power of all his duties as acting assistant paymaster in the Navy of the United States. No service on Power or appearance for him and no defense by Denvir being made, judgment was rendered for the sum of money found to be in the hands of the paymaster, with interest from the service of the original writ in this suit, in March, 1875. The United States asserted a right to interest from the date of the last receipt of money by the paymaster, namely: August, 1865, and excepted because the court overruled this proposition.

No evidence was given of any demand on the paymaster, or any refusal to pay or transfer the fund in his hands, or to comply with any lawful order on the subject.

Though the condition of the bond is not exactly the same as in the case of *U. S.* v. *Curtis*, 100 U. S., 119 [XXV., 571], the principle of that case must control this.

That principle is, that where an officer of the Government has money committed to his charge, with the duty of disbursing or paying it out as occasion may arise, he cannot be charged with interest on such money until it is shown that he has failed to pay when such occasion required him to do so, or has failed to account when required by the Government, or to pay over or transfer the money on some lawful order.

The mere proof that the money was received by him, raises no obligation to pay interest in the absence of some evidence of conversion, or some refusal to respond to a lawful requirement. [537]

The obvious reason for this is, that the Government places the money in the hands of this class of officers and all others who are disbursing officers, that it may remain there until needed for use in the line of that officer's duty; and until that duty requires such payment, or a return of the money to the proper department of the Government, he is in no default, and cannot be required to pay interest.

The judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Plff. in Errr.*,

v.

JOHN A. KNOWLES ET AL.

(See S. C., 16 Otto, 537.)

Interest chargeable to officer.

In a suit on the bond of a military storekeeper in the army, where the amount found due had reference to property as well as money, where no demand had been made until the service of the writ, interest can only be allowed from that date.

[No. 108.]

Argued Nov. 23, 1882. Decided Jan. 8, 1883.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

Mr. **Samuel F. Phillips,** *Solicitor-Gen.*, for plaintiff in error.

Mr. John A. George, for defendants in error.

Mr. Justice **Miller** delivered the opinion of the court:

This case differs from the preceding case of *U. S.* v. *Denvir* [*ante*, 264], only in the circumstance that it is a suit on the bond of a military storekeeper in the army, and the amount found due had reference to property as well as money.

The same question as to interest was raised, and the court, on the ground that no demand was made until the service of the writ, only allowed interest from that date.

Though, in the case of personal property and, indeed, of money so held, proof of a conversion might justify interest from the date of such conversion, there is no evidence in this case of such conversion or of an earlier demand than that

*Head note by *Mr. Justice* MILLER.

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made by service of the writ, *and the judgment must be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[594] FRANCIS E. PRAY, *Appt.*,

v.

UNITED STATES.

(See S. C., 16 Otto, 594, 595.)

Pay of weigher and measurer.

One appointed occasional weigher and measurer, with a compensation fixed at $2,000 per annum when employed, who, during the period of such service, was paid his salary upon bills made out for the sum due for each month named, after deducting Sundays, which bills were receipted by him, cannot recover compensation for the Sundays excepted out of these monthly payments.

[No. 132.]

Argued Dec. 14, 1882. Decided Jan. 8, 1883.

APPEAL from the Court of Claims.

The case is stated by the court.

Mr. **Thomas H. Talbot**, for appellant.

Mr. **Wm. A. Maury**, *Asst. Atty-Gen.*, for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

According to the finding of facts in this case, the claimant received, on the first day of March, 1867, a written instrument, appointing him *occasional* weigher and measurer, with a compensation fixed at $2,000 per annum *when employed.* He held the place and performed the duties of occasional weigher and measurer at Portland, Maine, under that appointment, until November 30, 1877.

A further finding is this:

For each month during the period of said service the claimant was paid his compensation upon bills made out in the following form:

"*The United States, Dr. to F. E. Pray, occasional weigher of the customs for the Port of Portland.*

For my services as occasional weigher of the customs from————to————inclusive, Sundays excepted, one month, at two thousand dollars per annum."

Each bill so made out was for the sum due for the month named in it, after deducting the Sundays, and to each was subjoined a receipt, signed by the claimant, in the following form:

"Received payment for the above services, $————of———— Collector of Customs for the Port of Portland."

[595] The present suit is brought to recover compensation for the Sundays excepted out of these monthly payments during the entire period of service.

This demand is founded on the law which gives to the weighers and measurers, holding office as such by the usual appointment, a salary of $2,000 per annum, in which, of course, Sundays are disregarded.

Counsel for the Government contends that his letter of appointment, naming him as "occasional weigher and measurer," to be paid at the rate of $2,000 per annum "when employed," justified payment at that rate only for the days when he was in actual service.

Whatever might have been said in opposition to this view, if claimant had asserted it during the early time of his service, it is clear that, by the form of the bill for services for each month, he expressed his own understanding of the contract to be the same as that with the collector who employed and paid him. He makes out in his own name, "for (his) my services as occasional weigher" "for one month, Sundays excepted," his bill, with the sum fixed on that basis, and accepts and signs a receipt for it; and this he does every month for ten years.

He cannot be permitted now to say, after he is out of that employment, that his contract was for $2,000 a year as an absolute salary.

If this was the case of a person employed by a bank, a railroad company, or in any large business requiring many persons for its service, the case would admit of no argument.

We think it equally plain in the present case. *U. S.* v. *Adams*, 7 Wall., 463 [74 U. S., XIX., 249]; *Same* v. *Child*, 12 Wall., 241 [79 U. S., XX., 362]; *Same* v. *Justice*, 14 Id., 535 [81 U. S., XX., 753]; *Mason* v. *U. S.*, 17 Id., 75 [84 U. S., XXI., 566].

The judgment of the Court of Claims, dismissing the petition, is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JAMES PATTERSON, for the Use of THOMAS J. BROWER, *Plf. in Err.*,

v.

CORNELIUS LYNDE, Jr.

(See S. C., 16 Otto, 519-521.)

Action by creditor of a corporation, against stockholders.

1. A creditor of a corporation, formed and organised under the general laws of Oregon, in relation to the formation of private corporations, cannot maintain an action at law against a stockholder to recover, out of an unpaid balance of subscription to the capital stock, the debt due to him from the corporation.

2. The remedy of the creditor to enforce this liability is in equity, where the rights of the corporation, the stockholder and all the creditors can be adjusted in one suit.

[No. 122.]

Argued Dec. 11, 1882. Decided Jan. 8, 1883.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This action was brought in the court below, by the plaintiff in error, as a judgment creditor of the Malheuer and Burnt River Consolidated Ditch and Mining Company, a corporation of the State of Oregon, to enforce an alleged liability of the defendant, to the amount of $70,000, as a stockholder of said company.

The court below sustained a demurrer to the declaration and entered a judgment dismissing the cause. Whereupon, the plaintiff sued out this writ of error.

NOTE.—*Individual liability of stockholders for corporate debts.* See *note* to Hatch v. Dana, 101 U. S., XXV., 885.

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The facts of the case sufficiently appear in the opinion of the court.

Messrs. **C. M. Harris** and *F. W. Packard*, for plaintiff in error.

Messrs. **Chas. M. Osborn** and *T. J. Henderson*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The only question we deem it necessary to consider in this case is, whether a creditor of a corporation, formed and organized under the general laws of Oregon in relation to the formation of private corporations, can maintain an action at law against a stockholder, to recover, out of an unpaid balance of subscription to the capital stock, the debt due to him from the corporation.

The Constitution of Oregon, article 11, section 3, provides that "The stockholders of all corporations and joint stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more."

Section 14 of the statute in relation to the formation of private corporations, is as follows:

"Sec. 14. All sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder or person from whom the same is purchased, and subject such purchaser to the payment of any unpaid balance, due or to become due on such stock. But if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser."

Since this case was decided below, the Supreme Court of Oregon has passed on the same question and, in *Ladd* v. *Cartwright*, 7 Oreg., 329, determined that the individual liability of stockholders for the indebtedness of the corporation is limited to the amount of their stock subscribed and unpaid; and that the remedy of the creditor, to enforce this liability, is in equity, where the rights of the corporation, the stockholder and all the creditors can be adjusted in one suit. Of the correctness of this decision, we have no doubt. The liability of the stock-
[521] holder is upon his subscription; that is to say, upon his obligation to contribute to the capital stock, which is a trust fund for the benefit of those to whom the corporation, as a corporation, becomes liable. *Sawyer* v. *Hoag*, 17 Wall., 620 [84 U. S., XXI., 735]. The Constitution of Oregon created no new right in this particular; it simply provided for the preservation of an old one. The liability under this provision is not *to* the creditors, but *for* the indebtedness. That is no more than the liability created by the subscription. The subscription is part of the assets of the corporation, at least so far as creditors are concerned. The liability of the stockholder, to the creditor, is through the corporation; not direct. There is no privity of contract between them, and the creditor has not been given, either by the Constitution or the statute, any new remedy for the enforcement of his rights. The stockholder is liable, to the extent that the subscription represented by his stock requires him to contribute to the corporate funds; and when sued for the money he owes, it must be in a way to put what he pays, directly or indirectly, into the treasury of the corporation, for distribution, according to law. No one creditor can assume that he alone is entitled to what any stockholder owes, and sue at law so as to appropriate it exclusively to himself.

The judgment of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

GRAND TRUNK RAILWAY COMPANY OF CANADA, *Plf. in Err.*, [700]

v.

OLIVER P. CUMMINGS

(See S. C., 16 Otto, 700-702.)

Refusal to direct verdict—negligence of fellow-servant.

1. Although the court errs in refusing to direct a verdict for the defendant at the close of the plaintiff's testimony, and such refusal will be good ground for the reversal of a judgment on a verdict in favor of the plaintiff, if the defendant rests his case on such testimony and introduces none in his own behalf; but if he goes on with his defense and puts in testimony of his own, and the jury, under proper instructions, finds against him on the whole evidence, the judgment cannot be reversed, in the absence of the defendant's testimony, on account of the original refusal.

2. If the negligence of a railroad company contributes to, that is to say, has a share in producing, an injury to its *employé*, it is liable, even though the negligence of a fellow-servant of the injured person is also contributory.

[No. 138.]

Argued Dec. 15, 1882. Decided Jan. 8, 1883.

IN ERROR to the Circuit Court of the United States for the District of Maine.

This action was brought in the Superior Court of Cumberland County, Maine, by the defendant in error, to recover damages sustained by him in the course of his employment as engineman of the defendant Company.

The cause was subsequently removed, on petition of the defendant, into the court below. There were two trials, both of which resulted in verdicts for the plaintiff, the first for $15,708.33, which was set aside, and the last for $10,791.00.

Judgment having been entered for the amount of the last verdict, the defendant sued out this writ of error.

Mr. **John Rand**, for plaintiff in error:

A servant takes upon himself the ordinary risks and perils incident to the performance of his duties; and among these perils are those arising from the carelessness and negligence of those in the same employment.

Farwell v. *R. R. Co.*, 4 Met., 49; *Gillshannon* v. *R. R. Co.*, 10 Cush., 228; *Hayes* v. *R. R. Co.*, 8 Cush., 270; *Gilman* v. *R. R. Co.*, 10 Allen, 233; *Russell* v. *R. R. Co.*, 17 N. Y., 134; *Chapman* v. *R. R. Co.*, 55 N. Y., 579; *Lawler* v. *R. R. Co.*, 62 Me., 463; *Slater* v. *Jewett*, 85 N. Y., 61.

The only obligation and duty of the Corpo-

NOTE.—*Who are co-employés, or co-servants within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a co-servant.* See *note* to Hough v. R. R. Co., 100 U. S., XXV., 612.

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ration was to use reasonable care to enforce its rules.

Ladd v. *R. R. Co.*, 119 Mass., 412; *Zeigler* v. *Day*, 123 Mass., 152; *Snow* v. *R. R. Co.*, 8 Allen, 445; *Ross* v. *R. R. Co.*, 58 N. Y., 217.

Messrs. **A. A. Strout** and *Geo. F. Holmes*, for defendant in error:

The cases of *Oceanyan* v. *Arms Co.*, 103 U. S., 262 (XXVI., 540); *Improvement Co.* v. *Munson*, 14 Wall., 442 (81 U. S., XX., 867); *Pleasants* v. *Fant*, 22 Wall., 116 (89 U. S., XXII., 780), and *Herbert* v. *Butler*, XXIV., 958), establish the principle, that if, after the testimony is all in, it is insufficient to sustain a verdict, the court will be justified in directing a verdict for the defendant. But the material testimony must be undisputed, in order, under the decisions, to warrant the withdrawal of the case from the jury.

Ins. Co. v. *Snyder*, 93 U. S., 393 (XXIII., 887); *Klein* v. *Russell*, 19 Wall., 465 (86 U. S., XXII., 124); *Griggs* v. *Houston*, 104 U. S., 554 (XXVI., 840); *R. R. Co.* v. *Fraloff*, 100 U. S., 26 (XXV., 583).

Cummings did not contract against the combined negligence of a fellow-servant and of his employer, and the negligence of the servant does not excuse the Corporation for negligence which contributed to the injury.

Paulmier v. *R. R. Co.*, 34 N. J. L., 151–157; *McMahon* v. *Henning*, 3 Fed. R., 353; *Cone* v. *Del. R. R. Co.*, 81 N. Y., 206; *Booth* v. *R. R. Co.*, 73 N. Y., 38; *Crutchfield* v. *Richmond R. R. Co.*, 76 N. C., 320; *Fifield* v. *R. R. Co.*, 42 N. H., 225; *Cayzer* v. *Taylor*, 10 Gray, 274.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was a suit brought by Cummings, the plaintiff in error, an engine-man in the employ of the Grand Trunk Railway Company of Canada, to recover damages for an injury sustained in the course of his employment, by a collision of a train on which he was, with another train of the same Company. The claim of Cummings is, that the collision was caused by the fault and neglect of the Company; that of the Company, that it was caused by the negligence and disobedience of a fellow-servant of Cummings. This was the issue at the trial and, at the close of the testimony on the part of Cummings, the Company asked the court to instruct the jury to return a verdict in its favor, which being refused, an exception was taken. All the testimony before the jury, when this instruction was asked, has been put into the bill of exceptions.

The Company then introduced testimony touching the points covered by that on the part of Cummings. None of this testimony is in the record. The Company did not contend that [701] Cummings was guilty of contributory negligence.

At the close of the case on both sides, the court gave to the jury sundry instructions, not excepted to, and then, at the request of Cummings, instructed them further "That if Noyes (the person claimed to be a co-servant) was negligent, and if the Company was also wanting in ordinary care and prudence in discharging their duties, and such want of ordinary care contributed to produce the injury, and the plaintiff did not know of such want of ordinary care and prudence, the defendant would be liable; that if two of those causes contributed, the Company would be liable; that the mere negligence of Noyes, of itself, does not exonerate them if one of their own faults contributes." To this, an exception was taken. The jury returned a verdict for Cummings, upon which a judgment was rendered against the Company. To reverse that judgment, this writ of error was brought, and the only errors assigned are: 1, the refusal to direct a verdict for the Company at the close of Cummings' testimony; and, 2, the giving of the instruction which was excepted to.

It is, undoubtedly, true that a case may be presented in which the refusal to direct a verdict for the defendant at the close of the plaintiff's testimony will be good ground for the reversal of a judgment on a verdict in favor of the plaintiff, if the defendant rests his case on such testimony and introduces none in his own behalf; but if he goes on with his defense and puts in testimony of his own, and the jury, under proper instructions, finds against him on the whole evidence, the judgment cannot be reversed, in the absence of the defendant's testimony, on account of the original refusal, even though it would not have been wrong to give the instruction at the time it was asked.

The present case comes within this rule. The evidence introduced on the part of the Company is not in the bill of exceptions, and the court was not asked to instruct the jury to find for the defendant on the whole case. Under such circumstances, it must be presumed, in the absence of anything to the contrary, that when the case was closed on both sides, there was enough in the testimony to make it proper to leave the issues to be settled by the jury. In this we are not to be understood as saying that [702] the instruction ought to have been given when it was asked.

In the instruction which was given we find no error. It was, in effect, that if the negligence of the Company contributed to, that is to say, had a share in producing the injury, the Company was liable, even though the negligence of a fellow-servant of Cummings was contributory also. If the negligence of the Company contributed to, it must necessarily have been an immediate cause of the accident, and it is no defense that another was likewise guilty of wrong.

The judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

LOT M. MORRILL, Collector, etc., *Plff. in Err.*, [466]

v.

JOHN WINSLOW JONES.

(See S. C., 16 Otto, 466, 467.)

Treasury regulations—duty on animals—insufficient objection.

1. The Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law, nor put into the body of the statute a limitation which Congress did not think it necessary to prescribe.

2. All animals, specially imported from beyond the seas for breeding purposes, are free of duty.

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3. It is a sufficient answer to an objection, that it was not made below.

[No. 140.]

Submitted Jan. 3, 1883. Decided Jan 8, 1883.

IN ERROR to the Circuit Court of the United States for the District of Maine.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **Wm. A. Maury,** *Asst. Atty-Gen.*, for plaintiff in error.

Mr. **Charles P. Mattocks,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

Section 2505 of the Revised Statutes provides, among other things, that "Animals, alive, specially imported, for breeding purposes, from beyond the seas, shall be admitted free (of duty), upon proof thereof satisfactory to the Secretary of the Treasury, and under such regulations as he may prescribe." Article 383 of the Treasury Customs Regulations provides that, before a collector admits such animals free, he must, among other things, "Be satisfied that the animals are of superior stock, adapted to improving the breed in the United States."

Jones, the defendant in error, imported certain animals, which were entered at the Port of Portland, Maine, and claimed that they should be admitted free, as they were "specially imported for breeding purposes." The Collector, though the importation was for breeding purposes, demanded the duties because he was not satisfied the animals were of "superior stock." The duties were, accordingly, paid under protest, and this suit was brought to recover back the amount so paid.

On the trial, the court instructed the jury, "That, under the statute, animals, whether of superior or inferior stock, if in fact imported specially for breeding purposes, are entitled to be admitted free of duty," and "that the law does not give to the Secretary of the Treasury power to prescribe in the regulations what classes of animals imported for breeding purposes shall be admitted free of duty." To this instruction, an exception was taken. The jury returned a verdict against the Collector, upon which judgment was rendered. To reverse that judgment, this writ of error was brought. The only error assigned, on the exceptions actually taken at the trial, relates to the instruction as to the effect of the treasury regulation.

The Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case, we are entirely satisfied the regulation acted upon by the Collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of "superior stock." This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit, duty free, all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation.

It has been argued here, that, as it appears from the testimony which has been incorporated into the bill of exceptions that the importation in this case was from Prince Edward's Island, it was not from "beyond the seas" and, therefore, that the judgment below was right. It is a sufficient answer to this objection, that no such point was made below. The court was not asked to rule on any such question. Our examination is confined to such exceptions as were taken to the rulings actually made on the trial and incorporated in some form into the record, an authenticated transcript of which is returned with our writ of error.

The judgment of the Circuit Court is affirmed.

True copy. Test,
James H. McKenney, Clerk, Sup. Court, U. S.

FIRST NATIONAL BANK OF YOUNGSTOWN, OHIO, *Appt.*,

v.

JAMES B. HUGHES, Late Auditor of MAHONING COUNTY, FREMAN H. SHERER, Present Auditor of MAHONING COUNTY, and MONROE W. JOHNSON, Prosecuting Attorney of MAHONING COUNTY, OHIO

(See S. C., "*Youngstown Bank* v. *Hughes*," 16 Otto, 523–525.)

Jurisdiction as to amount—affidavits of value.

1. To give this court jurisdiction, in cases dependent upon the amount in controversy, the matter in dispute must be money, or some right, the value of which, in money, can be calculated and ascertained.

2. Affidavits can only be used to furnish evidence of value not appearing on the face of the record, when the nature of the matter in dispute is such as to admit of an estimate of its value in money.

[No. 674.]

Submitted Dec. 18, 1882. Decided Jan. 8, 1883.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

The history and facts of the case sufficiently appear in the opinion of the court.

On motion to dismiss.

Mr. **W. C. McFarland,** for appellees, in support of motion.

Mr. **Sidney Strong,** for appellant, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

Section 2782 of the Revised Statutes of Ohio, 1880, provides that, if a county auditor has reason to believe or is informed that any person has given to a tax assessor a false statement of his personal property, moneys, etc., or that the assessor has made an erroneous return of any property, moneys, etc., which are by law subject to taxation, he may proceed to correct the return and to charge such persons, on the tax duplicate, with the proper amount of taxes;

NOTE.—*Jurisdiction of U. S. Supreme Court depends on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

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"To enable him to do which, he is * * * authorized and empowered to issue compulsory process, and require the attendance of any person or persons whom he may suppose to have a knowledge of the articles, or value of the personal property, moneys or credits, investments [524] in bonds, stocks, joint stock companies or otherwise, and examine such person or persons, on oath, in relation to such statement or return."

Section 2783 provides for process of subpœna, in case any person shall neglect to appear and testify when called on by the auditor, and for punishment for contempt.

Under the authority of this statute the Auditor of Mahoning County, in the exercise of his power to charge persons on the tax duplicate with the proper amount of taxes, called on the Cashier of the First National Bank of Youngstown to appear and testify and, because he could not testify without, to bring with him the books of the Bank showing its deposits. Thereupon the Bank filed a bill in equity to enjoin the Auditor, alleging, for cause, that such a proceeding on his part would unlawfully expose its business affairs, lessen public confidence in it as a depository of moneys, diminish its deposits and greatly impair the value of its franchises. The circuit court dismissed the bill and the Bank appealed. A motion is now made to dismiss the appeal for want of jurisdiction because the value of the matter in dispute does not exceed $5,000.

In *Barry* v. *Mercein*, 5 How., 120, it was decided that to give this court jurisdiction, in cases dependent upon the amount in controversy, "The matter in dispute must be money, or some right, the value of which, in money, can be calculated and ascertained." To the same effect are *Pratt* v. *Fitzhugh*, 1 Black, 273 [66 U. S., XVII., 207]; *DeKrafft* v. *Barney*, 2 Black, 714 [67 U. S., XVII., 352]; *Potts* v. *Chumasero*, 92 U. S., 361 [XXIII., 499].

The present suit is not for money nor for anything, the value of which can be measured by money. The Bank has no interest in the taxes to be placed on the tax duplicate. There is no property in dispute between the Auditor and the Bank. If the cashier is compelled to testify and to produce the books to be used in evidence for the purposes required, the damages, if any, resulting to the Bank, would be, in the highest degree, remote and speculative. Certainly, no suit for even nominal damages could be sustained against the Auditor, on account of what he had done. All the cashier is required to do, is to give testimony in a proceeding instituted under the authority of law, by the Auditor, to perfect the tax lists of the County. [525] It is supposed the books of the Bank contain evidence pertinent to this inquiry, and appropriate measures are taken to have them produced for examination. The case is in no respect different in principle from what it would be if the evidence was called for in an ordinary suit in a court of justice between individuals.

Affidavits can only be used to furnish evidence of value not appearing on the face of the record when the nature of the matter in dispute is such as to admit of an estimate of its value in money.

The motion to dismiss is, therefore, granted.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

CHARLES E. SHELTON ET AL., *Appts.*, *v.* EDGAR M. VAN KLEECK ET AL.

(See S. C., 16 Otto, 532-535.)

Bill of review—admission by demurrer—new matter.

1. The only questions open for examination on a bill of review for error of law appearing on the face of the record, are such as arise on the pleadings, proceedings and decree, without reference to the evidence in the cause.

2. A demurrer admits only such facts as are properly pleaded. As questions of fact are not open for re-examination, on a bill of review, for errors in law, the truth of any fact averred in the bill inconsistent with the decree, is not admitted by a demurrer.

3. New matter, alleged to have been discovered, which relates only to the proceedings in making the sale in a foreclosure action, can have no effect on the original decree.

[No. 888.]

Submitted Dec. 14, 1882. Decided Jan. 8, 1883.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

Nov. 18, 1877, Edgar M. Van Kleeck, the principal appellee, filed a bill in the Circuit Court of the United States for the Northern District of Illinois, against the appellants and others, to foreclose a mortgage or trust-deed which was executed Sep. 21, 1871, to secure $9,000, with the interest to accrue, upon certain lands in Livingston Co., Ill. Appellants filed their joint and several answer, and Elizabeth Blue her separate answer, to said bill, Sep. 6, 1877, setting up various defenses and, among others, the defense of usury, partial payment of amount claimed, and that other land than appellants' should be made to pay a large part of the amount claimed. The cause was then referred to a master to take evidence and report his conclusion thereon; the defendants, other than appellants and Elizabeth Blue, all having been defaulted.

April 28, 1879, the master filed his report, dated Apr. 1, 1879. Exceptions were filed to said report, and overruled, and the court entered a decree of foreclosure. No appeal was taken from this decree. Sep. 30, 1879, the master sold the premises and, Oct. 10, 1879, filed his report of sale in said cause. No exceptions to the report of sale were filed nor taken; and the report was approved and sale confirmed, in December, 1879. Subsequently, Dec. 15, 1880, the court entered a special order confirming the sale. Dec. 31, 1880, the last day allowed by law for redemption from the sale by a creditor, appellants filed, in the cause, a motion to set aside the sale. The motion was heard Jan. 12, 1881, and overruled by the court. The master, thereupon, executed his deed to appellee, Van Kleeck, and he was put into possession of the premises.

NOTE.—*Bill of review; nature of; when may be brought; who may maintain; time within which; what it should contain.* See, *note* to Bk. of U. S. v. Ritchie, 33 U. S. (8 Pet.), 128.

Bill of review; when may be brought; for what.

None but parties and privies in representation are entitled to bring a bill of review. Assignees cannot. Thompson v. Maxwell Land Grant & Ry. Co., 95 U. S., XXIV., 451, and cases cited; Vaughan v. Outrer, 49 Miss., 782; Story, Eq. Pl., sec. 409.

A decree of affirmance is not a bar to a bill of review for newly discovered evidence. Campbell v. Campbell, 22 Gratt., 649; Singleton v. Singleton, 8 B.

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This is a bill of review based upon this record. All the above facts appear upon the face of the bill, and the exhibits expressly made a part of it. It makes the bill of foreclosure, the answer of appellants, the master's report upon the evidence and the evidence therewith, the motion to set aside the sale, and the evidence introduced into that motion, a part of the bill.

The court sustained a demurrer and entered a decree dismissing the bill. Whereupon the complainants appealed to this court.

The grounds relied upon to sustain the bill of review are sufficiently stated by the court.

Messrs. **Charles J. Beattie,** *Lewis E. Payson* and *Thomas J. Henderson*, for appellants.

Mr. **John I. Bennett,** for appellees:

A bill of review cannot be maintained, on the ground that the court has decided wrong on a question of fact, or that the decree is contrary to the proofs in the case.

2 Dan. Ch. Pr., 1576, 4th Am. ed.; Stor. Eq. Pl., sec. 407; *Mellish* v. *Williams*, 1 Vern., 166; *Whiting* v. *U. S. Bank*, 13 Pet., 14; *Bartlett* v. *Fifield*, 45 N. H., 81; *Barnum* v. *McDaniels*, 6 Vt., 177; *Webb* v. *Pell*, 3 Paige, 368; *Young* v. *Henderson*, 4 Hayw., 189; *Dougherty* v. *Morgan*, 6 Mon., 153; *Eaton* v. *Dickinson*, 3 Sneed, 397; *Getzler* v. *Saroni*, 18 Ill., 517; *Evans* v. *Clement*, 14 Ill., 208; *Dexter* v. *Arnold*, 5 Mason, 303; *Turner* v. *Berry*, 3 Gilm., 544; *Griggs* v. *Gear*, 3 Gilm., 10; *Garrett* v. *Moss*, 22 Ill., 365.

A bill of review will not lie to proceedings subsequent to the final decree and in execution of it.

The decree of sale is the final decree in a foreclosure case, and from it an appeal will lie to the Supreme Court.

Whiting v. *Bank*, 13 Pet., 15.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The only questions open for examination on a bill of review, for error of law appearing on the face of the record, are such as arise on the pleadings, proceedings and decree, *without reference to the evidence in the cause.* This has been many times decided in this court. *Whiting* v. *Bank*, 13 Pet., 6; *Putnam* v. *Day*, 22 Wall., 66 [89 U. S., XXII., 766]; *Buffington* v. *Harvey*, 95 U. S., 99 [XXIV., 381]; *Thompson* v. *Maxwell*, 95 U. S., 397 [XXIV., 483].

A demurrer admits only such facts as are properly pleaded. As questions of fact are not open for re-examination, on a bill of review, for errors in law, the truth of any fact averred in that kind of a bill of review, inconsistent with the decree, is not admitted by a demurrer, because no error can be assigned on such a fact; and it is, therefore, not properly pleaded. This disposes of the first, second, third, fourth and fifth specifications of error presented in this bill of review. They are all errors of fact and can only be determined by a reference to the evidence. It nowhere appears from the bill, answer and other pleadings, together with the decree, constituting what *Mr. Justice* Story said, in *Whiting* v. *Bank of U. S.*, *supra*, "is properly considered as the record," that there was any usury in the case, or that the appellants had not waived their homestead rights as alleged in the bill.

All the allegations of error on the face of the record are equally bad. It is stated in the decree that all the material averments of fact in the bill were proved, and on these facts the priority of the lien of the complainant was established. All the issues were thus disposed of, [535] and the decree was in favor of the complainant and against all the defendants. The omission of the name of McGregor, from among those against whom it was stated in the decree the bill was taken as confessed, is unimportant. If, as is stated in the brief of counsel for the appellant, he was served with subpœna and did not plead, answer or demur to the bill, the decree was in fact *pro confesso* as to him; and he

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Mon., 340; *contra*, Kinsell v. Feldman, 28 Iowa, 497; Stafford v. Bryan, 2 Paige, 45; Jewett v. Dringer, 9 Reptr, 379.

Bill of review cannot be brought on a judgment or decree entered by consent of parties. Ryder v. Phœnix Ins. Co., 101 Mass., 548; Cornish v. Keesee, 21 Ark., 528.

When a bill of review is brought for errors of law and is in the nature of a writ of error, it will not lie after the time for bringing a writ of error has passed. Cooper, Eq. Pl., 91-93; Thomas v. Harvie, 23 U. S. (10 Wheat.), 146; Nolan v. Wimston, 17 Ohio, 170; Dolton v. Erb, 53 Ill., 289; Boyd v. Vanderkamp, 1 Barb. Ch., 273.

On a bill of review, facts may be looked to, but not the evidence which proves or disproves the facts. Barnum v. McDaniels, 6 Vt., 179; Burdine v. Shelton, 10 Yerg., 41; Turner v. Berry, 3 Gilm., 544; Dougherty v. Morgan, 6 Mon., 152; Evans v. Clement, 14 Ill., 208.

This court will, on a bill of review, revise or reverse its own decision for an erroneous application of the law to the facts found, whenever a court of appeals would do so for the same cause. Mitf. Eq. Pl., 84; Evans v. Clement, 14 Ill., 208; Bk. of U. S. v. Ritchie, 33 U. S. (8 Pet.), 140; Whiting v. Bk. of U. S., 38 U. S. (13 Pet.), 14; Randon v. Cartright, 3 Tex., 268; Trulock v. Robey, 15 Sim., 277; Barnum v. McDaniels, 6 Vt., 179.

Errors apparent for which a bill of review will lie must be errors of law, patent on the pleadings and decree. Berdanatti v. Sexton, 2 Tenn. Ch., 699; Dexter v. Arnold, 5 Mason, 303; Eaton v. Dickinson, 3 Sneed, 401.

The granting of a bill of review is a matter of discretion. It may be refused, although the facts, if true, would change the decree, where it would be productive of mischief to innocent parties, or from any other cause unadvisable. Dexter v. Arnold, 5 Mason, 303, and cases cited; Thomas v. Harvie, 23 U. S. (10 Wheat.), 146; Ricker v. Powell, 100 U. S., XXV., 527; Wood v. Mann, 2 Sumn., 316; Jenkins v. Eldridge, 3 Story, 299; Massie v. Graham, 3 McLean, 52; P. & M. Bk. v. Dundas, 10 Ala., 661; Nichols v. Nichols, 8 W. Va., 186.

The requisites of a bill of review for newly discovered evidence are:

1. That it must be discovered after the decree and could not have been discovered before by reasonable diligence. Patterson v. Slaughter, Amb., 293; Brainard v. Morse, 47 Vt., 320; Carter v. Allen, 21 Gratt., 245; Norris v. Le Neve, 3 Atk., 25; Beard v. Burts, 95 U. S., XXIV., 485; Dexter v. Arnold, 5 Mason, 312, and cases cited; Davidson v. King, 51 Ind., 228; Barnes v. Dewey, 58 Ind., 418; Crooker v. Houghton, 61 Me., 346; Whelan v. Cook, 29 Md., 1; Burson v. Dosser, 1 Heisk., 762.

2. The new matter must be of such a character as would have produced a different result. Todd v. Chipman, 62 Me., 189; Jenkins v. Eldridge, 3 Story, 299; Carter v. Allen, 21 Gratt., 245; Brainard v. Morse, 47 Vt., 320; Nichols v. Nichols, 8 W. Va., 185; Providence Rubber Co v. Goodyear, 76 U. S., XIX., 828.

3. It must not be cumulative. Anon., 2 Freem., 31; Dan. Ch. Pl., 1578; Partridge v. Usborne, 5 Russ., 195; McDougald v. Dougherty, 49 Ala., 409; Per v. Routh, 3 How. (Miss.), 292; Willan v. Willan, 16 Ves., 88; Taylor v. Sharp, P. Wms., 371; Coller v. Shields, 2 Stew. & P., 423; Foy v. Foy, 25 Miss., 212; Repass v. McClanahan, Hard., 342; Love v. Blewit, 1 Dev. & B., 108.

Bill of review must be brought in the court in which the original decree was rendered. Hanna v. Spotts, 5 B. Mon., 302; S. C., 43 Am. Dec., 132.

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is as much bound as if he had been particularly named.

All the new matter alleged to have been discovered relates to the proceedings in making the sale, and can have no effect on the original decree. So far as the decree confirming the sale is concerned, the matter is not new, for the addition to the transcript, filed by consent, shows that all the affidavits now relied on to establish the new facts were actually read in evidence on the hearing of a motion, made before the confirmation, to set aside the sale. These affidavits cannot be considered on a bill of review to reverse the decree of confirmation for errors appearing on the face of the record, because, as evidence, they form no part of the record which can be looked into on such a review. But, as part of the exhibits annexed to a bill of review for alleged discovery of new matter, they may be referred to for the purpose of determining, whether, upon the showing of the complainant in review, the matter alleged to be new first came to his knowledge after the time when it could have been made use of at the original hearing.

This disposes of the case; and the decree of the Circuit Court, dismissing the bill of review, is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S

JOHN H. HAYWARD, *Appt.*, *v.* ALFRED H. ANDREWS ET AL.

(See S. C., 16 Otto., 672-679.)

Bill in equity, when not sustainable.

The assignee of a chose in action, as a patent-right, with claims of damages for its infringement, cannot proceed by bill in equity to enforce for his own use the legal right of his assignor, merely because he cannot sue at law in his own name; he has a plain and adequate remedy at law by an action in the name of his assignor.

[No. 918.]

Submitted Jan. 3, 1883. Decided Jan. 15, 1883.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The history and facts of the case appear in the opinion of the court.

Messrs. **Gilbert M. Speir, Ephraim Banning** and **Thomas A. Banning,** for appellant.

Messrs. **E. A. West** and **L. L. Bond,** for appellees.

Mr. Justice **Matthews** delivered the opinion of the court:

This appeal brings into review the decree of the circuit court, sustaining a general demurrer to the amended bill of the complainant, and dismissing the bill for want of equity.

The case made by the amended bill and exhibits is this: Aaron H. Allen was the owner of [673] re-issued patent No. 1126, granted to him upon the surrender of original patent No. 12017, dated December 5, 1854, for a new and useful improvement in seats for public buildings, which was extended for seven years from December 5, 1868, and which consequently expired by limitation December 4, 1875. The complainant claimed to be the sole and exclusive owner, in equity, of all claims for damages arising out of or occasioned by infringements of said re-issued letters patent, committed after September 18, 1869, and of all claims for gains and profits, derived by others by reason of such infringements, by virtue of certain written instruments, set out as exhibits to the bill.

The first of these is an instrument, dated September 18, 1869, by which Allen grants to J. W. Schermerhorn & Co. "The sole right and privilege of manufacturing and selling school furniture, made according to" the re-issued patent, "for a tilting seat on a lever principle," subject to the terms and conditions of an indenture between the parties, which, however, is not set out. On April 22, 1881, Jno. H. Platt, as assignee of Jas. W. Schermerhorn, George M. Kendall, and George Munger, bankrupts, transfers to the complainant all the interest of the bankrupts in the Allen patent, and all causes of action arising to him, as assignee of the bankrupts, by reason of his interest in the said patent; and especially his claim in a certain suit then pending, brought by Allen in the Circuit Court of the United States for the Southern District of New York against the City of New York.

The second and only other instrument of title exhibited is an assignment from Allen, the patentee, to the complainant, dated March 8, 1880, whereby Allen transfers to him and to his assigns all his right and interest in the suit, mentioned in the assignment from Platt, against the City of New York, "Together with all claims for damages arising since the 18th day of September, 1869, against any persons, firms or corporations, by reason of infringements of letters patent of the United States for a tilting seat supported on the lever principle," being the re-issued patent specified in the bill. And the complainant is, thereby, further constituted the attorney in fact of Allen, irrevocably in his name, to demand and recover all such damages, for his own use, paying all expenses, but account- [674] ing for thirty per cent of all sums recovered, to Allen, until the latter shall have received $6,600, and no longer.

It is alleged in the amended bill that, in the suit against the City of New York, a decision was reached sustaining the validity of the patent, but no final decree therein has been entered; and that, owing to the delays incident to that litigation, while waiting for a decision upon the validity of the patent, neither Allen nor complainant have been in a situation to prosecute other infringers or sooner to file this bill.

It is also alleged, in the amended bill, that the defendants have infringed the said letters patent since September 18, 1869, and until the expiration thereof, and in violation thereof "Have manufactured, sold and used the said invention for improvements in seats for public buildings, patented as aforesaid, whereby great injury resulted to your orator, and great gains and profits accrued to the said defendants," for which, accordingly, an account is prayed and a decree for the amount thereof and for damages.

The original bill was filed December 1, 1881, Allen being a co-complainant; and the amended bill on May 25, 1882, the original bill having been dismissed as to Allen.

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It is manifest that the right claimed by the complainant receives no support from any title derived from Allen through J. W. Schermerhorn & Co., for the right of the latter, under the instrument of September 18, 1869, was that of mere licensees. They could maintain no action for damages or profits against infringers, for they had no interest in the patent, nor was there any assignment to them of any right of action accrued or to accrue to Allen. In addition to this, the license itself only extended to the manufacture and sale of school furniture, and there is no allegation in the amended bill that the defendants had infringed the patent in that respect. That branch, therefore, of the complainant's bill is removed from the case, and he is relieved from the embarrassment which, it is alleged in argument, is occasioned by the uncertainty produced by alternative and inconsistent titles, and which is made one of the grounds for claiming the right to resort to equity.

The case, then, is left to stand upon the right [675] derived under the contract between Allen and the complainant, of March 8, 1880; and the single question remains whether the assignee of a chose in action may proceed, by bill in equity, to enforce for his own use the legal right of his assignor, merely because he cannot sue at law in his own name.

It is admitted that, according to the rule declared and established in *Root* v. *R. R. Co.*, 105 U. S., 189 [XXVI., 975], the patentee could not, in his own name and right, maintain the present suit; and the original bill, in which he was a co-complainant with the appellant, was, accordingly, dismissed as to him. To permit the latter to proceed in equity, upon the mere ground of the assignment to him, would be substantially to abrogate that rule. The principle was stated to be, that the relief granted to a patentee in equity, by the recovery of profits and damages against an infringer, was "Incidental to some other equity, the right to enforce which secures to the patentee his standing in court;" that "The most general ground for equitable interposition is to insure to the patentee the enjoyment of his specific right, by injunction against a continuance of the infringement; but that grounds of equitable relief may arise, other than by way of injunction;" and among these, by way of illustration, was mentioned that "where the title of the complainant is equitable merely;" but it is the obvious meaning of the passage, to limit the exception to cases where the purpose and necessity of the resort to a court of chancery are to enforce the peculiar equity personal to the complainant, and not merely the legal right of which he is the beneficial owner. If the assignee of the chose in action is unable to assert in a court of law the legal right of the assignor, which in equity is vested in him, then the jurisdiction of a court of chancery may be invoked, because it is the proper forum for the enforcement of equitable interests and because there is no adequate remedy at law; but when, on the other hand, the equitable title is not involved in the litigation, and the remedy is sought merely for the purpose of enforcing the legal right of his assignor, there is no ground for an appeal to equity because, by an action at law in the name of the assignor, the disputed right may be perfectly vindicated and the wrong done by the denial of it fully redressed. To hold otherwise would be to enlarge the jurisdiction of courts of equity to an extent the limits of which could not be recognized; and that, in cases where the only [676] matters in controversy would be purely legal rights.

In opposition to this view, a passage from Story, Eq. Jur., sec. 1057 *a*, is cited and relied on in argument, in which that learned author, after stating that it had been "Recently held that the assignee of a debt, not in itself negotiable, is not entitled to sue the debtor for it in equity, unless some circumstances intervened which show that his remedy at law is or may be obstructed by the assignor," adds, that "This doctrine is apparently new, at least, in the broad extent in which it is laid down, and does not seem to have been generally adopted in America. On the contrary, the more general principle established in this country seems to be, that, wherever an assignee has an equitable right or interest in a debt or other property (as the assignee of a debt certainly has), then a court of equity is the proper forum to enforce it; and he is not to be driven to any circuity, by instituting a suit at law in the name of the person who is possessed of the legal title." In the next paragraph, however, it is admitted that, "If the assignment be of a contract involving the consideration and ascertainment of unliquidated damages, as in case of the assignment of a policy of insurance, then, unless some obstruction exists to the remedy at law, it would seem that a court of equity ought not or might not interfere, to grant relief; for the facts and the damages are properly matters for a jury to ascertain and decide. But the same objection would not lie to an assignment of a bond or other security for a fixed sum."

The doctrine referred to in this passage, as "apparently new," is that stated by *Vice-Chancellor* Shadwell, in *Hammond* v. *Messenger*, 9 Sim., 327-332, where he said: "If this case were stripped of all special circumstances, it would be simply a bill filed by a plaintiff, who had obtained from certain persons to whom a debt was due, a right to sue in their name for the debt. It is quite new to me that, in such a simple case as that, this court allows, in the first instance, a bill to be filed against the debtor by the person who has become the assignee of the debt. I admit that if special circumstances are stated and it is represented that, notwithstanding the right which the party has obtained to sue in the name of the creditor, the creditor will interfere and prevent the exercise of that right, this [677] court will interpose for the purpose of preventing that species of wrong being done; and if the creditor will not allow the matter to be tried at law in his name, this court has a jurisdiction in the first instance to compel the debtor to pay the debt to the plaintiff, especially in a case where the act done by the creditor is done in collusion with the debtor. If bills of this kind were allowable, it is obvious they would be pretty frequent; but I never remember any instance of such a bill as this being filed, unaccompanied by special circumstances."

And, accordingly, the Supreme Judicial Court of Massachusetts, in *Walker* v. *Brooks*, 125 Mass., 241, held, that "A court of equity will not entertain a bill by the assignee of a strictly legal right, merely upon the ground that

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he cannot bring an action at law in his own name, nor unless it appears that the assignor prohibits and prevents such an action from being brought in his name, or that an action so brought would not afford the assignee an adequate remedy." And *Chief Justice* Gray, delivering its opinion in that case, referring to the passage from Story to the contrary, said: "But the adjudged cases, including those cited by the learned commentator, upon being examined, fail to support his position, and show that the doctrine of *Hammond* v. *Messenger* is amply sustained by earlier authorities in England and in this country." This conclusion he then verifies by a review of the cases from the time of *Lord Chancellor* King, whose decision in *Dhegetoff* v. *London Assurance Co.* was affirmed in the House of Lords; Mosely, 83; [*Ghettoff* v. *Assurance Co.*], 4 Bro. P. C., 2d ed., 436; followed by *Lord* Hardwicke, in *Motteux* v. *Assurance Co.*, 1 Atk., 545, 547; and *Lord* Loughborough, in *Cator* v. *Burke*, 1 Bro. Ch., 434, to *Vice-Chancellor* Knight Bruce, in *Rose* v. *Clarke*, 1 You. & C. Ch., 534, 548; and in this country from *Carter* v. *Ins. Co.*, 1 Johns. Ch., 463, by *Chancellor* Kent; and *Bank* v. *Mumford*, 2 Barb. Ch., 596, 615, by *Chancellor* Walworth; including several others in various States. He then points out that, in *Riddle* v. *Mandeville*, 5 Cranch, 322, the principal case cited by *Mr. Justice* Story in support of his statement, a bill in equity by an indorsee of a promissory note against a remote indorser was sustained by this court, upon the [678] ground that in Virginia the law of which governed the case, no remedy at law could be had against him, except by the circuitous course of successive actions by each indorsee against his immediate indorser; and that, in that particular case, the intermediate party was insolvent; and that *Chief Justice* Marshall, who delivered the opinion in that case, did not consider it as establishing the general proposition for which it was cited, was manifest from his opinion in the later case of *Lenox* v. *Roberts*, 2 Wheat., 373, in which the assignee of all the property of a banking corporation was allowed to maintain a bill in equity in his own name upon a promissory note which had not been formally indorsed to him, for the reason that, "As the act of incorporation had expired, no action could be maintained at law by the bank itself."

The same doctrine had received a pointed application by this court in the case of *Thompson* v. *R. R. Co.*, 6 Wall., 134 [78 U. S., XVIII., 765]. That case was commenced in the state court in Ohio, by the parties in interest, in their own name, although only beneficially entitled, in accordance with the Code of the State. It was removed into the circuit court, where the plaintiffs filed a bill in equity, because their title was equitable merely. A decree in their favor, on appeal, was reversed by this court. *Mr. Justice* Davis remarking, in the opinion, that "This case does not present a single element for equitable jurisdiction and relief," and added: "the absence of a plain and adequate remedy at law, is the only test of equity jurisdiction; and it is manifest that a resort to a court of chancery was not necessary, in order to enable the railroad companies to collect their debt."

That decision has been cited with approval in the subsequent cases of *Walker* v. *Dreville*, 12 Wall., 442 [79 U. S., XX., 430]; *Van Norden* v. *Morton*, 99 U. S., 380 [XXV., 454]; and *Hurt* v. *Hollingsworth*, 100 U. S., 103 [XXV., 570].

In the present case, the complainant had a plain and adequate remedy at law, by an action in the name of Allen, whose willingness to permit his name to be so used, in accordance with his agreement to that effect, is manifest, from the fact that, in the original bill, he was named as one of the complainants.

There was, therefore, no error committed by the Circuit Court in dismissing the amended bill for want of jurisdiction in equity. The decree is, accordingly, affirmed. [679]

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Cited—107 U. S., 214.

JAMES TURNER AND INDIANAPOLIS, BLOOMINGTON AND WESTERN RAILWAY COMPANY, *Appts.*, [552]

v.

FARMERS' LOAN AND TRUST COMPANY ET AL.

(See S. C., 16 Otto, 552-558.)

Review of decree in case removed from state court, extent of.

*In a suit for foreclosure, commenced in a state court, and removed to the Circuit Court of the United States, a motion to remand the cause was made and overruled. Subsequently, a final decree of sale was passed. Upon appeal merely from the order confirming the sale, the final decree not disclosing, affirmatively, a want of jurisdiction, this court will not examine the record, prior to such final decree, to see whether the petition for removal was filed in proper time, or whether it makes a case of federal jurisdiction by reason of the presence in the suit of a controversy between citizens of different States; but, assuming that the final decree was within the power of the circuit court to render, will only examine the decree to ascertain whether the sale was had in conformity with its provisions.

[No. 120.]

Argued Dec. 7, 8, 1882. Decided Jan. 15, 1883.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **George W. Kretzinger** and **N. A. Cowdrey**, for appellants.

Messrs. **J. D. Campbell, J. A. Johnson,** and *I. B. Edmunds*, for appellees.

Mr. Justice **Harlan** delivered the opinion of the court:

This suit was commenced on the 21st day of November, 1874, in the Circuit Court for De Witt County, Illinois, by Malcolm C. Turner, James Turner and others, constituting the firm of Turner Brothers, against the Indianapolis, Bloomington & Western Railway Company, the Farmers' Loan and Trust Company and others. The complainants, suing in behalf of themselves and all other bondholders and creditors of the Railway Company, asked a decree for the foreclosure of several mortgages, covering as well its property and franchises as the

Head note by *Mr. Justice* HARLAN.

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road and franchises of the constituent Companies, by whose consolidation it was created.

The Farmers' Loan and Trust Company appeared and answered. It also filed a cross-bill, making all necessary parties defendant thereto; and, as trustee in some of the mortgages creating prior liens upon the main line of the consolidated road, it prayed for a decree of foreclosure, a sale of the mortgaged property, and a proper distribution of the proceeds arising therefrom among the several classes of creditors of the Railway Company. Subsequently, on the 26th of April, 1876, it filed a petition, accompanied by a sufficient bond, for the removal of the suit into the Circuit Court of the United States for the Southern District of Illinois; and [553] thereafter, it is asserted, the state court proceeded no further. A transcript of the proceedings having been filed in the Circuit Court of the United States, a motion was there made to remand the cause, while the Farmers' Loan and Trust Company moved that the court take jurisdiction. By an order entered on the 19th day of July, 1876, the former motion was denied and the latter sustained.

On the 18th day of July, 1877, a final decree was passed, ascertaining the amounts due and unpaid on the mortgages to the Farmers' Loan and Trust Company. By that decree it was ordered and adjudged that the Railway Company, within twenty days thereafter, pay the trustee the amount so ascertained, $6,234,625, with interest from the date of the decree; that in default of such payment the equity of all the defendants to the cross-bill, in the mortgaged property, be forever barred and foreclosed, and the property—which included all the rights, effects and franchises of the consolidated Company and of its constituent Companies, as to the main line of road—be sold as an entirety, the same being, in the opinion and judgment of the court, incapable of sale separately or in division, without material injury to its value.

It was further decreed that the mortgaged property be sold, without appraisement and without reference, and not subject to any law of Illinois or Indiana conferring the right of redemption from mortgage sales.

On the 8th day of May, 1878, the original decree was amended by way of further direction for its execution.

The sale occurred on the 30th day of October, 1878, was reported to court on the succeeding day, and on the first day of November, 1878, exceptions thereto were filed by James Turner and the Railway Company. On the 23d of December, 1878, the exceptions were overruled and an order entered confirming and approving the sale in all respects.

On the 3d day of February, 1879, Turner and the Railway Company filed their joint petition, praying an appeal from the final order confirming the sale. The appeal was allowed, and the bond tendered was approved, not to operate as a *supersedeas*. Subsequently, the purchaser received a deed and took possession of the property under the direction of the court.

It may be stated that a similar decree was en- [554] tered in the Circuit Court of the United States for the District of Indiana, in a suit pending therein between, substantially, the same parties and relating to the same property. That suit was commenced on the 18th day of November, 1874, in the Circuit Court for Montgomery County, Indiana, and thence removed into the Federal Court upon the petition of the Farmers' Loan and Trust Company.

Notwithstanding the record is very voluminous, it is believed that this statement is sufficient to indicate the grounds upon which this court rests its determination of the case.

Numerous errors have been assigned in behalf of the appellants, James Turner and the Indianapolis, Bloomington & Western Railway Company. The first and most important one relates to the jurisdiction of the Circuit Court of the United States. Their contention is, that under the Act of March 3, 1875, the state court could not have been deprived of jurisdiction to proceed, unless the petition for removal was filed "before or at the term at which such cause could be first tried and before the trial thereof;" that the petition of the Farmers' Loan and Trust Company was not so filed; consequently, it is insisted, jurisdiction in the Federal Court could not have attached. It is further argued that the pleadings disclose the fact that there was no such controversy in this suit, between citizens of different States, as would authorize its removal from the state court under the Act of March 3, 1875, or under that of March 2, 1867, even if the latter is in force for any purpose.

Without admitting the soundness of these propositions, we are of opinion that the questions of jurisdiction now raised cannot be determined upon an appeal merely from the order confirming the report of sale. Whether the suit was one which the Farmers' Loan and Trust Company was entitled to have removed, that is, whether the Circuit Court of the United States could rightfully proceed after the petition for removal, accompanied by a sufficient bond, had been filed in the state court, was a question directly presented to that court for judicial determination upon the motion that the cause be remanded. The denial of that motion constituted an adjudication by the Federal Court that the facts existed which were necessary to give jurisdiction. And had the question not been thus formally presented, it was the [555] duty of the circuit court to dismiss or remand the cause, as justice might have required, at any time during its progress, when it appeared that the suit did not really or substantially involve a dispute or controversy properly within its jurisdiction. Act of March 3, 1875, sec. 5 [18 Stat. at L., 470]; *Williams* v. *Nottawa*, 104 U. S., 209 [XXVI., 719]. Further, the final decree necessarily involved, and was itself, a judicial determination, as between the parties, that the suit was one of which that court might take cognizance. That decree, unmodified and unchallenged by any direct appeal therefrom, should, upon this appeal only from the order confirming the sale, be deemed conclusive, between the parties and their privies, as to all matters in issue and by it adjudicated, including the questions of jurisdiction now pressed upon our attention. Such, we think, must be the rule, especially under existing statutes regulating the jurisdiction of the courts of the United States. Whether or not a cause, commenced in a state court, could have been tried at some term thereof prior to the filing of a petition for removal; whether the parties to a particular suit,

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without regard to their position as plaintiffs or defendants, can be so arranged on different sides of the controversy as to make a proper case for removal upon the ground of citizenship, *Removal Cases*, 100 U. S., 457 [XXV., 593]; whether there is in the suit a separable controversy between citizens of different States to which the judicial power of the United States extends, are often questions difficult of solution. We have held in numerous cases that, upon the filing of a petition and bond for removal in the state court, the suit being removable under the statute, its jurisdiction ceases. And to the end that litigants may not, in such cases, be harassed by doubt as to which court has authority to proceed, the party, against whom the removal is had, is at liberty to move that the suit be remanded; and the Act of 1875, for the first time in the legislation of Congress, declares that an order of the circuit court remanding a cause may, in advance of the final judgment or decree therein, be reviewed by this court on writ of error or appeal, as the case may require the one or the other mode to be pursued. Prior to that Act, the remedy, in that class of cases, was by *mandamus* to compel the circuit court to hear and determine the cause. *Babbitt* v. *Clark*, [556] 103 U. S., 606 [XXVI., 507]; *R. R. Co.* v. *Wiswall*, 23 Wall., 507 [90 U.S., XXIII., 103]; *Ins. Co.* v. *Comstock*, 16 Wall., 258 [83 U.S., XXI., 493]. When the circuit court assumes jurisdiction of the cause, the party denying its authority to do so, may, after final decree and by a direct appeal therefrom, bring the case here for review upon the question of jurisdiction, the amount in dispute being sufficient for that purpose. *R. R. Co.* v. *Koontz*, 104 U. S., 15 [XXVI., 646]. In the present case we have seen that the appeal is only from the order confirming the sale. Appellants elected not to appeal from the final decree, although it necessarily involved every question affecting the jurisdiction of the circuit court. That decree is, consequently, not before us for any purpose, except to ascertain, from an inspection thereof, whether the sale was conducted in conformity with its provisions. In such cases, upon an appeal not from the final decree but only from an order in execution thereof, the court will not examine the record, prior to such decree, to see whether the petition for removal was filed in due time, or whether it makes a case of federal jurisdiction, by reason of the presence in the suit of a controversy between citizens of different States, but will assume that the final decree, being passed by a court of general jurisdiction, and not showing upon its face a want of jurisdiction as to subject-matter or parties, was within the power of the court to render. Whether the order confirming the sale would have been erroneous, had the decree itself disclosed, affirmatively, a want of jurisdiction, is a question which need not be decided.

What we have said disposes of numerous other assignments of error, such as that the court erred in decreeing that the property of the Railroad Company be sold without appraisement and without reference, and not subject to the laws of Illinois and Indiana conferring the right of redemption from sales of mortgaged real estate; in ordering the railroad and other property to be sold without first ascertaining what claims existed which were prior in lien to the mortgages foreclosed; in amending the decree of September, 1877, after the expiration of the term at which it was entered; in ordering the cross-bill of the Farmers' Loan and Trust Company to be taken by default as against the complainants in the original bill, after it appeared that they had become bankrupts, and their property and rights had passed to an assignee in [557] bankruptcy, who was not made a party to the cause; in decreeing the personal property of the Railroad Company to be sold, and in subsequently delivering it to the purchasers, in disregard of the alleged rights of appellants under the chattel mortgage executed to Thomas on the 16th day of November, 1874; in refusing to entertain appellant Turner's petition to intervene, filed on the day of sale; and in directing a foreclosure and sale of the property for the principal and interest of the debt secured by the mortgage, when, as is claimed, it did not appear that the principal had become due.

We do not stop to consider whether these objections find any support in the record, since it is sufficient to say that, if any such errors exist, they necessarily inhere, some in the final decree of foreclosure and sale, and others in the orders which preceded it. They cannot be examined upon an appeal merely from the order confirming the report of sale. Our authority extends, as we have shown, no further than to an examination of the exceptions filed by appellants to the report of sale, from the order confirming which this appeal is taken. And some of these exceptions plainly have reference, not to the sale itself, but to the final decree of foreclosure; such, for instance, as that the terms of sale were too onerous; that the property was sold subject to various claims, the amount of which was wholly uncertain; and that the court had no jurisdiction in the case. The only exceptions which properly relate to the sale are that the price at which the property was struck off and sold, $1,000,000, was inadequate and insufficient; and that the property was not advertised for a sufficient length of time. It is enough to say that the record discloses no ground upon which these exceptions could have been sustained. One exception was to the effect that the purchasers at the sale constituted a committee, acting as agents of bondholders of the Railway Company, and that the report of sale did not disclose the names of the principals for whose use the property was purchased, or the amount to which each of said parties was beneficially interested. We are unable to perceive anything of substance in this exception. Since the sale was, in all material respects, in conformity with the final decree, from which no appeal was prayed; and since the record discloses no ground [558] upon which its fairness can be impeached, the court below properly overruled the exceptions and confirmed the sale.

The order appealed from must, consequently, be affirmed. It is so ordered.

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[563] MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH, *Appts.*,

v.

MORRIS K. JESUP, Surviving Trustee, EUGENE KELLY, Trustee, etc.

(See S. C., "*Savannah* v. *Jesup*," 16 Otto, 563–571.)

Appeal by corporation—jurisdictional amount—void taxes.

*1. Where a foreclosure suit was brought, and the municipal corporation, within which the mortgaged property was situate, was allowed to intervene and set up a claim for taxes thereon; *held*, that the order of the circuit court rejecting such claim is binding upon the corporation, and where the amount of taxes is sufficient to give this court jurisdiction, the corporation is entitled to an appeal.

2. Certain taxes assessed by the City of Savannah, for the years 1877 and 1878, upon lands situate within its limits, and belonging to the Atlantic and Gulf Railroad Company; *held* to be unauthorized by law.

[No. 126.]

Argued Dec. 13, 1882. Decided Jan. 15, 1883.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

For the history and facts of the case see the opinion of the court and the case of *Georgia* v. *Jesup*, *ante*, 216.

Messrs **Alexander R. Lawton**, *H. C. Cunningham* and *S. Y. Levy*, for appellants.

Mr. W. S. Chisholm, for appellee.

Mr Justice **Harlan** delivered the opinion of the court·

In *Georgia* v. *Jesup* [*ante*, 216], decided at the present Term of this court, will be found a brief statement of the history of a suit commenced on the 15th day of February, 1877, in the Circuit Court of the United States for the Southern District of Georgia, by Morris K. Jesup, surviving Trustee, etc., against the Atlantic and Gulf Railroad Company, a Georgia corporation, for the foreclosure of certain mortgages, covering the main line and branches of that company, with their respective appurtenances rolling stock, equipment, etc. In addition to the facts there stated, it may be added that, on the 10th day of April, 1879—the mortgaged property being then, as it had been since February 20, 1879, in the actual possession of receivers—the City of Savannah, a municipal Corporation of Georgia, by leave of court, filed, in said cause, its petition *pro interesse suo*. It was therein alleged that the City was a creditor of the railroad company, in this, that the latter was indebted to the City for taxes "upon real estate owned and used for its legitimate corporate purposes," within the corporate limits of Savannah, in the sum of $2,858.75 for the year 1877, and $3,720 for the year 1878; and that, for those sums, execution had duly issued on the 20th day of January, 1877 and March 1, 1879, respectively, and were then in the hands of the [564] city marshal to be levied on the goods, chattels, lands and tenements of the railroad company. The prayer of the City was, that it be heard in its own interest; that the court would authorize it to proceed in the collection of said taxes by levy and sale, under its ordinances and the laws of the State; else order the receivers to pay such taxes out of the funds and property in their possession, or give such other and immediate relief in the premises as to the court seemed proper.

This intervening petition, having been submitted and considered upon the merits, was, by order of the court, dismissed. Subsequently, the main cause was heard upon bills and answers, and the various interventions filed and a final decree rendered, in which, among other things, it was recited that various persons had intervened for their interest, claiming to have liens against the property of the company, as laborers, mechanics, or material men, or claiming to have an equity to be paid out of moneys in the hands of the receivers before payment of the bonds secured by the mortgages. By the decree, it was, among other things, ordered and adjudged that certain claims of laborers and mechanics were superior liens on the mortgaged property and its proceeds, but that the claims of those who have furnished material only, but not as laborers or mechanics, although entitled to liens therefor, be postponed to the mortgages therein mentioned, "And no allowance is made or to be paid, from the proceeds of said property, or from the money in the receiver's hands, to any other persons than to those who have such liens as aforesaid."

The City of Savannah prayed and was allowed an appeal, the one now before the court, from the decree denying its claim for taxes for the years 1877 and 1878.

Upon the oral argument in this court, some question arose as to whether the present appeal brings before us for review the merits of these claims for taxes. We are of opinion that this question must receive an affirmative answer. If the City had a valid claim for taxes, paramount to the lien created by the mortgages, two courses were open to it: to postpone action under its executions until the proceedings in the Circuit Court of the United States were concluded, and its possession of the property, by receivers, had ended; or, with leave of court, to file a petition *pro interesse suo*, submitting its claims for judi- [565] cial determination. It adopted the latter course and, in so doing, put itself in a condition to appeal from any order adverse to its interests, if such order involved an amount sufficient to give this court jurisdiction. This practice received the sanction of this court in *Wiswall* v. *Sampson*, 14 How., 65. The order dismissing the City's petition was followed by a final decree, which, in terms, limited the distribution of the proceeds of sale to certain claimants, the City not among the number, excluding all others. The orders in the court below, therefore, constituted, in every essential sense, a judicial determination adverse to the City's claims for taxes. Until those orders are reversed or modified, the City is concluded against any further assertion of its rights in the premises. Consequently, the appeal from the decree dismissing the petition and denying the claims for taxes, brings before us the question whether those claims were valid and enforceable against the property of the railroad company, or the proceeds arising from any sale thereof. That question we proceed to examine.

In conformity with an Act of the Legislature of Georgia, passed April 18, 1863, the Atlantic and Gulf Railroad Company was formed by the consolidation of two other companies: one, the Savannah, Albany and Gulf Railroad Company,

*Head notes by *Mr. Justice* HARLAN.

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incorporated December 25, 1847; and the other, the Atlantic and Gulf Railroad Company, incorporated February 27, 1856. The two constituent companies acquired, by their respective charters, an immunity from all taxation in excess of one half of one per cent upon its annual net income or the annual net proceeds of its investments, whether the one or the other is not material in the present case. This immunity passed to the consolidated company, subject, however, to the right of the State, reserved in the Code of Georgia, which was in force on and after January 1, 1863, to withdraw it altogether. In *R. R. Co.* v. *Georgia*, 98 U.S., 365 [XXV., 187], we held that this immunity or limited exemption was, in law, withdrawn by the State in the Act of February 28, 1874, entiled "An Act to Amend the Tax Laws of the State so far as the Same Relate to Railroad Companies, and to Define the Liabilities of Said Companies to Taxation, and to Repeal so Much of the Charters of Such Companies Respectively as May Conflict with [566] the Provisions of this Act." As the present case turns mainly upon the construction and effect of that Act, it is necessary to examine its provisions with some care.

By the 1st section it is enacted that, from and after the passage of the Act, "The presidents of all the railroad companies in this State shall be required to return on oath, annually, to the Comptroller-General, the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State, and that said returns shall be made under the same regulations provided by law for the returns of officers of other incorporated companies which are required by law to be made to the Comptroller-General."

The 2d section provides that the presidents of railroad companies shall "Pay to the Comptroller-General the taxes assessed upon the property of said railroad companies, and on failure to make the returns required by the preceding section, or on failure to pay the taxes so assessed, the Comptroller-General shall proceed to enforce the collection of the same, in the manner provided by law for the enforcement of taxes against incorporated companies hereinbefore mentioned."

The 3d section provides that if any railroad company affected by the 1st and 2d sections of the Act "Desires to resist the collection of the tax herein provided for, said company, through its proper officer, may, after making the return required in the 1st section in this Act, and after paying the tax levied on such corporation by the tax Act for 1873 and continuing to pay the same while the question of its liability under this Act is undetermined, resist the collection of the tax herein provided for by filing an affidavit of illegality to the execution or other process issued by the Comptroller-General aforesaid, and stating fully and distinctly the grounds of resistance which shall be returnable to the Superior Court of Fulton County, to be there determined as other illegalities; only the same shall have precedence of all cases in said court as to time of hearing, and with the same right of motions for new trial and writs of error as in other cases of illegality on the part of the Comptroller-General and of said corporation, in which cases the Comptroller-General shall be represented by the Attorney- [567] General of the State, or such other attorney as the Governor may select; and if the grounds of such illegality be not sustained, the Comptroller-General shall, after crediting the process aforesaid with amount paid, proceed to collect the residue due under the provisions of the Act, and if at any time during the pendency of any litigation herein provided for, the said corporation shall fail to pay the tax required to be paid as a condition of hearing, then said illegality must be dismissed and no second affidavit of illegality shall be allowed. Said illegality may be amended as other affidavits of illegality, and shall always be accompanied by good bond and security for the payment of the tax *fi. fa.* issued by the Comptroller-General."

The remaining section does nothing more than repeal all conflicting laws.

In *R. R. Co.* v. *Georgia*, *supra*, the constitutional validity of that Act was sustained.

The effect, then, of the Act of 1874 was, that whereas, prior to its passage, the railroad company enjoyed immunity from all taxation, except at a limited rate upon its annual net income, or annual net proceeds of its investments, by that statute, each class or species of its property, without exception, was, thenceforward, liable, without deducting the indebtedness of the company, "to be taxed as other property of the people of the State." Now, the argument of learned counsel is, that by its charter the City had "Full power and authority to make such assessments and lay such taxes on the inhabitants of said City, and those who have taxable property within the same, and those who transact or offer to transact business therein, as said corporate authorities may deem expedient for the safety, benefit, convenience and advantage of said City;" and that, "besides real and personal property, the said Mayor and Aldermen may tax capital invested in said City, stocks in money, corporations, choses in action, income and commissions derived from the pursuit of any profession, faculty, trade or calling, dividends, bank, insurance, express or other agencies, and all other property or sources of profit not expressly prohibited or exempt by state law or competent authority of the United States." Code of Georgia, sec. 4847. Consequently, it is argued, when the Act of 1874 withdrew the im- [568] munity theretofore enjoyed by the company, and declared that its property should "be taxed as other property of the people of the State," such of the property of the company, within the City, as was taxable under its charter, could be thereafter reached for all purposes of municipal taxation.

This argument, at first blush, would seem to have some force; but we are of opinion that the opposing view is more consistent with the language of the Statute of 1874, and the policy which seems to have dictated its enactment. Upon its face that Act appears to establish a system of taxation by the State, for its benefit exclusively, of the property of railroad companies. The returns by the companies are required to be made to the Comptroller-General, under the same regulations prescribed for returns to him by other incorporated companies. The taxes assessed are to be paid to that officer, and upon him, as representing the State, and

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upon no other officer, is imposed the duty of enforcing their collection. In the event of litigation, he is to be represented by the Attorney-General of the State, or by such other attorney as the Governor may select. The statute, thus imposing, in behalf of the State, taxes to be collected by its officer, and to be paid, when collected, into its treasury, provides no machinery by means of which the property of railroad companies may be taxed by municipal corporations for local purposes. No provision is made for taxation by the municipal authorities of counties, cities and towns, through which the road passes, of such portion of the company's property as was within their respective limits. Nor is any provision made for the transmission by the Comptroller-General, to such local authorities, of the returns made to him by railroad companies of their property for taxation. Had the statute done nothing more, in the cases of railroad companies whose charters were subject to legislative repeal or modification, than to withdraw the immunity from taxation theretofore enjoyed by them, there would be more force in the position taken by the City of Savannah. But such is not the case; for, in the same Act requiring taxation, for the benefit of the State, of all the property of railroad companies, and which, therefore, operated as a withdrawal of the then existing right of limited exemption from taxation, the Legislature [569] makes the returns to the Comptroller-General by the railroad companies of their property the only basis of the taxation to which, by its provisions, they are to be thereafter subjected. The mode prescribed by the statute for the payment of taxes by railroad companies has reference exclusively to taxes to be paid to the State, and not to municipal corporations. It seems to the court that the Legislature did not intend, when imposing, as was done by the Statute of 1874, taxation for the State upon all the property of railroad companies, to put upon the same property the additional burden of municipal taxation, which, had not that Act been passed, would have been forbidden by the charters of those companies. The City relies upon that statute as opening the door for municipal taxation upon all the property of the railroad company which was taxable under any law of the State. But as the State simply substituted, for taxation to a limited amount, taxation for the benefit of the State upon all the property of the company according to its value, we do not think that the railroad company could be subjected to additional taxation upon the part of the City of Savannah without further legislation to that end.

Counsel have called our attention to *Bailey* v. *Magwire*, 22 Wall., 216 [89 U. S., XXII., 850], and insist that the principles there announced, if applied in this case, will lead to a conclusion different from that indicated. We do not so understand that case, and do not assent to any such interpretation of the decision there rendered. In that case it appeared that the Pacific Railroad Company, a Missouri corporation, was granted an exemption from taxation for a limited period. When, as well as before, that immunity was granted, the property of the company was liable for county, school and municipal taxes, under *the public laws of the State* providing a *general scheme for the taxation of all property*. It was decided that there was nothing in the language of the statute, giving the exemption for a fixed term of years, which justified the conclusion that the State intended to relieve the property of the railroad company, after the exemption ceased, from the same liability for municipal taxes to which it was subject, by the general tax laws of the State, at the time that exemption was granted. The essential difference between that case and this is, that the Atlantic and Gulf Rail- [570] road Company was, from its organization, exempted from *all* taxation, in excess of a limited amount and, simultaneously with the withdrawal of that immunity, the State provided for the taxation of all of its property for the benefit of the State. Here it is not claimed that the property of the company was taxable by the City of Savannah during the period of limited exemption, withdrawn by the Act of 1874, and for which exemption was substituted taxation, for the benefit of the State, of all of its property.

But it is contended that the taxes for the year 1878 stand upon a different footing from those in 1877; that is, that the City is entitled to collect the former, even if the law be otherwise as to the latter. This position rests upon that part of the Constitution of Georgia, which went into effect December 21, 1877, declaring that "All laws exempting property from taxation, other than the property herein enumerated (which does not embrace the property of railroad corporations), shall be void." We are unable to perceive how, in the view expressed as to the scope and effect of the Act of 1874, that constitutional provision can have any bearing upon the present case. The Act of 1874, as was ruled in *R. R. Co.* v. *Georgia*, took away the immunity of limited taxation previously enjoyed by the Atlantic & Gulf Railroad Company under its charter, and substituted another mode of taxation, for the benefit of the State, covering all the property of that company. The Act of 1874 contained no exemption, and it was, therefore, unaffected by a constitutional provision declaring laws to be void which exempted property, other than that specially enumerated, from taxation.

For the reasons given, we are of opinion that the decree below was right and should be affirmed. It is so ordered.

Mr. Justice **Miller**, dissenting:

I do not agree to the construction which the court places upon the Act of the State of Georgia subjecting the railroad company to taxation.

When that statute says that the property of the railroad company is "to be taxed as other [571] property of the people of the State," I understand it to mean that it is to be subjected to all the lawful taxes imposed by state laws, under the same circumstances that the property of the citizen is.

The case of *Bailey* v. *Magwire*, 22 Wall., 215 [89 U. S., XXII., 850], construes a statute of Missouri, passed under similar circumstances and in language almost identical, to have this meaning.

That the Statute of Georgia only provides in *that Act* for the means of collecting the taxes due the State, affords no argument against taxation by counties and cities for local purposes,

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because the laws already in existence were sufficient for that purpose.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[468] THOMAS BRANCH ET AL., AND THOMAS P. BRANCH, Partners as BRANCH, SONS & Co., SOUTH GEORGIA AND FLORIDA RAILROAD COMPANY ET AL., *Appts.*,

v.

MORRIS K. JESUP, Surviving Trustee, AND ATLANTIC AND GULF RAILROAD COMPANY.

(See S. C., 16 Otto, 468-487.)

Power of railroad company to purchase another road—power of corporation to sell its franchises and property—mortgage, when covers purchased road—estoppel as to stockholders—preferred stock—priority of lien.

*1. The South Georgia & Florida R. R. Co. having power, by its charter, to construct a railroad from Albany to Thomasville, Georgia; and from Thomasville to the Florida line; and also power to purchase and sell all kinds of property of every nature and quality, and to incorporate its stock with that of any other company, contracted with the Albany & Gulf R. R. Co. to construct its road from Thomasville to Albany, and to sell and deliver it to the latter Company in sections as completed, together with the franchise of using the same, and to incorporate its stock created for building said road with that of the Albany & Gulf R. R. Co.; *held*, that this contract was not *ultra vires*.

2. The Albany & Gulf R. R. Co. had the same general power, except that of incorporating its stock with that of other companies, and had the right under its charter also to construct a railroad from Thomasville to Georgia; *held*, that it was not acting *ultra vires* to make the purchase of said road and franchises as above stated, and to pay for the same, by issuing its own stock therefor; which was delivered to and accepted by the contractors in lieu of the stock of the South Georgia and Florida R. R. Co., which latter stock they had subscribed for and agreed to take in payment for the work of construction.

3. When a railroad company has the right of constructing a particular line of railroad, with general power to purchase all kinds of property of whatever nature or kind, it may purchase from another company a road constructed upon that line, if the latter company had power to sell and dispose of the same.

4. As a general rule, a corporation cannot dispose of its franchises, nor a railroad company its road, without legislative authority; but in this case it was held that the legislative authority existed.

5. Prior to the purchase of the railroad, the Albany & Gulf R. R. Co. had executed a trust-deed by way of mortgage upon all its railroad and property acquired or to be acquired; *held*, that, inasmuch as the road purchased was within its chartered limits, and might have been constructed if it had not been purchased, the mortgage extended to and covered the said road, when purchased, the same as it would have done had the company itself constructed it.

6. The contractors who built the road and accepted in payment therefor the stock of the Atlantic & Gulf R. R. Co. in lieu of that of the South Georgia & Florida R. R. Co., and the assignees and purchasers of said stock, after the transaction between the two Companies has been carried into effect and the road has been possessed and operated by the Atlantic & Gulf R. R. Co. for several years, are estopped from claiming the right to be regarded as stockholders of the South Georgia & Florida R. R. Co., or as preferred creditors as against the railroad itself. Having voluntarily accepted the position of stockholders of the purchasing Company, they cannot question the validity of the transaction adverrely to it, or to the mortgage given by it, covering the road in question.

7. The stock thus issued and accepted was preferred stock, on which interest was payable; *held*, that the holders thereof and their assigns, having accepted it and received interest on it for several years, are estopped from questioning the power of the Company to issue such preferred stock.

8. The South Georgia & Florida R. R. Co. having received all it stipulated for, and having incorporated its stock with that of the Albany & Gulf R. R. Co., by accepting the stock of that Company in lieu of issuing its own stock, and being in fact amalgamated therewith so far as the road in question is concerned, has no ground to complain that the terms of the contract have not been fulfilled by the Atlantic & Gulf R. R. Co. It has lost nothing. It has not incurred any liability which is not protected by first liens on the road, the priority of which is conceded by all parties.

*Head notes by *Mr. Justice* BRADLEY.

NOTE.—*The lien of a mortgage on after acquired property.* See *note* to Pennock v. Coe, 64 U. S., XVI., 426.

See 16 OTTO.

[No. 81.]

Argued Nov. 10, 1882. Decided Jan. 15, 1883.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

The history and facts of the case appear in the opinion of the court.

Messrs. C. N. West, Salem Dutcher and **William W. Montgomery**, for appellants.

Messrs. **R. Falligant** and **Walter S. Chisholm**, for appellee.

Mr. Justice **Bradley** delivered the opinion of the court:

This case arises upon a bill filed by Morris K. Jesup, as surviving trustee, for the foreclosure of a deed of trust in the nature of a mortgage, bearing date December 20, 1867, given by the Atlantic & Gulf R. R. Company of Georgia to said Jesup and one Gardner, since deceased, to secure the payment of certain bonds of the Company to the amount of $2,000,000, payable in 1897, with interest. The bill was filed February 15, 1877, and on the 19th of the same month receivers were appointed to take charge of the mortgaged property, being the railroad of the Company with its rolling stock and machinery. A supplemental bill was filed on the 20th of April, 1877. The only defendant named in either bill was the Atlantic & Gulf R. R. Co. The premises sought to be foreclosed and sold were: first, the main line of the Company's road, extending from Savannah southwesterly and westerly to Bainbridge, in Georgia, a distance of about 237 miles; secondly, a branch road, extending from Dupont to the Florida line, about 32 miles, connecting, thirdly, with a short road in Florida, extending to Live Oak in that State, which the Company held and operated under a lease; fourthly, a branch road about fifty-eight miles in length, extending from Thomasville, on the main line, northerly to Albany, Georgia; fifthly, two other small branches at Savannah, one connecting the main line with wharves on the Savannah River, and the other connecting it with the Savannah & Charleston Railroad. The Thomasville Branch was purchased from the South Georgia & Florida R. [470] R. Co. in 1868, shortly after the giving of the mortgage in suit, for the purpose of extending the line to Albany; which branch was subject to certain bonds and mortgages issued by the latter Company, having a lien paramount to the mortgage in suit. The other branches were, in

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like manner, severally subject to certain prior mortgages, given for purchase money or construction, and having a paramount lien. The bill conceded the priority of these several liens.

The defendant answered, specifying the liens on its property prior to that of the mortgage, and insisting that it would be inequitable to foreclose and sell at that time, although consenting to the appointment of receivers.

On the 22d of April, 1878, Branch, Sons & Co. and others, who are appellants here, petitioned for and obtained leave to intervene *pro interesse suo*, claiming to be preferred creditors of the Atlantic & Gulf R. R. Co. as to the proceeds and earnings of the South Georgia & Florida R. R.; that is, the branch from Thomasville to Albany. By amendment to the petition, the South Georgia & Florida R. R. Co. was also made a party, and a prayer was added to have declared void the sale of the said branch road, and for its restoration to the South Georgia & Florida R. R. Co.

By their petition of intervention, the appellants insisted that the lien of the mortgage sought to be foreclosed does not cover the branch aforesaid, that the petitioners and others are holders of certificates of special guarantied seven per cent stock of the Atlantic & Gulf R. R. Co. to the amount of some $300,000, of which the petitioners own $56,100; that these certificates were issued by the Atlantic & Gulf R. R. Co. under a contract with the South Georgia & Florida R. R. Co., dated January, 1869, for the construction of its road from Thomasville to Albany; a copy of which contract and certain modifications of it, and a copy of one of the certificates, were annexed to the petition. The petitioners further contended that the earnings of that branch road, if kept by themselves, would be sufficient, not only to pay the interest on the preferred bonds of the South Georgia [471] & Florida R. R. Co., but to pay the interest on said certificates; that the guarantied scrip was given for the purchase of the South Georgia & Florida R. R., and was distributed among the contractors who built it in payment for their labor; that it is in effect the promissory notes of the Atlantic & Gulf R. R. Co., and that the holders could proceed by attachment if the property of that Company were not in the hands of receivers; and, after making further averments as to the solvency of the South Georgia & Florida R. R. Co., if it stood alone, unconnected with the Atlantic & Gulf R. R. Co., the petitioners prayed, for themselves and the other holders of certificates, to be examined *pro interesse suo*, touching their alleged paramount claim upon the proceeds of the South Georgia & Florida R. R. after payment of interest on its bonds, and for an order directing such examination before the master, and for other directions.

In the amended petition, the petitioners averred that the original holders of the certificates of preferred stock before mentioned were subscribers to the capital stock of the South Georgia & Florida R. R. Co., and paid their subscriptions by work done on the road, for which they received the said certificates of preferred stock in the Atlantic & Gulf R. R. Co., and that the present holders are *bona fide* purchasers of said scrip, except in some instances where the original holders have not parted with their scrip; and they alleged that when the contracts between the two Companies were executed it was supposed that they had power to enter into the same; but that they are now advised that the contracts were *ultra vires* and void, and they prayed a rescission and cancellation thereof; but if the court should decree that the contract only amounted to a lease of the road, which they conceded would not be *ultra vires*, then they prayed that it may be rescinded for non-compliance with its terms, and the inability of the Atlantic & Gulf R. R. Co. to comply therewith. But if the court should think there was a valid contract of sale, then they repeated their prayer to be decreed to have a first lien on the proceeds of the road after the mortgages executed thereon by the South Georgia [472] & Florida R. R. Co., and for a separate sale of that road subject to said mortgages.

The first contract referred to in the petition bore date June 19, 1868, and provided that the South Georgia & Florida R. R. Co. should complete its road from Thomasville to Albany, and turn it over in sections, as completed, to the Atlantic & Gulf R. R. Co.; and that, when completed to Albany, the stock of the South Georgia and Florida R. R. Co. should be incorporated with the stock of the Atlantic & Gulf R. R. Co., and that interest at the rate of seven per cent per annum on the actual cost of the road should be paid, as well before such incorporation of stock as on said stock after its incorporation; and that when the stock should be thus incorporated, all the rights, privileges and franchises of the South Georgia & Florida R. R. Co., so far as related to the road from Thomasville to Albany, should vest in the Atlantic & Gulf R. R. Co., and said road should be a branch of the Atlantic and Gulf Road. This contract was modified by another contract made January 15, 1869, which recited that the Legislature of the State had passed an Act authorizing the State to indorse the bonds of the South Georgia & Florida R. R. Co. to the amount of $8,000 per mile; and that the Atlantic & Gulf R. R. Co. consented to the issue of said bonds and a first mortgage to secure them, and guarantied their payment; and it was stipulated that the amount of said bonds should be deducted from the amount of preferred stock to be issued to the South Georgia & Florida R. R. Co. for the construction of the road. Another agreement, made September 1, 1869, authorized the further issue of bonds by the South Georgia & Florida R. R. Co. to the amount of $200,000, to be secured by a second mortgage on the road, and guarantied by the Atlantic & Gulf R. R. Co.

The road appears to have been completed to Albany prior to October, 1870. On the 10th of that month the following resolution was passed by the board of directors of the South Georgia & Florida R. R. Co.:

"Whereas, the South Ga. & Fla. Railroad [473] Company entered into an agreement with the Atlantic and Gulf Railroad Company, on the 19th day of June, 1868, by which a transfer of the said South Georgia and Florida Railroad was to be made (that is, all of said road between Thomasville and Albany) upon certain conditions therein stipulated, all of which will more fully appear by reference to said agreements; and whereas, the South Georgia and Florida

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Railroad has been completed to East Albany and the same has been turned over to the Atlantic and Gulf Railroad Company, and which is now being operated by said Atlantic and Gulf Railroad Company; and whereas, the president of the Atlantic and Gulf Railroad Company has signified his willingness to receive said road finished to East Albany; and whereas, the South Georgia and Florida Railroad Company have made up the entire cost of said road and made affidavit certificate under oath as prescribed by said agreement, *it is, therefore, resolved:* that the president of this road proceed to Savannah, submit his estimates and certificates, and demand and receive the guarantied stock agreed to be given to the South Georgia and Florida Railroad stockholders under said agreements in terms of the several agreements made by the South Georgia and Florida Railroad Company with said Atlantic and Gulf Railroad Company. *Resolved, further:* that the president be and he is hereby authorized to make, execute and deliver all papers necessary to carry out and fulfill said agreements for a transfer of so much of said South Georgia and Florida Railroad as lies or is located between Thomasville and Albany, specially reserving the other franchise or rights of building and equipping a railroad from Thomasville to the Florida line under the charter of the South Georgia and Florida Railroad Company."

This resolution was duly carried into effect shortly after its adoption, as appears by a final contract executed in due form between the Companies, bearing date January 8, 1876, which recited the several prior contracts, and the said resolutions, and the fact of their acceptance and of the performance and fulfillment of the same, and by which the South Georgia & Florida R. R. Co. made a formal conveyance to the Atlantic & Gulf R. R. Co., its successors, and assigns forever, of so much of the South Georgia & Florida R. R. as lies or is located between Thomasville and Albany, with all the appurtenances thereof, including the franchises of the South [474] Georgia & Florida R. R. Co. to construct and use the same.

The certificates of stock issued by the Atlantic & Gulf R. R. Co. in pursuance of said contract were regular scrip certificates for preferred stock in that Company, in the following form: "Atlantic & Gulf Railroad, Georgia: Special guaranteed seven per cent stock issued under a contract with the South Georgia & Florida Railroad Company, bearing date Jan. 2, 1869, for the construction of the South Georgia & Florida Railroad: this is to certify that Branch & Sons or bearer is entitled to sixty-six shares, on which the par value of $100 has been paid, of the special stock of the Atlantic & Gulf Railroad Company, on which interest from date is perpetually guaranteed at the rate of 7 p. c. per ann., payable semi-annually, etc. Witness, etc. Sealed, etc., first day of November, 1872.

(Signed) John Scriven, President:

Attest, D. Macdonald, Secretary."

No evidence was taken in the case, and the hearing was had on bill and answer. It was conceded or at least not controverted that the interveners were holders of the stock certificates as claimed in their petition, and that said certificates originated in the manner and in fulfillment of the contracts therein set forth.

The court below denied the prayer of the interveners and dismissed the petition; and went on to make a final decree in the cause, ordering a foreclosure and sale of the railroad of the Albany & Gulf Railroad Company, with all its branches, including the branch from Thomasville to Albany, subject, however, to all prior mortgage liens, including the first and second mortgages on the Thomasville branch. From this decree the interveners have appealed.

The questions raised by the appellants, as stated in their brief, are as follows:

1. Was the sale of a part of the S. G. & F. R. R. and its franchises to the A. & G. R. R. void, as against public policy, and *ultra vires?*

2. If not, did the contract amount to anything more than a lease?

3. If it was a sale, are not the S. G. & F. R. R. Co. and other interveners vendors with the [475] purchase money unpaid, and hence entitled to assert their right of attachment upon the property sold, in preference to the claims of the mortgage creditors of the vendee, the A. & G. R. R. Co.?

4. If the interveners are not entitled to attach as vendors, are they not *creditors* of the A. & G. R. R. Co., and entitled to be paid out of property of the debtor which is not covered by the mortgage; and in this case does the mortgage cover the S. G. & F. R. R.?

5. If only stockholders, can they not object to the sale of the S. G. & F. R. R. under the present proceedings?

The court below was of opinion that the sale and purchase of the road was not void, nor *ultra vires* of the two contracting Companies, without examining the question of the right of the appellants to contest the validity of the transaction. We will proceed to give some examination to that question.

The appellants are stockholders of the Atlantic & Gulf Railroad Company. Their stock is a preferred stock, it is true, entitling them to interest on its face before any dividends can be made to the common stockholders. But this is not inconsistent with its being stock. It is a very common thing in this country to issue stock of this kind. The interest accruing thereon is in the nature of a preferred dividend, and is sometimes so-called. Though after it has accrued it may become a debt; so also does a dividend become a debt after it has been declared and has become payable. It has no priority over other debts, if, indeed, it has an equality with them. And this position, as stockholders of the Atlantic & Gulf R. R. Co., was voluntarily assumed by the appellants. This is true, both of those who purchased their stock at second hand and of those who originally received the stock. They probably deemed it to their interest to accept payment for their work in this form. But again; not only are they stockholders in the Atlantic & Gulf R. R. Company, but the acceptance of the stock was an acknowledgment of the validity of the contract between the two Companies. The issue of the stock was in part performance of that contract, and this appears upon the face of the certificates. After [476] thus acquiescing in the purchase by the Atlantic & Gulf R. R. Co. of the branch railroad in

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question, and of the amalgamation of stock incident to said purchase; and after the possession and use of said road and its franchises by the said Company as a part of its road system for a period of several years, the appellants are estopped from questioning the validity of said transaction; and cannot now repudiate their character of stockholders of the Atlantic & Gulf R. R. Company, and assume that of stockholders of the South Georgia & Florida Railroad Company. To sustain such a course on their part would have the effect of ripping up and unraveling a thousand transactions which have taken place on the basis of the purchase and amalgamation referred to. Whatever right the State may have to inquire into the validity of such purchase and amalgamation, certainly the appellants have no right in law or in equity to question it. In law, they are stockholders of the purchasing Company, in which character they neither can nor do ask any relief; in equity, they are participators in the face of all the world in a transaction which is conceded to have been fair and supposed to be lawful at the time, and upon the faith of which numberless transactions in business, and in the stock and bonds of the purchasing Company, have undoubtedly been entered into. To give to the appellants relief in any form in which it is asked, would be attended with injury and injustice to others who have innocently confided in the acts of the appellants and their associates.

We might safely stop here and affirm the decree below on this consideration alone. But as our view of the other questions which have been raised leads to the same result, it may be proper to state the reasons therefor.

The first relates to the power of the two Companies to enter into the arrangement for the sale and purchase of the Thomasville branch. The power of the South Georgia & Florida R. R. Co. to sell the road depends upon its charter, which took its origin in an Act of the Legislature, approved January 22, 1852, creating the Georgia & Florida Railroad Company, with power to construct a railroad from Oglethorpe or some other point on the Southwestern Railroad, to [477] Albany; also with power to construct a railroad from Albany to Thomasville, and from thence to the Florida line in the direction of Tallahassee; also a plank or macadamized road in connection with the railroad; and for the purpose of constructing said road or roads, procuring right of way, and managing all its affairs, the said Company was invested with the same powers and privileges granted to the Savannah & Albany Railroad Company, not inconsistent therewith; and it was enacted that the said Georgia & Florida Railroad Company might at any time incorporate their stock with the stock of any other company on such terms, as might be mutually agreed upon. The Company was further authorized, from time to time, to determine the amount of stock necessary to carry out its purposes and the construction of said road or roads. The powers given in this charter by adoption and reference to the charter of the Savannah & Albany Railroad Company consisted, as expressed in the charter of the latter Company, of all the rights, privileges and immunities which by the laws of Georgia were held or enjoyed by any incorporated railroad company or companies in the State; and by a reference to prior existing charters we find that, so far as relates to the question in hand, these powers were, "To have, purchase, possess, enjoy and retain lands, rents, hereditaments, tenements, goods, chattels and effects, of whatsoever kind, nature or quality the same may be, and the same to sell, grant, demise, alienate or dispose of."

All the powers thus given to the Georgia & Florida Railroad Company in 1852 were conferred upon the South Georgia & Florida Railroad Company by an Act passed December 22, 1857. By this Act the South Georgia & Florida R. R. Company was created, and the line of road which the Georgia & Florida Company was authorized to construct from Albany to Thomasville and thence to the Florida line, was separated from the rest and granted to the South Georgia & Florida Railroad Company, which Company was invested with the usual powers to purchase, hold and convey property, real and personal, and with specific power to construct a railroad from Albany to Thomasville, and from Thomasville to any point on the Florida line, and to connect with any other road at such points as they should deem best; and it was enacted "That the provisions of the Act incorporating the Georgia & Florida Railroad Company, [478] so far as applicable, shall be applied to said South Georgia & Florida Railroad Company." By reference and adoption, therefore, the latter Company became invested with all the authority and power, in regard to the line between Albany and Thomasville and between Thomasville and the Florida line, which had been conferred upon the Georgia & Florida R. R. Co. It seems to us clear that these powers were sufficient to enable the Company to sell its road and franchises to any company competent to purchase them. As a general rule, it is true, a railroad company, with only the ordinary power to construct and operate its road, cannot dispose of it to another company. Legislative aid is necessary to that end. But this Company had, by its charter, express power to incorporate its stock with the stock of any other company. This power has an enlarging effect upon the ordinary power to sell and dispose of property belonging to the Company. Generally, the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad Company; and does not extend to the sale of the railroad itself, or of the franchises connected therewith. Outlying lands, not needed for railroad uses, may be sold. Machinery and other personal property may be sold. But the road and franchises are generally inalienable; and they are so, not only because they are acquired by legislative grant or in the exercise of special authority given, for the specific purposes of the incorporating Act, but because they are essential to the fulfillment of those purposes; and it would be a dereliction of the duty owed by the corporation to the State and to the public to part with them. But where, as in this case, power is given to incorporate the capital stock with the stock of any other company, a very large addition is made to the ordinary powers granted to a company. In this country, the creation and exercise of such a power is well understood. It contemplates not only the possible transfer of the railroad and its franchises to another company, but even the

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extinguishment of the corporation itself, and its absorption into a different organization. The greater power of alienating or extinguishing all its franchises, including its own being and ex- [479] istence, contains the lesser power of alienating its road and the franchises incident thereto and necessary to its operation. Its power of alienation and sale extends to a class of subjects to which it does not ordinarily apply. In view of the large power thus conferred upon the South Georgia & Florida Railroad Company, we cannot doubt that it had full power to enter into the arrangement made with the Atlantic & Gulf Railroad Company for the transfer of that portion of its line extending from Albany to Thomasville, including the franchise of constructing and using the same, and an incorporation of all its stock issued for the construction of said road with the stock of the latter Company.

It is true that the South Georgia & Florida R. R. Co. did not part with its entire franchise. Power was given to it by its charter to construct a road from Thomasville to the Florida line, being a distance of about fifteen miles due south, and to connect with any other road at such points as it might deem best. But this extension is mentioned as a distinct enterprise, has never been entered upon, and would have no value without a connection with some railroad in Florida, for which, so far as appears, no authority has thus far been accorded by that State. The authority to make it is nominal only, if it has not entirely expired by lapse of time, and could be of little use to the Atlantic & Gulf R. R. Co., which had a connection of its own with the Florida system of railroads at Live Oak. The retention of this nominal franchise by the South Georgia & Florida R. R. Co., which has never issued any capital stock under it or with a view to its use, seems to be, in reality, a mere shadow without any substance. All the capital stock which the Company ever provided for, was that which went to the building of the road from Thomasville to Albany; and that, at its very inception, was incorporated with the stock of the Albany & Gulf R. R. Co.; the stock of the latter Company being issued and accepted in the place of it. So that, in truth, the terms of the charter have been literally carried out. At all events, we think that the arrangement made with the latter Company was within the powers given to the South Georgia & Florida R. R. Co.; and this arrangement was fully assented [480] to and acquiesced in by every subscriber to its stock, as before mentioned.

In this connection, it is proper to notice a fact which has been referred to by the counsel of the appellants in support of his views, but which seems to us corroborative of the view which we have taken of the powers of the South Georgia & Florida R. R. Co. The original route authorized to be taken by its parent Company, the Georgia & Florida R. R. Co., extended, as we have seen, from Oglethorpe or some other point on the Southwestern Railroad, to Albany, with authority also to construct a railroad from Albany to Thomasville, and from thence to the Florida line. Afterwards, as we have also seen, in December, 1857, the South Georgia & Florida R. R. Co. was created, and that portion of the route extending from Albany southward to Thomasville and the Florida line was transferred to the latter Company with all the general powers of the parent Company, among which was the power to incorporate its stock with that of any other company. The northern part of the original route, extending, from Albany northward, to Americus, a point of connection with the Southwestern Railroad, still remained under the original charter; and this part, between thirty and forty miles in length, was afterwards transferred to the Southwestern R. R. Co. with an incorporation of stock, similar to what was done by the South Georgia & Florida R. R. Co. with the southern part of the line. But it seems that the Southwestern R. R. Co. had not sufficient unissued stock to pay for the road thus acquired. Whereupon, an Act was passed by the Legislature "To amend the charter of the Southwestern R. R. Co. and to authorize an increase of the capital stock of said Company, etc.," by which, after reciting the power given to the Georgia & Florida R. R. Co. to incorporate its stock with the stock of any other company, further recited that the latter Company had agreed with the Southwestern R. R. Co. to incorporate its stock with the stock of that company, and had delivered its railroad running from Americus to Albany to the Southwestern R. R. Co., and had received stock of the said Company to the amount of near $500,000, and that it thereby became necessary to increase the capital stock of [481] said Southwestern R. R. Co.; it was, therefore, enacted that the latter Company be authorized to issue stock in addition to the amount mentioned in its charter for any sum not exceeding $500,000; and that the road from Americus to Albany should be considered part and parcel of the road of the Southwestern R. R. Co., and be liable to pay to the State the same tax that the rest of the Southwestern R. R. Co. was liable to pay. This arrangement, which the Legislature thus enabled the Southwestern R. R. Co. to carry out, and in doing so recognized its validity, was precisely similar to that which had been made between the South Georgia & Florida R. R. Co. and the Atlantic & Gulf R. R. Co. in regard to the road from Albany to Thomasville. The only difference between the two cases was, that the Southwestern R. R. Co. had to get power to issue additional stock, a power which the Atlantic & Gulf R. R. Co. did not need, as it already had authority to issue the amount of stock required for carrying out its arrangement with the South Georgia & Florida R. R. Co.; at least, it is so stated and is not denied, nor is the contrary alleged in any of the pleadings.

The point taken, in relation to the issue of stock by the Atlantic & Gulf R. R. Co. in payment of the road purchased by it, is, not that the Company had no power to issue that amount of stock, but that it had no power to issue preferred stock. But it hardly lies in the mouth of those who received this stock and who, for several years, accepted the interest guarantied to be paid thereon, to make this objection; especially, as no other parties, neither the State nor the holders of the common stock, have ever objected to the issue of this preferred stock. Without entering, therefore, into a discussion of the abstract question whether a railroad company may not issue a preferred stock, when done in good faith, instead of issuing bonds to the

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same amount, it is sufficient to say that the appellants are not in a position to raise the question.

But, supposing it to be shown that the South Georgia & Florida R. R. Co. had the power to sell; had the Atlantic & Gulf R. R. Co. the power to buy the road in question? The latter [482] Company was formed by the amalgamation of two distinct Companies and became invested with all the powers contained in the charters of both. These Companies were, first, the Savannah, Albany & Gulf R. R. Co., chartered in 1847 under the name of the Savannah & Albany R. R. Co., and second, the Atlantic & Gulf R. R. Co., chartered in 1856. The first of these Companies was authorized to construct a railroad communication between Savannah and Albany, by such route as the Company might select, with such branch road towards the north and towards the south from said road to such point or points as they might deem requisite; with power also, at any time, to extend said road to any point or points on or across the Chattahoochee River. Besides the ordinary corporate powers given to this Company, it was invested, as already mentioned, "With all the rights, privileges and immunities which by the laws of Georgia are held and enjoyed by any incorporated railroad company or companies." The Georgia R. R. & Banking Co. had been chartered in 1835. Other railroad companies in Georgia, then in existence, had power "To have, purchase, receive, possess, enjoy and retain lands, rents, tenements, hereditaments, goods, chattels and effects of whatsoever kind, nature or quality; and the same to sell, grant, demise, aliene or dispose of." See, Charters of Georgia R. R. & Central R. R., Prince's Digest, pp. 311, 326. The second of the Companies consolidated as aforesaid, to wit: the Atlantic & Gulf R. R. Co., had power to construct a railroad from a point in Wayne County, southwest of Savannah, to the western boundary of the State, south of Fort Gaines, being in a general westerly direction across the southern part of the State; but it was provided that the Savannah, Albany & Gulf R. R. Co., as well as the Brunswick & Florida R. R. Co., might join their tracks with that of the Atlantic & Gulf R. R. Co. The latter Company was invested with all the privileges, immunities and exemptions granted to the Central and to the Georgia Railroad Companies, or either of them.

The two Companies, Savannah, Albany & Gulf, and Atlantic & Gulf, were consolidated [483] under the name of the latter Company by virtue of an Act passed in April, 1863, by which it was provided that "The several immunities, franchises and privileges granted to said Companies, by their original charters and the amendments thereof and the liabilities therein imposed shall continue in force."

From these charters and laws it appears that the consolidated Company had power to construct a railroad from Savannah to the southwestern border of the State; and, amongst other things, to construct a railroad communication between Savannah and Albany, and to make branch roads towards the north and towards the south: and, even before the consolidation, the Savannah & Albany Company was authorized to join its tract to that of the Albany & Gulf Company; so that the line of roads, as finally located, constructed and acquired, including the branch from Thomasville to Albany, cannot be said to have departed in any respect from the strict course pointed out and designated by the charters of the consolidated Companies. The main line commences at Savannah, under the charter of the Savannah & Albany Company, and runs southwesterly to Wayne County, and thence, under both charters, for both Companies were authorized to use the same track, westwardly to Thomasville and Bainbridge, in the southwestern part of the State, with a branch running from Dupont towards the south into Florida, and a branch from Thomasville towards the north to Albany, forming a railroad connection between Savannah and Albany. In making the railroad connection between Savannah and Albany, the original charter of the Savannah & Albany R. R. Co. could not be construed to require that this connection should be made by a rigidly straight line. The directors were invested with reasonable discretion as to the route to be taken; and since the subsequent legislation expressly authorized the Savannah & Albany Co. to join its track with that of the Albany & Gulf R. R. Co., it is clear that the line of the latter Company was not regarded as an improper departure for that of the former. Indeed, by an Act passed in 1857, the Albany & Gulf R. R. Co. were required to get the release of the Savannah & Albany Co. of its right of way over the line of its contemplated road, before it could have the state subsidy proposed to be given to [484] it; which plainly shows that the line of the Albany & Gulf road, which properly lay through Thomasville, was regarded as within the fair limits of the route granted to the Savannah & Albany Co. This being so, the branch road from Thomasville to Albany was fairly within the power and authority given to the Savannah & Albany Co. by its original charter, to establish a railroad connection between Savannah and Albany.

Then, since the consolidated Company had authority to construct a railroad from Thomasville to Albany, and to establish the railroad connection between Savannah and Albany in that way, and had the general power to purchase and receive property of every conceivable kind, nature or quality (limited, of course, by the general objects of its charter), what was to hinder its purchasing from the South Georgia & Florida R. R. Co. its line of road between Thomasville and Albany, and paying for it by the issue of its own stock; an arrangement which, as we have seen, the South Georgia & Florida R. R. Co., on its part, had a perfect right to make? It seems to us that this question is not hard to answer; but, that it is clear, that the one Company had the right to purchase this road as fully as the other Company had the right to sell it; and that the right of both was fully given by the charters and laws which gave them their respective powers.

We do not mean, in the slightest degree, to disaffirm the general rule, that a corporation cannot dispose of its franchises to another corporation without legislative authority. But we think that the authority clearly existed in this case, being fairly derived from the legislation which affected the two Companies, without any forced or strained construction of its terms.

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The second question raised by the appellants, namely: whether the contract amounted to anything more than a lease, has been sufficiently answered by what has already been said. The transaction between the Companies had in view a transfer of the entire interest of the South Georgia & Florida R. R. Co.

The third question raised is, whether the South Georgia & Florida R. R. Co. and the other interveners, are not vendors whose purchase money is unpaid, and who are thence en- [485] titled to assert a right of attachment upon the property in preference to the claims of the mortgage creditors of the Atlantic & Gulf R. R. Co., the vendee? The original interveners are certainly not entitled to assume any such position. As already shown, their *status* is fixed by their own choice, as stockholders of the Atlantic & Gulf R. R. Co. They are such and nothing more, except as to the interest due on their stock, as to which they are nothing more than general creditors. As to the South Georgia & Florida R. R. Co.: it has no claim at all. It received all that it stipulated for. The priority of its bonds and mortgages is fully conceded; and its stock, so far as the railroad in question is concerned, was incorporated with that of the Atlantic & Gulf R. R. Co., with which it became amalgamated and identified. Its separate existence *pro tanto* became merged in the latter Company. How far it can ever be galvanized into new life for the purpose of the extension of the road from Thomasville to the Florida line, it is not necessary to inquire. That question has nothing to do with the one now in hand.

The only remaining question is, whether the deed of trust or mortgage given by the Atlantic & Gulf Railroad Company to the complainant and his co-trustee covers the railroad in question. In terms, it covers and pledges the entire railroad of the Atlantic & Gulf R. R. Company in Georgia, constructed or to be constructed from Savannah to Bainbridge or to and from any other points in the State of Georgia, with its appurtenances, with all rights of way acquired, or thereafter to be acquired or obtained, and all rolling stock and machinery acquired or to be thereafter acquired, and all franchises, rights and privileges connected with or relating to said railroad or the construction, maintenance or use thereof. Under the settled rule in regard to the operation of railroad mortgages on after acquired property, where the terms of the instrument extend to such property, there can be no question that the mortgage in this case did extend to and cover any portion of road belonging to the Company and authorized by its charter, which was constructed after the mortgage was given. The only question here is, whether the railroad from Thomasville to Albany is fairly within this category. We have already seen that the Com- [486] pany had the power to construct this line; that it was within its chartered limits. There can be no doubt, therefore, that if the road had been constructed by the Company without any reference to the South Georgia & Florida Railroad Company, it would have fallen directly within the operation of the rule in question. Instead of constructing it directly, the Atlantic & Gulf R. R. Company procured its construction through, and by arrangement with and purchase from, the South Georgia & Florida Company. Can this make any difference? When constructed, the road became part of the system of roads of the Atlantic & Gulf R. R. Company, as much so as if it had constructed it independently. A road purchased as and for a part of its chartered line is no less a part of its proper road than one built for that purpose. Provision was made, it is true, in the contract between the Companies, for a prior lien in favor of the mortgages separately placed upon the road thus acquired. That lien is conceded to be valid and binding. But subject thereto, the mortgage given to the complainant properly extends to and covers this road as part of the entire line of the Company. It is embraced in the terms of the mortgage, and is in law subject to its operation. It is part of the lawfully acquired property of the Atlantic & Gulf R. R. Company, acquired under its chartered rights and powers. It is the property of no other company. It is subject to the debts of no other company, except those which attached to it by virtue of the superior mortgage liens before mentioned. The appellants, as stockholders of the Company, equally with the Company itself, are bound by the mortgage. Their claims are inferior and subject to it. Their position as general creditors, in regard to any interest due them, is equally inferior. They have no equity that can prevail against it.

The appellants have suggested several subsidiary points which, regard being had to the views we have already expressed, cannot affect the result. One point is, that the charter of the South Georgia & Florida R. R. Co. expired in 1872, before the execution of the final deed to the Atlantic & Gulf R. R. Co. We do not understand that the charter expired at that time, but only that the time limited for the construction of the road expired. If the charter expired, how did the Company become a party to this [487] suit? But even if the charter did expire, the road was finished and in possession of the Atlantic & Gulf R. R. Co. in 1870, and the entire transaction was then completed. The conveyance executed in 1876 was merely carrying out in form what was already completed and carried out in substance. But how can this objection avail the appellants in any view of the case? What right have they to object to the conveyance? Its only purpose was to carry out what they and all the parties concerned consented to and acquiesced in long before. And in their position, as stockholders of the Atlantic & Gulf R. R. Co., it does not lie in their mouths to object that the South Georgia & Florida R. R. Co. unlawfully exercised corporate powers, when it completed the performance of its obligation to the Atlantic & Gulf R. R. Co.

But it is unnecessary to pursue the subject further. *We see nothing in the points raised on the appeal to invalidate the decree of the Circuit Court.*

The decree is, therefore, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[607] UNITED STATES, On Behalf of DAVID D. PORTER ET AL., Officers and Men of the NORTH ATLANTIC SQUADRON, *Appt.*,

v.

THE STEAM VESSELS OF WAR, SEABOARD, TEXAS, BEAUFORT ET AL.

(See S. C., "*Porter* v. *United States*," 16 Otto, 607-612.)

Prize money or bounty, when allowed—Act of 1864—inland waters—rivers, when inland.

1. Prize money, or bounty in lieu of it, is not allowed by the laws of Congress, where vessels of the enemy are captured or destroyed by the navy with the co-operation of the army.
2. Bounty money cannot be recovered under the Act of June 30, 1864, for the destruction of confederate vessels upon inland waters of the United States.
3. The term "inland" applies to all waters of the United States upon which a naval force can go, other than bays and harbors on the sea coast.
4. Rivers across which one can see are inland waters, although the tide may ebb and flow for miles above their mouths.

[No. 141.]

Submitted Jan. 3, 1883. Decided Jan. 15, 1883.

APPEAL from the Supreme Court of the District of Columbia.

The history and facts of the case fully appear in the

Statement of the case by *Mr. Justice* **Field:**

This was a proceeding termed a libel of information, filed in the Supreme Court of the District of Columbia, on behalf of the admiral and officers and men of the North Atlantic Squadron, to recover the bounty provided by the Act of Congress of June 30, 1864, regulating prize proceedings and the distribution of prize money. 13 Stat. at L., 306.

The 11th section of that Act declares "That a bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement, which shall be sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States, or which it may be necessary to destroy in consequence of injuries sustained in action, of $100, if the enemy's vessel was of inferior force, and of $200, if of equal or superior force, to be divided among the officers and crew in the same manner as prize money; and when the actual number of men on board any such vessel cannot be satisfactorily ascertained, it shall be estimated according to the complement allowed to vessels of its class in the Navy of the United States; and there shall be paid as bounty to the captors of any vessel of war captured from an enemy, which they may be instructed to destroy, or which shall be immediately destroyed for the public interest, but not in consequence of injuries received in action, $50 for every person who shall be on board at the time of such capture."

The libel, in substance, alleges that, between the 8th of October, 1864, and the 28th of April, 1865, the North Atlantic Squadron, consisting of eleven ships of war, which are mentioned, [608] was under the command of David D. Porter, now Admiral of the Navy; that, by orders of the President of the United States and of the Secretary of the Navy, he ascended the James and York Rivers, in Virginia, with the vessels composing his squadron, for the purpose of expelling the naval and military forces of the Confederate States from those waters, and to assist in the capture of Richmond; that, previous to April 1, 1865, the Confederates, in order to obstruct the passage of the vessels, had erected along those rivers batteries and other means of defense; had caused boats to be sunk in the streams and trees to be filled in and across them; and had placed in the James River, in support of the defenses of Richmond, many armed steam batteries, steam rams, iron-clad ships of war, and armed steamers, of which eleven are mentioned by name; that the fleet removed the obstructions from the river, attacked the naval forces of the Confederates, destroyed some of the vessels, and caused the enemy to destroy others to prevent them from falling into the possession of the United States, and that nine vessels, which are named, were thus destroyed.

The libel further alleges that the vessels of the enemy, aided by the guns of the batteries and the obstructions in the river, constituted a superior force to that under the command of Admiral Porter; and claims that, by the Act of Congress of June 30, 1864, cited above, the officers and men of the squadron were entitled to a bounty of $200 a head for each man on the enemy's vessels at the commencement of the engagement. It, therefore, prays that such bounty may be allowed to them; and that, in estimating the numerical strength of the enemy, the court will take into consideration and adjudge that all persons engaged on land, as well as those on the water, in resisting the United States naval forces in that engagement, may be held to have been on board of the enemy's vessels, and treated as adjuncts to them; and, furthermore, as it will be difficult and in some instances impossible, by reason of the lapse of time and from other causes, to show the number of men that were on and about the enemy's vessels when the engagement commenced, the libel prays that such forces may be estimated according to the complement of men allowed to vessels of the same capacity in the navy of the United States.

Upon this libel, process was ordered to be issued to the Secretary of the Navy, notifying [609] him of the commencement of the suit; and, subsequently, testimony in the case was taken and such proceedings were had as resulted in a decree in favor of the libelants, by the Supreme Court of the District of Columbia, sitting in admiralty, and held by a single Justice. The case being subsequently carried before the full court, the decree was reversed and the libel dismissed.

From the decree of dismissal the case is brought by appeal to this court.

Messrs. **Jerome F. Manning,** *B. F. Butler, Enoch Totten* and *Q. Corwine,* for appellant.

Mr. **S. F. Phillips,** *Solicitor-Gen.*, for appellees.

Mr. Justice **Field** delivered the opinion of the court:

Two objections are made to the recovery of the bounty claimed by the libelants: one, that the destruction of the confederate vessels was effected by the joint action of the army and navy; the other, that it took place on the inland waters of the United States.

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For the determination of the first of these objections, it will be necessary to consider the movements of the fleet under command of Admiral Porter, immediately preceding the capture of Richmond. The record enables us to do this, although officers present on the vessels differ in their recollection of dates.

On the morning of April 2, 1865, General Lee, commanding the enemy's forces around Richmond, informed the confederate authorities that he should immediately withdraw his lines and evacuate the city. The withdrawal and evacuation took place on the evening of that day. Information of his purpose was, undoubtedly, communicated to Admiral Porter soon after it was generally known in Richmond, which was before noon. At that time there were in James River, for some miles below Richmond, obstructions which the Confederates had placed to prevent the ascent of the Union fleet. Vessels filled with stone had been sunk and numerous torpedoes planted in the stream. Batteries had also been erected along the river. Some of the obstructions were just above the lower end of what was known as Dutch Gap Canal about sixteen [610] miles by the river from Richmond, which were originally placed there by the Confederates, and afterwards maintained by the forces of the United States. Two miles above them was Howlett's confederate battery. Eight miles above the Dutch Gap Canal was Chaffin's Bluff, and one mile above that on the opposite side of the river was Drury's Bluff, seven miles below Richmond. General Lee's lines extended across the river between the two bluffs, and below them. Above the obstructions near Dutch Gap Canal several confederate vessels of war were stationed. When General Lee was compelled to abandon his lines, orders were given that the batteries on James River should be withdrawn and the confederate vessels destroyed.

As soon as Admiral Porter, on the 2d of April, was informed or had reason to believe that General Lee intended to retreat from Richmond, he gave orders for the removal of the obstructions in the river, and for his vessels to open fire on the confederate batteries within range, and to push on through the obstructions as fast as they were carried away, first sending boats ahead to remove the torpedoes. These orders were carried out with great gallantry and spirit; a heavy fire was opened on the batteries and, during the following night, a channel was cut through the obstructions. Soon after the fleet opened fire the enemy, to prevent the capture of his vessels, commenced destroying them, setting fire to some of them and blowing up others. On the next day, the 3d, the fleet passed through the obstructions and moved up to Drury's Bluff, capturing one of the enemy's vessels which had not been destroyed, the iron-clad ram, Texas. Another of the enemy's vessels, The Beaufort, was subsequently captured further up the river. At Drury's Bluff, the vessels were detained by the obstructions until the 4th. On that day the Admiral, accompanied by President Lincoln, proceeded up to Richmond.

Although, in the movements of the Admiral's fleet in its ascent of James River and in its attack on the batteries, he was not assisted by the actual presence of any portion of the Army of the United States, so that the capture of the two vessels, The Texas and The Beaufort, and the destruction of the other vessels, may, in that sense, be said to have been effected by his fleet alone, yet, without the aid of the army, the result mentioned would not probably have been accomplished. Certainly its movements con- [611] tributed most essentially to the success of the fleet. For several months it had been lying near Richmond, under the command of General Grant, with the avowed purpose of capturing that city and of destroying the confederate forces. The result of the battle of Five Forks, on the first of April, satisfied the confederate commander that he could not hold his lines and protect Richmond. The withdrawal of his troops and the evacuation of Richmond followed. Had they not been thus forced to retire and his lines had continued to cross James River between Chaffin's Bluff and Drury's Bluff, it would have been almost if not quite impossible for the fleet of Admiral Porter to ascend the river. The fire of the shore batteries, with the assistance of the confederate troops near by, would have checked any advance, supported, as they would have been, by the confederate vessels and the torpedoes in the stream. It is plain, therefore, that whatever was accomplished by the fleet of the Admiral, in James River, on the 2d and 3d days of April, 1865, must be considered as the result of the co-operative action of both the army and the navy. It matters not that the movements of the army were miles distant from the operations of the fleet. They relieved that fleet from resistence which might, and probably would, have defeated any attempt to ascend the river above the shore batteries, and destroy the armed vessels of the enemy.

Prize money, or bounty in lieu of it, is not allowed by the laws of Congress where vessels of the enemy are captured or destroyed by the navy with the co-operation of the army. To win either, the navy must achieve its success without the direct aid of the army, by maritime force only. No pecuniary reward is conferred, for anything taken or destroyed by the navy, when it acts in conjunction with the army in the capture of a fortified position of the enemy, though the meritorious services and gallant conduct of its officers and men may justly entitle them to honorable mention in the history of the country. *The Siren*, 13 Wall., 389 [80 U. S., XX., 505].

The second objection to a recovery, that the destruction of the confederate vessels was effected upon inland waters of the United States, is equally clear, if the term "property" used in the 7th section of the Act of 1864, can be con- [612] strued—as counsel seem to take for granted—to embrace public vessels of the enemy. That Act provides, among other things, for the collection of captured and abandoned property, and is in addition to the Act on that subject of March 12, 1863. 13 Stat. at L., 377; 12 Stat. at L., 820. The 7th section declares, "That no property seized or taken upon any of the inland waters of the United States, by the naval forces thereof, shall be regarded as maritime prize; but all property so seized or taken shall be promptly delivered to the proper officers of the courts, or as provided in this Act and in the said Act approved March 12, 1863."

The term "inland" as here used was evidently intended to apply to all waters of the United

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States upon which a naval force could go, other than bays and harbors on the sea coast. In most instances, property of the enemy on them could be taken, if at all, by an armed force, without the aid of vessels of war. These were seldom required on such waters, except when batteries or fortified places near them were to be attacked in conjunction with the army. As observed by the court in the case of *The Cotton Plant*, Congress probably anticipated, in view of the state of the war when the Act was passed, that most of the captures on the rivers would be made by the army. 10 Wall., 577 [77 U. S., XIX., 983].

James River is an inland water in any sense which can be given to the term "inland." It lies within the body of counties in Virginia. For miles below Richmond and below the obstructions mentioned, a person can see from one of its banks what is done on the other. Rivers across which one can thus see are inland waters. It matters not that the tide may ebb and flow for miles above their mouths; that fact does not make them any part of the sea or bay into which they may flow, though they may be arms of both. *U. S.* v. *Grush*, 5 Mason, 290.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 101; 113 U. S., 752.

Ex Parte:

In the Matter of SELAH C. CARLL, *Petitioner.*

(See S. C., 16 Otto, 521-523.)

Power of review on habeas corpus.

The jurisdiction of this court to review the judgments of the inferior courts of the United States in criminal cases, by the use of the writ of *habeas corpus* or otherwise, is limited to the single question of the power of the court to commit the prisoner for the act of which he has been convicted.

[No. 7, Orig.]

Submitted Jan. 3, 1883. Decided Jan. 15, 1883.

APPLICATION for a rule to show cause why a writ of *habeas corpus* should not issue.

This case comes before the court upon an application for writs of *habeas corpus* and *certiorari*.

The petitioner, Carll, was indicted and convicted in the Circuit Court for the Southern District of New York, charged with having violated section 5431 of the Revised Statutes of the United States, in having passed, uttered and published to and upon the Bank of the Metropolis of the City of New York, with intent to defraud the said bank, certain bonds of the United States, described in the indictment, and therein alleged to be falsely made, forged, counterfeited and altered.

Mr. **A. J. Dittenhoefer,** for petitioner.

No opposing counsel.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This application is denied. We have had occasion to say at the present Term, in *Ex parte Curtis* [*ante*, 232], that "We have no general power to review the judgments of the inferior courts of the United States in criminal cases, by [521 the use of the writ of *habeas corpus* or otherwise. Our jurisdiction is limited to the single question of the power of the court to commit the prisoner for the act of which he has been convicted." This rule is well settled. *Ex parte Lange*, 18 Wall., 163 [85 U. S., XXI., 872]; *Ex parte Rowland*, 104 U. S., 604 [XXVI., 861].

The grounds of the present application, as stated in the petition, are: that the circuit court had no jurisdiction to try the prisoner for the offense of which he has been convicted and to commit him to prison therefor, because:

1. The instruments, described in the indictment and charged to have been forged, show on their face that they are not bonds or obligations of the United States and, even if genuine, possessed no validity; and,

2. It was conceded on the trial that the instruments set forth in the indictment were genuine registered bonds, and that the forgery

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NOTE.—*What questions may be considered on writ of* habeas corpus.

Habeas corpus is a remedy for every illegal imprisonment. Com. v. Lecky, 1 Watts, 66; S. C., 26 Am. Dec., 47.

The writ of *habeas corpus* cannot be used as a writ of error to correct mistakes or irregularities of other tribunals. *Ex parte* Virginia, 100 U. S., XXV., 676; *Ex parte* Siebold, 100 U. S., XXV., 717; State v. Towle, 42 N. H., 541; State v. Shattuck, 45 N. H., 211; *Ex parte* McCullough, 35 Cal., 97; *Ex parte* Hartman, 44 Cal., 32; *Ex parte* Max, 44 Cal., 579; Darrah v. Westerlage, 44 Tex., 388; *Ex parte* Schwartz, 2 Tex. App., 74; *Ex parte* Oliver, 3 Tex. App., 345; Griffin v. State, 5 Tex. App., 457; Emanuel v. State, 36 Miss., 627; Matter of Eaton, 27 Mich., 1; Smith's Petition, 2 Nev., 338; *Ex parte* Winston, 9 Nev., 71.

A state court may, upon *habeas corpus*, inquire into the validity of any detention of liberty which it is attempted to justify under authority from United States, as the validity of an enlistment. State v. Dimick, 12 N. H., 194; S. C., 37 Am. Dec., 197.

The question of guilt or innocence will not be examined on *habeas corpus*. Hurd, Hab.Corp., 2d ed., 346; People v. Martin, 1 Park. Cr. 189; People v. Rulloff, 5 Park. Cr. 81; People v. Dixon, 4 Park. Cr. 54; S. C., 3 Abb. Pr., 398.

Illegalities and not irregularities will be inquired into. *Ex parte* Shaw, 7 Ohio St., 81; *In re* Farnham, 3 Col., 545; *Ex parte* Van Hagan, 25 Ohio St., 426; *Ex parte* Gibson, 31 Cal., 619; *Ex parte* Schwartz, 2 Tex. App., 74; *Ex parte* McGill, 6 Tex. App., 498.

Mere errors will not be inquired into. If the court had jurisdiction and did not exceed it, the inquiry will be carried no further. People v. Cavanagh, 2 Park. Cr., 650; Matter of Prime, 1 Barb., 340; People v. McCormick, 4 Park. Cr. 9; Crandall's Petition, 34 Wis., 177; Matter of Place, 34 How. Pr., 259; People v. Liscomb, 60 N. Y., 559; S. C., 19 Am. Rep., 211; Williamson's Case, 26 Pa. St., 9; Fleming v. Clark, 12 Allen, 191; Nauer v. Thomas, 13 Allen, 572; *Ex parte* Bushnell, 9 Ohio St., 77.

The question of jurisdiction is always open to inquiry upon a writ of *habeas corpus*. Danah v. Westerlage, 44 Tex., 388; Cropper v. Com., 2 Rob. (Va.), 842; *In re* Booth, 3 Wis., 1; *In re* Booth & Rycraft, 3 Wis., 157; *In re* Blair, 4 Wis., 522; *In re* O'Connor, 6 Wis., 288; Falvey v. Massing, 7 Wis., 630; *In re* Boyle, 9 Wis., 264; *In re* Tarble, 34 Wis., 177; *In re* Semler, 41 Wis., 517; *In re* Eldred & Ford, 46 Wis., 530; Miller v. Snyder, 6 Ind., 1; People v. Neilson, 16 Hun, 214.

Prisoner may be discharged on *habeas corpus*, if the court under whose process he is held had no jurisdiction. Cases last cited, and *Ex parte* Bridges, 2 Woods, 428.

The objection that the indictment on which the prisoner was convicted was not found by a legal grand jury will not be considered, if the indictment is regular on its face. State v. Fenderson, 28 La. Ann., 82; *Ex parte* Twohig, 13 Nev., 302.

The title to office of the officer before whom the prisoner was committed will not be considered on *habeas corpus*. *Ex parte* Strahl, 16 Iowa, 369; Matter of Prime, 1 Barb., 340; Matter of Wakker, 3 Barb., 162; Griffin's Case, Chase, Dec., 364; S. C., 25 Tex. Supp., 623; *Ex parte* Call, 2 Tex. App., 497.

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complained of consisted in erasing the name of the original payee and substituting that of the prisoner.

All the bonds described in the indictment, except that in the third count, purported to have been issued under the Act of July 14, 1870, [16 Stat. at L., 272], ch. 256, as amended by the Act of January 20, 1871 [16 Stat. at L., 399], ch. 23. This Act provides for an issue of bonds by the Secretary of the Treasury in such form as he may prescribe. The bonds now in question appear to be signed by the Register of the Treasury and not by the Secretary. They also have the imprint and impression of the seal of the Department of the Treasury of the United States. In the indictment it is averred that the counterfeits were of bonds of the United States. This is enough for the purposes of the jurisdiction of the circuit court. Whether the bonds counterfeited are in the form of those actually issued by the Secretary of the Treasury under the authority of the Act referred to, is a question of fact to be established on the trial. Errors committed on the trial of this issue do not deprive the court of its power to imprison upon conviction and, as has been seen, such errors are not subject to correction here, either in the present form of proceeding or any other.

What has just been said applies equally to the instrument described in the third count, which purports to be signed by the acting Register of the Treasury. By the Act of February [523] 20, 1863 [12 Stat. at L., 656], ch. 45, the President was authorized to designate some officer in a department to perform the duties of another in case of death, resignation, absence or sickness.

The second ground of application presents no jurisdictional question. The indictment charged the prisoner with a crime against the laws of the United States; *U. S.* v. *Marigold*, 9 How., 560; and we have nothing to do with questions arising on the evidence presented to sustain the charge.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—39 Ohio St., 377; 48 Am. Rep., 469; 114 U. S., 421.

S. D. MILLER ET AL., *Plffs. in Err.*,

v.

NATIONAL BANK OF LANCASTER ET AL.

(See S. C. "*Miller* v. *Lancaster Bank*" 16 Otto, 542-545.)

Jurisdiction over state judgment.

To give jurisdiction to this court over a state judgment, the party claiming a federal right denied by the judgment must claim the right for himself and not for a third person in whose title he has no interest.

[No. 1173.]

Submitted Jan. 3, 1883. Decided Jan 15, 1883.

IN ERROR to the Court of Appeals of the State of Kentucky.

The history and facts of the case appear in the opinion of the court.

On motion to dismiss.

Messrs. **R. T. Merrick** and **M. F. Morris**, for defendants in error, in support of motion.

Messrs. **P. Phillips** and **W. Hallett Phillips**, for plaintiffs in error, *contra*.

Mr. Chief Justice **Waite** delivered the opinion of the court:

From this record it appears that one S. W. Miller, being insolvent, made an assignment of his property to M. J. Durham, trustee, for the benefit of his creditors. The trustee afterwards instituted a suit in the Boyle Circuit Court of [543] Kentucky, to enforce his trust. To this suit, S. D. Miller and E. B. Miller, two of the present appellants, were parties; and in due course of proceeding a decree was entered for the sale of the assigned property. In this decree it appears that S. D. Miller and E. B. Miller, who were then in possession of part of the premises under a lease, were permitted to hold until the 31st of December, 1880, but it was added: "Said S. D. Miller and Ed. B. Miller agree to give said trustee the full, entire and peaceable possession of the house and lands they use and occupy, on or before the 31st day of December next, and on their failure so to do, the trustee, Durham, may have a writ of *habere facias possessionam* against each of them, and the clerk of this court is hereby directed to issue the same."

Under this decree, the property now in question was sold and duly conveyed to the First National Bank of Danville. The Danville Bank afterwards sold and conveyed the property to the National Bank of Lancaster, a bank organized under the national banking law. Tit. LXII., Revised Statutes. After these conveyances were made a writ was applied for, under the decree, in behalf of the Lancaster Bank, and issued to John Meyer, sheriff of the county, commanding him to take the possession of the property from S. D. Miller and E. B. Miller, and deliver it to Durham, the trustee. Thereupon S. D. Miller, E. B. Miller and John W. Miller, the last of whom had in some way got into the possession of the property after the decree, filed a petition in the Boyle Circuit Court against the Lancaster Bank and the sheriff, to enjoin the execution of the writ, on the ground that it was issued without authority and was void. In this petition it was alleged that the Lancaster Bank had no power under its charter to take and hold the property and that, consequently, the deed to it was inoperative and void. There were also allegations of irregularity in the form of the writ, and that, since the decree, Durham, the trustee, had sold and conveyed the property to the Danville Bank. To this petition, the Lancaster Bank filed an answer and counterclaim. In the counterclaim, the Bank set up its title through the sale under the decree. The prayer was, that the petition of the plaintiffs be dismissed and for a judgment for recovery of possession. Upon the [544] hearing, the writ which had been issued was set aside for irregularity, but a new writ was awarded the Bank. From a judgment to that effect an appeal was taken to the Court of Appeals of Kentucky, where the judgment was affirmed. To reverse this judgment of affirmance, the present writ of error was brought.

Our jurisdiction depends on the question whether the plaintiffs in error have been denied,

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by the judgment below, any "title, right, privilege or immunity specially set up or claimed" under the banking Act. As early as 1809 it was held by this court in *Owings* v. *Norwood*, 5 Cranch, 344, that, in order to give us jurisdiction in this class of cases, the right, title or immunity which is denied must grow out of the Constitution, or a treaty or statute of the United States relied on. Under this rule jurisdiction was not taken in that case, although it was an action of ejectment by Norwood's lessee, and the record showed that an effort was made to defeat the recovery because of an outstanding title in a third person adverse to Norwood and protected by a treaty. *Chief Justice* Marshall, in speaking for the court, said: "Whenever a right grows out of or is protected by a treaty, it is sanctioned against all the laws and judicial decisions of the States, and whoever may have this right, is to be protected. But if the person's title is not affected by the treaty, or if he claims nothing under a treaty, his title cannot be protected by the treaty." The principle thus announced has been recognized in many cases since. *Montgomery* v. *Hernandez*, 12 Wheat., 129; *Henderson* v. *Tennessee*, 10 How., 323; *Wynn* v. *Morris*, 20 How., 5 [61 U. S., XV., 801]; *Hale* v. *Gaines*, 22 How., 160 [63 U. S., XVI., 269]; *Verden* v. *Coleman*, 1 Black, 472 [66 U. S., XVII., 161]; *Long* v. *Converse*, 91 U. S., 105 [XXIII., 233]. *Henderson* v. *Tennessee*, like *Owings* v. *Norwood*, was an action of ejectment, and the effort was to defeat the recovery by showing an outstanding title in a third person under a treaty with which the party in possession did not connect himself; but the jurisdiction was denied, *Chief Justice* Taney saying in the opinion: "The right to make this defense is not derived from the treaties, nor from any authority exercised under the General Government. It is given by the laws of the State, which provide that the defendant in ejectment may set up title in a stranger in bar of the action. It is [545] true the title set up in this case was claimed under a treaty. But to give jurisdiction to this court the party must claim the right for himself, and not for a third person in whose title he has no interest." And in *Hale* v. *Gaines* it was said: "The plaintiff in error must claim for himself, some title, right, privilege or exemption under an Act of Congress, etc., and the decision must be against his claim to give this court jurisdiction. Setting up a title in the United States by way of defense is not claiming a personal interest affecting the subject in litigation."

In our opinion, these cases are conclusive of the present motion. The plaintiffs in error set up no title against the Bank. In effect, they seek to prevent the issue of an execution on a judgment against them or those under whom they claim, because, as between the Danville Bank and the Lancaster Bank, a conveyance made by the Danville Bank, of the property to be delivered under the execution, is inoperative on account of the provisions of the banking law. What was done between the two Banks had no effect on the title of the parties in possession, and it was a matter of no importance to them whether the execution issued on the application of the one or the other. Clearly, therefore, the plaintiffs in error occupy no other position than that of parties setting up title in the Danville Bank by way of defense, and that is not claiming for themselves any title, right, privilege or immunity given by the law.

The motion to dismiss is granted.

Mr. Justice **Miller** took no part in the decision of this case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Plf.*,
v.
R. G. HARRIS ET AL.

(See S. C., 16 Otto, 629-644.)

Certificate of division—form of—criminal law—when constitutional.

1. That the certificate of division of opinion in a criminal case in a circuit court does not expressly state that the point of difference between the judges was certified upon the request of either party or their counsel, is not fatal to the jurisdiction of this court.
2. If the request may be fairly inferred, from the circumstances which appear in the record, that it all that is necessary to satisfy the statute.
3. Section 5519 of the Revised Statutes, making it a criminal offense for two or more persons in a State or Territory to conspire to deprive any person of the equal protection of the laws of the State, is unconstitutional.
4. Those provisions of the law which are broader than is warranted by the article of the Constitution by which they are supposed to be authorized, cannot be sustained.

[No. 7.]

Submitted Nov. 7, 1882. Decided Jan. 22, 1883.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Western District of Tennessee.

The history and facts appear in the

Statement of the case by *Mr. Justice* **Woods:**

Section 5519 of the Revised Statutes of the United States declares: "If two or more persons in any State or Territory conspire or go in disguise upon the highway or on the premises of another for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws, each of said persons shall be punished by a fine of not less than $500 nor more than $5,000, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment." This section was originally a part of section 2 of the Act of April 20, 1871. 17 Stat at L., 13, 14.

At the November Term, 1876, of the United States Circuit Court for the Western District of Tennessee an indictment, based on this section, was returned by the grand jury against one R. G. Harris and nineteen others. The indictment contained four counts. The first count charged as follows: "That R. G. Harris," and nineteen

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others, naming them, "yeomen of the County of Crockett, in the State of Tennessee, and all late of the county and district aforesaid, on, to wit: the fourteenth day of August, in the year of our Lord one thousand eight hundred and seventy-six, in the County of Crockett, in said State and district, and within the jurisdiction of this court, unlawfully, with force and arms, did conspire together with certain other persons whose names are to the grand jurors aforesaid unknown, then and there, for the purpose [630] of depriving Robert R. Smith, William J. Overton, George W. Wells, Jr., and P. M. Wells, then and there being citizens of the United States and of said State, of the equal protection of the laws in this, to wit: that, theretofore, to wit: on the day and year aforesaid, in said county, the said Robert R. Smith, William J. Overton, George W. Wells, Jr., and P. M. Wells, having been charged with the commission of certain criminal offenses, the nature of which said criminal offenses being to the grand jurors aforesaid unknown, and having upon such charges then and there been duly arrested by the lawful and constituted authorities of said State, to wit: by one William A. Tucker, the said William A. Tucker then and there being a deputy-sheriff of said county and then and there acting as such; and having been so arrested as aforesaid, and being then and there so under arrest and in the custody of said deputy-sheriff as aforesaid, they, the said Robert R. Smith, William J. Overton, George W. Wells, Jr., and P. M. Wells, were there and then by the laws of said State entitled to the due and equal protection of the laws thereof, and were then and there entitled under the said laws to have their persons protected from violence when so then and there under arrest as aforesaid. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said R. G. Harris," and nineteen others, naming them, "with certain other persons whose names are to the said grand jurors unknown, did then and there, with force and arms, unlawfully conspire together as aforesaid then and there for the purpose of depriving them, the said Robert R. Smith, William J. Overton, George W. Wells, Jr., and P. M. Wells, of their rights to the due and equal protection of the laws of said State and of their rights to be protected in their persons from violence while so then and there under arrest as aforesaid and while so then and there in the custody of the said deputy-sheriff, and did then and there deprive them, the said Robert R. Smith, William J. Overton, George W. Wells, Jr., and P. M. Wells, of such rights and protection and of the due and equal protection of the laws of the said State, by, then and there, while so under arrest as aforesaid and while so then and there in the custody of the said deputy-sheriff as aforesaid, beating, bruising, wounding and otherwise ill-treating them, the said [631] Robert R. Smith, William J. Overton, George W. Wells, Jr., and P. M. Wells, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

The second count charged that the defendants, with force and arms, unlawfully did conspire together for the purpose of preventing and hindering the constituted authorities of the State of Tennessee, to wit: the said William A. Tucker, deputy-sheriff of said county, from giving and securing to the said Robert R. Smith and others, naming them, the due and equal protection of the laws of said State, in this, to wit: that, at and before the entering into said conspiracy, the said Robert R. Smith and others, naming them, were held in the custody of said deputy-sheriff by virtue of certain warrants duly issued against them, to answer certain criminal charges, and it thereby became and was the duty of said deputy-sheriff to safely keep in his custody the said Robert R. Smith and others while so under arrest, and then and there give and secure to them the equal protection of the laws of the State of Tennessee; and that the defendants did then and there conspire together for the purpose of preventing and hindering the said deputy-sheriff from then and there safely keeping, while under arrest and in his custody, the said Robert R. Smith and others, and giving and securing to them the equal protection of the laws of said State.

The third count was identical with the second, except that the conspiracy was charged to have been with the purpose of hindering and preventing said William A. Tucker, deputy-sheriff, from giving and securing to Robert R. Smith alone the due and equal protection of the laws of the State.

The fourth count charged that the defendants did conspire together for the purpose of depriving said P. M. Wells, who was then and there a citizen of the United States and the State of Tennessee, of the equal protection of the laws, in this, to wit: said Wells having been charged with an offense against the laws of said State, was duly arrested by said Tucker, deputy-sheriff, and so being under arrest was entitled to the due and equal protection of said laws and to have his person protected from violence while [632] so under arrest; and the said defendants did then and there unlawfully conspire together for the purpose of depriving said Wells of his right to the equal protection of the laws, and of his right to be protected in person from violence while so under arrest, and "Did then and there deprive him of such rights and protection, and of the due and equal protection of the laws of the State of Tennessee, by, then and there, and while he, the said P. M. Wells, was so then and there under arrest as aforesaid, unlawfully beating, bruising, wounding and killing him, the said P. M. Wells, contrary to the form of the statute in such case made and provided," etc.

The defendants demurred to the indictment on several grounds, among them the following:

1. "Because the offenses, created by section 5519 of the Revised Statutes of the United States, and upon which section the aforesaid four counts are based, are not constitutionally within the jurisdiction of the courts of the United States, and because the matters and things therein referred to are judicially cognizable by state tribunals only, and legislative action thereon is among the rights reserved to the several States and inhibited to Congress by the Constitution of the United States;" and,

2. "Because the said section 5519 of the Revised Statutes of the United States, in so far as it creates offenses and imposes penalties, is in [633] violation of the Constitution of the United States, and an infringement of the rights of the several States and the people thereof."

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The case was heard in the circuit court on the demurrer to the indictment and, as the record states, "Came the district attorney, on behalf of the United States, and came also the defendants indicted herein, by their attorneys, when this case came on to be heard before the Honorable John Baxter, Circuit Judge, and the Honorable Connally F. Trigg, District Judge, presiding, on the demurrer of the said defendants, filed herein on the 5th day of February, A. D. 1878, to the indictment herein, and the said Judges being divided in opinion on the point of the constitutionality of the section of the Revised Statutes of the United States on which the said indictment is based, being section number 5519 thereof, * * * after argument, hereby direct the said point * * * to be certified to the Supreme Court of the United States for its decision thereon, and the same is, accordingly, ordered. And it is further ordered by the court that this case be continued until the decision of said Supreme Court in the premises."

Section 651 of the Revised Statutes, which authorizes certificates of division of opinion, declares: "Whenever any question occurs on the trial or hearing of any criminal proceeding before a circuit court, upon which the judges are divided in opinion, the point upon which they disagree shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges, and certified, under the seal of the court, to the Supreme Court at their next session; but nothing herein contained shall prevent the cause from proceeding if, in the opinion of the court, further proceedings can be had without prejudice to the merits."

Mr. **S. F. Phillips,** *Solicitor-Gen.*, for the United States.

No counsel appeared for defendants.

Mr. Justice **Woods** delivered the opinion of the court:

The certificate of division of opinion in this [634] case does not expressly state that the point of difference between the Judges was certified "upon the request of either party or their counsel." Neither party challenges the jurisdiction of this court, but it has occurred to us as a question, and we have considered it, whether this omission in the certificate is fatal to our jurisdiction, and we have reached the conclusion that it is not.

It fairly appears from the certificate that the point upon which the Judges differed in opinion was stated, under their direction, in the presence of the counsel of both parties, without objection from either, and it is expressly stated that the cause was continued until the decision of this court, upon the point of difference between the Judges could be rendered. Had no certificate of division of opinion been made, the result must have been a judgment against the indictment, although the difference of opinion arose upon the demurrer of defendant; for no judgment could have been given against the defendant upon the indictment, if the Judges were not agreed as to the constitutionality of the law upon which it was based. Hence, it became the duty of the prosecuting officer and the interest of the Government, which he represented, to request a certificate of division of opinion for the determination of the question by this court. The case is brought to this court by the counsel for the United States upon the point stated in the certificate; the case is suspended until our decision upon the point certified is made; and he asks us to decide the question upon which the Judges of the circuit court differed. These circumstances, all of which appear of record, considered in connection with the fact that the court made the certificate, raise the legal presumption that a request for the certificate was duly preferred. The record evidence of the fact of the request by counsel for the United States is incontrovertible.

It is suggested, that under section 649 of the Revised Statutes, which provides that a jury may be waived whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury, this court has decided that the fact that the stipulation was in writing and filed with the clerk must appear of record in order to entitle the party to the review of the rulings of the court in the progress of the trial provided by section 700, and, therefore, [635] that in the present case the record should distinctly show the request. But section 649 expressly requires that the waiver of the jury shall be in writing and shall be filed with the clerk. The section which provides for a certificate of division of opinion makes no such requirement in relation to the request for a certificate.

In one case, the jurisdictional fact is the filing of a certain paper writing with the clerk; in the other, the making of a request, which may be oral, to the court. In either case, when the jurisdictional fact fairly appears by the record, our jurisdiction attaches. So, in this case, if the request may be fairly inferred from such circumstances as we have mentioned, that is all that is necessary to satisfy the statute. In *Supervisors* v. *Kennicott*, 103 U. S., 554 [XXVI., 486], this court held that when a stipulation in writing was filed with the clerk, by which it was provided that the case might be submitted to the court on an agreed statement of facts, but which contained no express waiver of a jury, yet this amounted to a waiver sufficient to meet the requirements of section 649. And though the right of trial by jury is a constitutional one, yet this court has declared that when it simply appeared by the record that a party was present by counsel and had gone to trial before the court without objection or exception, a waiver of his right to a jury trial would be presumed, and he would be held in this court to the legal consequences of such waiver. *Kearney* v. *Case*, 12 Wall., 275 [79 U. S., XX., 395].

We are, therefore, of opinion that the request by counsel of the United States for a certificate of division is sufficiently shown by the record in this case, and that our jurisdiction is clear.

We pass to the consideration of the merits of the case. Proper respect for a co-ordinate branch of the Government requires the courts of the United States to give effect to the presumption that Congress will pass no Act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an Act in question is clearly demonstrated. While conceding this, it must, nevertheless, be stated that the Government of the United States is one of delegated, limited and enumerated powers. *Martin* v. *Hunter*, 1 Wheat., 304; *McCulloch* v. *Maryland*, [636] 4 Wheat., 316; *Gibbons* v. *Ogden*, 9 Wheat., 1.

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Therefore, every valid Act of Congress must find in the Constitution some warrant for its passage. This is apparent by reference to the following provisions of the Constitution: section 1, of the 1st article, declares that all legislative powers granted by the Constitution shall be vested in the Congress of the United States. Section 8, of the same article, enumerates the powers granted to the Congress, and concludes the enumeration with a grant of power "To make all laws which shall be necessary and proper to carry into execution the foregoing powers and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof." Article X., of the Amendments to the Constitution, declares that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

Mr. Justice Story, in his Commentaries on the Constitution, says:

"Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is, whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be, whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it." Section 1243, referring to Virginia Reports and Resolutions, January, 1800, pp. 33, 34; President Monroe's Exposition and Message of May 4, 1822, p. 47; 1 Tuck. Bl. Com. App., 287, 288; 5 Marsh. Wash. App., *n.* 3; 1 Hamilton's Works, 117, 121.

The demurrer filed to the indictment in this case questions the power of Congress to pass the law under which the indictment was found. It is, therefore, necessary to search the Constitution to ascertain whether or not the power is conferred.

There are only four paragraphs in the Constitution which can, in the remotest degree, have any reference to the question in hand. These are section 2 of article 4 of the original Constitution, and the 13th, 14th and 15th Amend-
[637] ments. It will be convenient to consider these in the inverse of the order stated.

It is clear that the 15th Amendment can have no application. That Amendment, as was said by this court in the case of *U. S.* v. *Reese*, 92 U. S., 214 [XXIII., 563], "Relates to the right of citizens of the United States to vote. It does not confer the right of suffrage on anyone. It merely invests citizens of the United States with the constitutional right of exemption from discrimination in the enjoyment of the elective franchise on account of race, color or previous condition of servitude." See, also, *U. S.* v. *Cruikshank*, 92 U. S., 542 [XXIII., 588]; *S. C.*, 1 Woods, 308. Section 5519 of the Revised Statutes has no reference to this right. The right guarantied by the 15th Amendment is protected by other legislation of Congress, namely: by sections 4 and 5 of the Act of May 31, 1870, 16 Stat. at L., 140, and now embodied in sections 5506 and 5507 Revised Statutes.

Section 5519, according to the theory of the prosecution and as appears by its terms, was framed to protect from invasion by private persons, the equal privileges and immunities under the laws, of all persons and classes of persons. It requires no argument to show that such a law cannot be founded on a clause of the Constitution whose sole object is to protect from denial or abridgment, by the United States or States, on account of race, color or previous condition of servitude, the right of citizens of the United States to vote.

It is, however, strenuously insisted that the legislation under consideration finds its warrant in the 1st and 5th sections of the 14th Amendment. The 1st section declares "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The 5th section declares "The Congress shall have power to enforce by appropriate legislation the provisions of this Amendment."

It is perfectly clear, from the language of the [638]
1st section, that its purpose also was to place a restraint upon the action of the States. In the *Slaughter-House Cases*, 16 Wall., 36 [83 U. S., XXI., 394], it was held by the majority of the court, speaking through *Mr. Justice* Miller, that the object of the 2d clause of the 1st section of the 14th Amendment was to protect, from the hostile legislation of the States, the privileges and immunities of citizens of the United States, and this was conceded by *Mr. Justice* Field, who expressed the views of the dissenting Justices in that case. In the same case, the court, referring to the 14th Amendment, said that "If the States do not conform their laws to its requirements, then, by the 5th section of the article of Amendment, Congress was authorized to enforce it by suitable legislation."

The purpose and effect of the two sections of the 14th Amendment above quoted were clearly defined by *Mr. Justice* Bradley in the case of *U. S.* v. *Cruikshank*, 1 Woods, 316, as follows: "It is a guaranty of protection against the acts of the State Government itself. It is a guaranty against the exertion of arbitrary and tyrannical power on the part of the Government and Legislature of the State; not a guaranty against the commission of individual offenses; and the power of Congress, whether express or implied, to legislate for the enforcement of such a guaranty does not extend to the passage of laws for the suppression of crime within the States. The enforcement of the guaranty does not require nor authorize Congress to perform "The duty that the guaranty itself supposes it to be the duty of the State to perform and which it requires the State to perform."

When the case of *U. S.* v. *Cruikshank* came to this court, the same view was taken here. The *Chief Justice*, delivering the opinion of the court in that case said: "The 14th Amendment prohibits a State from depriving any person of life, liberty or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not add anything to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by

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the States upon the fundamental rights which belong to every citizen as a member of society. [639] The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guaranties and no more. The power of the National Government is limited to this guaranty." 92 U. S., 542 [XXIII., 588].

So in *Virginia* v. *Rives*, 100 U. S., 313 [XXV., 667], it was declared by this court, speaking through *Mr. Justice* Strong, that "These provisions of the 14th Amendment have reference to state action exclusively and not to any action of private individuals."

These authorities show conclusively that the legislation under consideration finds no warrant for its enactment in the 14th Amendment.

The language of the Amendment does not leave this subject in doubt. When the State has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty or property, without due process of law, nor denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative and construed by its judicial and administered by its executive departments, recognize and protect the rights of all persons, the Amendment imposes no duty and confers no power upon Congress.

Section 5519 of the Revised Statutes is not limited to take effect only in case the State shall abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the laws. It applies, no matter how well the State may have performed its duty. Under it, private persons are liable to punishment for conspiring to deprive any one of the equal protection of the laws enacted by the State.

In the indictment in this case, for instance, which would be a good indictment under the law, if the law itself were valid, there is no intimation that the State of Tennessee has passed [640] any law or done any act forbidden by the 14th Amendment. On the contrary, the *gravamen* of the charge against the accused is, that they conspired to deprive certain citizens of the United States and of the State of Tennessee of the equal protection accorded them by the laws of Tennessee.

As, therefore, the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the States or their administration by the officers of the State, we are clear in the opinion that it is not warranted by any clause in the 14th Amendment to the Constitution.

We are next to consider whether the 13th Amendment to the Constitution furnishes authority for the enactment of the law under review. This Amendment declares that "Neither slavery nor involuntary servitude, except as a punishment of crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." "Congress shall have power to enforce this article by appropriate legislation."

It is clear that this Amendment, besides abolishing forever slavery and involuntary servitude within the United States, gives power to Congress to protect all persons within the jurisdiction of the United States from being in any way subjected to slavery or involuntary servitude, except as a punishment for crime, and in the enjoyment of that freedom which it was the object of the Amendment to secure. *Mr. Justice* Swayne, in *U.S.* v. *Rhodes*, 1 Abb. U. S., 28; *Mr. Justice* Bradley, in *U.S.* v. *Cruikshank*, 1 Woods, 308.

Congress has, by virtue of this Amendment, enacted that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other. Act of April 9, 1866, sec. 1, 14 Stat. at L., 27.

But the question with which we have to deal is: does the 13th Amendment warrant the en- [641] actment of section 5519 of the Revised Statutes? We are of opinion that it does not. Our conclusion is based on the fact that the provisions of that section are broader than the 13th Amendment would justify. Under that section, it would be an offense for two or more white persons to conspire, etc., for the purpose of depriving another white person of the equal protection of the laws. It would be an offense for two or more colored persons, enfranchised slaves, to conspire with the same purpose against a white citizen or against another colored citizen who had never been a slave. Even if the Amendment is held to be directed against the action of private individuals, as well as against the action of the States and United States, the law under consideration covers cases both within and without the provisions of the Amendment. It covers any conspiracy between two free white men against another free white man to deprive the latter of any right accorded him by the laws of the State or of the United States. A law under which two or more free white private citizens could be punished for conspiring or going in disguise for the purpose of depriving another free white citizen of a right accorded by the law of the State to all classes of persons, as, for instance, the right to make a contract, bring a suit, or give evidence, clearly cannot be authorized by the Amendment which simply prohibits slavery and involuntary servitude.

Those provisions of the law, which are broader than is warranted by the article of the Constitution by which they are supposed to be authorized, cannot be sustained.

Upon this question, the case of *U. S.* v. *Reese*, 92 U. S., 214 [XXIII., 563], is in point. In that case, this court had under consideration the constitutionality of the 3d and 4th sections of the Act of May 31, 1870, 16 Stat. at L., 140, and now constituting sections 2007, 2008 and 5506, Revised Statutes. The 3d section of the Act made it an offense for any judge, inspector or other officer of election, whose duty it was, under the circumstances therein stated, to receive

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and count the vote of any citizen, to wrongfully refuse to receive and count the same; and the 4th section made it an offense for any person by force, bribery or other unlawful means to [642] hinder or delay any citizen from doing any act required to be done to qualify him to vote, or from voting at any election.

The indictment in the case charged two inspectors of a municipal election in the State of Kentucky with refusing to receive and count at such election the vote of William Garner, a citizen of the United States, of African descent. It was contended by the defendants, that it was not within the constitutional power of Congress to pass the section upon which the indictment was based. The attempt was made by the counsel for the United States to sustain the law as warranted by the 15th Amendment to the Constitution of the United States. But this court held it not to be appropriate legislation under that Amendment. The ground of the decision was that the sections referred to were broad enough, not only to punish those who hindered and delayed the enfranchised, colored citizen from voting, on account of his race, color, or previous condition of servitude, but also those who hindered or delayed the free, white citizen. The court, speaking by the *Chief Justice*, said: "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government. The courts enforce the legislative will, when ascertained, if within the constitutional grant of power. But if Congress steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts are authorized to and when called upon must annul its encroachment upon the reserved rights of the States and the people."

And the court declared that it could not limit the statute so as to bring it within the constitutional power of Congress, and concluded: "We must, therefore, decide that Congress has not as yet provided, by appropriate legislation, for the punishment of the offenses charged in the indictment."

This decision is in point, and applying the principle established by it, it is clear that the legislation now under consideration cannot be sustained by reference to the 13th Amendment to the Constitution.

There is another view which strengthens this [643] conclusion. If Congress has constitutional authority, under the 13th Amendment, to punish a conspiracy between two persons to do an unlawful act, it can punish the act itself, whether done by one or more persons.

A private person cannot make constitutions nor laws, nor can he with authority construe them, nor can he administer or execute them. The only way, therefore, in which one private person can deprive another of the equal protection of the laws is by the commission of some offense against the laws which protect the rights of persons, as by theft, burglary, arson, libel, assault or murder. If, therefore, we hold that section 5519 is warranted by the 13th Amendment, we should, by virtue of that Amendment, accord to Congress the power to punish every crime by which the right of any person to life, property or reputation is invaded. Thus, under a provision of the Constitution which simply abolished slavery and involuntary servitude, we should, with few exceptions, invest Congress with power over the whole catalogue of crimes. A construction of the Amendment which leads to such a result is clearly unsound.

There is only one other clause in the Constitution of the United States which can, in any degree, be supposed to sustain the section under consideration, namely: the 2d section of article 4, which declares that "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." But this section, like the 14th Amendment, is directed against state action. Its object is to place the citizens of each State upon the same footing with citizens of other States, and inhibit discriminative legislation against them by other States. *Paul* v. *Virginia*, 8 Wall., 168 [75 U. S., XIX., 357].

Referring to the same provision of the Constitution, this court said, in the *Slaughter-House Cases*, *ubi supra*, that it "Did not create those rights which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the state governments over its own citizens. Its sole purpose was to declare to the several States that whatever those rights, as you grant or establish them to your own citizens, or as [644] you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

It was never supposed that the section under consideration conferred on Congress the power to enact a law which would punish a private citizen for an invasion of the rights of his fellow citizen, conferred by the State of which they were both residents on all its citizens alike.

We have, therefore, been unable to find any constitutional authority for the enactment of section 5519 of the Revised Statutes. The decisions of this court above referred to leave no constitutional ground for the Act to stand on.

The point in reference to which the Judges of the Circuit Court were divided in opinion must, therefore, be decided against the constitutionality of the law.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Dissenting, *Mr. Justice* **Harlan.**

Cited—109 U. S., 18; 112 U. S., 607.

ANDREW ALBRIGHT ET AL., *Appts.*, [613]

v.

ANDREW TEAS.

(See S. C., 16 Otto, 613-620.)

Removal of cause—patent case—when not removable.

1. A suit brought to recover the consideration for the transfer of an interest in letters patent, in which no issue is made touching the construction

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of the patent or its validity or infringement, is not one arising under the patent laws of the United States, and cannot be removed from a State to a Federal Court, where all the parties are citizens of the same State.

2. The fact that defendants had licenses to use other patents under which they were manufacturing goods, does not give them the right to litigate their cause in the United States Courts, because certain goods, which they asserted were made under the other patents, were asserted by the plaintiff to be really made under his.

3. The controversy, as to whether certain goods manufactured by defendant embody the invention covered by the plaintiffs' patents, does not necessarily involve a construction of the patents.

[No. 1184.]

Advanced and submitted, under 32d Rule, Jan. 8, 1883. Decided Jan. 22, 1883.

APPEAL from the Circuit Court of the United States for the District of New Jersey.

The history and facts fully appear in the

Statement of the case by *Mr. Justice* **Woods:**

This was a suit in equity, originally brought in the Court of Chancery of the State of New Jersey by Andrew Teas, the appellee, against the appellants, Andrew Albright, Edwin R. Cahoone and Samuel E. Tompkins. The bill alleged that Teas was the inventor and patentee of certain improvements in coach pads, harness saddles, and saddle trees, covered by three certain letters patent issued to him; that, on February 1, 1876, he made an agreement in writing of that date with Albright and Cahoone, which was in substance as follows: Teas agreed on his part to make assignments of said letters patent to Albright and Cahoone, and also of certain other letters patent for which he had made application to the Patent Office, and also of any other patents which he might obtain for improvements in gig saddles and coach pads for harness; in consideration whereof, Albright and Cahoone agreed that they would use their best endeavors to have the aforesaid inventions worked, goods manufactured and sold to the best advantage of themselves and said Teas, and to pay Teas certain specified royalties for the use of the patented improvements, and pay all just and necessary expenses for the purpose of procuring and sustaining all of said letters patent against infringers, provided it be for the mutual interests and financial benefits to all the parties to the agreement.

The bill further alleged that Teas did assign the patents as stipulated in the agreement and that the agreement was in full force; that a large amount of goods, in which the improvements covered by the patents of complainant were used, had been manufactured by Albright and Cahoone under the name of the Cahoone Manufacturing Company, and by Tompkins, Albright and Cahoone, under the firm name of Samuel E. Tompkins, Cahoone & Co.; that the [614] defendants had failed to render proper statements of the quantity of goods manufactured by them; that complainant believed there was a large amount due him under said contract for royalties, and that he had tried without success to obtain an inspection of the account books of defendants to ascertain what was so due him.

The bill prayed for discovery, for an account of the sums due the complainant for royalties under said contract, and for a decree against Albright and Cahoone for the amount found to be due from them to him on said account and for general relief.

Albright and Cahoone filed a joint and several answer and Tompkins a several answer to the bill.

Albright and Cahoone, in their answer, neither admitted nor denied that Teas was the original inventor of the patents assigned to them, but they denied that he had not free access to their books of account. They averred that they had rendered full accounts and made all payments due to Teas under the agreement set forth in the bill; that if any disputes existed between Teas and defendants, they arose from a wrong construction put on the agreement by Teas, and from unfounded claims by him as to his rights under it; that at the time of the agreement they were in litigation with Tompkins in respect to certain patents held by him for improvements in saddle trees; that the litigation and rivalry impaired the business of all three, and that in October, 1877, they settled their differences with Tompkins and united their business with his, and it had since been carried on by the firm of Tompkins, Cahoone & Co., which had been entitled to use all the patents of both parties, and that the new firm had manufactured many goods without employing any of the improvements described in the patents of Teas, and had manufactured many to which they had applied the improvements covered by the Teas patents in connection with those covered by patents of Tompkins and others; that Tompkins had always disputed the value and validity of the Teas patents, but that they, Albright and Cahoone, had always been anxious to fulfill their agreement with Teas, and had paid royalties on all goods to the manufacture of which it could, by any reasonable construction, be claimed that the improvements covered by the Teas patents had been applied; and that if Teas claimed more, it was because he insisted that goods made under the patents of Tomp- [615] kins were infringements on his patents.

Tompkins made substantially the same denials and averments in his answer. He also averred that he was not a party to the agreement with Teas, and denied all obligations under it. He alleged that though he had always disputed the validity of the Teas patents, he had desired to enable his partners, Albright and Cahoone, fairly to fulfill their agreement with Teas, and that it had been fulfilled, and all moneys had been paid him to which he was entitled for goods made under his patents.

Replications were filed to these answers, and the parties proceeded to take testimony. While the taking of the testimony was going on, some correspondence took place between the counsel of the parties, in which counsel for defendants specified a large number of articles which they admitted that the defendants were manufacturing under the Teas patents, and gave a list of nineteen other articles manufactured by the defendants, which they contended were not made under the Teas patents, and did not, therefore, fall within the agreement between Teas and Albright and Cahoone. Thereupon the defendants filed a petition for the removal of the cause to the Circuit Court of the United States, in which they alleged that all the parties to the suit were citizens of the State of New Jersey, but

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that the suit was one arising under the patent laws of the United States, and exclusively within the cognizance of the Courts of the United States, and removable under the Act of March 3, 1875, 18 Stat. at L., 470. Upon this petition the cause was removed to the Circuit Court of the United States for the District of New Jersey. By consent of parties, an interlocutory order was made in the Circuit Court referring the cause to a master to report the amount due the complainant, if anything, for royalty upon the articles, enumerating them, in the manufacture of which the patented improvements of the complainant were used.

Upon final hearing, the testimony having been closed, the counsel for the complainant moved the Circuit Court to remand the cause to the State Court of Chancery, and the court declaring its opinion to be that the suit was not one arising under any of the laws of the United States, but was one over which the United States Courts had no jurisdiction, and that it was a suit for an accounting and relief for the settle-
[616] ment of controversies under a contract of which the State Courts had full cognizance, ordered the cause to be remanded to the State Court. To obtain a review of this order, the present appeal was taken by Tompkins, Albright and Cahoone, defendants in the Circuit Court.

Messrs. **A. Q. Keasbey** and **J. C. Clayton**, for appellants.

Messrs. **Walter H. Smith** and *King & Woodruff*, for appellee.

Mr. Justice **Woods** delivered the opinion of the court:

The contention of the appellants is, that the case is one "arising under the * * * laws of the United States," and was, therefore, properly removable from the State to the United States Courts, and should not have been remanded.

It is clear, from an inspection of the bill and answers, that the case is founded upon the agreement in writing between the appellee and the appellants, Albright and Cahoone, by which the former, for a consideration therein specified, transferred to the latter his interest in certain letters patent. The suit was brought to recover the consideration for this transfer, and was not based on the letters patent.

The appellants insist, however, that evidence was taken in the cause by the appellee for the purpose of proving that they were using his patented improvements in the manufacture of goods for which they paid him no royalty, and which they contended did not embody the improvements covered by his patents; that the testimony developed a controversy between the parties, on the question whether the goods manufactured by the appellants under the Tompkins and other patents owned by them, were or were not infringements on the patents of appellee; consequently, that questions of infringement and of the construction of the claims of appellee's patents were necessarily involved in the case and, therefore, it was one arising under the patent laws of the United States.

We search the bill of complaint in vain, to find any averments raising these questions. It makes no issue touching the construction of the patents granted the appellee, or their validity, or their infringement. The only complaint made in the bill is, that the appellants were fraudulently excluding the appellee from an inspection of their books of account, and refusing to pay him the sums due for royalties under his contract. And the prayer of the bill was for a dis- [617]
covery, an account of what was due appellee under his contract, and a decree for the amount found to be due him.

On the face of the bill, therefore, the case is not one arising under the patent laws of the United States. *Wilson* v. *Sandford*, 10 How., 99.

The testimony on which appellants rely, to show the jurisdiction of the Circuit Court, is not before us; but conceding that it discloses the controversy, which appellants assert it does, the question arises: does this fact give the Courts of the United States jurisdiction of the case?

Tompkins is the only one of the appellants who questions the validity of the appellee's patents. But he is not a party to the contract between appellee and Albright and Cahoone, and no relief is prayed against him by the bill; and though he says in his answer that he had always disputed the value and validity of the patents of appellee, he raises no issues thereon. The fact that he is made a party defendant to the bill can, therefore, have no effect on the question in hand.

In passing on the question of jurisdiction, the case is to be considered as if Albright and Cahoone were the only defendants.

The appellee, before the commencement of the suit, sold and transferred to Albright and Cahoone all his title and interest in the inventions covered by his patents. The transfer was absolute and unconditional. No right, therefore, secured to the appellee in the patent by any Act of Congress remained in him. He had no right to prosecute anyone for infringements of his patents nor to demand damages therefor nor an account of profits.

He was entitled to the royalties secured by his contract and nothing more. And the only question raised by the bill of complaint and the answer of Albright and Cahoone was simply this: what is the sum due the appellee from Albright and Cahoone for his royalties under his contract? In ascertaining this amount it, of course, became necessary to inquire, what goods were manufactured by the appellants under the patents of the appellee? In prosecuting this inquiry an incidental question might arise, namely: what goods were manufactured by the appellants under other patents of which they
were the owners or licensees? But this inci- [618]
dental and collateral inquiry does not change the nature of the litigation. The fact that Albright and Cahoone had licenses to use other patents under which they were manufacturing goods, does not give them the right to litigate their cause in the United States Courts because certain goods which they asserted were made under the other patents, the appellee asserted were really made under his. The suit, notwithstanding the collateral inquiry, still remains a suit on the contract to recover royalties, and not a suit upon the letters patent. It arises solely upon the contract and not upon the patent laws of the United States.

In fact it does not appear that there is any dispute whatever, between the parties, in reference to the construction of the patents of the

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appellee. The controversy between them, as stated by the appellants themselves is, whether certain goods manufactured by them embody the invention covered by the appellee's patents. This does not, necessarily, involve a construction of the patents. Both parties may agree as to what the patented invention is, and yet disagree on the question whether the invention is employed in the manufacture of certain specified goods. The controversy between the parties in this case is clearly of the latter kind.

The case cannot, therefore, be said to be one which grows out of the legislation of Congress. Neither party asserts any right, privilege, claim, protection or defense founded, in whole or in part, on any law of the United States.

We are, therefore, of opinion that, even if we go outside the pleadings and look into the testimony, the case is not one arising under the laws of the United States and, consequently, that the Courts of the United States had no jurisdiction to entertain it.

The cases adjudged by this and other Courts of the United States sustain this conclusion. In the case of *Wilson* v. *Sandford, ubi supra*, the object of the bill was to set aside a contract made by the appellant with the appellees, by which he had granted them permission to use and vend to others to be used one of Woodworth's planing-machines in the Cities of New Orleans and Lafayette, and also to obtain an injunction [619] against the further use of the machine, on the ground that it was an infringement of his patent-rights. Upon this cause, the court, speaking by *Mr. Chief Justice* Taney, said: "The dispute in this case does not arise under any Act of Congress, nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill, and there is no Act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles."

The case of *Hartell* v. *Tilghman*, 99 U. S., 547 [XXV., 357], is also in point. In that case Hartell, the complainant, alleged that he was the original patentee and inventor of a process for cutting and engraving stone, glass, metal and other hard substances by what is known as the sand blast process; that the defendants had paid him a considerable sum for machines necessary in the use of his invention, and had also paid him, during several months, the royalty which he asked for the use of the invention described in and secured by his patent; that the defendants refused to do certain other things, which the complainant charged to have been a part of the consideration of the contract between them, whereupon he had forbidden them further to use his invention, and that the defendants had disregarded this prohibition. The bill prayed for an injunction, an account of profits and damages.

The defendants admitted the validity of the patent, their use of it and their liability for its use, under their contract with the complainant, and offered to perform all that the contract required them to perform. All the parties were citizens of the same State.

Upon this case, the question of the jurisdiction of the United States Courts was raised, and this court, after a review of several cases bearing on the subject, held that the suit was not one arising under the laws of the United States, and that the Circuit Court had no jurisdiction of the case, and reversed its decree and remanded the cause with directions to dismiss the bill.

The argument against the jurisdiction in the case under consideration is stronger than in the two cases above referred to. In each of these cases the object of the complainant in filing the bill was to go behind the agreement, under [620] which the defendant had contracted, for the right to use the complainant's invention, and to obtain an injunction against the defendant as an infringer. In this case, the appellee admits the contract to be in force, and simply seeks to compel its performance.

The following cases cited by this court in *Hartell* v. *Tilghman* are in accord with the views we have expressed: *Goodyear* v. *Rubber Co.*, 4 Blatchf., 63; *Mercerole* v. *Paper Collar Co.*, 6 Blatchf., 356; *Blanchard* v. *Sprague*, 1 Cliff., 288; *Hill* v. *Whitcomb*, 1 Holmes, 317.

From the conclusions reached by us, it follows that the decree of the Circuit Court, remanding the cause to the State Court, must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

TOWN OF THOMPSON, In the COUNTY OF SULLIVAN, *Plff. in Errr.*,
v.
ORLANDO PERRINE.

(See S. C., 16 Otto, 589-593.)

Coupons, when negotiable—suit by holder.

*1. Thompson v. Perrine, 103 U. S., 806 [XXVI.], followed.

2. Overdue coupons of municipal bonds which have not matured are negotiable by the law merchant.

3. The right of the owner of coupons, payable to bearer or to the holder thereof, to sue in the Federal Court, does not depend upon the citizenship of any previous holder. He is not an assignee within the meaning of the Act of March 3, 1875.

[No. 76.]

Argued Jan. 10, 11, 1883. Decided Jan. 22, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

This action was brought in the court below by the defendant in error, to enforce the payment of certain coupons, amounting to the sum of $8,890, with interest, alleged to be due and unpaid.

The trial having resulted in a verdict, by direction of the court, and judgment in favor of the plaintiff for $11,474.50, the defendant sued out this writ of error.

The facts of the case are sufficiently stated by the court.

Messrs. **F. N. Bangs** and **Timothy F. Brush**, for plaintiff in error.

Messrs. **William M. Evarts**, *James K. Hill* and *T. Wing*, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

*Head notes by *Mr. Justice* HARLAN.

NOTE.—*Suits on coupons detached from bonds. See note to* Kenosha v. Lampson, 76 U. S., XIX., 725.

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In *Thompson* v. *Perrine*, 103 U.S., 806 [XXVI., 612], we affirmed a judgment of the Circuit Court of the United States for the Southern District of New York, against the Town of Thompson, in that State, for the amount of certain coupons of bonds, executed in behalf of that Town, by virtue of the provisions of an Act passed May 4, 1869, and amended April 1, 1869. Those [590] Acts, as will be seen from the statement of the former case, authorized the Town of Thompson, in aid of the construction of a railroad from Monticello, New York, to Port Jervis, in the same State (a majority of its taxpayers, appearing upon the last assessment roll and representing a majority of the taxable property, not including lands of non-residents, having first consented to the debt being contracted), to issue bonds and to invest *the proceeds*, when disposed of, in the capital stock of the railroad company organized to construct the proposed road. Bonds were issued, and instead of selling them and investing the proceeds in the company's stock, the local authorities exchanged them directly with the railroad company for stock. This, according to certain decisions of the highest court of New York, was in violation of the Act giving authority to issue the bonds. But, by an Act passed April 28, 1871 (previous to which time the bonds had been issued and delivered), that exchange for stock was, in express terms, ratified and confirmed. And the controlling question in the former case was as to the constitutional validity of the latter statute. In *Horton* v. *Thompson*, 71 N. Y., 513, decided January, 1878, the Court of Appeals of New York held that, as the taxpayers had only consented to an issue of bonds, the proceeds of the sale of which should be invested in stock, it was beyond the power of the Legislature to validate bonds, which, in violation of the Act under which they were issued, were not sold but were directly exchanged for stock, of which fact all purchasers had notice from the recitals of the bonds themselves. That adjudication, it was contended, was binding upon this court. But to that proposition we declined to give our assent and stated, with some fullness, the reasons why this court could not give to the decision in *Horton's Case* the effect claimed for it by the Town.

We held, for reasons which need not be repeated, that it was within the constitutional power of the Legislature of New York to pass the curative Statute of April 28, 1871, and that from the moment it was enacted, if not before, the bonds, by whomsoever held, whether by the railroad company or others, became binding obligations upon the Town, as much so as if they had originally been sold and the proceeds [591] invested in stock of the railroad company, as required by the Acts under which they were issued.

That decision controls the present case, for the latter, in its essential features, differs from the former only in the circumstance of the time when Perrine acquired title to the coupons in suit. Those heretofore sued on were purchased by him in 1875, while those now in suit were purchased by him in 1878, when they were overdue, and after the decision in 71 N. Y. was announced. Counsel for the Town now insist that this court should follow the ruling in that case, at least as to holders of coupons or bonds who purchased after *Horton* v. *Thompson* was decided; and they suppose that this court placed its former decision upon the ground, mainly, that Perrine purchased the bonds there in suit before the Court of Appeals declared the Act to be unconstitutional. But in this view we do not concur. The reference, in the former case, to the date when Perrine purchased, was to illustrate the injustice which would be done were we, in opposition to our own view of the law, to follow the ruling of the state court made after he purchased; a decision which, with entire respect for the state court, was held not to be in harmony with its former decisions. What we decided was, that the curative statute was within the limits of legislative power, and that, at least from its passage, the bonds, by whomsoever held, whether by the railroad company or others, became enforceable obligations of the Town. *Mitchell* v. *Burlington*, 4 Wall., 274, 275 [71 U. S., XVIII., 352]; *Taylor* v. *Ypsilanti*, 105 U. S., 60 [XXVI., 1008]; *Ohio L. & T. Co.* v. *Debolt*, 16 How., 433.

There is, however, one point made in this case not made in the former one, and which it is our duty to notice. It is, that this action is excluded by statute from the jurisdiction of a Circuit Court of the United States.

The 11th section of the Judiciary Act of 1789 declares that no district or circuit court shall "Have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." 1 Stat. at L., 73; R. S., sec. 629. The provision in the Act of March 3, 1875 [18 Stat. at L., 470], is: "Nor shall any circuit [592] or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange."

It is not claimed that the words "assignee" and "assignment," as found in the Act of 1875, have any meaning different from that attached to the same words in the Act of 1789, or in section 629 of the Revised Statutes. But the contention of counsel is that the coupons in suit, being detached from the bonds and overdue when Perrine purchased them, were dishonored and, therefore, not negotiable by the law merchant; consequently, it is claimed, they are not within the exception of promissory notes negotiable by the law merchant, but are embraced by the general inhibition upon suits founded on contract where the assignor himself could not have sued in the circuit court.

This position cannot be sustained. It is an immaterial circumstance that the coupons, when purchased by Perrine, were detached from the bonds. And the bonds not having then matured, the coupons, though overdue, had not lost the quality of negotiability by the law merchant. This result must follow from the principles announced in *Cromwell* v. *Sac Co.*, 96 U. S., 58 [XXIV., 686]. Further, and apart from any consideration of the question as to the negotiability, according to the law merchant, of these coupons, Perrine is not an *assignee* within the meaning of the Act of 1875, nor of the

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previous statutes relating to the same subject. Giving the words, assignee and assignment, their broadest signification and conceding that, in some cases, the holder of a promissory note may become such in virtue alone of an assignment; yet, according to the established construction of the Judiciary Act of 1789, the right of the holder of a promissory note or bond, payable to a particular person or bearer, to sue in his own name, did not depend upon the citizenship of the named payee or of the first or any previous holder; this, because, in all such cases, the title passed by delivery and not in virtue of any assignment. In *Bullard* v. *Bell*, 1 Mason, 243, *Mr. Justice* Story said that to bring a case within the exception contained in the 11th section [593] of the Act of 1789, "The action must not only be founded on a chose in action, but it must be assignable; and the plaintiff must sue in virtue of an assignment." "A note," said he, "payable to bearer, is often said to be assignable by delivery; but, in correct language, there is no assignment in the case. It passes by mere delivery; and the holder never makes any title by or through any assignment, but claims merely as bearer. The note is an original promise by the maker to pay any person who shall become the bearer; it is, therefore, payable to any person who successively holds the note *bona fide* not by virtue of any assignment of the promise, but by an original and direct promise, moving from the maker to the bearer." In *Bank* v. *Wister*, 2 Pet., 326, this court said that it had "Uniformly held that a note payable to bearer is payable to anybody, and is not affected by the disabilities (to sue) of the nominal payee." *Thompson* v. *Lee Co.*, 3 Wall., 331 [70 U. S., XVIII., 178]; *Bushnell* v. *Kennedy*, 9 Wall., 391 [76 U. S., XIX., 788]; *Lexington* v. *Butler*, 14 Wall., 293 [81 U. S., XX., 812]; *Cooper* v. *Thompson*, 13 Blatchf. [434]; *Coe* v. *R. R. Co.*, 19 Blatchf., 522.

The coupons here in suit are payable to the holder thereof, and, upon the authority of the adjudged cases, Perrine is not an assignee within the meaning of the Act of 1875 [18 Stat. at L., 470]. He is entitled to sue without reference to the citizenship of any previous holder.

We perceive no error in the record and the judgment must be affirmed. It is so ordered.

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James H. McKenney, Clerk, Sup. Court, U. S.

Cited—106 U. S., 666; 107 U. S., 35; 109 U. S., 356.

Town of Thompson, Plff. in Err., v. *Orlando Perrine*, No. 75.

Argued at same time by same counsel as preceding case.

Mr. Justice **Harlan** delivered the opinion of the court:

This case is controlled by the decision just made in case No. 76 [*ante*, 298] between the same parties.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CITY OF DETROIT, *Appt.*, v. THOMPSON DEAN AND THE MUTUAL GAS-LIGHT COMPANY.

(See S. C., 16 Otto, 537-542.)

Suit by stockholder against corporation.

A single stockholder in a corporation has the right to institute legal proceedings against it to protect his individual rights; but when he brings a suit, to protect not simply such interests but the property and rights of the corporation against third parties, he must show a clear breach of duty on the part of the directors in neglecting or refusing to act in the matter, and such neglect and refusal must not be simulated but real.

[No. 73.]

Argued Nov. 7, 1882. Decided Jan. 22, 1883.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

The bill in this case was filed in the court below, by the appellee, a stockholder in the Mutual Gas-Light Company, for an injunction to restrain the City of Detroit from disturbing the said Company in the possession of its property and use of streets and public grounds within said City.

The court below having entered a decree granting the injunction, according to the prayer of the bill, the City of Detroit appealed to this court.

The further facts of the case are stated by the court.

Mr. **Henry M. Duffield**, for appellant:

The action of the Board of Directors of the Mutual Gas-Light Company was taken for the express purpose of enabling the complainant to file a bill in this cause against the Mutual Gas-Light Company, as a co-defendant with the City of Detroit, and thus confer jurisdiction upon the Federal Court, although the complainant's interest is identical with that of the Gas Company.

Under the decision in *Williams* v. *Nottawa*, U. S. Supreme Court, October Term, 1881 (104 U. S., 209, XXVI., 719), it was the duty of the circuit court to dismiss the case on its own motion.

Messrs. **George Ticknor Curtis, E. N. Dickerson** and *E. W. Meddaugh*, for appellees:

There was such a refusal of the Company to act as gave the complainant, or any other stockholder, the right to file a bill.

In *Pond* v. *Val. R. Co.*, 12 Blatchf., 281, Woodruff, *J.*, speaking on the subject of the court's jurisdiction says: "It cannot prevent or defeat the right of complainants to sue, if it be true that such directors refused to bring suit in order to drive the complainants to bring suit themselves for their own protection," etc.

"If the grounds of jurisdiction exist, the motives which led thereto are immaterial."

See, also, *Dodge* v. *Woolsey*, 18 How., 334 (59 U. S., XV., 401).

Perdicaris v. *Gas-Light Co.*, 10 Int. Rev. Rec., 110, holds, that if the corporation has neglected to sue, that is sufficient to authorize a bill by a stockholder.

See, also, *Memphis* v. *Dean*, 8 Wall., 64 (75 U. S., XIX., 326); *Newby* v. *R. R. Co.*, 1 Sawy., 63; *Hotel Co.* v. *Wade*, 97 U. S., 13 (XXIV., 917); *Barney* v. *Baltimore*, 6 Wall., 280 (73 U. S., XVIII., 825); *McDonald* v. *Smalley*, 1 Pet., 620.

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Mr. Justice **Field** delivered the opinion of the court:

In December, 1871, the Mutual Gas-Light Company of Detroit, was created a Corporation under a general law of Michigan, for the purpose of manufacturing, selling and furnishing gas for consumption in Detroit. The proposed corporators had previously made application to the common council to authorize the Corporation, when formed, to lay gas-pipes, mains, conductors and service-pipes in the avenues, streets, lanes, highways, alleys, public parks and squares throughout the City; and obtained the passage of an ordinance granting permission to the Company to lay the pipes, subject, however, to certain conditions. Power was conferred by law upon the city authorities to grant the permission upon such reasonable regulations as they might prescribe; and they provided that the permission should cease if the Company should, at any time, combine with any other company concerning rates to be charged for gas, either to the City or to private consumers; and that the Company should not sell its property, franchises or privileges to any other gas-light company, under the penalty of a forfeiture of its works in the City. The Company accepted the terms of the ordinance; erected its manufacturing works in the Township of Hamtranck, just beyond the boundary of the City; laid mains and service-pipes in the streets, and in November, 1872, commenced distributing and supplying gas to private consumers and to the City, and continued to do so up to the time this suit was commenced.

During this period and previously, another corporation, known as The Detroit Gas-Light Company, was in existence and was also supplying gas to private consumers and the City. In June, 1877, the two Companies entered into an agreement to divide the City between them, one to take the part lying easterly of the middle of Woodward Avenue, and the other the part lying westerly of it, each to transfer to the other its property situated in the portion of the other, and each stipulating not to lay mains or to supply gas in the portion of the other, reserving, [539] however, the right to fulfill all obligations resting upon it with respect to any portion of the City. The difference in the value of the property exchanged was $140,000 in favor of the old Company, and this sum the new Company agreed to pay.

The common council, deeming this division of the City and other things done or omitted by the Company to constitute a breach of the conditions upon which permission to lay its pipes in the streets had been granted, passed, on the 14th of December, 1877, an ordinance repealing the previous one, reciting as reasons for it that the Company had not built its gas works in the City of Detroit, but in the Township of Hamtranck; that it had entered into an agreement with the Detroit Gas-Light Company to divide the territory of Detroit between them for the supply of gas; and that it had refused to lay mains in streets on petition of owners or occupants of buildings for a supply of gas.

The repealing ordinance declared that the Company had thus forfeited its gas-pipes, mains, conductors and service-pipes lying within the avenues, streets, lanes, highways, alleys, public parks and squares of the City, and all other property situated within its limits; and that the title to the whole had vested in the City of Detroit. It, therefore, directed the comptroller to assume possession and control of the same and to serve a copy of the ordinance upon the Company. To restrain the enforcement of this ordinance and protect the rights and property of the Company, the present suit was commenced by the complainant, a citizen of New York. The Company had expended large sums of money in the construction of its works and created for that purpose a debt, represented by bonds secured by mortgage upon its property, which, with interest, amounted to $650,000. There was, therefore, an urgent necessity for legal proceedings to stop the seizure of the property. There were only three directors of the Company, two of them residents of Detroit and one of New York; and as the Company could not maintain a suit in the Federal Court against the City they devised such a case of refusal on their part to take the necessary legal proceedings to protect the property and rights of the Company as to give jurisdiction to the Federal [540] Court of a suit brought for that purpose by the non-resident director and stockholder. The three directors discussed the matter among themselves. The president represents himself to have been very belligerent in his disposition. According to his statement, he professed not to want any legal proceedings taken. He proposed to settle the matter by force, and if any man attempted to take the property, to shoot him on the spot. His feelings on the subject must have been very intense, for more than two months afterwards he testified under oath that he would "most assuredly" have shot any man who meddled with him "as quick as wink;" as quick as he would have shot a burglar in his house at midnight. Dean, the complainant, another director, favored more pacific methods; he desired legal proceedings to be instituted. The third director, Meddaugh, was similarly disposed. He was a member of the bar of Michigan, and acting as one of the attorneys of the Company. He favored legal proceedings, but expressed a want of confidence in the local tribunals of the State by reason of the then excited condition of the public mind; he desired to get into the Federal Court, and so he resolved to object to a suit in the state courts. A meeting of the directors was thereupon improvised in his office to carry out the course resolved upon. Dean then asked that the officers of the Company be instructed to protect its property and rights from the execution of the threat contained in the repealing ordinance of the City, and for that purpose to bring suit in the proper court. The matter being discussed, it was resolved: "That the Company, convinced of the improbability of obtaining redress or justice in the local courts, which would be its only recourse in the present excited condition of the public mind—the press of the City having, for some time past, continually aggravated public feeling by exaggeration and falsehood—cannot prudently enter into a litigation with the City, and that no such attempt on its part would now be made." Dean voted against the resolution, the other two directors in favor of it. The resolution having passed, Dean, on the following day, commenced the present suit, alleging the refusal of the directors to institute proceedings in the name of

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ROBERT E. JENKINS, As Assignee in Bankruptcy of SAMUEL J. WALKER, *Plff. in Err.*,

v.

INTERNATIONAL BANK OF CHICAGO ET AL.

(See S. C., 16 Otto, 571–577.)

Writ of error by assignee of bankrupt—limitation of time.

1. Where a judgment in a state court is rendered against one who is shortly thereafter declared to be a bankrupt, a writ of error to that judgment sued out by the assignee is a suit brought by such assignee within the meaning of section 5057 of the Revised Statutes.
2. The limitation of time in that section applies to suits by the assignee to recover debts and other moneyed obligations, as well as to controversies concerning adverse interests in property, more strictly speaking.

[No. 1185.]

Submitted Jan. 3, 1883. Decided Jan. 29, 1883

IN ERROR to the Supreme Court of the State of Illinois.

The history and facts of the case appear in the opinion of the court.

Mr. **W. T. Burgess,** for plaintiff in error.

Messrs. **Julius Rosenthal** and **A. M. Pence,** for defendants.

Mr Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of Illinois.

In the course of a complicated litigation between Samuel J. Walker and his creditors, it became a question whether the International Bank, which was a party to the litigation, had a just and paramount right to certain securities held by it as collateral to debts due by him to the Bank. These were promissory notes secured by mortgage on real estate.

In the progress of the case, the Bank filed its cross-bill, alleging that they held the notes and mortgage not only as security for the specific loan made on them at the time they were re- [572] ceived, but for a large balance due to the Bank from Walker, and praying for a decree for this balance.

Walker denied this and asserted that, by reason of usury, he had overpaid the Bank, which was indebted to him.

The result was a decree in favor of the Bank, finding the amount due on the collateral notes to be $23,116.66; amount due on Walker's three principal notes to the Bank, $17,092.86, and the amount due on the entire indebtedness of Walker to the Bank, $172,474, and that the sum to be realized from the collaterals should be first applied on the three notes aforesaid, amounting to $17,092.76, and the remainder on the general balance due the Bank.

This decree was rendered on the 25th day of April, 1878. Shortly afterwards, Walker was adjudged to be a bankrupt, and Robert E. Jenkins, the plaintiff in error here, became his assignee.

On March 5, 1881, he sued out a writ of error from the Court of Appeals for the First District of Illinois, on which this decree was reversed, and the Bank having removed the case to the Supreme Court of the State, the decree of the Court of Appeals was reversed, on the ground that Jenkins, the assignee, had not brought his writ within the two years allowed to him by the bankrupt law.

He brings the case to this court by writ of error to the Supreme Court of Illinois, in which the only question that we can consider is the correctness of the ruling of that court on that point.

Without searching the record for the precise date at which Jenkins became assignee of Walker, and as such had authority to assert his rights, it is conceded that it was more than two years prior to any movement of his to bring the decree of the Circuit Court of Cook County before the appellate court.

The question was raised in the argument of the case in the Supreme Court of Illinois, whether the writ of error sued out by Jenkins from the Court of Appeals was the beginning of a suit, or was so far a mere continuance of the former suit that the language of the Act of Congress did not apply. That court held, in accordance with its own previous decisions, that a writ of error was the beginning of a new suit, and as this was a question concerning the nature and effect of a writ of error in their own courts, it would seem that it is not reviewable here, or, if so, we should follow the decisions of that court on the subject.

We are, however, satisfied that, within the meaning of the limitation clause of the bank- [573] rupt law, this first appearance of the assignee, more than two years after the decree of the court and the termination of the litigation between Walker and the Bank, is a suit brought by him after that time.

There remains, however, the question, mainly argued before us: whether the suit thus commenced, between the assignee of Walker and the Bank, was one involving an adverse interest touching any property or rights of property transferable to or vested in the assignee. We can see but little reason to doubt that, so far as the controversy related to the right to the collateral securities resting on the mortgage, it was a suit touching adverse interests to property, the property being the notes and the equitable interests in the real estate mortgaged to secure them, and the adverse claims being that coming to Jenkins as assignee of Walker, and the claim of the Bank.

But in that decree there was an adjudication against Walker of a debt to the Bank of more than $150,000 after these collaterals had been applied in payment of the debt thus established, and this decree would be evidence, whether conclusive or not, of the right of the Bank to share in the dividends of the bankrupt's estate.

So that, apart from the collaterals, here was a decree for money which the assignee was interested in reversing if he came in time. We must, therefore, inquire whether, as to this personal judgment, the assignee is barred by the limitation of the bankrupt law.

This question is one which has received the consideration of many of the courts of bankruptcy in this country, but with no unanimity in the result, and its solution depends upon the construction of section 5057 of the Revised Statutes. It reads thus: "No suit either at law or

*Head notes by *Mr. Justice* MILLER.

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in equity shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property, or rights of property, transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time an assignee is appointed." It is asserted by appellant that this limitation can have no application to a case [574] where an assignee is suing to recover on a simple debt or other money obligation, and as the sentence stands in this section there is plausibility in the argument.

It is, however, true in one sense, that debts are property, and this sense of the word is coming more into use in legislation every day. If it be permissible to hold that it was so used in this Act, then the interest of the assignee in the debts due to the bankrupt is an interest adverse to the parties who have to be sued on them before they will pay, and the debts claimed to be due by the bankrupt are matters in which the interest and the duty of the assignee, when they come into contest, are adverse to the creditor. If a debt secured by a mortgage raises, as it unquestionably does when a suit is brought to foreclose it, an interest adverse to the mortgagor, or to some purchaser from him of the equity of redemption, it would be a strange construction, which requires the assignee to bring his foreclosure suit to enforce a debt well secured, within the two years, while as to a simple note, unsecured, he can sue at any time, unless barred by the statute of the State. No reason can be seen for such a discrimination.

Assuming that there is some ambiguity in section 5057, as we find it in the Revised Statutes, we may be permitted to examine the connection in which it stood in the original Bankrupt Act. On reference to that it will be found that it was a part of the 2d section of that Act, the one which conferred upon and defined the jurisdiction of the circuit courts in bankruptcy cases. The part of the section pertinent to the matter in hand is this: "Said circuit courts shall also have concurrent jurisdiction with the district courts of the same district of all suits, at law or in equity, which may or shall be brought by the assignee in bankruptcy, claiming an adverse interest, or by such person against said assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee; but no suit at law or in equity shall *in any case be maintainable by or against such assignee, or* by or against any person claiming an adverse interest touching the property or rights of property aforesaid, *in any court whatsoever*, unless the same shall be brought within two [575] years after the cause of action shall have accrued for or against such assignee; *Provided*, That nothing herein contained shall revive a right of action barred at the time such assignee is appointed."

We are not aware that it has ever been held that this section did not confer upon the assignee the right to bring a suit, whether it was at law or in equity, to recover a debt or other moneyed obligation in the circuit court of the district. If any such doubt was ever entertained, it was put at rest by the 3d section of the Act of June 22, 1874 [18 Stat. at L., 178], which was an Act amending the Bankrupt Law of 1867 [14 Stat. at L., 517] in many particulars.

This section declares that after the words "adverse interests," in line 12 of the section we have quoted, should be inserted "or owing any debt to such bankrupt," thereby making it clear that the jurisdiction did extend to the collection of debts owing to the bankrupt.

The limitation clause of the section, however, needed no amendment, for it applied to all suits, brought in any court, federal or state, by or against the assignee, and using the word "*or*" distributively, it applied to all suits touching an interest in property transferable to the assignee, no difference who was the suitor. The reason of this is that there might be suits brought concerning property or rights of property vested in the assignee, in which he was not a necessary party, as: ejectment against his tenant, or foreclosure of liens paramount to his, to which the plaintiff did not choose to make him a party. It was intended to say that, in any such case, in any court where the suit touched property or rights to property of the bankrupt passing to the assignee, it would be a good defense that it was not brought within two years after the right of action accrued.

This construction is consistent with the language of the original statute and with the policy of it as declared by this court in *Bailey* v. *Glover*, 21 Wall., 342 [88 U. S., XXII., 636], and repeated in numerous cases since.

"It is obviously one of the purposes of the bankrupt law," says the court, "that there should be a speedy disposition of the bankrupt's assets. This is only second in importance to securing equality of distribution. The Act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, [576] without regard to usual modes of trial attended by some necessary delay. Appeals in some instances must be taken within ten days." To prevent the estate being wasted in litigation and delay "Congress has said to the assignee, you shall begin no suit two years after the cause of action has accrued to you, nor shall you be harassed by suits when the cause of action has accrued more than two years against you. Within that time the estate ought to be settled up and your functions discharged, and we close the door to all litigation not commenced before it has elapsed."

The language of the revision in section 5057, though slightly varied from that of the original Act, was not intended to give a different meaning. As it is susceptible of the interpretation that no suit shall be brought by or against the assignee, or by or against any person, touching an adverse interest in property transferred to him by the assignment, which is clearly the meaning of the original Act, this latter construction must be given to the section under consideration.

The judgment of the Supreme Court of Illinois is affirmed in this case, and also in the three other cases between Jenkins and the Bank and other parties, which depend on the same question.

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James H. McKenney, Clerk, Sup. Court, U. S.

Cited—110 U S., 643.

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586] BENJAMIN HAYDEN, *Appt.*,

v.

CHARLES MANNING.

(See S. C., 16 Otto, 586-589.)

Collusive plaintiff, effect of on jurisdiction.

Where the name of the plaintiff in a suit, who has no real interest in the controversy, has been improperly and collusively used for the purpose of creating a case cognizable in this court, the case should be dismissed.

[No. 45.]

Argued Jan. 12,15, 1883. Decided Jan. 29, 1883.

APPEAL from the Circuit Court of the United States for the District of Oregon.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **John H. Mitchell** and *Augustus H. Garland*, for appellant.

Messrs. **Geo. A. King**, *John Mullan*, *W. L. Hill* and *W. W. Thayer*, for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

This is a case which the circuit court should have dismissed under the 5th section of the Act of March 3, 1875 [18 Stat. at L., 470], concerning the jurisdiction of the Circuit Courts of the United States, instead of granting the relief prayed by complainant.

It is charged in the bill that Hayden, the appellee [appellant], while acting as the attorney of Rachel Dove and Bethuel Dove, her husband, purchased under execution a valuable tract of land belonging to Rachel. That he had defended the suit for foreclosure of a mortgage on the property for the Doves, in which a decree was rendered under which it was sold. It is set out with sufficient fullness that, at this sale, he bought the land at less than its value, under circumstances which should subject the title which he acquired to the character of a trust for the benefit of Mrs. Dove.

It is not necessary now to inquire into the truth of that allegation, on which the circuit court rendered a decree in favor of Manning, the complainant in the suit, because we are of opinion that Manning had no such interest in the matter as to enable him to sustain a suit in the Circuit Court of the United States in regard to it.

The sale to Hayden was made March 5, 1864, and he received the sheriff's deed April 26, thereafter. On the 7th day of April, 1875, Rachel and Bethuel Dove conveyed the land to Manning, who brought the present suit May 12, 1876.

[587] It appears in evidence that not long after the sheriff's deed was made to him, Hayden took possession of the land and has retained it ever since, though it is said he obtained the possession unfairly.

In April, 1874, Rachel Dove began a suit in the State Court of Polk County, where the land was situated, against Hayden, to recover these premises, and the court decided against her on demurrer. From this decision she took an appeal to the Supreme Court of the State, which was dismissed by her, as was the suit in the Polk County Circuit Court. In April, 1875, and while this suit was pending in some stage of it, the conveyance was made to Manning of the land in question.

Manning was the husband of the daughter of the Doves, and resided in California, and had the citizenship necessary to enable him to renew the litigation in the Circuit Court of the United States.

The deed purports to be one of bargain and sale for the consideration of $5,000, but no money was ever paid on it. No note or other obligation was given nor any mortgage, as security for the debt. It does not appear that Manning ever promised to pay anything for it.

Mrs. Dove's account of the transaction is this:

"My daughter Elizabeth is the wife of Charles Manning, the plaintiff. Manning never has paid me any money on this land, but he was going to. He never gave me his note. I can't say when I saw Manning last. I think eight years ago. Manning wrote first about having the land conveyed to him; said he would take the matter off our hands. I have not the letter with me."

Mr. Dove says he don't know whether any part of the $5,000 has been paid, either from his own knowledge or from his wife. Manning's deposition was not taken in the case, nor is any word, verbal or in writing, produced as coming from him in regard to this suit. The bill, which is filed in his name, is neither signed nor sworn to by him. Mr. Dove swears that he is the agent and attorney in fact of Manning, and as such he verifies the bill.

The defendant, who is called upon to make full and perfect answer, does so under oath, and denies that Manning was in good faith the lawful owner of the land. No bond for costs was given by Manning or any one for him. Mr. [588] Dove, in swearing to the bill of costs of about $300, does not say that plaintiff had paid any part of them, but that they were incurred in the suit.

There is no evidence that the deed from Dove and wife to Manning was ever delivered to Manning, or was ever in his possession, and there is no reason to suppose it ever left Oregon or that he had been in Oregon for years before and after its execution.

Undoubtedly, Mrs. Dove and her husband could have given their interest in the property to their daughter, and a conveyance in consideration of natural love and affection might have been good.

But this deed was not made to her, nor on any such consideration, but recites a consideration of $5,000 in money, while it clearly appears that no money was paid, none was secured by note or mortgage, and none was promised or intended to be paid.

"Manning wrote to me," says Mrs. Dove, "about having the land conveyed to him; said he would take the matter off our hands." What matter? Manifestly the litigation at that time going on. "I will sue for you in my name. I can go into a court of the United States where you can't go," is what he meant.

There is not a syllable in this record inconsistent with the idea that the deed was made to Manning without his knowledge, recorded in Oregon, and delivered to the lawyers who brought this suit, the same who brought the suit in the state court, without his authority and without any communication from him whatever. If the bringing of this suit was a

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tort, there is no evidence in the record by which Manning could be connected with it or with any assertion of claim under the deed.

It seems to us that Manning's name is used because he is a citizen of a different State from the defendant, for the sole benefit of Mrs. Dove. That he has no real interest in the controversy, and if cognizant of what is going on, of which there is much doubt, is passively permitting the use of his name for the benefit of the Doves in order to make a simulated case of jurisdiction in the Federal Court.

[589] This is precisely the case provided for in the Act of 1875.

The suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the circuit court, because the real controversy is wholly between citizens of the same State. "The name of Manning, the plaintiff in the suit, has been improperly and collusively used (in the language of this statute) for the purpose of creating a case cognizable under it." *Hawes* v. *Oakland*, 104 U. S., 450 [XXVI., 827]; *Williams* v. *Nottawa*, 104 U. S., 209 [XXVI., 719]; *Detroit* v. *Dean*, present Term [*ante*, 800].

The decree of the Circuit Court is reversed and the case remanded, with direction to dismiss the bill for want of jurisdiction and without prejudice to any other action in a proper court.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—114 U. S., 146.

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[663] TOWNSHIP OF CHICKAMING, *Plff. in Errr.*,

v.

SAMUEL M. CARPENTER.

(See S. C., 16 Otto, 663-668.)

Jurisdiction of Circuit Court—Michigan practice—township bonds—pleadings—when bonds may be delivered to another company.

1. The Circuit Court of the United States has jurisdiction of a suit brought by a citizen of another State, to recover the amount due on the bond of a municipal corporation of Michigan, payable to a corporation of Michigan or bearer, or to bearer.
2. In Michigan, upon the plea of the general issue in an action upon any written instrument, the plaintiff cannot be put to the proof of the execution of the instrument or the handwriting of the defendant, unless the plea is verified by affidavit.
3. Where, by the law of a State, if any township voted aid to railroads, it was authorized within sixty days after the vote to issue its coupon bonds for the amount so voted, valid bonds may be issued after that time, and antedated.
4. Under such a statute, an affidavit, denying that the bonds were issued within the sixty days, puts in issue the question of their validity, if they were issued after that time.
5. Municipal bonds, in aid of a railroad company, may be delivered to a corporation created by the consolidation of the corporation to which they were voted with another.

[No. 154.]

Argued Jan. 19, 1883. Decided Jan. 29, 1883.

IN ERROR to the Circuit Court of the United States for the Western District of Michigan.

This action was brought in the court below by the defendant in error, to enforce the payment of certain bonds and coupons, alleged to have been issued by the Township of Chickaming, in aid of the construction of the Chicago & Michigan Lake Shore Railroad, under an Act of the Legislature of the State of Michigan, approved March 22, 1869.

The declaration alleged: that the bonds were issued and dated June 1, 1869, in pursuance of a vote of the Township, authorizing the same:

That the bonds were delivered to the State Treasurer of Michigan by the Township, and that the state treasurer afterwards delivered the same to the railroad company;

That the plaintiff obtained the bonds from the railroad company and became the lawful bearer and owner thereof, entitled to receive payment upon the same.

The bonds were signed by Oliver L. Newkirk, as supervisor, and by O. C. Gillett, as township clerk.

The defendant gave notice that it would show: that O. C. Gillett was not an officer of said Township; that the bonds did not legally come into the possession of the state treasurer and that the state treasurer never delivered the said bonds prior to Feb. 18, 1870;

That the vote, authorizing the issue of the bonds, was for aid by donation only and was had in May, 1869;

That the Chicago & Michigan Lake Shore Railroad Company, in whose aid they were voted, consolidated with another railroad company, before the bonds were issued, and that the bonds were issued to the consolidated company, and not to the company for which they were originally voted.

The trial resulted in a verdict and judgment for the plaintiff for $6271.75, with interest and costs. Whereupon the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **Edward Bacon** and *George W. Lawton*, for plaintiff in error:

Section 6630, Compiled Laws of Michigan, 1871, has ever been construed to prohibit any suits upon liquidated demands against any township, and to limit the creditor to his remedy by *mandamus*.

Marathon v. *Oregon*, decided in 1860, 8 Mich., 378; *Dayton* v. *Rounds*, 27 Mich., 82; see, also, *People* v. *Township Board of La Grange*, 2 Mich., 187; *People* v. *Auditors of Wayne Co.*, 5 Mich., 223; *People* v. *Townships of Porter and Calvin*, 18 Mich., 101; *McArthur* v. *Duncan*, 34 Mich., 28; *Just* v. *Wise*, 42 Mich., 574.

The plaintiff was bound to prove in the ordinary manner the legal signing and legal delivery of such bonds.

Freeman v. *Ellison*, 37 Mich., 462.

Mr. **Mitchell J. Smiley**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The assignments of error in this case present the following questions:

1. Whether an action at law can be maintained in the Circuit Court of the United States against a municipal corporation of Michigan upon municipal bonds or the coupons for interest attached thereto. [665]

2. Whether the Circuit Court of the United

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States has jurisdiction of a suit brought by a citizen of a State other than Michigan, to recover the amount due on an obligation of a municipal corporation of Michigan, for the payment of a sum of money to a corporation of Michigan or bearer, or to bearer.

3. Whether the obligations and coupons sued on in this case could be introduced in evidence under the pleadings, without proof that the person who signed them as township clerk actually held that office at the time his signature was affixed and the obligations were delivered; and,

4. Whether, since the obligations were not delivered to the corporation to which they were voted by the Township, but to a corporation created by the consolidation of that corporation with another, they are valid.

1. As to the right to sue a municipal corporation of Michigan in the courts of the United States on an obligation for the payment of money:

If we understand correctly the cases in the courts of Michigan to which our attention has been directed, they decide no more than that in the courts of the State the remedy for the recovery of money for a municipal corporation, on a liquidated demand, is by *mandamus* against the proper officer to require him to do his duty under the law with respect to the discharge of the obligation which has been entered into, and that for such purposes, in that jurisdiction, an independent judgment in an action at law against the corporation is not necessary. There is no law of the State prohibiting such a suit. All that has been determined is that, in the courts of the State, a judgment is not necessary to lay the foundation for a writ of *mandamus* to require the officer to do his duty.

In the courts of the United States, however, a *mandamus* can only be granted in aid of an existing jurisdiction, and in this class of cases a judgment against the corporation is an essential prerequisite to such a writ, although in the courts of the State it is not. This whole subject was fully considered at the last Term, in *Davenport* v. *Dodge Co.*, 105 U. S., 242 [XXVI., 1020], where the other cases establishing the rule are cited.

[666]

2. As to the jurisdiction of the courts of the United States in a suit by the assignee of an obligation of a municipal corporation of a State, payable to a citizen of the same State or bearer, or to bearer:

This question was decided at the present Term, in *Thompson* v. *Perrine* [*ante*, 298]. The Act of March 3, 1875, ch. 137 [18 Stat. at L., 470]; 1 Sup. R. S., 174, which provides, section 1, that the District and Circuit Courts of the United States shall not "Have cognizance of any suit founded on a contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange," is certainly not a limitation on the Judiciary Act of September 24, 1789, ch. 20, 1 Stat. at L., 79, which provided, section 11, that the same courts should not "Have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." Under the Act of 1789 it was always held that an obligation payable to bearer, or to an individual or bearer, did not come within the prohibition of suits by assignees. *Bank* v. *Wistar*, 2 Pet., 326; *Bushnell* v. *Kennedy*, 9 Wall., 391 [76 U. S., XIX., 738]; *Lexington* v. *Butler*, 14 Wall., 293 [81 U. S., XX., 812].

3. As to the necessity for proving that the township clerk, whose signature appears on the bonds and coupons, was, in fact, township clerk when he affixed his signature:

The name of the person who signed the bonds as clerk, is O. C. Gillett. That O. C. Gillett signed the bonds was admitted, but it was denied under oath that he was clerk of the Township prior to the end of the summer of 1869, which was more than sixty days after the bonds were voted by the Town. The Statutes of Michigan and the rules of the circuit court in force when this cause was tried, provided that, upon the plea of the general issue, in an action upon any written instrument under seal or without seal, the plaintiff should not be put to the proof of the execution of the instrument or the handwriting of the defendant unless the plea was verified by affidavit. In this case the suit was on a written instrument, and the plea was the general issue. This plea, however, was not verified in broad terms, but an affidavit was filed to the effect, argumentatively, that the township clerk, whose signature was necessary under the law to the due execution of the bonds, could not have signed them before the end of the summer of 1869, because he was not clerk until after that time. The law under which the bonds were issued; provided that, if any township voted the aid to railroads, which was authorized, it "Shall, within sixty days after the question of aid is determined by a vote of the electors, * * * issue its coupon bonds for the amount so determined to be granted."

[667]

The effect of the affidavit was to raise the question whether the bonds were valid if issued after the sixty days. The affirmative of showing that they were issued within the sixty days was probably put by the pleadings on the plaintiff. This showing he did not make. Consequently, the objection to the admissibility of the bonds resolved itself into the question of their validity, issued as they were after the time.

We see nothing in the statutes which takes away from the township authorities the right to execute and deliver bonds, if, for any reason, it is not done within the time named. The word "shall" as used in the statute undoubtedly gives the township officers the whole of the sixty days to get the bonds out, but it certainly does not imply that if they fail to do it voluntarily within the time, they cannot be compelled to do so afterwards. And if they can be compelled to do so, it necessarily follows that they should do it voluntarily. We have not been referred to any decisions by the courts of Michigan to the contrary, and, construing the statute for ourselves, we think that valid bonds may be issued after the time. This being so, the antedating does not invalidate the bonds. In this suit, no attempt is made to recover for interest accruing before actual delivery.

4. As to the issue to the consolidated company:

This precise question was before us at the last

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Term, in the case of *New Buffalo* v. *Iron Co.*, 105 U. S., 76 [XXVI., 1025], and decided ad-
[668] versely to the claim of the plaintiff in error. We see no reason for reconsidering that case, and this cannot be distinguished from it.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 356.

COUNTY OF KANKAKEE, *Plff. in Err.*, *v.* ÆTNA LIFE INSURANCE COMPANY.

(See S. C., 16 Otto, 668-672.)

Bonds in aid of railroads—effect of statutes—Illinois law.

1. A charter of a railroad company, authorizing townships, corporate towns and cities along its line to subscribe to the capital stock of such company, does not limit the operation of the general laws of the State authorizing counties to subscribe for stock in the company and issue bonds therefor.
2. Where a county in Illinois is organized under the Township Act, the supervisors are the proper officers to issue the county bonds.

[No. 1146.]

Submitted Jan. 19, 1883. Decided Feb. 5, 1883.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The history and facts of the case appear in the opinion of the court.

Mr. **Francis H. Kales**, for plaintiff in error:

I. There was a total want of authority in the municipal officers of the County of Kankakee to issue the bonds to which the coupons in question were attached.

Charter of Kank. & Ill., etc., R. R. Co., secs. 16, 17; General law, Nov. 6, 1849; Law Amendatory, approved Mar. 1, 1854; Broom, Leg. Max., 7th ed., 664, 665; *Wells* v. *Supervisors*, 102 U. S., 625 (XXVI., 122); *Mayor* v. *Ray*, 19 Wall., 468 (86 U. S., XXII., 164); *Gaddis* v. *Richland Co.*, 92 Ill., 119.

II. The power to issue bonds, if it can be held there was any, was conditional, and the conditions were part of the power conferred.

Sec. 4, General Law, Nov. 6, 1849; Act, March, 1854, amendatory, etc.; *Marshall Co.* v. *Cook*, 38 Ill., 44; *Daw* v. *Met. Board*, 12 C. B. (N. S.), 161; *Gaddis* v. *Richland Co.*, 92 Ill., 119; *East Oakland* v. *Skinner*, 94 U. S., 255 (XXIV., 125); *Jasper Co.* v. *Ballou*, 108 U. S., 750 (XXVI., 425); *Schuyler Co.* v. *People*, 25 Ill., 181; *Marsh* v. *Fulton Co.*, 10 Wall., 676 (77 U. S., XIX., 1040); *Loan Asso.* v. *Topeka*, 20 Wall., 656 (87 U. S., XXII., 455).

The principle of estoppel does not apply, where bonds are void in their inception for want of authority to issue them or where they have been issued by a corporate body or its agents, who were not authorized by law to issue the same.

Marsh v. *Fulton Co.*, 10 Wall., 677 (77 U. S., XIX., 1040); *Loan Asso.* v. *Topeka* (*supra*).

As said in *East Oakland* v. *Skinner* (*supra*), where there is a total want of authority to issue bonds, there can be no such thing as a *bona fide* holder.

Messrs. **O. J. Bailey** and **James H. Sedgwick**, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

The judgment sought to be reviewed by this writ of error was rendered upon coupons attached to municipal bonds purporting to be issued by the plaintiff in error. The cause was tried by the court without the intervention of a jury, and the facts appear in a bill of exceptions. Each bond of the issue contains a recital that it "Is issued under and pursuant to orders of the Board of Supervisors of Kankakee County, Illinois, for subscription to the capital stock of the Kankakee & Illinois River Railroad Company, as authorized by virtue of the laws of the State of Illinois authorizing cities and counties to subscribe capital stock to aid and construct railroads; also in accordance with the provis-
[669] ions of an Act of said State of Illinois entitled 'An Act to Fund and Provide for Paying the Railroad Debt of Counties, Townships, Cities and Towns,' in force April 16, A. D. 1869."

The bonds were sealed with the county seal, signed by the chairman of the board of supervisors, and countersigned by the clerk of the county court, under the order of the board of supervisors of the County, September 20, 1870.

The defendant in error is a *bona fide* holder for value, having purchased before due in the open market and without notice of any defense.

The defense made, however, and overruled in the court below, is matter of law, and alleges that the bonds are void, in whosesoever hands; first, because the County had no power under the law to issue them at all; and, second, because they were issued by the board of supervisors of the County, who were not the representatives of the County, empowered to bind it.

The charter of the Kankakee & Illinois River Railroad Company, in force April 15, 1869, contained a provision (sec. 16) that "To further aid in the construction of said railroad, townships, corporate towns and cities on or along the line of said railroad may subscribe to the capital stock of said company in sums not exceeding $100,000 respectively;" provided that such subscription shall have been authorized by a majority of the legal voters at an election called and held for that purpose; in which event, bonds of such township, corporate town or city should be issued in payment thereof to the railroad company. The same Act (sec. 17) provides that "Nothing herein contained shall prevent counties and cities from taking and voting for subscriptions in the stock of said company, under the general laws of the State."

The general laws of the State referred to, include "An Act supplemental to an Act entitled 'An Act to Provide for a General System of Railroad Incorporations,'" which took effect November 8, 1849. Laws of 1849, 2d sess., p. 33. That statute authorizes every county in the State to subscribe for stock in any railroad company, already or thereafter to be organized or incorporated, to the extent of $100,000; and, for the payment of the same, expressly empowers [670
them to borrow money, at a rate of interest not exceeding ten per cent per annum, and to pledge the faith of the county for the annual payment of the interest and the ultimate redemption of the principal, or, if the judges of the county

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court should deem it most advisable, they are authorized to pay for such subscription in bonds of the county, bearing interest not exceeding the rate aforesaid; and the railroad company are also authorized, by a separate section of the Act, to receive such bonds in payment of such subscriptions.

The contention now is on the part of the plaintiff in error, that the language quoted from the 17th section of the charter of the Kankakee and Illinois River Railroad Company is a reservation merely of the power given by the general laws of the State to counties to subscribe for stock; and as the power to issue bonds in payment therefor is a distinct power, it is not included in the reservation and, therefore, ceased to exist on the passage of the Act, so far as the present transaction is concerned.

But the obvious meaning of the clause relied on to accomplish that result is, merely, that the general laws of the State, authorizing counties to subscribe for stock in that railroad company, shall remain unaffected by the charter, which conferred similar power on townships, corporate towns and cities on the line of the road, and not in any manner to limit the operation and application of those general laws upon the subject. The very purpose of the proviso seems to us to have been to exclude the very conclusion now sought to be drawn from it.

Indeed, if the argument be good for anything at all, it results that, under the operation of this reservation, the naked power to subscribe for stock remains in the counties, without any authority and, therefore, without any obligation to pay for it; for if the power to issue bonds is taken away, so also is the power to pledge the faith of the county for the annual payment of the interest and the ultimate redemption of the principal, a pledge which means, of course, that payment shall be made out of the revenues of the county derived from taxation.

As such a construction of law confesses its own absurdity, it is not necessary to make any formal refutation of it.

[671] It is further contended, on the part of the plaintiff in error, that if, at the date of these bonds, Kankakee County had corporate power to execute and issue them, it could only be done by the county court according to the terms of the statute conferring that power. Such, in fact, is the language of the general law of 1849, from which the power is derived.

But the County of Kankakee, it is admitted, was organized under the Act to provide for township organization of April 1, 1851. Laws of 1851, p. 85. Under that mode of organization, the corporate powers of counties, otherwise exercised by the judges of the county court, are devolved upon a board of supervisors, such as, in the present instance, executed and issued the bonds in question. Article 15, section 4, of that Act declares that "The powers of a county as a body politic can only be exercised by the board of supervisors thereof, or in pursuance of a resolution by them adopted." And article 16, section 4, provides that "The board of supervisors of each county in this State shall have power, at their annual meetings, or at any other meeting, * * * to perform all other duties, not inconsistent with this Act, which may be required of or enjoined on them by any law of this State to the county courts."

In *Green* v. *Wardwell*, 17 Ill., 281, it was said that the board of supervisors were the legal successors to the county commissioners' court, as had been previously decided in *People* v. *Thurber*, 13 Ill., 554. In *Prettyman* v. *Tazewell Co.*, 19 Ill., 406, the very point here raised was decided, and it was held that under the Act of 1851 it was the duty of the board of supervisors to act instead of the county court in calling an election to vote on the question, in making the subscription for the stock, and in issuing county bonds in payment therefor. The Act of April 1, 1861, "To reduce the Act to provide for township organization and the several Acts amendatory thereof into one Act and to amend the same," Sess. L. of Ill., 1861, pp. 216-237, removes all doubt on the subject. It confers (art. 14, sec. 6, 8th clause) upon the board of supervisors authority "To perform all other duties, not inconsistent with this Act, which may be required of or enjoined on them by any law of this State, *or which are enjoined upon county courts, when holding terms for the transaction of county business in those counties not adopting township organization.*". This Act was in force when the bonds sued upon in this case were issued, and they are governed by it. [672] The case of *Gaddis* v. *Richland Co.*, 92 Ill., 119, relied upon by counsel for plaintiff in error on this point, is not inconsistent with this result in the present case, because that decision is based on the words of the charter of the railroad company conferring the authority to subscribe to its capital stock, which, in the opinion of the court, expressly limited the exercise of the power to the county court. The same comment may be made upon the case of *Schuyler Co.* v. *People*, 25 Ill., 181.

We find no error in the record, and the judgment of the Circuit Court is, accordingly, affirmed.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

UNITED STATES, Intervener, *Appt.*,
v.
JAMES H. WILSON, Receiver, etc.

(See S. C., 16 Otto, 620-622.)

Certificates of indebtedness, not taxable.

Certificates of indebtedness issued by a receiver of a railway company, not intended to circulate or to be used as money, are not taxable as "circulation," under section 3408 R. S.

[No. 157.]

Argued Jan. 23, 1883. Decided Feb. 6, 1883.

APPEAL from the Circuit Court of the United States for the Middle District of Tennessee.

This is a case in which the United States appears as an intervener, demanding payment of a tax upon "circulation issued" between the months of May, 1873, and November, 1874, inclusive, by the Receiver of the St. Louis and Southeastern Railway Company under an order of court, the cause in which the intervention occurs being one for the foreclosure of a mortgage given by the company to secure its bonds.

A copy of one of the certificates of indebtedness, relied upon as justifying the claim of the United States, is as follows:

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No. 3491.) (1874.
Saint Louis and Southeastern Railway Company.

Certificate of indebtedness, good for twenty dollars, to H. W. Gardner, paymaster, or bearer, payable at the office of the Treasurer, Saint Louis, Mo., four months after date, with interest at the rate of ten per cent per annum. Good only when countersigned by the paymaster of the company.

J. F. Alexander,
Treasurer.

I. P. Hains, Auditor,
Countersigned:
H. W. Gardner, Paymaster.

148. $20,000) (Due Dec. 6, 1874.

Twenty-five per cent of freight bills due the company may be paid in these certificates at their face value before maturity thereof.

These certificates were issued under orders of the court appointing a Receiver "For the purpose of providing money to make payments on account of the balance of purchase money due the State of Tennessee for the road sold as the Edgefield & Kentucky Railroad, from time to time to issue his certificates, which, altogether, shall not exceed $250,000 on so much of the road mentioned in the pleadings as lies and is situated in the State of Tennessee, in such general form as may be approved by complainants, providing for the payment thereof out of any of the moneys that are applicable for that purpose, which certificate shall bear interest at a [621] rate not exceeding ten per cent per annum, and the sums represented by such certificates shall, unless previously discharged, be paid out of any moneys realized upon a foreclosure and sale of the mortgaged property within the jurisdiction of this court, equally with any other liability incurred by the Receiver in the management of said railroad and the protection of the said property coming into his hands as Receiver as aforesaid. And it is further ordered that said certificates may be sold below par if necessary so to do."

The court below having entered an order dismissing the petition, the intervener appealed to this court.

Mr. **S. F. Phillips,** *Solicitor-Gen.*, for appellant.

No counsel appeared for the appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

We are not satisfied that the certificates of indebtedness, on account of which the United States have assessed the taxes petitioned for, were calculated or intended to circulate or to be used as money. They were not, therefore, taxable as "circulation" under the 3d clause of section 3408 of the Revised Statutes.

The decree dismissing the petition of intervention is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

See 16 OTTO.

COUNTY OF MADISON, *Plff. in Err.*,
v.
THOMPSON M. WARREN.

(See S. C., 16 Otto, 622, 623.)

Review of case tried without a jury.

In a case tried by the court without a jury, if a written stipulation waiving a jury is not shown affirmatively in the record, none of the questions decided at the trial can be re-examined here on writ of error.

[No. 1042.]

Submitted Jan. 19, 1883. Decided Feb. 5, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The case is sufficiently stated by the court.

Mr. **Chas. P. Wise,** for plaintiff in error.

Mr. **T. C. Mather,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a case tried and determined by the court without the intervention of a jury. The record does not show any stipulation in writing waiving a jury. The errors assigned all relate to rulings of the court on the trial, excepted to at the time and presented by bill of exceptions. The rule is well settled that if a written stipulation waiving a jury is not in some way shown affirmatively in the record, none of the [623] questions decided at the trial can be re-examined here on writ of error. *Kearney* v. *Case*, 12 Wall., 283 [79 U. S., XX., 397]; *Gilman* v. *Ill. & Miss. Tel. Co.*, 91 U. S., 614 [XXIII., 409]; *Boogher* v. *Ins. Co.*, 103 U. S., 96 [XXVI., 311]; *Hodges* v. *Easton*, at the present Term [*ante*, 169].

For this reason, and without passing on any of the questions presented by the assignment of errors, we affirm the judgment.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 607, 608.

County of Alexander, Plff. in Err., v. *John F. Kimball*, No. 1091. Argued and decided at same time as preceding case. Same counsel for defendant in error, and **William B. Gilbert,** for plaintiff in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This, like *Madison Co.* v. *Warren*, just decided [*supra*], is a case tried by the court, and there is nothing in the record showing a stipulation in writing waiving a jury. *The errors assigned all relate to rulings at the trial, and the judgment is affirmed for the reasons stated in the opinion filed in the case of the* County of Madison.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 607, 608.

END OF VOL. 106.

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERM, 1882,

Vol. 107.

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OCTOBER TERM, 1882,

AND REPORTED HEREIN,

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THE DECISIONS

OF THE

Supreme Court of the United States.

AT

OCTOBER TERM, 1882.

STANDARD OIL COMPANY, *Plff. in Err.*,
v.
GEORGE H. VAN ETTEN.

(See S. C., 17 Otto, 325-335.)

Mistake in quantity of goods—question for jury—sale of goods—account stated—evidence—cross-examination.

1. Where goods are sold on a contract, subject to the count of an inspector at a particular place, his count is subject to impeachment for fraud or mistake and direct evidence of the fact of a mistake is not necessary. Proof of a similar count at another place, before shipment, is admissible.
2. Whether it was more probable that the apparent difference between the two counts was lost in transportation than that there was error in one or both counts, was a question for the jury.
3. Where a sale of goods is completed, the risk follows the title; any loss that subsequently occurs by non-delivery by the carriers or otherwise, will be the loss of the buyer.
4. An account rendered becomes an account stated, unless objected to within a reasonable time, and cannot afterwards be impeached except for fraud or mistake. What constitutes a reasonable time in such a case is a question of law.
5. Where there are two counts in evidence as to the number of pieces of heading sold, the jury are not obliged to adopt either one, but may proceed upon the supposition of possible errors in both counts, and make probable allowances for such errors, although no mathematical calculation can be made to demonstrate the exact accuracy of the result.
6. The question asked on cross-examination, with a design to impeach the witness by subsequent contradiction, whether he had not recently made certain statements "to different parties, in talking about the matter," was clearly incompetent, as too indefinite.

[No. 56.]

Argued Oct. 27, 30, 1882. Decided Nov. 20, 1882.

IN ERROR to the Circuit Court of the United States for the Eastern District of Michigan.

The history and facts of the case appear in the opinion of the court.

Messrs. Don M. Dickinson and **Levi T. Griffin,** for plaintiff in error.

Messrs. M. E. Crofoot, **Harrison Geer** and **Walter H. Smith,** for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

This action was originally brought in the State Circuit Court for the County of Genesee, in Michigan, and removed by the plaintiff in error, who was defendant below, into the Circuit Court of the United States for the Eastern District of Michigan. The defendant in error sued as assignee of Merritt & Helme, partners, as J. J. Merritt & Co., who were assignees of J. J. Merritt, upon a certain contract entered into between him and the Standard Oil Company, and subsequent modifications thereof, to recover a balance alleged to be due thereon on account of the price of certain headings for oil barrels sold and delivered in pursuance thereof.

By the original contract, dated October 4, 1873, Merritt, described as of Lapeer, Michigan, sold the Standard Oil Company 2,000,000 headings suitable for oil barrels, to be sawed twenty-two inches in length, full one inch thick on sap, and full one half inch thick on the heart edge, and whenever more than two pieces are required to make a head the same shall be counted as two; to be delivered on board the cars at Cleveland, Ohio, on or before March 1, 1875, subject to the count and inspection of the Standard Oil Company, who agreed to receive and pay for the same as fast as inspected, at the [327] price of $40 per thousand. Merritt also agreed that full one half of the whole amount of the heading should saw full two-pieced heading, and the Standard Oil Company agreed in that case, and if the other half were not more than three-pieced heading, they would pay an additional $1 per thousand on the whole amount. It was further agreed that Merritt should have the privilege of drawing, on sight drafts, for $25 per thousand, through bank, accompanied by duplicate bill of lading signed by railroad company, as evidence of shipment, and that the cars should be so loaded as to have a net value in Cleveland of amount of draft after culling and paying freight.

This contract was modified by a supplemental agreement of April 1, 1874, Helme then becoming a party to it, by which it was stipulated that Merritt & Co. should make and deliver the heading, properly piled on land in Lapeer controlled by the Standard Oil Company; the latter to furnish a man to count the heading as nearly as might be from week to week as piled, but not to inspect it; the object of the count being to obtain an approximate estimate of the heading thus piled, in order to determine from time to time the amount of advances to be made there-

NOTE.—*What constitutes an account stated.* See *note* to Wiggins v. Burkman, 77 U. S., XIX., 884.
When an account stated is impeachable for fraud, mistake, omission, accident, usurious charges. See *note* to Perkins v. Hart, 24 U. S. (11 Wheat.), 237.

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on; but thereupon the delivery of the heading so counted should be deemed complete, and the heading should then become the property of the Standard Oil Company absolutely, Merritt & Co. being entitled to draw upon certificates of such counts at the rate of $20 per thousand, on which advances the Oil Company were to be allowed interest at the rate of ten per cent per annum until the heading should be received at Cleveland, and also to charge the cost of insurance thereon to the amount of $21 per thousand, the loss by fire, if any, above that amount to be borne by Merritt & Co. In all other respects the terms of the original contract were to govern.

On May 29, 1874, another modification of the contract was made, which recited that "Through an error made by the inspector employed by said Standard Oil Company, the said J. J. Merritt & Co. have received from the said Standard Oil Company money in excess of the amount" which under the contract they were entitled to receive, amounting to about $2,500, and made [328] certain provisions as to the time and mode in which it should be refunded, but otherwise left the contract unchanged.

On August 24, 1874, a further modification was agreed to, increasing the amount of the advances to $25 per thousand on the second million of the heading.

The heading was manufactured mostly in 1874 and was piled on each side of the railroad track, upon land leased for that purpose by the defendant below, and shipments begun in May, 1875.

Testimony on the part of the plaintiff below was offered and admitted to show that in loading, an accurate account was made and kept of each car loaded; of the number of the car; the line to which it belonged; and the number of pieces in each car; and that there were 391 car loads, containing in all 2,691,660 single pieces.

After the first four car loads had been shipped through, all rail, an arrangement was made between the parties by which the rest of the heading was to be sent by rail from Lapeer to Detroit, a distance of sixty miles, and thence by vessel to Cleveland. These first four car loads by rail and the first cargo by vessel were counted and inspected by the defendant below at Cleveland, and returns of the result made to Merritt & Co. These returns showed the number of matched headings and the number of single pieces rejected, on inspection, as deficient in size and quality, called "culls;" and it appearing that these were but a small portion of the whole, it was then agreed that if Merritt & Co. would cull before shipment as closely as they had done in these shipments, the defendant would not cull any more at Cleveland, but would merely match and count the matched heads.

Evidence was offered, on the part of the plaintiff below, and admitted, to prove that the subsequent deliveries were equal on an average with these shipments as to quality and size; and that, calculating the entire quantity by this comparison, it would show a delivery of 263,303 matched headings, more than had been accounted for, which, at $40 per thousand, amounted to $10,532.12.

It was in evidence, on the part of defendant [329] below, that on the receipt of the heading at Cleveland, it was inspected by their inspector. This inspector being called as a witness, testified that he actually matched the whole of the first cargo as it was counted and inspected, but the rest by only averaging from samples; that is, he laid off and piled up a thousand pieces, and arrived at the matching by seeing how many pieces it took to make the number of inches, and made an average from that. The whole number of pieces, as taken by the teamsters, was reported to him, of which he made a record, and then reduced it to matched heading, which he reported to the Company. The number of single pieces, in gross, was 2,296,160, making of matched headings, 1,958,539 pieces. This, he said, was the usual mode of counting and matching.

It was admitted, on the part of the defendant below, that in going carefully over the inspector's calculations, errors had been discovered in computation, twenty-five in number, some in favor of and some against the Company, and resulting in a balance of $144.34 against them, for which they admitted their liability.

On the basis of the count of their inspector, the Standard Oil Company rendered to Merritt & Co. an account, dated August 20, 1875, showing a credit balance of $542.54. That balance was paid and accepted, and no objection made to the statement of the account, until the bringing of this suit, January 10, 1876. One car load of heading was shipped after the close of that account, and was accounted for September 25, 1875.

There was other evidence, on each side, which, it was claimed, tended to establish the accuracy of the counts, respectively, made at Lapeer and at Cleveland. There was no evidence, bearing upon the question, of any loss of heading between Detroit and Cleveland; but it did appear in evidence that when the heading was loaded in Detroit, upon vessels, bills of lading were made and delivered to the captains of the boats, showing the number of car loads of heading on each vessel, which bills of lading were, upon the arrival of the vessels in Cleveland, delivered to the defendant below, at its office, when freight was paid thereon and charged to Merritt & Co., the bills of lading being retained by the Standard Oil Company. There was no evidence, tending to impeach the good faith of the count on either side, or that [330] the inspector of the defendant below was not a competent person for the business intrusted to him.

The court charged the jury, in substance, that, by the terms of the contract, as modified on April 1, 1874, the heading became the property of the Standard Oil Company, on delivery at Lapeer on land leased by it, but subject to their inspection and count at Cleveland; that, if that count was made fairly and in the exercise of the best judgment of the inspector, it would be binding on the plaintiff, unless its variance from the actual truth was too great to be accounted for by any error of judgment, in which case the plaintiff was not precluded from showing a mistake; that if, upon all the evidence, the jury should be unable to determine whether there was fraud or mistake in the count upon either side; or if, upon being satisfied that there had been fraud or mistake, they were unable to determine which party is responsible for it, they must find for the defend-

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ant, except as to the small amount admitted to be due. And the jury was also instructed, that the count and inspection, so far as it involved the culling or rejection of defective pieces and matching, so as to determine how many single pieces were required to make a matched heading, according to the contract, was a matter of judgment on the part of the inspector, which, if honestly exercised, would be binding; and that, consequently, the proof of mistake, upon the case, as it arose upon the evidence, was confined to the count of the whole number of single pieces, and the consequent error, if such were proved, as to the number of matched headings; although the defendant Company was not bound by the contract to make a gross count to determine the whole number of single pieces, or to keep any memorandum or estimate of any such gross count, or to make return thereof to Merritt & Co., its duty being performed if it handled all the heading delivered to it and honestly and correctly counted it in such a way as to determine the number of complete heads.

As to the account stated and rendered, the court charged the jury, in effect, that, the account having been rendered in September, 1875, and no objection having been made until January, 1876, by the bringing of the suit, it had [331] been kept such a time as made it an admission on the part of Merritt & Co. of its correctness, but that the plaintiff was not estopped from showing fraud or mistake in it, which, however, should be made clearly to appear; the burden of proof resting upon the plaintiff to establish it.

Various exceptions were duly taken to the rulings of the court, in the admission of evidence, in refusing to instruct the jury as requested, and to the charge as given, which, so far as necessary, will be referred to in their order. A verdict was returned in favor of the plaintiff below for $7,688, and judgment rendered thereon, which the defendant below now brings into review upon this writ of error.

1. It is objected by the plaintiff in error, in the first place, that the court erred in admitting evidence as to the counts, by both parties, of the whole number of single pieces of heading, and submitting to the jury the comparison between them, as furnishing any means of establishing error in the count of matched headings.

It is argued that the count of gross pieces was not recognized by the contract, as it contemplated only a count of matched headings; and that, as this involved culling the bad from the good and the matching of single pieces to constitute the heading required by the contract and then only a count of the number of the latter, the process involved, at least in two of its steps, the exercise of skill and judgment and made it necessary, if mistake was relied on, to show directly that it had occurred in the actual count of matched headings.

But, as we have already stated, the culling had been dispensed with after the first four cargoes; and the matching, as testified to by the inspector, was made upon an estimate based upon a few experiments, according to which, upon an average, the whole number of single pieces was reduced to matched headings. It did become necessary, therefore, for the inspector to make a count of the single pieces, as the means of arriving at the number of matched headings.

It was also contemplated by the contract that a count of single pieces should be made at Lapeer, by a counter, also appointed by the defendant below, for the purpose of determining the amount of advances to which Merritt & Co., were entitled; and although this count was not the final and conclusive one, it was quite legiti- [332] mate to use it in comparison with that made at Cleveland, as one mode of testing the accuracy of the latter. And this comparison was justified by the evidence, also objected to, that in those particulars which might affect the ratio of single pieces to matched heading, such as size, quality, etc., the early cargoes, in respect to which that ratio had been determined by actual inspection and count, averaged no better than all subsequent deliveries. It furnished to the jury, quite fairly and consistently with the intent of the parties to the contract, a means of determining whether there had not been a mistake in the last count, properly limited by the court in the rule, that the discrepancy must be so great, as that it could not reasonably be accounted for by any mere variation of judgment in the matter of matching.

It is admitted by counsel for plaintiff in error, and such undoubtedly is the law, that the count of the inspector at Cleveland was subject to impeachment for fraud or mistake; the mistake being not a mere alleged error of judgment, but one of fact, which prevented the proper exercise of his judgment. Such was the character of the mistake to which the evidence was directed, namely: a mistake in counting the number of single pieces, which formed the basis of an estimate and average from which the number of matched heading was deduced. The objection seems to be directed to the mode of proof, it being insisted that it should be direct evidence of the fact of a mistake, independent of the evidence of its amount. But we are not aware of any rule of law which requires any particular method of proving such a fact, differing from that required to prove any similar fact. Whatever naturally and logically tends to establish it is competent evidence. If a stranger had stood by at Cleveland, and following the inspector in his count of single pieces, had detected him in error, which would necessarily affect the final count of matched headings, he would thereby have been a competent witness to prove the discrepancy. Proof of a similar count at Lapeer would differ only in degree and not in quality, as evidence to the same effect.

It is suggested, however, in reply to this, that in the latter case an indispensable link in the chain necessary to connect the count at Lapeer [333] with that at Cleveland is wanting, because it is admitted that there was no evidence to show that all the pieces of heading shipped at Lapeer were, in fact, delivered at Cleveland and, for aught that appears, the quantity of the apparent difference may have been lost in transportation between the two places. But whether this was so probable, as to more reasonably account for the discrepancy, than the supposition of an error, in one or both counts, was a matter for the consideration of the jury. They were not bound to assume a loss in transportation, in the absence of any evidence on the subject, and were entitled to assume that the shipments arrived at their destination undiminished, in the absence of any reason to the contrary; especially in view of the

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fact that there had been no complaint from any quarter, that the number of car loads called for by the bills of lading was not verified, or that more freight had been charged and paid than would be due if there had been a deficiency.

But, independent of this and on the assumption that the whole amount of the discrepancy between the two counts could be accounted for by an actual loss in transportation, the case of the defendant below would not have been strengthened. Although the count was to be of matched headings and at Cleveland and conclusive in the absence of fraud or mistake, nevertheless, by the modified contract of April 1, 1874, the delivery of the heading took place at Lapeer, so as to pass the property in the heading absolutely to the Standard Oil Company. And as the risk follows the title, any loss that subsequently accrued, by non-delivery on the part of the carriers, would be the loss of the defendant below; and the plaintiff would be entitled to recover the contract price, on proof of the quantity of single pieces reduced to matched headings, delivered at Lapeer, upon the best evidence that could be adduced under such circumstances, although they could not be actually counted and matched at Cleveland, as required by the terms of the contract.

2. It is next objected by the plaintiff in error, that the court below erred in its rulings upon the account offered and admitted in evidence and which, it was claimed, was a stated account. The claim on this part of the case is, that an account rendered becomes an account stated, unless objected to within a reasonable time; that what constitutes a reasonable time in such a case is a question of law; and that an account stated cannot be impeached except for fraud or mistake; and in support of these propositions counsel cite: *Perkins* v. *Hart*, 11 Wheat., 237; *Toland* v. *Sprague*, 12 Pet., 334; *Wiggins* v. *Burkham*, 10 Wall., 129 [77 U. S., XIX., 884]; *Lockwood* v. *Thorne*, 11 N. Y., 170; and other cases.

[334]

There is no dispute but that this is a correct statement of the law, and it is precisely what was charged by the circuit court, and in the very language of instructions asked for by the plaintiff in error. The court followed it up by adding also that the lapse of time from September, 1875, when the account was rendered, to January, 1876, when the suit was begun, without objection, converted it into a stated account, which could be impeached only for fraud or mistake.

But the same evidence which sufficed to establish a mistake in the count at Cleveland on the part of the inspector, also impeached the account, for it was founded on that count and embodied its mistake.

3. It is further alleged as error, that the court refused to instruct the jury, as requested by plaintiff in error, that "This cause is based upon the ground of either fraud or mistake, and there is no evidence of any kind, except the two counts," referring to the number of headings delivered, "and if the jury find a verdict for the plaintiff, they must find a verdict for the entire amount. Either the defendant is liable for this entire amount or it is not liable, except for the small sum admitted." This request was very properly denied by the court. There is no rule of law that limits, in such a manner, the discretion of the jury in dealing with the evidence on a question of damages in such a case. The very spirit of trial by jury is, that the experience, practical knowledge of affairs, and common sense of jurors, may be appealed to, to mediate the inconsistencies of the evidence, and reconcile the extravagances of opposing theories of the parties. There was nothing illogical in the present case, in the verdict of the jury, proceeding upon the supposition of possible errors in both counts, and making probable allowances for their amount, although no mathematical calculation could be made to demonstrate the exact accuracy of the result.

But even if the ruling was erroneous, as alleged, it is difficult to understand how it could have prejudiced the plaintiff in error. The argument presupposes that the evidence justified a verdict for the larger amount, and establishes merely that it was for less than it might properly have been. Whatever error was committed in this respect, was certainly not to the prejudice of the party complaining.

[335]

One of the witnesses for the plaintiff below, on cross-examination, was asked this question:

"Have you not recently stated to different parties, in talking about the matter, that you wanted them to recover here, because you would then get your pay?"

The plaintiff's counsel objected to the question on the ground that it did not specify time and place, to which suggestion defendant's counsel replied that he did not propose to impeach the witness; whereupon, the court sustained the objection, and to that ruling an exception was taken.

There is no error in this. If the object was to impeach the witness by subsequent contradiction, the question was clearly incompetent, as too indefinite. If the design was to impeach the witness in another mode, as by showing interest or bias, supposing it to have been competent for such purpose, as to which we express no opinion, it was the duty of counsel to have accompanied his disclaimer with that qualification. He must be taken, without such explanation, to have waived the objection. The disclaimer, in its general form, was broad enough to cover every form of impeaching the credit of the witness, and it cannot be narrowed now without injustice. *We have considered all the exceptions of the plaintiff in error, and find no error in the record. The judgment is, accordingly, affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

AUGUSTINE I. AMBLER, *Appt.*, [586]

v.

CHARLES P. CHOTEAU ET AL.

(See S. C., 17 Otto, 586-591.)

Equitable jurisdiction—suit against stockholders.

1. Where the object of a suit is to recover damages for an unlawful and fraudulent conspiracy to cheat complainant out of his interest in an original invention which is the subject matter of the controversy, the remedy is clearly at law and not in equity.

2. An action for an account of profits and an injunction against the further use of a patented invention should be against the corporation, in its

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corporate capacity, which used it, and not against a part only of its stockholders and directors individually.

[No. 128.]

Argued Dec. 13, 14, 1882. Decided Dec. 14, 1882.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The bill in this case was filed in the court below, by the appellant, to recover damages alleged to have been sustained through an unlawful conspiracy to cheat the complainant out of his interest in a certain invention.

The court below entered a decree, on general demurrer, dismissing the bill; whereupon, the complainant appealed to this court.

The facts of the case are fully stated by the court.

Messrs. **Augustine I. Ambler,** *in propria personæ,* **Oliver D. Barrett,** *S. S. Henkle, F. P. Stanton* and *B. Gratz Brown,* for appellant.

Messrs. **W. Hallett Phillips** and *P. Phillips,* for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit in equity, and the case made by the bill may be stated as follows:

Ambler, the appellant, and one R. M. Whipple, invented an improved mode of manufacturing gas from petroleum, for which they were about to apply for patents, and being desirous of securing each to the other one undivided half of what they were doing, on the 24th of May, 1869, entered into an agreement of copartnership to effect that object. The third article of the agreement was as follows:

"R. M. Whipple shall have the exclusive and entire 'business management' of the same, so as to include the introduction of said invention to public use and to secure, as far as possible, the adoption of the same: both in this country and in all other countries; and for which purpose, and all and singular the purposes incident thereto, the said R. M. Whipple shall have full and ample power and authority, and is hereby granted by said Ambler full power and authority to act for him in the premises, to sign his name, and make his seal to any instrument, and all instruments of writing, needful and necessary to carry out the object and intention of this agreement, as fully and entirely as the same may be done by the said Ambler if personally present at the doing thereof; and the [587] said A. I. Ambler hereby ratifies and confirms all and singular whatsoever may be legally and lawfully done in and about the premises."

All patents secured for the invention were to be put into the business and owned by the parties in equal shares. The proceeds of sales and all other profits were to be equally divided.

For the purpose of carrying into effect the provisions of the partnership agreement, Ambler, on the 25th of May, executed to Whipple an assignment of all his interest in the invention and in the patents that might be issued thereon. The agreement and the assignment were both recorded in the Patent Office. On the 13th of July, 1869, a patent was issued to Whipple & Ambler for "Whipple & Ambler's Steam Petroleum Gas Generating Apparatus," which was embraced in their inventions. In September, 1869, Whipple fraudulently determined to exclude Ambler from the benefits of their undertaking, and to accomplish that purpose formed another partnership with one Thomas S. Dickerson, to whom, in October, 1869, a patent was issued for an improved mode of manufacturing gas from petroleum, which was the invention of Whipple & Ambler. Afterwards another patent was issued to Whipple & Dickerson which came within the scope of the Whipple & Ambler experiments. In this condition of affairs, Ambler, on the 4th of January, 1870, began a suit in equity in the Supreme Court of the District of Columbia against Whipple & Dickerson, the object of which was to bring the Dickerson and the Whipple & Dickerson patents into the Whipple & Ambler partnership, and to get an account of sales and profits. The Supreme Court of the District dismissed the bill, but on appeal to this court that decree was reversed at the October Term, 1874, and the cause remanded, with instructions to enter another decree, "Declaring Whipple & Dickerson to hold in trust for the benefit of Ambler to the extent of one half of the two patents issued to them," and "that an accounting be had as to the profits realized by them, or either of them, from the use or sale, or otherwise, arising from said patents." *Ambler* v. *Whipple,* 20 Wall., 559 [87 U. S., XXII., 406]. A decree was entered in the court of the District on the 2d of February, 1875, in accordance with this mandate, and afterwards upon an account- [588] ing a balance was found due from Whipple of $666,052.35. Whipple is insolvent and the amount due from him is uncollectible.

On or about the 21st of April, 1870, Whipple & Dickerson sold and conveyed to James G. Blunt and Merritt H. Insley, of the State of Kansas, the right to use the Dickerson patent in Missouri for $35,000, and on the 23d of December, 1871, the right to use the Whipple & Dickerson patent in the same State for the same sum. On the 18th of December, 1871, Charles P. Choteau, Gerard B. Allen, Charles H. Peck, Stilson Hutchins, Theodore Laveille, George H. Rea, Albert C. Ellithorpe, John Kupferle, James G. Blunt, M. H. Insley, Charles P. Warner, Frank Gregory and Oliver B. Filley, organized a corporation under the general corporation law of Missouri by the name of the Missouri Liquid Fuel Illuminating Company, with an authorized capital of $500,000, divided into 5,000 shares of $100 each. The persons thus organizing the corporation were, by the articles of association, constituted directors for the first year. On the 23d of December, 1871, Blunt & Insley, in consideration of $83,000 in cash, or its equivalent, and $417,000 in capital stock, assigned to this company all their right to the Dickerson and Whipple & Dickerson patents for the State of Missouri. At the same time Whipple & Dickerson agreed with the company to make such conveyance as might be deemed necessary to perfect the title of the company under the assignment from Blunt & Insley. When these several transactions took place, all the parties had full notice of all the rights and claims of Ambler in the premises.

This suit is brought against Choteau, Harrison, Allen, Peck, Rea, Laveille, Warner, Gregory and Filley. All the other corporators and

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directors or, so far as appears, stockholders of the Missouri corporation are named as defendants in the bill, but they were never served with process and have never appeared. Neither Whipple, Dickerson nor the Missouri corporation is even named as defendant. The persons who are served and who appear in the cause hold or are interested in the stock of the corporation to the amount of $150,000 or thereabouts. The bill abounds in charges of fraud [589] and conspiracy, in a general way, against all the persons who are named, whether parties to the suit or not, but so far as the defendants served with process are concerned, the only specific allegation to be found is that, being "Incorporators of the Missouri Liquid Fuel and Illuminating Company," they "made said purchase and paid said large sum of money with full knowledge of the trust and of the fraud and breach of trust aforesaid (that of Whipple & Dickerson), and with lawful and timely notice of your orator's legal rights and equitable title therein, without any effort whatever on the part of said directors of said company to protect your orator's share of the purchase money, as they were bound in law, in equity and good conscience to do in this behalf and without the knowledge or consent of your orator, and to your orator's damage and injury."

At the opening of the bill it is expressly averred "That the subject-matter of this complaint and the foundation and *gravamen* of this bill is the franchise, the trust, the breach of trust, the collusion, conspiracy and fraud between the defendants and said Whipple & Dickerson, as the trustees of your orator, the rights and remedies of your orator against these defendants, and the prayer for relief." It is then stated, "That this cause is an action on the case, in the nature of a conspiracy, founded upon the fraudulent intention and specific acts of the defendants to cheat, swindle and defraud your orator of his franchise, and the rights in the patent and trust property aforesaid, and that said plan consists in an agreement with a common design to do an unlawful act, and which plan, agreement and conspiracy, being a common design to do an unlawful act, was fully carried out, as will hereafter more fully appear, to the great damage and injury of your orator."

It is nowhere alleged that these defendants had any actual connection with the transactions of Whipple & Dickerson otherwise than as corporators, stockholders and directors of the Missouri corporation, though it is stated that they "Gave to such fraudulent firm (Whipple & Dickerson) credit, character and support by dealing with them," etc., and that they "took no steps whatever, legal or otherwise, to recover said property or the proceeds thereof, or to stay Whipple & Dickerson in the pursuit and [590] furtherance of the fraud in the waste of the proceeds of the trust," etc.

The prayer is, that the defendants may be enjoined "From proceeding further with any dealings with the said partnership and trust property aforesaid," and "that the damages to your orator for the wrong and injury done in this behalf may be duly considered, and that an account be taken thereof before the master * * * and that your orator, upon the final hearing, be allowed, adjudged and decreed damages therefor."

This is the substance of all there is material in the mass of irrelevant matter that incumbers the record and fills the voluminous argument filed by the appellant in his own behalf. Upon full consideration, we have no hesitation in saying that it presents no case for such relief in equity as is asked. If, as is more than once distinctly alleged, the object of the suit is to recover damages for an unlawful and fraudulent conspiracy to cheat Ambler out of his interest in the original invention which is the subject-matter of the controversy, the remedy is clearly at law and not in equity. If an account of profits is wanted and an injunction against the further use of the patented inventions, under the transfers from Whipple & Dickerson, then the suit should have been against the Missouri corporation in its corporate capacity, and not against a part only of its stockholders and directors individually. If the object is to charge these defendants for the profits made by Whipple through his breach of trust, then he is a necessary party, and nothing can be done in his absence. In any event, these defendants are but purchasers from Whipple, of specific interests in the property which he held in trust for himself and Ambler. While the allegations of fraud in their general terms are as broad as language can make them, specifically they are confined by other allegations to the use of the patented invention in Missouri by the Missouri corporation, of which the defendants are stockholders and directors. It is not in any manner alleged or claimed that the defendants have profited by what Whipple has done, except through the title acquired by the conveyance to Blunt & Insley, and from them, with the consent of Whipple & Dickerson, the faithless trustees, to the corporation. No effort is made to set aside these conveyances. It is conceded [591] that Blunt & Insley actually paid Whipple & Dickerson $70,000 for the assignments which were made, and it is fairly to be inferred that in the accounting had under the decree of this court in *Ambler* v. *Whipple* [*supra*], Whipple has been charged with the proceeds of this sale. But whether that be so or not, no case has been made by the loose and general allegations in this bill for relief against these defendants. The words "fraud" and "conspiracy" alone, no matter how often repeated in a pleading, cannot make a case for the interference of a court of equity. Until connected with some specific acts for which one person is in law responsible to another, they have no more effect than other words of unpleasant signification. While in this case the offensive words are used often enough, the facts to which they are applied are not such as to make the defendants answerable to the complainant for the damages and other relief he asks.

The decree of the Circuit Court sustaining the demurrer and dismissing the bill is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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MICHIGAN CENTRAL RAILROAD COMPANY, *Plff. in Err.*,

v.

PARIS MYRICK, For the Use of the COMMERCIAL NATIONAL BANK OF CHICAGO.

(See S. C., "*Myrick* v. *Michigan Central R. R. Co.*," 17 Otto, 102-110.)

Railroad Company, as carrier—agreement to transport goods—receipt—notice thereon—common law—state decision.

1. A railroad company, as a carrier of goods to be transported by connecting lines, is only bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier; but any one of the companies may agree that its liability shall extend over the whole route.
2. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence.
3. A receipt for cattle given by a railroad company, which only says that the cattle are consigned to the order of M, and that B, at a place beyond its own line, is to be notified, does not on its face import any contract to carry the cattle through to that place.
4. A notice on the margin of the receipt that goods consigned to any place beyond the company's line would be sent forward by a carrier, in the usual manner, the company acting for that purpose as the agent of the consignor or consignee, and not as carrier, tends to rebut any inference of such a contract from the receipt of goods marked for a place beyond the road of the company.
5. There is no common law responsibility devolving upon any carrier to transport goods over other than its own lines.
6. What constitutes a contract of carriage is not a question of local law, upon which the decision of a state court must control. It is a matter of general law, upon which this court will exercise its own judgment.

[No. 123.]

Argued Dec. 11, 12, 1882. Decided Jan. 8, 1883.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The history and facts of the case fully appear in the

Statement of the case by *Mr. Justice* **Field**:

This is an action for breach of two alleged contracts of the Michigan Central Railroad Company with the plaintiff, Paris Myrick, each to carry for him two hundred and two head of cattle from Chicago to Philadelphia, and there deliver them to his order. It arises out of these facts: Myrick was in 1877 engaged, at Chicago, in the business of buying cattle, sometimes on his own account and sometimes for others, and forwarding them by railway to Philadelphia. The Company is a corporation created by the State of Michigan, and its line extends from Chicago to Detroit, where it connects with the Great Western Railroad, which, by its connections, leads to Philadelphia.

In November, 1877, Myrick purchased two lots of cattle, each consisting of two hundred and two head, and shipped them over the road of the Company. One of the purchases and shipments was made on the 7th and the other on the 14th of the month. It will suffice to give the particulars of the first of these transactions, as they were identical in all respects, except in the amount of the draft negotiated and the weight of the cattle. [103]

On the shipment of the cattle Myrick took from the Company a receipt, as follows:

"Michigan Central Railroad Company,
Chicago Station, Nov. 7th, 1877.

Received from Paris Myrick, in apparent good order, consigned order Paris Myrick (notify J. and W. Blaker, Philadelphia, Pa.):

Articles.	Weight or measure.
Two hundred and two (202) cattle.....	240,000

Advance charges, $12.00. Marked and described as above (contents and value otherwise unknown) for transportation by the Michigan Central Railroad Company to the warehouse at ————.

Wm. Geagan, *Agent*."

On the margin of the receipt was the following:

"This Company will not hold itself responsible for the accuracy of these weights as between buyer and seller, the approximate weight having been ascertained by track-scales, which is sufficiently accurate for freighting purposes, but may not be strictly correct as between buyer and seller. This receipt can be exchanged for a through bill of lading.

Notice.—See rules of transportation on the back hereof. Use separate receipts for each consignment."

On the back of the receipt the rules were printed, one of which, the eleventh, was as follows:

"Goods or property consigned to any place off the Company's line of road, or to any point or place beyond the *termini*, will be sent forward by a carrier or freightman, when there are such, in the usual manner, the Company acting, for the purpose of delivery to such carrier, as the agent of the consignor or consignee, and not as carrier. The Company will not be liable or responsible for any loss, damage or injury to the property after the same shall have been sent from any warehouse or station of the Company." [104]

On the day this receipt was obtained, Myrick drew and delivered to the Commercial National Bank, at Chicago, a draft, of which the following is a copy:

"$12,287.57.] Chicago, *Nov.* 7, 1877.

Pay to the order of Geo. L. Otis, cashier, twelve thousand two hundred and eighty-seven $\frac{57}{100}$ dollars, value received, and charge the same to account of Paris Myrick.

To J. and W. Blaker, *Newtown, Pa.*"

As security for its payment Myrick indorsed the receipt obtained from the Railroad Company and delivered it, with the draft, to the Bank, which thereupon gave him the money for it.

The cattle were carried on the road of the Michigan Central to Detroit, and thence over the road of the Great Western Railroad Company to Buffalo, and thence over the roads of

NOTE.—*Liability of common carrier, for goods to be transported beyond termination of its line.* See *note* to R. R. Co. v. Mfg. Co., 88 U. S., XXI., 297.

In what instances U. S. Courts do not follow state decisions. See *note* to U. S. v. Muscatine, 75 U. S., XIX., 490.

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other companies to Philadelphia, the last of which was the road of the North Pennsylvania Railroad Company. They arrived in Philadelphia in about four days after their shipment, where, according to the uniform custom in the course of business of the railroad company, they were turned over to the Drove Yard Company, which was formed for the purpose of receiving cattle arriving there, taking care of them and delivering them to their owners or consignees. This company notified the Blakers of the arrival of the cattle, and delivered them to those parties without the production of the carriers' receipt, transferred by Myrick to the Commercial National Bank. The Blakers paid the expense of the transportation, took possession of the cattle, sold them, and appropriated the proceeds. The lot shipped on the 14th of November were delivered in like manner to the Blakers by the Drove Yard Company without the production of the carrier's receipt given to the Bank, and were in like manner disposed of. Soon afterwards, the Blakers failed, and the two drafts on them, one made upon the shipment of November 7 and the other on the shipment of Nov. 14, were not paid. Hence the present action for the value of the cattle thus lost to the Bank, Myrick suing for its use.

It appeared on the trial that Myrick had made [105] previous shipments of cattle from Chicago to Philadelphia and taken similar receipts from the Michigan Central Railroad Company; that the cattle shipped had always been delivered by the Pennsylvania Company, at Philadelphia, to the Drove Yard Company there, and by that company delivered to the Blakers without the production of the carrier's receipt or any bill of lading; that the Blakers were dealers in cattle and had particular pens in the yards assigned to them; that the cattle of the shipments of November 7 and November 14 were, on their arrival, placed by the superintendent of the drove yards in those pens and were sold by the Blakers on the following day, and that the carriers' receipt was not called for either by the railroad or the stock-yard company. It also appeared on the trial that Myrick bought the cattle for the Blakers, and that a person employed by them accompanied the cattle from Chicago until their delivery at the drove yard at Philadelphia; that the through rate from Chicago to Philadelphia on the cattle was fifty-eight cents per hundred; that notice of this rate was posted in the station of the defendant Company at Chicago, and that it was not the custom of the railroad company at Philadelphia to look to the consignee for freight, but collected it from the Drove Yard Company.

The court was requested to give to the jury various instructions, one of which, though presented under many forms, amounts substantially to this: that, as the road of the Michigan Central Railroad Company terminates at Detroit, the Company was not bound, in the absence of special contract, to transport the cattle beyond such termination, and that the receipt of freight for a point beyond and an agreement for a through fare did not, of themselves, establish such a contract.

The court refused to give this instruction, or any embodying the principle which it expresses. On the contrary, it instructed the jury that the receipt, termed bill of lading, under the circumstances in which it was made, was a through contract whereby the defendant agreed to transport the cattle named in it from Chicago to Philadelphia, and there deliver them to the order of Paris Myrick, and to notify the Blakers of their arrival; that this was the undertaking on the part of the defendant Company with the plaintiff Myrick, and with any assignee or holder of the contract. The facts attending the trans- [106] action not being disputed, there could be only one result from this instruction, a recovery by the plaintiff. From the judgment entered thereon, the case is brought to this court for review.

Messrs. **Geo. F. Edmunds, Andrew L. Osborn** and *Wirt Dexter*, for plaintiff in error.

Messrs. **John N. Jewett** and **Walter Cranston Larned**, for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

The principal question presented by the instruction requested by the defendant has been elaborately considered and adjudged by this court. It is only necessary, therefore, to state the conclusion reached.

A railroad company is a carrier of goods for the public and, as such, is bound to carry safely whatever goods are intrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line, the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it. This is the doctrine of this court, although a different rule of liability is adopted in England and in some of the States. As was said in *R. R. Co.* v. *Mfg. Co.*, "It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country, but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction." 16 Wall., 324 [83 U. S., XXI., 301].

This doctrine was approved in the subsequent [107] case of *R. R. Co.* v. *Pratt*, 22 Wall., 123 [89 U. S., XXII., 827], although the contract there was to carry through the whole route. Such a contract may, of course, be made with any one of different connecting lines. There is no objection in law to a contract of the kind, with its attendant liabilities. See, also, *Ins. Co.* v. *R. R. Co.*, 104 U. S., 157 [XXVI., 685].

The general doctrine, then, as to transportation by connecting lines, approved by this court, and also by a majority of the state courts, amounts to this: that each road confining itself to its common law liability, is only bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier, but that any one of the

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companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence. Although a railroad company is not a common carrier of live animals in the same sense that it is a carrier of goods, its responsibilities being in many respects different, yet when it undertakes generally to carry such freight, it assumes, under similar conditions, the same obligations, so far as the route is concerned over which the freight is to be carried.

In the present case, the court below held that by its receipt, construed in the light of the circumstances under which it was given, the Michigan Central Railroad Company assumed the responsibility of transporting the cattle over the whole route from Chicago to Philadelphia. It did not submit the receipt with evidence of the attendant circumstances to the jury, to determine whether such a through contract was made. It ruled that the receipt itself constituted such a contract. In this respect it erred. The receipt does not, on its face, import any bargain to carry the freight through. It does not say that the freight is to be transported to Philadelphia or that it was received for transportation there. It only says that it is *consigned* to the order of Paris Myrick, and that the Blakers at Philadelphia are to be notified. And, after the description of the property, it adds: "Marked and de-
[108] scribed as above (contents and value otherwise unknown) for transportation by the Michigan Central Railroad Company to the warehouse at ———," leaving the place blank. This blank may have been intended for the insertion of some place on the road of the Company, or at its termination. It cannot be assumed by the court, in the absence of evidence on the point, that it was intended for the place of the final destination of the cattle. On the margin of the receipt is the following: "Notice.—See rules of transportation on the back hereof." And among the rules is one declaring that goods consigned to any place off the Company's line or beyond it would be sent forward by a carrier or freightman, when there are such, in the usual manner, the Company acting for that purpose as the agent of the consignor or consignee and not as carrier; and that the Company would not be responsible for any loss, damage or injury to the property after the same shall have been sent from its warehouse or station. Though this rule, brought to the knowledge of the shipper, might not limit the liability imposed by a specific through contract, yet it would tend to rebut any inference of such a contract from the receipt of goods marked for a place beyond the road of the Company.

The doctrine invoked by the plaintiff's counsel against the limitation by contract of the common law responsibility of carriers, has no application. There is, as already stated, no common law responsibility devolving upon any carrier to transport goods over other than its own lines, and the laws of Illinois restricting the right to limit such responsibility do not, therefore, touch the case. Nor was the common law liability of the defendant Corporation enlarged by the fact that a notice of the charges for through transportation was posted in the defendant's station-house at Chicago. Such notices are usually found in stations on lines which connect with other lines, and they furnish important information to shippers, who naturally desire to know what the charges are for through freight as well as for those over a single line. It would be unfortunate if this information could not be given by a public notice in the station of a company without subjecting that company, if freight is taken by it, to responsibility for the manner in which it is carried on intermediate and connecting lines to the end of the route.

Nor was the liability of the Company affected [109]
by the fact that the notice on the margin of the receipt stated that the ticket given might be "exchanged for a through bill of lading." It would seem to indicate that the receipt was not deemed of itself to constitute a through contract. The through bill of lading may also have contained a limitation as to the extent of the route over which the Company would undertake to carry the cattle. Besides, if weight is to be given to this notice as characterizing the contract made, it must be taken with the rule to which it also calls attention, that the Company assumed responsibility only for transportation over its own line.

It follows, from the views expressed, that the court below erred in its charge that the ticket or bill of lading was a through contract, whereby the defendant Company agreed to transfer the cattle to Philadelphia, and safely deliver them there to the order of Myrick.

Our attention has been called to some decisions of the Supreme Court of Illinois, which would seem to hold that a railroad company which receives goods to carry, marked for a particular destination, though beyond its own line, is *prima facie* bound to carry them to that place and deliver them there; and that an agreement to that effect is implied by the reception of goods thus marked. *R. R. Co.* v. *Frankenberg*, 54 Ill., 88; *R. R. Co.* v. *Johnson*, 34 Ill., 389.

Assuming that such is the purport of the decisions, they are not binding upon us. What constitutes a contract of carriage is not a question of local law, upon which the decision of a state court must control. It is a matter of general law, upon which this court will exercise its own judgment. *Chicago* v. *Robbins*, 2 Black, 429 [67 U. S., XVII., 304]; *R. R. Co.* v. *Bank*, 102 U. S., 14 [XXVI., 61], and *Hough* v. *R. Co.*, 100 U. S., 213 [XXV., 612].

If the doctrine of the Supreme Court of Illinois, as to what constitutes a contract of carriage over connecting lines of roads, is sound, it ought to govern, not only in Illinois, but in other States; and yet the tribunals of other States, and a majority of them, hold the reverse of the Illinois court, and coincide with the views of this court. Such is the case in Massa-
chusetts. *Nutting* v. *R. R. Co.*, 1 Gray, 502; [110]
Burroughs v. *R. R. Co.*, 100 Mass., 26. If we are to follow on this subject the ruling of the state courts, we should be obliged to give a different interpretation to the same act: the reception of goods marked for a place beyond the road of the company, in different States, holding it to imply one thing in Illinois and another in Massachusetts.

The judgment must be reversed and the case re-

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manded for a new trial; and it is so ordered.
True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 126; 89 N. C., 311; 45 Am. Rep., 693.

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[85] WILLIAM B. SCHMIDT AND FRANCIS M. ZEIGLER, Partners, Doing Business as SCHMIDT & ZEIGLER, *Plffs. in Err.*,

v.

ALGERNON S. BADGER, Collector of Customs for the PORT OF NEW ORLEANS.

(See S. C., 17 Otto, 85-89.)

Duty Act—construction of.

*Schedule D of section 2504 of the Revised Statutes imposes the following customs duties: "Ale, porter and beer in bottles, thirty-five cents per gallon; otherwise than in bottles, twenty cents per gallon." Schedule B of the same section imposes the following customs duties: "Glass bottles or jars filled with articles not otherwise provided for, thirty per centum *ad valorem*." "All manufactures of glass * * * not otherwise provided for, and all glass bottles or jars filled with sweetmeats or preserves, not otherwise provided for, forty per centum *ad valorem*." Under these provisions, the bottles in which ale and beer are imported are subject to a duty of thirty per cent *ad valorem*, in addition to the duty of thirty-five cents per gallon on the ale and beer imported in the bottles.

[No. 878.]

Submitted Dec. 19, 1882. Decided Jan. 15, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of Louisiana.

The history and facts of the case appear in the opinion of the court.

Mr. **Charles W. Hornor,** for plaintiffs in error.

Mr. **S. F. Phillips,** *Solicitor-Gen.*, for defendant in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

This suit was brought to recover back customs duties paid under protest on glass bottles containing beer and ale, imported from abroad. The Collector exacted a duty of thirty per cent *ad valorem* on the bottles. The plaintiffs contended that as a duty of thirty-five cents per gallon had been paid on the contents of the bottles, such duty covered all the duty which the law imposed on the bottles. There was a verdict for the defendant under a charge by the court to the jury that, although a duty of thirty-five cents per gallon had been paid on the contents of the bottles, a further duty of thirty per cent *ad valorem* was chargeable on the bottles. After a judgment for the defendant the plaintiffs sued out this writ of error.

The importations in question were made in February and March, 1881. In order to a clear understanding of the statutory provisions in force at that time it will be useful to trace the course of legislation on the subject.

It was enacted by section 3 of the Act of January 29, 1795, 1 Stat. at L., 411, that the duty on any wines imported into the United States shall not be less than ten cents per gallon, and that bottles in which any liquor is imported shall be subject to the payment of the like duty as empty bottles.

By section 8 of the Act of August 30, 1842, 5 Stat. at L., 559, duties were imposed on various liquors and wines, in casks and in bottles, at so much per gallon, the duty on importations in casks being never higher than on importations in bottles and generally much lower; and it was enacted that "When wines are imported in [86] bottles, the bottles shall pay a separate duty." The same section provided that ale, porter and beer in bottles should pay twenty cents per gallon, and otherwise than in bottles, fifteen cents per gallon. The same Act imposed a duty on bottles.

By section 6 of the Act of March 2, 1861, 12 Stat. at L., 180, in was provided that "Brandies or other spirituous liquors may be imported in bottles, when the package shall contain not less than one dozen, and all bottles shall pay a separate duty, according to the rate established by this Act, whether containing wines, brandies or other spirituous liquors." The same section imposed a duty on ale, porter and beer in bottles, of twenty-five cents per gallon, and otherwise than in bottles, fifteen cents per gallon. The 17th section of the same Act imposed a duty of thirty per cent *ad valorem* on all glass bottles or jars filled with sweetmeats, preserves or other articles. Here was a duty on the bottles containing liquors, wines or ales, as well as on the contents.

By section 2 of the Act of June 30, 1864, 13 Stat. at L., 203, it was provided that the separate duty on bottles containing wines, brandies or other spirituous liquors subject to duty should be two cents each; and that the duty on ale, porter and beer in bottles should be thirty-five cents per gallon, and otherwise than in bottles twenty cents per gallon. By section 9 of the same Act, a duty of forty per cent *ad valorem* was imposed on "All manufactures of glass * * * not otherwise provided for, and all glass bottles or jars filled with sweetmeats or preserves not otherwise provided for." Here was a duty on the bottles containing liquors and ales, in addition to the duties on their contents, although the duty on bottles containing ale was expressed as an *ad valorem* duty on manufactures of glass not otherwise provided for, and the duty on bottles containing liquors was expressed as a duty of two cents each.

By section 21 of the Act of July 14, 1870, 16 Stat. at L., 262, the same rate of duty per gallon was imposed on wines imported in bottles as on wines imported in casks, and a duty of three cents in addition was imposed on each bottle; and the same section further provided that "Wines, brandy and other spirituous liquors imported in bottles shall be packed in packages containing not less than one dozen bottles in each package, and all such bottles [87] shall pay an additional duty of three cents for each bottle." Under this Act it was held by this court, in *De Bary* v. *Arthur*, 93 U. S., 420 [XXIII., 936], that each bottle containing champagne wine was subject to a duty of three cents in addition to the duty on the champagne wine.

We now come to the Revised Statutes, under which the duties in the present case were collected. Schedule D of section 2504 imposes the following duties: "Ale, porter and beer in bottles, thirty-five cents per gallon; otherwise than

* Head note by *Mr. Justice* BLATCHFORD.

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in bottles twenty cents per gallon." This is taken from section 2 of the Act of June 30, 1864. The same schedule contains the foregoing provisions from the Act of July 21, 1870, as to the duty per gallon on wines imported in bottles, and as to the additional duty of three cents on each bottle, and as to the additional duty of three cents for each bottle on bottles containing wines, brandy and other spirituous liquors. Schedule B of the same section imposes the following duties: "Glass bottles or jars filled with articles not otherwise provided for, thirty *per centum ad valorem.*" "All manufactures of glass * * * not otherwise provided for, and all glass bottles or jars filled with sweetmeats or preserves, not otherwise provided for, forty *per centum ad valorem.*" The Act of 1861 had imposed a duty of thirty per cent on glass bottles or jars filled with sweetmeats, preserves or other articles." The Act of 1864 had imposed a duty of forty per cent on glass bottles or jars filled with sweetmeats or preserves, thus leaving a thirty per cent duty on glass bottles filled with articles other than sweetmeats or preserves. So the Act of 1864 had imposed a duty of forty per cent on manufactures of glass, not otherwise provided for. Thus these provisions went into the Revised Statutes.

In the sentence "glass bottles or jars filled with articles not otherwise provided for," there is no comma between "jars" and "filled" and there is no comma between "articles" and "not." Yet the sentence must be read as if there were a comma in each place. The Act of 1861 imposed a duty of thirty per cent on glass bottles filled with sweetmeats, preserves or other articles. This was not a duty on the contained articles and on the bottles also. It was not a duty of thirty per cent on the contents of every glass [88] bottle. It was a duty merely on the bottles. The articles imported in the bottles were subject to such duty, if any, as was elsewhere imposed on them. The Act of 1864 imposed a duty of forty per cent on glass bottles filled with sweetmeats or preserves, thus raising the duty on such bottles by ten per cent, while the duty on glass bottles filled with other articles than sweetmeats or preserves was left to stand at thirty per cent; and in that shape these provisions went into schedule B of section 2504 of the Revised Statutes. They are found in a schedule which relates solely to earths and earthenware and glass. The Act of 1864 imposed a duty of forty per cent on all manufactures of glass not otherwise provided for, and that provision, being in force, went into the same schedule B.

The principle of imposing a duty on the sack, box or covering of any kind in which a dutiable article is imported, separate from and additional to the duty on such article, is applied by section 2907 of the Revised Statutes, which declares that the value of the sack, box or covering of any kind in which imported merchandise is contained shall be added in determining the dutiable value of such merchandise. This provision is enacted from section 9 of the Act of July 28, 1866, 14 Stat. at L., 330. Where the covering is a glass bottle, and the duty on its contents is a specific duty per gallon, and not an *ad valorem* duty, a duty on the bottle, when added, is to be added as a duty of so much per bottle or as an *ad valorem* duty, as the statute may enact. But it is no reason for saying that the bottles are not dutiable in addition to their contents, that a higher rate of duty is imposed on the contained article when imported in bottles than when imported otherwise than in bottles. If a reason is to be sought for, it may well be found in the fact, that while imposing a duty on the bottle, in analogy to the duty on the sack, box or covering, the statute desires to encourage the bottling here of the article imported in the bottles, by imposing a higher duty on the importation of it in bottles than on the importation of it otherwise than in bottles.

Under this view the statute reads and means that glass bottles which are not otherwise provided for and are filled with articles, shall pay a duty of thirty per cent. If they were to be regarded as manufactures of glass not otherwise [89] provided for, they would pay forty per cent; or if, under schedule B, of section 2504, they were to be regarded as plain, or mold, or press glass, they would pay thirty-five per cent. But as they are, clearly, bottles, they are to pay only thirty per cent.

In section 2 of the Act of February 8, 1875, 18 Stat. at L., 307, it is expressly enacted that no separate or additional duty shall be collected on the bottles in which still wines are imported. The additional duty on bottles in which other articles than still wines are imported is left undisturbed.

It is manifest, we think, in view of the course of legislation by Congress, that an enactment that the duty on ale, porter and beer in bottles shall be so much per gallon, cannot be regarded as an enactment that there shall be no additional duty on the bottles, when there is another provision of law which imposes an *ad valorem* duty on bottles, not otherwise provided for, filled with articles.

It is contended by the plaintiffs in error that all duty on the bottles is included in the duty of thirty-five cents per gallon on the ale "in bottles." Reliance for this view is had on the decision of *Chief Justice* Taney in *Karthaus* v. *Frick*, Taney, Dec., 94, in 1840, where it was held, that under a statute imposing a duty on salt of ten cents per fifty-six pounds, an *ad valorem* duty could not in addition be imposed on the sacks in which the salt was imported, as manufactures of hemp. That decision is placed expressly on the ground that there was no instance where a separate duty had been laid on the vessel or receptacle containing an article, when a specific duty was laid upon the article That case arose under the Act of July 14, 1832, 4 Stat. at L., 583, and stress was laid, in the decision, on the analogous fact that while there was in the Act a duty on bottles, there was no duty on bottles containing any article, but only a duty on the article in the bottles. This has all now been changed and there is a duty on coverings and a duty on bottles containing articles, as well as duty on the same articles imported in bottles.

The judgment of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney. Clerk, Sup. Court, U. S.

Cited—108 U. S., 107, 109, 110.

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GEORGE F. POTTER ET AL., *Plfs. in Err.*,

v.

UNITED STATES.

(See S. C., 17 Otto, 126-132.)

Sureties in receiver's bond—oath of preemptor—payment to officer—proof of settlement.

1. Sureties in an official bond of a receiver of public moneys for the sale of lands, cannot, in a suit thereon, set up as a defense that the moneys he has charged himself with, in his accounts, as paid for preemptions, were paid before the conditions for the sale of the lands prescribed by law had been complied with, and therefore were not payments made to the United States, but unauthorised and unofficial payments made to the receiver, for which his sureties were not liable.

2. The oath of the preemptor, which is part of the proof required by law to entitle to the right of preemption, may be taken before either the register or receiver.

3. If a public officer sees fit to allow the money of the Government to be paid, during his absence from his office, into the hands of his agent or servant, it is a good payment to him, and the risk is with him and his sureties and not with the Government.

4. The register and receiver of the land district are not required to meet and jointly consider the sufficiency of the proof of settlement and improvement by preemptors. If both are satisfied, that is all that the law requires.

[No. 127.]

Submitted Dec. 13, 1882. Decided Jan. 15, 1883.

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

The history and facts appear in the

Statement of the case by *Mr. Justice* **Woods:**

This was an action brought against George F. Potter and the sureties on the official bond given by him as receiver of public moneys in the Pembina land district, in the Territory of Dakota. The bond bore date August 3, 1870, and its condition was that Potter should "truly and faithfully execute and discharge all the duties of his said office according to law." The declaration alleged that Potter was appointed receiver of public moneys as aforesaid for four years beginning June 7, 1870; that, after the delivery of said bond and prior to June 30, 1874, there legally came into his hands as receiver of public moneys as aforesaid the sum of $8,564.77, which he had refused and neglected to account for or pay over to the United States, and still so neglected and refused.

[127] Only the sureties on the bond answered. The defense set up in their answer and relied on was as follows: "That from and after said September 30, 1873, there never was any register at the land-office at Pembina; that there were no legal sales of land or receipts of moneys at said land-office for any purpose during all the time from said 30th day of September, 1873, to the end of the time that said Potter held the office of receiver of said land-office."

The parties waived a jury and submitted the issues of fact as well as of law to the court. Upon the trial of the case, as shown by the bill of exceptions, the United States offered in evidence certified copies of the accounts rendered by Potter for four quarters, to wit: the quarters ending, respectively, September 30 and December 31, 1873, and March 31 and June 30, 1874, which showed a balance against him of $8,564.77, which he had not accounted for or paid over.

By way of defense, testimony was offered which, as stated by the bill of exceptions, "proved" that one Brashear, from the summer of 1871 until the expiration of the term of office of Potter, was register of the land-office at Pembina; that from and after September 23, 1873, Brashear was not present at said land-office, but on the day last named "Left Pembina and said land-office and never returned, but continued to hold said office of register during Potter's term of office," which expired in June, 1874; "That before leaving the office he signed a large number of printed blanks, covering all the various business of the register of said land-office, and left them with one William R. Goodfellow, who was a clerk in the custom-house in said Pembina, and had nothing to do with said land-office, except that he was authorized by said Brashear to act for him in his absence; and that all the business of said land-office, as far as the said register was concerned, was done by said Goodfellow with the blanks so signed by said register as aforesaid."

The bill of exceptions further showed that testimony was offered which proved "That the said receiver, George F. Potter, left said Pembina and said land-office on the 8th or 9th of April, 1874, and did not return until the last of June or the beginning of July, 1874, and that no one was in charge of said land-office while said receiver was gone except said Goodfellow; that, on the return of said Potter he received no money from said Goodfellow on account of said office, and that he did receive from his son the [128] sum of $200 or $300 and no more; that Goodfellow took in, during the absence of said Potter, some $1,400 of money belonging to said land-office, and paid the same over to said son of said Potter, from whom it was all stolen, except the $200 or $300 which was paid over by him to said Potter."

Upon this evidence the counsel for the sureties on the bond of Potter contended that "They were not liable for any moneys received at said land-office for any business done therein in the absence of either the register or receiver."

The court decided against the contention of the defendants, and rendered judgment against them for the sum of $6,406.30, which included moneys received by Potter after as well as before September 23, 1873. To this ruling and judgment of the court, the defendant excepted. The purpose of the writ of error is to obtain a review in this court of the question raised by this exception.

Messrs. **Chas. E. Flandrau** and *H. G. O. Morrison*, for plaintiffs in error.

Mr. **Wm. A. Maury,** *Asst. Atty-Gen.*, for the defendant in error.

Mr. Justice **Woods** delivered the opinion of the court:

The answer of the defendants does not allege that the moneys for which the court rendered judgment against them were received by Potter after September 23, 1873, and during the absence of Brashear, the register. Neither does the bill of exceptions profess to state all the evidence in regard to the absence of Brashear and Potter from their offices respectively. Passing by these defects in the record, we shall consider

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the question presented by the exception of defendants.

Their first contention is that they are not responsible for any moneys received by Potter, the receiver, during the time that Brashear, the register, was absent from the land-office. The ground of this contention is as follows: the record shows that during Potter's term of office all sales of land were either by preemption or commutation of homesteads. The argument of plaintiffs in error applies only to preemption sales. Section 2259 of the Revised Statutes of the United States prescribes what persons are entitled to preemption and upon what terms the right of preemption is accorded to the settler upon the public lands. Section 2263 declares [129] that "Prior to any entries being made under and by virtue of the provisions of section 2259, proof of the settlement and improvements thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands lie," etc. The plaintiffs in error contend that these officers constitute a joint tribunal and that there can be no business done without the presence and action of both, and as Brashear, the register, was absent from September 23, 1873, to the close of Potter's term, there could be no legal preemptions during that time; and that all moneys paid for preemptions before the conditions prescribed by law had been complied with, were not payments made to the United States, but unauthorized and unofficial payments made to the receiver, for which his sureties were not liable.

In our judgment, this contention has no ground to stand on. There is no expression in the statute which requires the register and receiver to sit at the same time and concurrently pass upon the sufficiency of the proof of settlement and improvement by preemptors. If the proof is submitted to the register on one day and he is satisfied, there is nothing in the statute which implies that it may not be lawfully submitted, at some subsequent day, to the receiver for his approval. The oath of the preemptor, which is part of the proof required by law, may be taken before either the register or receiver. Sec. 2262. *Lytle* v. *Ark.*, 9 How., 314. They are nowhere required to meet and jointly consider the sufficiency of the proof offered. If both are satisfied, that is all the law requires.

It does not appear in the record that the proof, by preemptors, of the settlement and improvement of the lands for which money was received by Potter during the absence of Brashear had not been made to his satisfaction before he left the land district. If such proof had been made to the satisfaction of Brashear, all that was necessary to complete the right of the preemptor was the approval of Potter, which was effectually expressed by his receipt of the money.

What the law requires is, that the conditions requisite to a preemption entry should be shown to have been performed to the satisfaction of [130] both officers. As it does not appear in the record that the proof was not made to the satisfaction of both officers, it must be presumed that the money received by Potter in the absence of Brashear was justly due the United State and was received by him in his official capacity. We find nothing, either in the cases or statutes cited by counsel for plaintiffs in error, which tends to establish a different construction of the law.

But if it be conceded that the statute required the register and receiver to pass concurrently upon the proof of the settlement and improvement before lands could be entered by a preemption, we are, nevertheless, of opinion that the plaintiffs in error are responsible for the moneys received by Potter.

The moneys were received by him as public moneys, for he charged himself with them in his accounts with the Government. They were paid as public moneys by preemptors, as a consideration for title to portions of the public domain. If any objection could be raised to the transfer of title to the preemptors, it could be made by the United States only. But the United States makes no objection. On the contrary, all objection is waived by the bringing of this suit by the Government to recover the moneys paid by the preemptors for their lands. These moneys are, therefore, public moneys. They belong neither to Potter nor the preemptors, and must, consequently, be the property of the United States. It was, therefore, the duty of Potter, as receiver, to account for and pay to the United States the moneys so received, and it does not lie in the mouths of the sureties on his official bond to raise an objection to the payment of the moneys to him, which he could not raise, and which is not raised by the preemptors, or by the United States. Their responsibility for the money so received is, therefore, clear.

In support of this view, the case of *King* v. *U. S.*, 99 U. S., 229 [XXV., 373], is in point. That was a suit brought against one Chase and his sureties, on the bond given by Chase, as Collector of Internal Revenue, to recover taxes collected by him, and never accounted for or paid over. The facts were, that on June 1, 1868, the Toledo, Wabash & Western Railroad Company was indebted to the United States in a large sum for the five per cent tax for interest paid on its first mortgage bonds. The tax was, on the [131] day named, paid to Chase by the treasurer of the railroad company. At the time of the payment the treasurer delivered to Chase the monthly returns of the taxes so due, in the form prescribed by law, signed by him as treasurer, but not sworn to, and which had never been filed with or delivered to the assessor. Chase delivered to the assessor all these returns, except those for August, September and October, 1867, which were never delivered, nor did Chase at any time make any mention of them in his report to the government, and he retained the amount, $24,923, paid by the railroad company as the tax upon the returns for the three months just mentioned. Five years after the receipt by Chase of this money, and when he had become insolvent, suit was brought on his official bond to recover the money so appropriated by him. The defense set up by his sureties was that, as the money was not received by Chase, on any return made to the assessor, nor on any assessment of said taxes made by the assessor or by the Commissioner of Internal Revenue, and as the return delivered to Chase by the treasurer of the railroad company was not verified by oath, it was a voluntary deposit of money in his hands by the treasurer of the railroad company and was not received by him in his official capacity; that it was not his duty to receive it for

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the Government; and the sureties were not liable because its receipt was an unofficial act.

But the court held that the payment of the taxes to the collector was a good payment to him in his official capacity; that the money so paid was the money of the United States and that the sureties on his bond were responsible for it.

This case is so apposite to the question in hand and so conclusive, as to require no further remark.

It is next contended by the plaintiffs in error that they are not liable for the $1,400 received during the absence of Potter, extending from April 9 to June 30, 1874, by the person whom he had left in charge of his office, because that person had no authority to perform any of the duties of receiver.

There are two sufficient replies to this contention. First, no such defense is set up in the answer or amended answer of the plaintiffs in error. They cannot complain that the circuit court did not give effect to a defense which they did not think it worth while to plead. Second, it is not made to appear by the bill of exceptions [132] that any money was paid to Goodfellow, the person left by Potter in charge of his office, which was not due the United States from preemption entries made by persons who had proved the settlement and improvement of the land to the satisfaction of both the receiver and register. If, therefore, this contention of the plaintiffs in error is sustained, we should, in effect, decide that the sureties of the receiver would not be answerable for public moneys paid, with his concurrence and assent, to his assistant or cashier, but only for moneys actually paid into the hands of the receiver himself. It requires no argument to expose the fallacy of such a conclusion. If a public officer sees fit to allow the money of the Government to be paid during his absence from his office into the hands of his agent or servant, it is a good payment to him, and the risk is with him and his sureties and not with the Government.

We find no error in the record. The judgment of the Circuit Court is, therefore, affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

REUBEN HOFFHEINS, *Appt.*,

v.

C. RUSSELL & CO., CLEMENT RUSSELL, WILLIAM K. MILLER AND JAMES S. TONNER.

(See S. C., 17 Otto, 132-147.)

Letters patent, construction of—difference between specifications—harvesters—driver's seat—raking apparatus—driving device—infringement.

*1. Claims 1, 8, 9, 11, 12, 14, 16 and 19 of re-issued letters patent No. 2224, granted April 10, 1866, to Reuben Hoffheins, for an improvement in harvesters, the original patent, No. 35315, having been granted to him May 20, 1862, and claims 1, 2, 6 7, and 9 of re-issued letters patent No. 2490, granted February 19 1867. to Reuben Hoffheins, for an improvement in harvesters, the original patent, No. 40481, having been granted to him November 3, 1863, and re-issued in two divisions, one, No. 1888, February 28, 1865, and the other, No. 2102, November 7, 1865, and No. 2490 having been issued on the surrender of No. 2102, considered.

2. The difference between the specifications and the drawings of No. 35315 and those of No. 2224, pointed out.

3. There is no warrant in No. 35315 for locating the rake support, or any part of it, on the finger beam, and as each of the above named claims of No. 2224 has, as an element, either a rake or a rake and reel, mounted on or attached to the cutting apparatus or the finger beam, No. 35315, could not lawfully be re-issued with those claims.

4. The difference between the raking apparatus and rake support of No. 2224 and those of the defendants, pointed out.

5. The defendants devised a new arrangement of rake, which made it possible for them to mount their rake support on the heel of the finger beam, where the rake support of No. 2224 could not be mounted.

6. The difference between the yielding belt tightener of No. 2224 and the defendants' arrangement for driving the raking apparatus pointed out, and the latter held not to be a mechanical equivalent for the former.

7. No. 40481 negatives the idea of mounting the rake post on the finger beam, while an element in claim 1 of No. 2490 is the mounting of the raking mechanism on the finger beam.

8. In No. 2490, a driver's seat mounted on the main frame so as to enable the driver to ride on the machine while the rake is in operation, is an element in claims 1 and 9, while the driver's seat in No. 40481 is not and cannot be in such a position that the driver can ride on the seat while the rake is in operation.

9. The raking apparatus is an element in claims 2, 7 and 9 of No. 2490 and, in view of the differences between the two machines, in the construction of the raking mechanism and the arrangement and location of the rake post, the rake of claims 2, 7 and 9 is to be construed to be such a rake, and one so arranged, on a rake post so mounted, as is shown and described in the specification, and thus does not include the defendants' raking mechanism or rake post.

10. The driving device in claims 6 and 7 of No. 2490 held not to include the defendants' driving device, the former being an extensible tumbling shaft and the latter a chain belt with open links, and patentability or invention inhering only in the device and not in its location.

11. No cause of action is established against the defendants, on either of the patents sued on.

[No. 142.]

Argued Jan. 4, 5, 1883. Decided Jan. 22, 1883.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

The history and facts of the case appear in the opinion of the court.

Messrs. **George H. Christy,** and **John H. B. Latrobe,** for appellant.

Messrs. **George Harding** and *John R. Bennett,* for appellees.

Mr. Justice **Blatchford** delivered the opinion of the court:

This suit is brought for the infringement of two re-issued letters patent granted to the appellant. One, No. 2224, was issued April 10, 1866, for an improvement in harvesters, the original patent, No. 35315, having been issued to him May 20, 1862. The other, No. 2490, was issued February 19, 1867, for an improvement in harvesters, the original patent, No. 40481, having been issued to him November 3, 1863, and re-issued in two divisions; one, No. 1888, February 28, 1865, and the other, No. 2102, No-

*Head notes by *Mr. Justice* BLATCHFORD.

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vember 7, 1865 and No. 2490 having been issued on the surrender of No. 2102.

No. 2224 contains 19 claims, and No. 2490 [134] contains 9 claims. In No. 2224, claims 1, 8, 9, 11, 12, 14, 16 and 19, and in No. 2490, claims 1, 2, 6, 7 and 9, are alleged to have been infringed. The circuit court rendered a decree that the appellees had not infringed any invention of which the appellant was the original and first inventor, recited in the two re-issues sued on; that No. 2224 "contains inventions different from that contained" in No. 35315; that No. 2490 contains inventions different from that embraced in No. 40481; that the said re-issues respectively are, therefore, void; and that the bill be dismissed. From this decree, this appeal is taken.

In No. 2224 the claims in question are these: "1. A sweep rake, which is mounted upon the heel of the finger beam proper, or upon the inner front corner of the platform of a harvester which has its cutting apparatus and platform hinged to the draft frame, all in such manner that the rake arm sweeps the platform from front to inner side, and maintains a correct position in relation to the finger beam and platform, during the rising or falling movements thereof on the joint or joints by which the finger beam is connected to the draft frame, substantially as set forth." "8. In a harvesting machine which has its cutting apparatus hinged or jointed to the main frame in such manner as to allow it to conform at both ends to the undulations of the ground, and a rake mounted upon the said cutting apparatus or upon the platform thereof, I claim so constructing and arranging the several parts, that the support of the rake can occupy a position outside of the inner drive wheel B, or a position which is between the point of suspension, *h*, and the outer divider G, and can also be hung or be suspended below the draft frame, substantially as described. 9. Effecting a combination of a rake and reel, located substantially as described, and a finger beam and platform, with the main frame, by means of a hinged draw bar, *b*, and hinged brace, I, or hinged suspender, *f*, and an extension bracket, 2, or their equivalents, substantially as and for the purposes described." "11. Preventing a too sudden or abrupt deflection of a rake and reel mounted upon a hinged joint cutting apparatus, by carrying the point of suspension beyond the rake support towards the center of the draft frame, by means substantially as described. 12. A [135] continuously revolving rake, which is mounted directly and wholly upon the platform or finger beam, so as to rise and fall therewith independently of the draft frame, when said rake is located between the center of the draft frame and the outer divider, and passes in at the front of the machine upon the platform and sweeps around to the inner side of the platform, substantially as described." "14. The combination of a suspended hinge joint cutting apparatus of harvesters, and a combined rake and reel, which is mounted directly and wholly upon the suspended platform or hinged finger beam, substantially as and for the purpose described." "16. The combination of a combined rake and reel, mounted upon a hinged joint cutting apparatus, and a yielding belt tightener, substantially as and for the purpose described." "19. Providing in a harvester with the rake attached to its hinged finger beam or platform, an extensible means for driving the rake which will permit the platform and rake to rise and fall together, and accommodate themselves independently of the draft frame to the undulations of the ground, substantially as described and for the purpose set forth."

The original patent, No. 35315, in stating what the invention is, says that it consists of certain improvements in the manner of mounting and operating a revolving rake. There were three features set forth in the specification of No. 35315: 1, the peculiar construction of the reel and rake; 2, the peculiar form and location of the rake post; 3, the peculiar manner of operating the rakes. There were only three claims in No. 35315, one covering each of said three features, as follows: "1. A combined reel and rake, rotating upon a vertical axis and having its arms successively turned up into an inverted position to pass over the main frame, substantially as explained. 2. The inclined standard, I, rigidly mounted upon a loosely hinged platform and employed to support a revolving reel and rake in an unchangeable position in relation to the said platform, without obstructing the free motion of the latter. 3. The yielding and swiveled rod, Q, operating in combination with the band, P, and pulleys, O and R, in the manner and for the purposes herein shown and explained."

A copy of the model, filed in the Patent Office with the original application for No. 35315, is [136] in evidence. The invention shown in the specification of No. 35315 consists, in general terms, in mounting a rake upon a quadrant shaped platform, said platform, being hinged to the frame of a two wheeled machine in such manner that the raking arms will maintain at all times a proper working position relatively to the surface of the platform and at the same time receive motion from driving mechanism mounted on the main frame, the result being accomplished by constructing the raking apparatus in a peculiar manner, and mounting it in a peculiar manner upon the platform of the machine and, also, by connecting the driving mechanism of the rake with the driving mechanism on the main frame, by a belt mounted in a peculiar manner, so that the varying changes in the position of the platform and the raking apparatus relatively to the main frame and the gearing therein will not affect the driving mechanism of the rake. The specification says: "D is a segmental platform, provided with a divider, E, at its outer end, and resting upon a roller, *e*. F is a draw bar, connected at front by a universal joint to the frame A, and attached at back to a shoe, *f*, upon which the inner side of the platform may rest. G is a lateral brace rod, hinged at one end beneath the right hand rear corner of the main frame, and at the other to the draw bar F, or shoe *f*. H is a link by which the inner end of the platform is suspended from the back of the main frame." This language describes the parts which relate to the platform and the devices by which it is attached to the main frame, and by which it is permitted to vary its movement relatively to the main frame, to conform to the unevenness of the ground, and there is nothing else on the subject in the text of the specification. In the drawings of

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No. 35315, the suspending link H, by which the inner side of the platform is suspended from the main frame, so as to keep it on a level with the wheel at the outer shoe, at the opposite side of the platform, is attached at its lower end to an arm which extends out from the platform, nearly to but short of the middle of the width of the tread of the left hand driving-wheel, B, but the drawing represents the central line of the link, H, as in the vertical plane of the left hand edge of the tread of the wheel, B, so as to [137] put the point of suspension in a vertical line with the left hand edge of the tread of the wheel, B. The model referred to shows the link as being suspended at a point on the frame to the right of the vertical plane of the left hand edge of the tread of the wheel, but not to the right of the vertical plane of the middle of the width of the tread. In the re-issue, great stress is laid upon this point of suspension. In the specification of the re-issue it is said: "From the inner corner of the finger beam or platform, or from the metal foot piece of the rake and reel support, by which the support is screwed to and braced on the platform and finger beam, a strong bracket, 2, is extended beyond the left hand side beam of the draft frame. To the extremity of this arm a swinging link or chain, *f*, is loosely connected or jointed, as at *g*, and by means of this link or chain the finger beam, platform and rake, though arranged at the left of the left hand drive-wheel, B, can be suspended from a point which is to the right of the said left hand side beam. The suspension is effected by hanging the upper end of the link or chain to the rear beam of the draft frame, as represented at *h*." In the drawings of the re-issue, the point of suspension of the link is located a little to the right of the vertical plane of the middle of the width of the tread of the left hand driving-wheel, and the arm or bracket to which the lower end of the link is attached extends to a point beyond, and at the right hand of, the middle of the width of such tread. In the specifications of No. 35315 the word "finger beam" is not found, nor is a finger beam described in it nor shown in the drawings.

As to the method of mounting the rake, the specification of No. 35315 says: "I is a post rigidly secured to the inner side of the platform, and inclining over the rear of the main frame; *i* is a brace rod extending from the draw bar to the said post, to support the latter at top; J is a box mounted on the top of the post I, and constituting the bearing in which the disk K rotates. The rakes or reel arms L L' are mounted in couples upon the ends of horizontal shafts M M, which are journaled at right angles across the rotating disk K." This is all that is found in that specification as to the location of the axis of the rake. On the other hand the specification of the re-issue says: "Fig. 9 is a rear elevation of a portion of the machine, showing [138] the manner of suspending the rake and reel support upon the hinge-joint finger beam or platform thereof." The drawings of the re-issue show a finger beam, and it is lettered and referred to by letter in the text. The specification of the re-issue further says: "It is also important to have the suspension of the rake made in such a manner that the base of the support of the axis of the rake is wholly upon the hinged finger beam, or the platform thereof; and also that the rake, the finger beam and the platform shall be rigidly connected together." Here the word "finger beam" is again introduced, as important in connection with the support of the axis of the rake. The expert for the defendants states that the drawings of No. 35315 show the base of the support of the rake so far back, or to the rear of the front edge of the platform, that it cannot, in his opinion, be brought in contact with the finger beam, without changing its locality very materially, or the mode of its construction or attachment. But the specification of the re-issue says: "D is the finger beam and E the platform of the harvester, the cutting apparatus and guard fingers being left off. F is a support for a combined rake and reel. This support is mounted rigidly upon the inner front corner of the platform and heel of the finger beam; but it may be mounted either wholly on the finger beam or wholly on any part of the platform which is to the left of the left hand drive-wheel B, or to the right of said drive-wheel, if it is a right hand machine." There is no warrant in the original patent for locating the rake support, or any part of it, on the finger beam.

As to claim 1 of the re-issue, the finger beam is made an element of the combination, while in the specification and drawings of No. 35315 there is no reference to a finger beam. Moreover, the raking apparatus of the appellant is so constructed that when one of the arms has descended to force the grain towards the platform and to sweep across the platform, the opposite arm must be raised to such a point as to clear the wheel of the machine. The arms are in pairs, and the motion of one arm of a pair is controlled by the motion and operation of the opposite arm of that pair. The inclination of the two to each other is such that when one is sweeping across the platform the other forms an exactly opposite angle to the axis on which they both revolve. Therefore, the support of the [139] rakes must be so mounted that they can descend to the grain at the proper point in front of the cutters to press in the grain and sweep across the platform and deliver the gavels and then rise out of the way of the frame. To effect this, the point of vibration of the pair of arms must be raised so high and carried over towards the frame so far, that the descending arm may reach its proper position to do its work, while the other arm of that pair shall clear the frame in rising. Therefore, the support of the raking apparatus was required to be of such form and character and so placed relatively to the platform and frame, that one arm of a pair would not interfere with the working of the other arm of the same pair. Now, the arms of the raking apparatus are diametrical arms, the centers of which are axes mounted on a horizontal head, which head is so fastened on a vertical shaft that, the opposite ends of the arms being inclined to the axis of rotation, one end of one arm will descend and sweep across the platform, while the other will be carried in an exactly opposite direction, with its rake teeth turned up while the teeth of its opposite arm are turned down. In such an arrangement, the bearing point or axis of rotation of the arms must be carried up a considerable distance above the platform and reach over in a diagonal direction from the front edge of the cutters to the delivery edge of the platform,

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so that the rake at its end next the base of the rake support may be brought close enough to the platform to do its work. Hence, the inclined post of No. 35315, described as so inclined and thus claimed in claim 2 of that patent. But, in the specification of the re-issue, though the drawings show the same sort of inclined post or standard, it is said: "From the platform or finger beam, the support *may* extend in an inclined position as high as the top of the draft frame, and then take a turn over toward the center of said frame, as represented, so as to form a support for the rake and reel which shall be somewhat higher than the frame and between the two drive or supporting wheels. The particular shape and height of this support is not very material, so long as the base of it is affixed at some point between the center of the main frame, A, and the outer shoe or divider, G." The special kind of support de-
[140] scribed and shown in the patents, original and re-issued, is essential to the operation of the special kind of raking apparatus there described. But, the appellees' machine has a raking apparatus differently organized. In it, each arm moves independently of every other arm; the arms are not coupled in pairs and each does its work without reference to the movement of any other. Therefore, it is unnecessary to raise the supporting point of the rake arms to any considerable height or to carry it over to a location between the drive-wheels; and in the appellees' machine the pivot on which the rakes revolve is at a considerable distance toward the outer shoe and is not all between the drive-wheels. The appellees' sweep rake is not substantially such a sweep rake as is referred to in claim 1 of the re-issue, nor is it mounted in such a manner as to perform the functions of the appellant's rake. The rake post in the appellees' machine is vertical and not inclined and is mounted on the shoe or inner end of the finger beam.

In analyzing the two machines, in view of the state of the art, it appears that the appellant adapted a continuously revolving gathering and discharging rake to a two wheeled loosely jointed finger bar machine. To do this he employed a peculiar rake and a peculiar rake support. The appellees employ an entirely different rake. They have a series of radial arms, pivoted, each independently of every other, in a head which has a double cam guideway for each arm, and the arms are thereby elevated vertically so as not to strike the frame in passing up. This makes it possible for the appellees to place the support for their rake on the finger beam by the side of the frame and in the line of the cutters instead of behind the frame. No such organization is possible with the appellant's arrangement of rakes. The center of movement of his rakes must be brought in line with the cutters by having an inclined rake post, the base of which is not in a vertical line with the line of the cutters. He shows no mode of placing the base of the post on the finger beam. If it were placed there, with his arrangement of rake arms, and his inclined post, the center of motion of the arms would be so far out of its proper position that the arms would not do their work. Having independent radial arms, the appellees can have a vertical and not an inclined rake
[141] post, and can bring the center of motion of the arms in a line with the cutters by mounting the vertical post on the finger beam. They do this; and for that purpose they have a bridge over the inner shoe of the finger beam for the foot of the rake post to rest on, while at the same time the cutters can vibrate under the bridge. The post is hollow and supports the cam guideway, and the vertical shaft which revolves the rakes passes up in and through the hollow post. The appellees have not borrowed from the appellant. They devised a new arrangement of rake which made it possible for them to mount their rake support on the heel of the finger beam proper, where the appellant can never mount his and where that of the appellees is mounted. The theory of the re-issue appears to be that, as the original patent shows a special device for supporting a special arrangement of rakes, such device being located on a particular part of the platform other than, and not possible to be, a part of the finger beam, he can claim in a re-issue any device for supporting a revolving rake, even one located on the finger beam. To carry out this view, the word "finger beam" is interpolated in the specification, in this connection, as an addition to the word "platform," and the rake post is described as being attached to the finger beam *or* the platform. But there is an entire absence in the original specification, and in the re-issued specification of any description of any means by which the rake support can be attached to or mounted on the finger beam, or by which the rakes can be made to work with the rake support in that location, or by which the connecting rod of the cutters can be free to work with the support so placed. The law of re-issues never, at any time or under any construction, allowed that to be done which has been thus attempted in this case.

The foregoing views apply also to claims 8, 9, 11, 12, 14, 16 and 19, being all the other claims alleged to have been infringed, and each of which has, as an element, either a rake or a rake and reel mounted on or attached to the cutting apparatus or the finger beam.

In the re-issue, claim 2 is substantially the same as claim 1 of the original; claim 5, with the interpolation of the finger beam, is intended to take the place of claim 2 of the original, and claim 18 corresponds with claim 3 of the orig- [142]
inal. Yet the appellees' machine is not alleged to infringe either claim 2, claim 5 or claim 18 of the re-issue, nor does it embrace what was covered by any one of the three claims of the original. As to the yielding belt tightener of the appellant, which is the subject of claim 3 of the original patent and is an element in claim 16 of the re-issue, the appellees' machine does not employ any device which performs the function of tightening a belt. It uses, to communicate motion from the main axle to the raking apparatus, an old form of chain belt, composed of square open links, connected by loops of metal between the links, and the links arranged to run over sprocket wheels, which have teeth on them corresponding to openings in the links of the chain and which prevent the chain from slipping on the wheels. As the links of the chain engage positively with the teeth on the sprocket wheels, there is no need of a belt tightener, as no slackness in the chain can interfere with the driving action. The only function of the appellees' device which holds up, by a yielding pressure, the under part of the chain belt, is to

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so guide that part, when slack, that the teeth on the sprocket wheels may readily enter the links of the chain. The appellant's belt could not, in the same position, drive the raking apparatus so as to make it work properly. The appellees, by the use of sprocket pulleys and a chain, dispense with a tight friction band, and with a pulley around which the platform vibrates, and with a tightening pulley. Their arrangement is not an equivalent, in mechanism or functions, for that of the appellant.

It is made an element of claim 11 of the re-issue, that the point of suspension of the platform to the main frame is carried beyond the rake support toward the center of the draft frame, by means described in the specification, so as to prevent a too sudden or abrupt deflection of the rake and reel. The specification of the re-issue says, that "It is important that the great weight of the rake, finger beam and platform shall not cause the draft frame to tilt over on its right hand drive-wheels by sudden and abrupt motions, but shall tend to insure a square run of the draft frame upon the ground during the pitching or rising and falling motions of the finger beam, platform and rake, and thus an [143] even and easy draft for the beam be secured." But the re-issue shows the point of suspension of the platform to the main frame as being nearly under the axis on which the rake arms revolve, and said point is near the vertical plane of the middle of the width of the tread of the drive-wheel which is next to the cutters, so that the inner end of the platform is subject to all the vertical motions of such drive-wheel. The point of suspension being in the pathway of the wheel, the rising or falling motion of the wheel must be communicated to that end of the cutters which is next to such wheel. In the appellees' machine, the suspension of the platform is made by an arm extending out from the finger bar or inner shoe to a point about opposite the center of the main frame, and which arm is there suspended by a chain to a hook on the frame, so that the weight of the cutting apparatus and rake and inner part of the platform is transferred to nearly a centre point between the drive-wheels. The appellant's structure shows no such organization, and does not involve what the appellees have done.

For the foregoing reasons, without considering the many other questions raised in the case, it must be held that the appellant has not established any cause of action against the appellees on re-issue No. 2224.

In No. 2490 the claims in question are these: "1. The combination, in a two wheeled hinged-joint machine, of a driver's seat mounted upon the main frame, with a raking mechanism mounted upon the finger beam, and rotating around a vertical axis or one nearly so, substantially in the manner described, for the purpose of enabling the driver to ride on the machine while the rake is in operation. 2. The combination, in a two wheeled hinged-joint machine, of a shoe with a hinged joint in it, with a rake and platform having an extension, J^2, and with a draft frame which sustains the weight of the cutting apparatus and raking apparatus with platform attached, at a point between the two drive-wheels." "6. Driving a revolving rake or a combined revolving rake and reel, which move about a vertical or nearly vertical axis, by a device arranged on the grain side of the inner drive-wheel or inner side of the draft frame. 7. Making a direct driving connection between a revolving rake, or a combined rake and reel, [144] which move about a vertical or nearly vertical axis, and the inner end of the main frame axle of the draft frame." "9. The combination of a quadrant platform, hinged finger beam, revolving rake and a driver's seat supported by the main frame."

The original patent, No. 40481, says that the improvements covered by it consist: 1, in a peculiar construction and combination of frame, gearing and double driving-wheels; 2, in a device for affording protection to the main crank shaft and strengthening the main frame; 3, in the use of a movable tongue; 4, in a device for permitting the finger beam to turn freely on its own axis. There were only four claims in No. 40481, one covering each of said four features, as follows: "1. The main frame and gear frame AA, constructed as described, open at each end, when used in combination with shafts, gearing and double driving-wheels arranged and operating substantially as and for the purposes specified. 2. The flange, *a*, cast or formed upon the gear frame for the combined purposes of strengthening the latter and protecting the crank shaft, E, as hereinbefore explained. 3. The movable tongues, K, adapted to be attached to the frame on either side of the wheel, B', and employed to support or raise the inner end of the beam. 4. Attaching the shoe to the drag bar by a transverse swivel joint, to permit the finger beam to turn its axis to elevate or depress the joints of the fingers, or to fold the beam against the frame for transportation, when combined with bracing guides, *h'*, substantially as herein described."

Every one of the four claims of No. 40481: the iron frame cast in one piece, the flange, the movable tongue and the transverse swivel joint is omitted from the re-issue and there are no corresponding claims. The rake support is of the same form and in the same location as in No. 35315, inclined and mounted on the platform, and not on the finger beam, and the inner end of the platform is suspended on the main frame in the same way as in No. 35315. The specification of No. 40481 says: "On the inner side of the grain platform, near the heel of the finger beam, is firmly mounted a post, R, which may incline over toward the main frame, as shown in Figure 1." This passage negatives the idea of mounting the post on the finger beam, and draws a distinc- [145] tion between the platform and the finger beam as a location for the attachment of the post. The only mention of a driver's seat in No. 40481 is this: "W, represents the driver's seat." In the specification of the re-issue the following language is found: "My first improvement consists in the combination, in a two wheeled hinged-joint machine, of a driver's seat mounted upon the main frame, with a raking mechanism mounted upon the finger beam and rotating on a vertical axis or one nearly so, substantially as hereinafter described, for the purpose of enabling the driver to ride upon the machine while the rake is in operation." Again, after describing the construction and arrangement of the rake or reel arms, which are the same as in No. 35315: "By this means, the rake and reel arms will stand high enough above the draft frame

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on the inner side of the machine, to move clear of the driver, who sits upon the machine in a seat, W, which is mounted upon the main frame, as shown, or in any other position on the frame that will give the greatest convenience and advantage from his weight and use of his hands in the management of the machine." Again; "From the foregoing description it will be seen that my invention enables me to combine in a self-raking harvester all the advantages derived from the two wheeled hinged-joint machine, and still use a rake that turns about an axis, or revolves entirely about the same, and at the same time have the driver or manager ride upon the main or draft frame in such a position that his weight may aid in counterbalancing the weight of the rake and platform, and his hands may be conveniently employed for controlling the machine."

As to claim 1 of the re-issue: although there is in No. 40481 a driver's seat mounted on the main frame, it is not in such a position nor can it be placed on the frame described in such a position that the driver can ride on the seat while the appellant's rake is in operation. The appellees' raking apparatus has been above described. The appellant's raking apparatus is like that of No. 35815 and of re-issue No. 2224. If the appellant's raking apparatus were substituted in the appellees' machine for their raking apparatus, no person could ride on the driver's seat located anywhere on the frame of the ap-
[146] pellees' machine, as it is constructed, with the rake in operation. The seat shown in the drawings of No. 2490 is mounted on a portion of the frame which extends to the rear of the main axle, and the seat itself is shown as placed in the rear of said axle. Consequently, a driver located on said seat would add his weight on the same side of the main axle on which the raking apparatus is mounted, so that the idea of any counterbalancing weight from the position of the driver is negatived by the arrangement. In the appellees' machine, the organization of the raking mechanism, before described, is such that the driver's seat may be located towards the front of the main frame, where he cannot be struck by the rake arms and where his weight will aid in counterbalancing that of the rake and the platform. No such organization of raking mechanism is shown or described in No. 2490, nor any such arrangement of seat relatively thereto. Moreover, claim 1 of No. 2490 requires that the raking mechanism be mounted on the finger beam. Such a construction is not shown nor described in No. 2490, or in No. 40481. The raking apparatus in the appellees' machine is mounted directly on the finger beam. The views hereinbefore expressed in connection with No. 2224 apply to No. 2490, so far as the mounting of the rake post on the finger beam and the arrangement of the raking mechanism are concerned.

As to claim 2: the raking apparatus is made an element in it, and the differences, before pointed out, between the two machines, in the construction of the raking mechanism and the arrangement and location of the rake post, lead to the conclusion that the rake mentioned in claim 2 must be construed to be such a rake, and one so arranged, on a rake post so mounted, as is shown and described in the specification, and thus does not include the appellees' raking mechanism or rake post.

As to claim 6: the driving device must be limited to one substantially the same as that of the appellant. He has an extensible tumbling shaft. The appellees have a chain belt, with links before described. Their arrangement requires that the axis of the driving-wheel and the driven wheel shall be substantially parallel, while No. 2490 requires that in the appellant's structure the axes of the two wheels, or the ends of the axes, shall incline towards each other at a con- [147]
siderable angle. The tumbling shaft, if used, must be used in such a location that the chain belt would not work in the same place. The two devices are not mechanical equivalents for each other. One could not be substituted for the other without a re-arrangement of parts. Their only resemblance is that both communicate motion. The place where the device is arranged, namely: as the claim says, on the grain side of the inner drive-wheel or inner side of the draft frame, imparts no patentable or inventive quality, in this case. That inheres only in the device.

In regard to claim 7, the appellant's raking apparatus and driving device are elements in it, and the observations before made apply, so that the appellee's raking apparatus and driving device are not covered by this claim.

Claim 9 includes the rake and the driver's seat and, under the views before stated, the appellees' machine cannot be held to infringe that claim.

These conclusions make it unnecessary to consider any other question.

The decree of the Circuit Court is affirmed, in so far as it dismisses the bill.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

SUN MUTUAL INSURANCE COMPANY,
Appt.,

v.

OCEAN INSURANCE COMPANY. [495]

(See S. C., 17 Otto, 485-511.)

Jurisdiction in reviewing admiralty case—questions of law—re-insurance—duty of disclosing facts.

1. Under the Act of 1875, the jurisdiction of this court in an admiralty case is limited to a determination of the questions of law arising upon the record, including the rulings of the circuit court, presented in a bill of exceptions. The findings of fact being

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NOTE.—*Re-insurance.*

Re-insurance is a contract wholly collateral to the original insurance. Herckenrath v. Am. Ins. Co., 3 Barb. Ch., 63.

The re-insured to recover must prove all that is necessary to make out a complete legal liability, the policy, loss, etc., but he need not prove that he has

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in the nature of a special verdict, this court can go neither behind nor beyond them.

2. A determination of the questions of law arising upon the record may be predicated of facts which appear in any part of it, whether admitted by the parties in the pleadings, or by stipulation, or found by the court.

3. In respect to the duty of disclosing all material facts, the case of re-insurance does not differ from that of an original insurance.

4. The exaction of information may be greater in a case of re-insurance than of an original insurance. In the former, the party seeking to shift the risk he has taken should communicate his knowledge of the character of the original insured, where such information would be likely to influence the judgment of an underwriter.

5. The assured will not be permitted to urge, as an excuse for his omission to communicate material facts, that they were actually known to the underwriters, unless it appears that their knowledge was as particular and full as his own information.

[No. 119.]

Argued Dec. 6, 7, 1882. Decided Jan. 22, 1883.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The history and facts are very fully set out in the

Statement of the case by *Mr. Justice* **Matthews:**

This was a libel in admiralty, filed in the District Court of the United States for the Southern District of New York by the appellee, upon a policy of marine insurance. A decree, dismissing the libel, was rendered in that court, which, on appeal, was reversed by the circuit court, and a decree entered in favor of the libelant. From that decree the present appeal has been prosecuted.

The findings of fact made by the circuit court as the basis of its conclusions of law are as follows:

Facts found by the court.

1. At the several times hereinafter mentioned, the libelant and the defendant were Insurance Companies engaged in the business of insuring against losses by perils of the sea. The libelant, to be referred to herein as The Ocean Company, was incorporated under the laws of the State of Maine, and had its principal place of business at Portland in that State. The defendant, to be [486] referred to as The Sun Company, was incorporated under the laws of the State of New York, and had its principal place of business in the City of New York.

2. On or about January 19, 1864, The Sun Company issued its open policy, No. 51564, to The Ocean Company in the usual form for the insurance of cargoes at and from Cuba to Boston or Portland; it being, however, expressly understood and agreed that no risk would be taken under it unless The Ocean Company take or have an amount on same risk equal to one half the amount covered by The Sun Company. On the 9th February, 1864, it was agreed in writing, noted upon the policy, that the policy should "cover such other risks as this (The Sun) Company may approve and indorse" thereon. Under this new arrangement, the clause limiting the risks to such as The Ocean Company retained an interest in to the extent named, to wit: an amount equal to one half that of The Sun, was kept in force; but February 24, 1864, the president of The Sun Company wrote to The Ocean Company as follows: "We are willing that you be not obliged to retain a half of risk when you do not wish to do so, but we reserve the right to object to amounts returned, which it is not probable will be too great very often."

A copy of the policy issued, with the indorsements thereon, is printed in the apostles in this case as Exhibit No. 1.

3. This policy was issued with the expectation that it would be used by The Ocean Company for the purposes of re-insurance, an arrangement for such a business on the part of the [490] Company having been made.

4. December 24, 1863, Charles S. Pennell, as an owner and agent of the ship C. S. Pennell, of 975 tons burden, and then lying in the harbor of Portland, Maine, chartered the whole of the vessel, including the state-rooms in cabin not used by the officers, and deck rooms not used for the crew or for sails and stores, to Sutton & Co., for a voyage from New York to San Francisco. No cargo was to be received on board except with the written consent of the charterers, and they were to pay for the charter or freight on the good and proper discharge of the cargo in San Francisco, $26,500, less two and one half per cent commission. George M. Melcher was at the time master of the ship, and his primage on the freight money, if earned, would have been $1,325. This charter will be referred to as the San Francisco charter.

5. After the making of this charter, the vessel sailed from Portland to New York, and was there put up and advertised by Sutton & Co. as a general ship for San Francisco. That firm at that time represented what was known as the Dispatch Line of San Francisco packets.

6. January 30, while the ship was in New York, loading under her San Francisco charter and advertised for that voyage, her master chartered her again to the Peruvian Government. By the terms of this charter she was to sail from New York on or before June 1, 1864, to San

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paid or intends to pay the insured. 3 Kent, Com., 279; Fame Ins. Co.'s Appeal, 83 Pa. St., 396; Hone v. Mut. Safety Ins. Co., 1 Sandf., 137; Blackstone v. Allemania Ins. Co., 56 N. Y., 104; 4 Daly, 299.

If the insurer is not bound the re-insurance is void for want of interest in the loss. Carpenter v. Prov. Ins. Co., 41 U. S. (16 Pet.), 495.

The re-insurer may defend on ground that the original insurance was void. Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind., 443; N. Y. Ins. Co. v. Prot. Ins. Co., 1 Story, 458.

Where the loss was payable in the original insurance *pro rata* and the re-insurance in the same way, the re-insurer is only liable for sums actually paid by the re-insured. Ill. Ins. Co. v. Andes Ins. Co., 67 Ill., 362; S. C., 16 Am. Rep., 620.

Provision as to other insurance in policy of re-insurance, means other re-insurance. Mut. Safety Ins. Co. v. Hone, 2 N. Y., 235.

The original insured is not a party to the re-insurance. If the insurer is not solvent, while the re-insurer is, and pays the loss, it does the insured no good. Hone v. Mut. S. Ins. Co., 1 Sandf., 137; Blackstone v. Allemania Ins. Co., 56 N. Y., 104; 4 Daly, 299.

If the insurer resists the claim in good faith, the re-insurer is liable after notice of the suit for the insurer's costs and expenses. Hastie v. De Peyster, 3 Caines, 190; N. Y. Ins. Co. v. Prot. Ins. Co., 1 Story, 458.

The insurer must communicate to the re-insurer all material facts known to him. Bowery Ins. Co. v. N. Y. Ins. Co., 17 Wend., 359.

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Francisco, and thence proceed, with all convenient dispatch, to Callao, Peru; and from thence, if on inspection she should be found to be well conditioned for the voyage, to the Chincha Islands for a cargo of guano to be taken to Hamburg or Rotterdam. The freight to be paid was at the rate of £4 per ton of 20 cwt. British net weight of guano, subject, however, to a deduction of five shillings per ton, if the vessel was not ready in Callao to proceed to Chinchas by December 15. This charter will be referred to as the Rotterdam charter.

7. On the 5th February, 1864, while the ship was in New York loading, Charles S. Pennell, a part owner, took from The Ocean Company a policy insuring his interest in the ship for $3,000 against war risks, and his interest in the [491] Rotterdam charter for $8,000 against marine risks on the voyage between New York and the Chinchas. In this policy the duration and locality of the risk was described as "At and from New York to at and from San Francisco, Callao and the Chinchas."

8. George M. Melcher was at the time owner of one eighth of the ship, and master. On the 20th March, he wrote one Sawyer, his agent at Portland, advising that the ship was about ready to sail, and directing that insurance be effected on his interest as follows:

War risk to San Francisco, ship	$5,000
Charter to San Francisco, $26,500–⅛	3,300
Primage on same	1,325
Homeward charter from Chinchas, insure out, say, 1,750 tons, at £4 to £7,000, at currency rate of exchange, $52,400, my ⅛	6,550
Primage on same	2,650
Chronometers, Dent, 1888; Negus, 1,261	500
And our effects, clothing, etc.,	1,000
	$19,425

In the same letter it was said: "I think you had better put 5 or $6,000 more marine risk in case I should lose the ship."

9. Upon the receipt of this letter, Sawyer applied to The Ocean Company for a policy upon the Rotterdam charter, primage and personal effects to San Francisco. In doing so, he exhibited his letter of instructions and explained fully all the circumstances. The risk was accepted and the policy issued March 23, in which the risk was described as follows: "$6,550 on charter; $2,650 on primage; and also $1,500 on property on board ship Charles S. Pennell, at and from New York to San Francisco."

10. On the same day The Ocean Company insured the master for $3,000 on his interest in the ship during the whole of her voyage, describing the duration and locality of the risk as "At and from New York to, at and from San Francisco and Chinchas, with usual liberties at Callao, to her port of advice and discharge in Europe."

11. On the same 23d of March, the president of The Ocean Company wrote the vice-president of The Sun as follows:

[492] "* * * I also inclose returns for registry as follows: * * * $5,000, ship C. S. Pennell, to San Francisco and Chinchas, war; $5,000 fr. of do. * * * P. S.—I also enclose an additional return for insurance on charter, primage and property per ship C. S. Pennell to San Francisco only."

The returns inclosed in this letter were as fellows:

"To the Sun Mutual Insurance Company:

Enter on open policy of this company No. 51564, $5,000, on charter of ship Charles S. Pennell, at from New York to, at and from San Francisco and Callao to Chinchas.

Rate three per cent on board.

New York, March 23d, 1864.

J. W., *V. P. Ocean Ins. Co.*
Per G. A. W., *Sec'y.*"

"To the Sun Mutual Insurance Company:

Enter on open policy of this company No. 51564, war risk only, $5,000 on ship Chas. S. Pennell, at and from New York, to, at and from San Francisco to Callao to Chinchas.

Rate, three per cent on board.

New York, March, 23d, 1864.

J. W., *V. P. Ocean Ins. Co.*
Per G. A. W., *Sec'y.*"

"To the Sun Mutual Insurance Company:

Enter on open policy of this company No. 51564, $6,550 on charter, $2,650 on primage, and $1,500 on property on board ship Chas. S. Pennell, at and from New York to San Francisco, including war risk.

Rate, six per cent on board.

New York; March 23d, 1864.

J. W. *V. P. Ocean Ins. Co.*
Per G. A. W., *Sec'y.*"

The first and second of these returns were for re-insurance on the risks taken for Charles S. Pennell, and the last on account of the risks taken in favor of the master on the Rotterdam charter and personal property on board, from New York to San Francisco. The risk on the vessel, taken in favor of the master at the same time, was not reported to The Sun Company. [493]

12. Upon the receipt of this letter, with its inclosures, the president of The Sun Company wrote The Ocean Company, under date of March 24, as follows:

"Your favor of the 23d inst. is received * * * and returns as stated. Those * * * on charter per Chas. S. Pennell, $10,700, in conformity thereto. For the marine risk per Chas. S. Pennell to San Francisco, thence to Callao & Chinchas, our regular tariff rate is four and one half per cent; the war risk is worth the same but we propose to enter for both marine and war on $5,000 for four per cent."

13. To this the president of The Ocean Company replied, under date March 26, as follows:

"Your favor of the 24th inst. is received. I think, really, considering that you have the risk on charter, primage and property to San Francisco at full rates, you should take the war and marine to San Francisco and Chinchas on C. S. Pennell at six per cent, as there is or will be but little risk in the Pacific after leaving San Francisco. I can have both risks taken at less than these rates." * * *

14. In response to this, the vice-president of The Sun wrote, under date of March 28, as follows:

"Your favor of the 26th inst. is received with a return * * * which is entered in conformity thereto, as have also been the returns of the 23d inst., per ship C. S. Pennell."

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15. The indorsement of these returns upon the open policy was as follows:

1864.	Vessel.	From—	To—
March 23.	Ship Chas. S. Pennell	N. Y., San Francisco	Callao & Chincha

	Am'ts.	Rates.	Prems.
On charter	$5,000	3	$150 marine

1864.	Vessel.	From—	To—
March 23.	Ship. Chas. S. Pennell	N. Y., San Francisco	Callao & Chinchas

	Am'ts.	Rate.	Prems.
On vessel	$5,000	3	$150 war only
" "	New York, San Francisco, charter,	0,550; 0,393	war & marine
" "	" " " primage,	2,650; 0,159	"
" "	" " " property,	1,500; 0, 90	"

16. At the time these returns were made and accepted, The Sun Company had actual knowledge of the San Francisco charter and had taken risks on cargo shipped on board the vessel to San Francisco under it.

[494] 17. When the returns were made by The Ocean Company to The Sun for acceptance and indorsement, no special mention was made of the Rotterdam charter, and no information was given The Sun Company of what had transpired between The Ocean Company and the agent of the master when the insurance was effected. No allusion was made to the letter of the master to his agent, which was shown the president of The Ocean in connection with the application to that Company, and The Sun Company had no other knowledge of the existence of the Rotterdam charter than such as is to be inferred from the correspondence which preceded the acceptance of the risk.

18. Both the president of The Ocean Company and the vice-president of The Sun Company are dead. The first named died in July, 1869, and the last some time before Jan. 1, 1867.

19. The ship sailed from New York to San Francisco about the first of April, 1864, having on board a full cargo under the San Francisco charter. Having met with a disaster on the voyage, she put into Rio Janeiro, where she was condemned and sold, and the voyage broken up.

20. The loss under the risk taken in favor of Charles S. Pennell, both on the ship and Rotterdam charter, was paid by The Sun Company without objection, October 23, 1865, and May 5, 1866.

21. In due time after the loss occurred, the master filed with The Ocean Company his proofs under his policy on account of the Rotterdam charter and his primage thereon. These proofs were promptly forwarded by The Ocean Company to The Sun, and no objections to their form were ever made. Payment was refused by The Sun Company on the ground that the master was over insured, and also upon the ground that the ship had been fraudulently cast away, and The Ocean Company was advised not to pay the claim on that account.

22. Pursuant to this advice, payment was refused by The Ocean Company and, in October, 1866, Melcher, the master, commenced suit upon his policy in the courts of Maine.

23. Of the commencement of this suit, notice was immediately given The Sun Company by The Ocean Company, and The Sun Company interested itself in the preparation for defense. An agent of those interested, including another [495] company having a risk upon the voyage, was sent to Rio Janeiro to ascertain the facts in relation to the loss and report. In the meantime, the suit upon the policy was suffered to remain in the court without being pressed. At the October Term, 1869, the counsel for the plaintiff insisting that something should be done, it was agreed, on behalf of The Ocean Company, that the case should, if possible, be tried at the January Term, 1870. In November, or late in October, 1869, the counsel on the part of The Ocean Company visited New York for the purpose of having a personal interview in respect to the case with the officers of The Sun Company. He there met the then vice-president of the Company. At the interview which then took place, the points of defense that had been previously suggested by the Companies having been discussed, the counsel stated that, in his opinion, they could not be sustained by the evidence, but that he intended to make the point that the Rotterdam charter was not included in the risk as described in the policy. He said, however, that he had been informed, by the attorneys who conducted the case for the plaintiff, they had extrinsic evidence which would establish the liability and which they expected to introduce. This extrinsic evidence he considered inadmissible, but at the same time said that if admitted, the defense to the action would undoubtedly fail. He then informed The Sun Company that upon the presentation of the evidence on the trial he should object to its admission, and he had no doubt the presiding Judge, under the practice of that State, would take the advice of the Supreme Court upon that question before proceeding further. If the evidence was ruled out he expected to succeed in his defense, but if admitted he had little hopes. He did not at that time know precisely what the testimony would be, and he did not communicate to the Company the particular facts relied upon.

24. At the conclusion of the interview, he was instructed by the vice-president of The Sun Company to go forward with the defense, and make every point possible. He was paid at the

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time $100, for which he gave a receipt, as follows:

[496] "New York, *Nov. 2d*, 1869.

Received from The Sun Mutual Insurance Company $100, on account of legal expenses and services for defending The Ocean Insurance Company of Portland from claims for loss on charter and primage in case of the ship C. S. Pennell, re-insured by The Sun Mutual Insurance Company for The Ocean Insurance Company.

John Rand."

25. At the April Term, 1870, the cause came on for trial, and the questions were raised upon the admissibility of the extrinsic evidence, and reported to the Supreme Court for its opinion. The testimony objected to included the deposition of Sawyer, the agent of the insured, as to what transpired between him and The Ocean Company at the time the insurance was effected; the letter from the insured to Sawyer specifying the risk to be taken, and which was submitted to the Company by the agent, as showing the authority under which he acted, and also the Rotterdam charter.

26. On the 6th of October, 1870, the attorney of The Ocean Company sent The Sun Company a copy of the case thus made, which contained a statement of the evidence offered and objected to.

In the letter transmitting this document, the attorney said: "The question now presented to our court is, simply, whether he (the insured) shall be allowed to put in the testimony. If not allowed, there is an end of the case. If allowed, then we go to trial upon other points of defense."

26¼. In reply to this, the president of The Sun Company wrote as follows:

"New York, *Oct.* 15, 1870.

Messrs. J. & E. M. Rand, *Portland, Me.*:

Gents: Yours of 6th instant was duly received, also the printed documents which you sent and which we have perused carefully.

It is shown by the testimony that the policy was made in accordance with the application of the plaintiff, and that there was no misunderstanding in relation thereto calling for the admission of evidence outside of the policy to explain it; certainly none would be admissible to contradict it, for that would be setting up a new contract other than the policy itself which is sued upon. [497]

It is important, therefore, to have excluded all evidence tending to contradict the policy. By the policy, as made, the plaintiff insured on charter New York to San Francisco, $6,550; on primage, $2,650; on personal effects, $1,500. There is no such charter shown, but the plaintiff sets up a charter to San Francisco and ports beyond, as described in the charter-party. The insurance of the charter to San Francisco was an insurance of only a part of said charter, not amounting even to a part insurance of the charter, because as the charter-party is to the effect that no money is to be paid by the charterers unless the whole round voyage is performed, and the contract being indivisible if no money was to be paid for the passage to San Francisco, the plaintiff had no insurable interest in that part of the charter; besides, the ship was loaded to her full capacity, and was carrying full freight on said passage outside of the charter, which was covered under special policies. The plaintiff has, therefore, by the perils insured against in the policy, suffered no loss beyond what he has already been indemnified for under his policy on freight. The interest of the plaintiff in the passage to San Francisco was, therefore, an impossible interest. I do not mean to say that he had no interest in the charter-party, but the risk under our policy being only to San Francisco, ended before the charter-party could by any possibility be performed. I think, therefore, that the main question is the question of interest, and think that the above reasons will be found sound in law. Please let me hear from you as to your opinion of them, and also as to your line of defense, what your points are, in order that I may be able to form some opinion as to the ultimate issue of the suit. Yours respectfully,

(Signed) J. P. Paulison, *President*."

27. In or about January, 1872, the Supreme Court decided that the testimony was admissible, and on the 16th of that month the attorneys advised The Sun Company of the result, and sent a copy of the opinion delivered. They also said that the case would probably come up again for hearing in a week or two, and asked that papers of any kind relating to the defense in the possession of The Sun Company might be forwarded to them at once.

28. Upon the receipt of this last letter, the case was submitted by The Sun Company to its counsel in New York, who gave his opinion in writing to the effect "That The Sun Mutual Insurance Company's liability under the re-insurance policy cannot be extended beyond the obvious import of the terms in which it is expressed. The letter of Melcher ordering the insurance not having been exhibited to them, nor the explanations of Sawyer made to them, they cannot be affected by them; and hence, if the admission of extrinsic evidence as to what took place between Sawyer and The Ocean Company, when the original insurance was made, varies the case as between that Company and Melcher from what it appears to be on the face of the original policy, I cannot see that it is a matter that concerns The Sun Company." [498]

29. January 29 a copy of this opinion was forwarded by The Sun Company to the attorneys in Portland, and attention called to its contents.

30. At the January Term, 1872, the cause was again tried and, the testimony being all in, the case was withdrawn from the jury and submitted to the court to enter such judgment as law and the evidence required. The point was directly made by The Ocean Company that the policy never attached, because the ship never actually or legally sailed under the Rotterdam charter.

31. On the 12th July, 1872, the case having been printed, a copy was sent by the attorneys in Portland to The Sun Company, with a statement that the cause would come on for argument before the full Bench in a few days. Permission was also asked to draw on the Company at sight for $500 on account of fees and disbursements.

31¼. On the 5th July The Sun Company replied, denying its liability to pay fees, and saying that, "As the suit is against The Ocean Company and not against us, you must look to them for your fees." It is also said in the letter that

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when the payment of $100 was made, in November, 1869, the case as subsequently developed was not fully understood.

32. A judgment was afterwards rendered in the suit against The Ocean Company for $9,200, and interest from April 27, 1865.

[499] 33. This judgment was satisfied by payments of The Ocean Company, as follows:

July 19, 1873	$4,234 29
July 21, 1873	10,086 55

34. The costs in the action which were included in the payment were $574.17

35. The account of the counsel in the cause for their professional services and disbursements, over and above the $100 paid by The Sun Company, was $1,164.70. This was also paid by The Ocean Company July 23, 1873, and was reasonable.

36. Payment of the amount of the judgment and the account for counsel fees was duly demanded of The Sun Company before the commencement of this suit, and refused.

The following is the statement by the circuit court of its,

Conclusions of Law.

1. The Sun Company's policy covers the Rotterdam charter.

2. The policy is not void because of any concealment by The Ocean Company.

3. The judgment in the Maine court against The Ocean Company is conclusive upon the issues there made and decided, and binds The Sun.

4. This action is not barred either by the Statute of Limitations or by lapse of time.

5. The Sun Company is bound in law to reimburse The Ocean for moneys expended on account of counsel fees, and the costs and expenses in defending the suit in the Maine court.

6. The libelant is entitled to a decree against the defendant for:

1. Amount paid in satisfaction of the Maine judgment	$14,320 84
2. Amount paid for counsel fees, expenses, etc.	1,164 70
In all	$15,485 54

With interest from July 21, 1873, and the costs in both courts.

[500] *Messrs.* **Wm. M. Evarts,** *Joseph H. Choate* and *C. F. Southmayd*, for appellant.

Messrs. **Benedict,** *Taft & Benedict*, for appellee.

Mr Justice **Matthews** delivered the opinion of the court:

By the express terms of the Act of Congress of February 16, 1875 [18 Stat. at L., 315], defining the jurisdiction of this court, in cases such as the present, we are limited to a determination of the questions of law arising upon the record, including the rulings of the circuit court, presented in a bill of exceptions. And, as was decided in the case of *The Abbotsford*, 98 U. S., 440 [XXV., 168], and substantially repeated several times since, *The Benefactor*, 102 U. S., 214 [XXVI., 157]; *The Adriatic*, 103 U. S., 730 [XXVI., 605]; *The Annie Lindsley*, 104 U. S., 185 [XXVI., 716]; *The Francis Wright*, 105 U. S., 381 [XXVI., 1100], "The facts as found and stated by the court below are conclusive. The case stands here precisely as though they had been found by the verdict of a jury." Or, as it was put in the case of *The Annie Lindsley* [*supra*]. "The question, and the only question, which we can consider is, whether the facts found support the conclusions of law and the decree." The findings of fact being in the nature of a special verdict, we can go neither behind them nor beyond them. We cannot correct them by inquiring into the evidence, nor supply any omissions by intendment or inference. The rule applicable to special verdicts was stated in *Collins* v. *Riley*, 104 U. S., 322-327 [XXVI., 752-754]; "That the special verdict must contain all the facts from which the law is to arise; that whatever is not found therein is, for the purposes of a decision, to be considered as not existing; that it must present, in substance, the whole matter upon which the court is asked to determine the legal rights of the parties and cannot, therefore, be aided by intendment or by extrinsic facts, although such facts may appear elsewhere in the record;" which needs qualification in its application to such cases as the present; for our jurisdiction, in cases of this description, extending to a determination of the questions of law arising upon the record, may be predicated of facts which appear in any part of it, whether admitted by the parties in the pleadings, or by stipulation, or found by the [501] court. But it is essential that the findings of fact should state the facts, and not the evidence merely, even although the evidence be sufficient to establish the fact. *Chief Justice* Marshall stated this rule in *Barnes* v. *Williams*, 11 Wheat., 415, when he said: "Although, in the opinion of the court, there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the court could not, upon a special verdict, intend it. The special verdict was defective in stating the evidence of the fact instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the plaintiff." This was approved in *Hodges* v. *Easton* [*ante*, 169], decided at the present Term. And see *Prentice* v. *Zane*, 8 How., 470, and *Norris* v. *Jackson*, 9 Wall., 125 [76 U. S., XIX., 608].

These observations have a material and important application in this case.

It was essential to the establishment of the libelant's right of recovery, to show that the risk insured against by the policy sued on was the same which the libelant was adjudged liable for on its policy to Melcher. The policy of the respondent in this suit, although, in substance, a re-insurance, was not so in form. It did not describe the risk by reference to the policy of The Ocean Company, so that the identity between the two could be ascertained by mere comparison. It did not, in fact, allude to any such policy. The risk is described, solely, by words descriptive of the property insured, without a definition of the interest of the assured. It became necessary, therefore, to aver the identity of the two insurances. This the libel does. But, as it is denied in the answer, it became necessary to prove it. The finding of facts, however, in the circuit court, does not assert it. It contains other facts bearing on the question. But the conclusion itself is stated, not as a fact, but as a conclusion of law, from the facts found; the facts and the conclusions of law having been separately stated, as expressly required by the Act of Congress. The first conclusion of law, in the statement made by the circuit court, is

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that "The Sun Company's policy covers the Rotterdam charter."

The question, therefore, presented to us on [502] this appeal is, not whether that might be true as a conclusion of fact from the circumstances stated in the findings of fact, but whether, upon the facts found, it must be true as matter of law.

The distinction is obvious and important. The circumstances in evidence might be such, that a jury, or a court sitting to try the case without a jury would believe, as the more reasonable probability, according to the ordinary and observed course of human conduct, that the fact disputed had or had not actually taken place; and in that case the inference would be one of fact. On the other hand, the facts found might be such as to be, in point of law, inconsistent with any supposition, except that of the existence or non-existence of the fact in controversy; in which case the conclusion is necessary, independently of any belief based upon what is more or less probable, because the law declares the uniform effect of such a state and condition of circumstances. The difference is between presumptions of fact and rebuttable presumptions of law, or *presumptiones juris tantum*, as distinguished from *presumptiones juris et de jure*, according to the classification of Best (Law of Ev., sec. 314, 4th English ed.), who states the practical test for distinguishing them thus: sec. 323. "Where a presumption of law is disregarded by a jury, a new trial will be granted *ex debito justitiæ;* but where the presumption disregarded is only one of fact, however strong or obvious, the granting a new trial is at the discretion of the court in banc."

In other words, when the testimony has been sifted and weighed, and the actual circumstances of the transaction stated in a connected form, the law, by means of its presumptions, determines whether they establish such a relation between the parties as to give rise to reciprocal rights and obligations, and if so, what legal consequences have followed. The issue to be determined may be one, in form, merely of fact, as whether a particular contract was made, or whether one or both of the parties have been guilty of negligence. The circumstances of the entire transaction having been ascertained and stated, the issue is determined by the interpretation which the law puts upon them. This is an office quite distinct from ascertaining the circumstances themselves by the process of reduc- [503] tion from the original mass of evidence. It involves only a consideration of the facts as found, in their relation to each other, in view of fixed legal presumptions, in order to determine and declare the effect to be given to them as a connected whole.

This is the same rule which, after much consideration, was established in the case of *U. S.* v. *Pugh*, 99 U. S., 265 [XXV., 322], in reference to the examination of the judgments of the Court of Claims, and which we reiterate here, as equally applicable to appeals from the decrees in admiralty of the Circuit Courts of the United States under the Act of 1875 [18 Stat at L., 315]. In that case, one of the issues to be determined was, whether the proceeds of the sale of the captured property belonging to the claimant had been paid into the Treasury. No direct proof to that effect had been given, but if shown at all, it was by way of inference from certain circumstantial facts which had been established by the evidence, which were set forth in the finding of the court below. The *Chief Justice* said, upon this point: "Confessedly, the court has found all the facts which have been directly established by the evidence. These facts are not evidence in the sense that evidence means the statements of witnesses or documents produced in court for inspection. They are the results of evidence, and whether they establish the ultimate fact to be reached is, if a question of fact at all, to say the least, in the nature of a question of law. If what has been found is, in the absence of anything to the contrary, the legal equivalent of a direct finding that the proceeds of this claimant's property have been paid into the Treasury, the judgment is right; otherwise, it is wrong. The inquiry thus presented is as to the legal effect of facts proved, not of the evidence given to make the proof, etc. * * * The rule relieves us from the necessity of considering the evidence at all, and confines our attention to the legal effect upon the rights of the parties of the facts proven as they have been sent up from the court below. In this way, the weight of the evidence is left for the sole consideration of the court below; but the ultimate effect of the facts, which the direct evidence has established, is left open for review here on appeal."

Tried according to this standard, we are quite clear that the conclusion under examination cannot be sustained.

The facts, material to the point and which, in [504] our opinion, justify and require this result, are as follows:

The language of the policy sued on, descriptive of the risk assumed, is, "$6,550 on charter, $2,650 on primage, and $1,500 on property on board ship C. S. Pennell, at and from New York to San Francisco." The proposal for this insurance was made March 28, 1864, by letter. The vessel, at that time lying at New York, had been previously chartered to her full capacity for a voyage from New York to San Francisco, of which both Companies had knowledge; and on January 30, 1864, was chartered by Melcher, her master, to the Peruvian Government, by the terms of which charter she was to sail from New York on or before June 1, 1864, to San Francisco, and thence proceed, with all convenient dispatch, to Callao, Peru; and from thence, if on inspection she should be found well conditioned for the voyage, to the Chincha Islands for a cargo of guano to be taken to Hamburg or Rotterdam. Of this second charter The Ocean Company had full knowledge, having, on February 5, 1864, insured to Pennell, a part owner, his interest in both the ship and this charter on the voyage described as "At and from New York, to, at and from San Francisco, Callao and the Chinchas." And on March 20, 1864, Melcher, one eighth owner and master, by letter to his agent, Sawyer, directed the latter to insure his interest in the ship and both charters, specifically describing them, and primage and personal effects on board. Sawyer, exhibiting this letter to The Ocean Company, and explaining fully the circumstances, that Company issued one policy to Melcher, describing the risk in the same words as those used in the policy sued; and by a separate policy insured

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$8,000 on his interest in the ship during the whole voyage, described as "At and from New York, to, at and from San Francisco and Chinchas, with usual liberties at Callao, to her port of advice and discharge in Europe."

The letter of March 23, 1864, from The Ocean Company to The Sun Company, containing the return of the insurance involved in this suit, included two others, both of which were accepted, one of $5,000 "On charter of Ship Charles S. Pennell at and from New York, to, at and from San Francisco and Callao to Chinchas;" the other, a war risk only of $5,000 on the ship, on [505] voyage described in the same words. The correspondence between the Companies on the subject, at the time these risks were assumed, undoubtedly contains a reference to the voyage from New York to San Francisco, and thence to Callao and Chinchas, and of two insurances on charter, in one of which the voyage is described as including New York and Chinchas *via* San Francisco and Callao, and in the other, from New York to San Francisco; but there is nothing which indicates, with any conclusive force, that there were two distinct charters; and certainly nothing to indicate that there was one which included the return voyage from the Chinchas to Rotterdam. And in respect to the latter, it is found, as a fact, that "The Sun Company had no other knowledge of the existence of the Rotterdam charter than such as is to be inferred from the correspondence," which, as we have just stated and as must appear from the full text of the letters set out in the findings, communicated no knowledge of such a charter whatever.

It will not suffice to say, as was said in argument, that the language of the correspondence and of the three contemporaneous insurances was such as to give The Sun Company notice of a voyage and charter beyond San Francisco, as well as of one to that Port from New York, and that they must include distinct interests, so that, upon inquiry, it might have become informed of all the particulars of the Rotterdam charters. For the question is not one of notice sufficient to suggest further inquiry, and of due diligence in prosecuting it, disregard of which may be alleged as laches; but whether the minds of the parties in fact met in a common understanding, so as to consummate the contract sued on. And to show that, it was necessary [to] prove, in the absence of express words, and to resolve the ambiguity arising upon the evidence, that from the circumstances, in point of fact, The Sun Company must have intended to insure an interest in the Rotterdam charter. Proof of its actual knowledge that such a charter was in existence, would be only one step in that direction, and even that is wanting. Had it been supplied, the burden of proof would have still remained with the libelant to show that it was meant by both parties to describe that particular risk, under an insurance upon a [506] charter during a voyage described as at and from New York to San Francisco.

It is admitted that the language of the policy does not of itself import an insurance of a charter beyond one during the voyage described. *Prima facie*, indeed, it describes a charter terminating with that voyage, and not beyond. In the action brought by Melcher against The Ocean Company in Maine, and determined in the Supreme Court of that State, it was claimed by the defendant that the language of the policy conclusively described a charter-party limited to the description of the voyage, and that proof was not admissible to show that any other existed and was the one meant. And it was held in that case, in substance, that without such proof there could be no recovery: but that, inasmuch as a description of the voyage during which the risk was insured did not, necessarily, determine the extent of the charter-party under which the freight was to be earned, it appearing from extrinsic evidence that two charter-parties existed to which the insurance might apply, a latent ambiguity was disclosed which was susceptible of explanation by parol evidence. And, accordingly, upon proof of the communications between Melcher and The Ocean Company, not made known at any time to The Sun Company, the former was adjudged to have insured, by its policy, his interest in the Rotterdam charter. Without that proof, he must have failed in his litigation. It cannot be claimed that such proof is admissible to explain the contract of the appellant.

Nor is the liability of the latter affected by the fact that its policy is one of re-insurance in fact; nor by the circumstance that it aided in the maintenance of the defense in the suit against The Ocean Company; nor by the result and judgment in that action.

The policy, although a re-insurance, is a contract, which, like others, must be construed according to its terms, and the same ambiguity arises in respect to it that was found to exist in respect to the original insurance. The Sun Company, in maintaining the defense in aid of The Ocean Company, that the policy of the latter did not cover an insurance of Melcher's interest in the Rotterdam charter, maintained also, what it has continued to do in this suit, its own defense against the changed claim of The Ocean [507] Company which the latter now asserts, with the advantage that its defense cannot be overcome by proof of explanations outside of the policy itself, such as defeated the libelant in its contest with Melcher. And the judgment rendered in favor of the latter, upon the point in question, as to what was in fact the contract made with him by The Ocean Company, is no adjudication against the appellant, as to what is the contract between the parties to this suit; for, it is only upon the presupposition of the identity of the subject-matter of the two contracts, that it could be pretended that the judgment against The Ocean Company would be admissible in evidence, for any purpose material here, against The Sun Company. To admit it as evidence of that identity is a pure *petitio principii*. Accordingly, it was an additional and substantive error in the circuit court to find, as a conclusion of law, as it did, that "The judgment in the Maine court against The Ocean Company is conclusive upon the issues there made and decided, and binds The Sun." It was, of course, conclusive upon The Ocean Company, but was not even admissible in evidence against The Sun Company, without prior proof that the policy of the latter Company was intended to cover the Rotterdam charter.

Much reliance is placed, in argument in support of this contention on the part of the libelant, upon the circumstance, stated in the find-

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ings of fact that: "The loss under the risk taken in favor of Charles S. Pennell, both on the ship and Rotterdam charter, was paid by The Sun Company, without objection, October 23, 1865, and May 5, 1866." These losses were paid on the two insurances effected contemporaneously with that sued on in this proceeding, in which the voyage described was, "At and from New York, to, at and from San Francisco and (to) Callao to Chinchas." But, at most, this only gives rise to an inference that these two insurances were intended to cover some charter, other than the one from New York to San Francisco, and indeed, is not conclusive as to that. It certainly does not establish, even in respect to them, that they were understood, at the time the insurances were effected, to cover a risk upon an interest in the Rotterdam charter, or any charter in force [508] during the voyage from New York to San Francisco; much less, can it be said, that any admission can be implied, from such payment, that the risk, described as upon ship and charter during the extended voyage to Callao and the Chinchas, although described as commencing at New York, was identical, so far as the charter was concerned, with that in the policy sued on, in which the voyage is described as from New York to San Francisco. In any aspect, the circumstance relied on is merely argumentative. The Sun Company may have made the payment inadvertently, without consideration of its strict rights. It certainly is not conclusive as an admission of liability in this case, for it has no element of estoppel, and to justify the conclusion of law sought to be drawn from it, would be to give it that effect.

The fact that The Sun Company participated in the defense of the Ocean Company in the action brought by Melcher, and the communications between the Companies in respect to it, so far as they are set out in the findings of fact, are, in our opinion, equally without effect, and do not amount either to an admission of liability or to an agreement to be bound by the result of that litigation; and having carefully considered all the circumstances found and relied on, without further special mention of them, we are constrained to say that they do not, either singly or together, sustain the conclusion that "The Sun Company's policy covers, the Rotterdam charter."

This conclusion is, in our opinion, greatly strengthened by the consideration of other facts set out in the finding, which, while they tend to show that, as a matter of fact, The Sun Company did not intend to re-insure Melcher's interest in the Rotterdam charter, furnished also a distinct ground of defense, as matter of law, if the fact had been otherwise, and negative the second conclusion of law announced by the circuit court, that "The policy is not void because of any concealment by The Ocean Company."

The situation was this: there were two concurrent charters on the ship, both which were treated as in force during the one voyage from New York to San Francisco, in the course of which she was lost. The first charter covered a full cargo, and no additional freight could be simultaneously earned under the second, for no part of the cargo contemplated by it could be [509] on board till after the voyage under the first charter had been completed. In case of loss during that voyage, consequently, there could be no salvage of freight applicable to the second charter. Melcher was master, and owner of one eighth of the ship. On March 20, 1864, he instructed his agent, Sawyer, by letter shown to The Ocean Company, to effect insurance on his behalf against war risk on ship, and generally on his interest in both charters specifically, besides primage, and on his personal effects, amounting in all to $19,425, and in the same letter said: "I think you had better put $5,000 or $6,000 more marine risk in case I should lose the ship." The Ocean Company accepted the risk on the Rotterdam charter, primage, and personal effects to San Francisco, and on the same day insured the master for $8,000 on his interest in the ship during the whole of her voyage, describing the duration and locality of the risk as "At and from New York, to, at and from San Francisco and Chinchas, with usual liberties at Callao, to her port of advice and discharge in Europe." This latter insurance was not made known to The Sun Company, nor was it informed of any of the communications that had taken place between The Ocean Company and Melcher, including the contents of the letter to Sawyer.

It thus appears that, at the time of the loss, Melcher had insurance on two concurrent charters and his primage thereon during one voyage, being insured, besides his interest in the ship, on double the amount of its possible earnings of freight for one voyage. This fact was known to The Ocean Company at the time, and was not communicated by it to The Sun Company, which was without other knowledge upon the subject, and executed its policy to The Ocean Company in ignorance of it.

That knowledge of the circumstance was material and important to the underwriter as likely to influence his judgment in accepting the risk, we think, is so manifest to common reason as to need no proof of usage or opinion among those engaged in the business. It was a flagrant case of over insurance upon its face, and made it the pecuniary interest of the master in charge of the ship to forego and neglect the duty which he owed to all interested in her safety. Had it been known, it is reasonable to believe that a prudent underwriter would not [510] have accepted the proposal as made, and, where the fact of the contract is in dispute, as here, corroborates the denial of the appellants. The concealment, whether intentional or inadvertent, we have no hesitation in saying, avoids the policy, if actually intended to cover the risk for which the claim is made.

In respect to the duty of disclosing all material facts, the case of re-insurance does not differ from that of an original insurance. The obligation in both cases is one *uberrimæ fidei*. The duty of communication, indeed, is independent of the intention, and is violated by the fact of concealment even where there is no design to deceive. The exaction of information in some instances may be greater in a case of re-insurance than as between the parties to an original insurance. In the former, the party seeking to shift the risk he has taken, is bound to communicate his knowledge of the character of the original insured, where such information would be likely to influence the judgment of an underwriter, while in the latter, the party, in the language of Bronson, *J.*, in the case of

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the *N. Y. Bowery Fire Ins. Co.* v. *N. Y. Fire Ins. Co.*, 17 Wend., 359-367, is "Not bound, nor could it be expected that he should speak evil of himself."

Mr. Duer (Lect. 13, pt. 1, sec. 13; 2 Ins., 398) states as a part of the rule, the following proposition:

"Sec. 13. The assured will not be allowed to protect himself against the charge of an undue concealment, by evidence that he had disclosed to the underwriters, in *general* terms, the information that he possessed. Where his own information is specific, it must be communicated in the terms in which it was received. General terms may include the truth, but may fail to convey it with its proper force and in all its extent. Nor will the assured be permitted to urge, as an excuse for his omission to communicate material facts, that they were actually known to the underwriters, unless it appears that their knowledge was as particular and full as his own information. It is the duty of the assured to place the underwriter in the same situation as himself; to give to him the same means and opportunity of judging of the value of the risks; and when any circumstance is withheld, how-
[511] ever slight and immaterial it may have seemed to himself, that, if disclosed, would probably have influenced the terms of the insurance, the concealment vitiates the policy."

This statement is sustained by the authorities cited: *Ely* v. *Hallett*, 2 Cai., 57; *Moses* v. *Ins. Co.*, 1 Wash. (C. C.), 385 and, in our opinion, is a necessary deduction from the nature and spirit of the contract of insurance. It applies with peculiar force in the present case, as every sentence of the rule is a condemnation of The Ocean Insurance Company in imposing upon the appellant the whole risk of the insurance, without communicating its knowledge of the circumstances, which might have made the latter as unwilling to assume it as they seem to have made the former unwilling to retain even a share of it.

For these reasons and without passing upon other questions discussed, the decree of the Circuit Court is reversed and the cause remanded, with directions to enter a decree dismissing the libel; and it is, accordingly, so ordered.

Mr. Justice **Miller** dissenting:

I do not concur in the opinion of the court.

It proceeds, as I think, upon an erroneous view of the principles of re-insurance.

It places the re-insurer in the exact condition of a joint insurer, or of an original insurer of the risk of the party first insured.

In point of fact, The Sun Company insured The Ocean Company against the risk which the latter incurred by its policies, and unless there was misrepresentation, fraud or intentional concealment by the Ocean Company, The Sun Company should pay the loss which the other sustained, and against the hazard of which it agreed to insure The Ocean Company.

The long course of dealing between the two Companies showed that The Sun Company was in the habit of re-insuring for The Ocean Company without inquiry into the particulars of the risk, and in this case there was no reason for any special communication of the circumstances of the risk by The Ocean to The Sun Company.

I am authorized to say that the *Chief Justice* and *Mr. Justice* **Bradley** concur with me in this dissent.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 359.

JAMES H. EMBRY, Admr. of R. J. ATKINSON, Deceased, *Plff. in Err.*,

v.

WILLIAM L. PALMER AND THOMAS W. PALMER, Admrs. of J. W. STANTON, Deceased, ET AL.

(See S. C., 17 Otto, 3-20.)

Injunction on judgment—Courts of District of Columbia—reviewable decision—equity jurisdiction—judgment refusing new trial—restraining same.

1. Where a party is perpetually enjoined from suing on a judgment on being paid a certain sum of money, he is not estopped from prosecuting a writ of error by receiving the money.
2. The Supreme Court of the District of Columbia is a court of the United States, and its judgment upon matters litigated before it is conclusive upon the parties, in every State and in every forum in which the same matters may be drawn in question, except for such causes as would be sufficient to set it aside in the courts of the district.
3. Where a state court refuses to give effect to a judgment of the Supreme Court of the District of Columbia, rendered with jurisdiction of the case and the parties, such decision of the state court is a denial of the title and right claimed under an authority exercised under the United States, and is reviewable by this court.
4. A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense, of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents.
5. The judgment of the Supreme Court of the District of Columbia refusing to grant a new trial in a case, is final, and not subject to be reviewed on an appeal or a writ of error in any superior jurisdiction and, for that reason, it cannot be reviewed elsewhere.
6. Where, after a judgment at law, defendant fails to obtain a new trial for newly discovered evidence, a court of equity will not for that reason restrain the enforcement of the judgment, there having been no fraud or unfairness on the part of plaintiff in procuring it.

[No. 144.]

Argued Jan. 5, 8, 1883. Decided Jan. 29, 1883.

IN ERROR to the Supreme Court of Errors of the State of Connecticut.

The history and facts appear in the

Statement of the case by *Mr. Justice* **Matthews**:

The plaintiff in error, in January, 1872, brought his action in the Supreme Court of the District of Columbia, against Stanton and Palmer, to recover compensation for professional services alleged to have been rendered, in their behalf and at their request, by his intestate, Robt. J. Atkinson, in prosecuting and recovering for them the amount of certain

NOTE.—*Conclusiveness of judgments.* See *note* to Bk. of U. S. v. Beverly, 42 U. S. (1 How.), 134.

Estoppel by judgment. See *note* to Aspden v. Nixon, 45 U. S. (4 How.), 467.

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claims in their favor against the United States. In this action the defendants appeared and defended, and judgment was rendered against them upon a verdict for $9,185.18. Upon a writ of error, issued out of this court, this judgment was affirmed, upon grounds which appear in the report of the case. *Stanton* v. *Embry*, 93 U. S., 548 [XXIII., 983].

Subsequently, in 1877, the plaintiff in error brought his action upon this judgment against the defendants, in the Superior Court for New London County, Connecticut, where they resided, in order to obtain judgment and execution thereof in that State.

Thereupon Stanton and Palmer, the defendants thereto, filed their petition in equity in the same court, the object and prayer of which were to obtain a perpetual injunction, restraining the plaintiff from prosecuting his action upon that judgment, or from in any manner enforcing it against the petitioners, upon the payment by them of $2,296.29, which they allege was as much as he was equitably entitled to on account of the causes of action, on which the judgment had been rendered.

The grounds of relief, alleged in this petition, may be shortly but sufficiently stated, as follows, *viz.:* that the claim in question was for collecting from the United States the sum of $45,925.91, under a special written agreement for a compensation to Atkinson of five per cent on that amount, the existence of which was well known to the plaintiff in error when he brought his suit in the Supreme Court of the District of Columbia; that when Embry, as administrator of Atkinson, first presented the account to the petitioners for payment, it was for $2,296.29, being at that rate; that Stanton and Palmer, claiming to have a good defense against it, declined to pay it, when Embry thereupon brought suit for that amount, in Connecticut, in 1871, which he discontinued in 1872, and, during its pendency, brought the action in which the judgment complained of was rendered, in which he ignored the special agreement, and sued upon a *quantum meruit;* that Palmer, one of the defendants, at the time of the trial, was absent from the District of Columbia, and was not notified of the day of trial in time to be present; that Stanton, though present in Washington at the time, was unable to attend the trial on account of sickness; that since the trial, Stanton, on examination, had found among his papers two letters from Atkinson, in which the latter expressly acknowledged the existence of the special contract for fees at five per cent, as claimed, but they were discovered too late for use on the trial; and that Embry, in suppressing his knowledge of the existence of this contract and in procuring a judgment for a larger sum, was guilty of fraud, which made it inequitable in him to enforce the judgment to its full extent.

A general demurrer to this petition was reserved to the Supreme Court of Errors of Connecticut for its advice and was overruled; that court being of opinion that the petition was sufficient. Its decision is reported in 46 Conn., 65, treating the case made in the petition as one of fraud in procuring an unjust judgment, admitted by the demurrer.

The defendant, Embry, then filed his answer to the petition, in which he denied that he made made out the account as originally presented at the rate of five per cent on the amount collected, to conform to any agreement between the parties, but because he found from Atkinson's books that he had charged at that rate in other cases, and without considering the difference of value in the services rendered in them; and that Atkinson kept no copies of the letters written to the petitioners. He claims that the questions, whether there was any contract between the parties and, if so, what were its terms, were fully tried and finally decided in the action which resulted in the judgment complained of, and which he sets up as an estoppel. He denies that he then or at any time knew of any contract between the parties as to fees, and claims that if the defendants failed in that action to substantiate a defense, it was through their own laches, and not by reason of any fraud on his part.

In accordance with the practice in that State, the cause was referred to a committee, whose report of the facts constitutes part of the record, from which the following extract is taken:

"At (the time of) the trial of this case at Washington, neither Mr. Stanton nor Palmer were present in court. Mr. Palmer was at Stonington; his attendance might have been secured by reasonable diligence, if such attendance had been deemed very important. Mr. Stanton was ill at his hotel in Washington, too ill to attend the trial. His counsel asked for a postponement on that account, but no affidavit was offered in support of the motion, and it was denied. The petitioner's counsel appears to have been content to proceed with the trial in the absence of his clients. He had full, and as it turned out, undue confidence in the legal defenses, which appear by the record to have been set up at the trial, and took it for granted that in no event could more be recovered than $2,296.29. The letters of Mr Atkinson of February 18, 1870, and May 7, 1870, recognizing the special agreement for five per cent on claim D were not in Washington at the trial there; they were received by Mr. Stanton, the active partner, at a time when his mind was much depressed; they were stored for safe-keeping at his home in Stonington, Connecticut, and the contents had escaped his recollection; they were not found by him until after the trial and disposal of the case at the General Term.

After the commencement of the suit at Washington, he made search for all letters and papers relating to the case, and placed in possession of his counsel such as he found; and he then supposed that he had found and placed in the hands of counsel all the letters and papers pertaining to the matters in suit. As bearing on the question how it happened that these letters escaped the recollection of Mr. Stanton, it appears that, for several reasons, the attention of the petitioners was not alive to the importance of being prepared at the trial in Washington with the proof of the special agreement which the letters furnished: 1. Because the petitioners took it for granted that the full extent of the plaintiff's claim at the trial would be $2,296.29, that being the amount of the claim D, presented through Mr. Pratt; and it did not occur to them that a larger amount might be claimed under the *quantum meruit* count. 2. Because their counsel had undue confidence in

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legal defenses against the entire demand and, therefore, did not apprehend the full importance to the interests of his clients of being prepared with proof of the special agreement.

As to specification 7th in the petition, Mr. Atkinson, while living, had full knowledge that the amount due him was but $2,296.29, on a special contract for that amount, and he, if living, could not, with a good conscience, have presented a claim for a greater amount. Mr. Embry, the administrator, knew that Messrs. Stanton and Palmer claimed a special contract and was willing, before trial was brought, to settle on that basis; but his claim in court on a *quantum meruit* was not on his part an intentional *suggestio falsi*. He did not know that the claim was unfounded; the full proof of the special agreement was not in his possession, and had not been fully brought to his knowledge."

What decree should be passed in the cause upon this report was reserved for the action of the Supreme Court of Errors, which court, after argument, advised that the prayer of the petition be granted, on condition that the petitioners pay to the respondent the sum of $2,296.29, within a reasonable time to be fixed, with interest thereon from March 10, 1871, which was accordingly so ordered, and the said sum of money having thereupon been paid by the petitioners to the attorney of the respondent, and received by him, with the interest thereon, it was ordered and decreed by the Supreme Court that Embry be enjoined, under a penalty of $20,000, payable to the petitioners, to abstain and desist from the further prosecution of his suit upon the judgment, and from instituting any other suit or action thereon, or from executing or in any manner enforcing the same against the petitioners.

Proceedings in error were taken in due form to review this judgment in the Supreme Court of Errors of the State, it being assigned for error "That the judgment and decree is in contravention of article 4, section 1, of the Constitution of the United States, and section 905, chapter 17, title 13, of the Revised Statutes of the United States, in that it enjoins the prosecution of a suit on a judgment of the Supreme Court of the District of Columbia," and "that the decree enjoins the collection of a judgment of a court of the United States."

The opinion of the Supreme Court of Errors, in passing upon the case as presented by the report of the committee, and advising as to the decree to be rendered thereon, is reported in 46 Conn., 595.

[8] The final decree entered in pursuance thereof, and affirmed by that court, is now brought into review in this court by writ of error.

Messrs. **A. L. Merriman** and **E. Lander,** for plaintiff in error.

Messrs. **J. Halsey,** *Charles W. Hornor* and *T. J. Durant,* for defendants in error.

Mr. Justice **Matthews** delivered the opinion of the court:

A suggestion is made in argument that the plaintiff in error is estopped to prosecute this writ to the reversal of the decree below, because it appears that the amount of money ordered by it to be paid to him as a condition of relief granted has been accepted by him. It is said that this is a release of errors. Without entering upon a discussion of the general question, it is sufficient for the present purpose to say that no waiver or release of errors, operating as a bar to the further prosecution of an appeal or writ of error, can be implied, except from conduct which is inconsistent with the claim of a right to reverse the judgment or decree, which it is sought to bring into review. If the release is not expressed, it can arise only upon the principle of an estoppel. The present is not such a case. The amount awarded, paid and accepted constitutes no part of what is in controversy. Its acceptance by the plaintiff in error cannot be construed into an admission that the decree he seeks to reverse is not erroneous; nor does it take from the defendants in error anything, on the reversal of the decree, to which they would otherwise be entitled; for they cannot deny that this sum, at least, is due and payable from them to the plaintiff in error. But in every point of view, the objection is met and answered by the decision of this court in the case of *U. S.* v. *Dashiel*, 3 Wall., 688 [70 U. S., XVIII., 268].

The jurisdiction of the court invoked by this writ of error is conferred by section 709, Revised Statutes, it being a case in which a title or right is claimed under an authority exercised under the United States, and the decision of the [9] state court being in denial of the title or right so asserted. It was decided in *Dupasseur* v. *Rochereau*, 21 Wall., 130 [88 U. S., XXII., 588], that such a question is undoubtedly raised whenever a state court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and of the parties. The judgment, which is the subject-matter of the litigation, is that of the Supreme Court of the District of Columbia, which is a court of the United States. The question we have to determine is, whether the Supreme Court of Errors of the State of Connecticut, in the decree complained of, gave to that judgment its due effect.

Section 905, Revised Statutes, which embodies the original Act of 1790 [1 Stat. at L., 122], and the supplement thereto of 1804 [2 Stat. at L., 298], provides that the records and judicial proceedings, not only of the courts of any State, but also of any Territory or of any country subject to the jurisdiction of the United States, authenticated as therein prescribed, "Shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the State from which they are taken;" which, by supplying the ellipsis, must be taken to mean, such faith and credit as they are entitled to in the courts of the State, Territory, or other country subject to the jurisdiction of the United States from which they are taken.

So far as this statutory provision relates to the effect to be given to the judicial proceedings of the States, it is founded on article IV., section 1, of the Constitution, which, however, does not extend to the other cases covered by the statute. The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States, which authorize all

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legislation necessary and proper for executing the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof, and which declare the supremacy of the authority of the National Government within the limits of the Constitution. As part of its general authority, the power to give effect to the judgments of its courts [10] is co-extensive with its territorial jurisdiction. That the Supreme Court of the District of Columbia is a court of the United States, results from the right which the Constitution has given to Congress of exclusive legislation over the District. Accordingly, the judgments of the courts of the United States have invariably been recognized as upon the same footing, so far as concerns the obligation created by them, with domestic judgments of the States, wherever rendered and wherever sought to be enforced. *Barney* v. *Patterson*, 6 Har. & J., 182; *Niblett* v. *Scott*, 4 La. Ann., 246; *Adams* v. *Way*, 33 Conn., 419; *Womack* v. *Dearman*, 7 Porter, 518; *Pepoon* v. *Jenkins*, 2 Johns. Cas., 119; *Williams* v. *Wilkes*, 14 Pa., 228; *Turnbull* v. *Payson*, 95 U. S., 418 [XXIV., 437]; *Cage* v. *Cassidy*, 23 How., 109 [64 U. S., XVI., 430]; *Galpin* v. *Page*, 3 Sawy., 93-109.

The rule for determining what effect shall be given to such judgments, is that declared by this court, in respect to the faith and credit to be given to the judgments of state courts in the courts of other States, in the case of *M'Elmoyle* v. *Cohen*, 13 Pet., 312-326, where it was said: "They are record evidence of a debt or judgments of record, to be contested only in such way as judgments of record may be; and, consequently, are conclusive upon the defendant in every State, except for such causes as would be sufficient to set aside the judgment in the courts of the State in which it was rendered."

The question then arises: what causes would have been sufficient in the District of Columbia, according to the law then in force, to have authorized its courts to set aside the judgment recovered there by Embry against Stanton and Palmer?

This is answered by the decision of this court, upon the point, in the case of *Ins. Co.* v. *Hodgson*, 7 Cranch, 332. That was a bill in equity, filed in a court of the District of Columbia, perpetually to enjoin the collection of so much of a judgment at law recovered in the District as was in excess of an amount claimed to be the sum equitably due. The grounds of relief alleged were, that a fraud had been practiced upon the underwriters in a valued policy of marine insurance, by an overvaluation of the ship, and that the complainant had been prevented [11] from making the defense at law. *Chief Justice* Marshall, delivering the opinion of the court, affirming the decree of the court below dismissing the bill, stated the rule as follows:

"Without attempting to draw any precise line, to which courts of equity will advance and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law or of which he might have availed himself at law but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery. On the other hand, it may with equal safety be laid down as a general rule that a defense cannot be set up in equity, which has been fully and fairly tried at law, although it may be the opinion of that court that the defense ought to have been sustained at law. In the case under consideration the plaintiffs ask the aid of this court to relieve them from a judgment, on account of a defense, which, if good anywhere, was good at law, and which they were not prevented, by the act of the defendants or by any pure and unmixed accident, from making at law."

This was held to be the law prevailing in the District of Columbia, not by reason of any local peculiarity, but because it was a general principle of equity jurisprudence. It was repeated in *Hendrickson* v. *Hinckley*, 17 How., 443 [58 U. S., XV., 123], where the rule was condensed by *Mr. Justice* Curtis into the following statement: "A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense, of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents." *Creath* v. *Sims*, 5 How., 192; *Walker* v. *Robbins*, 14 How., 584. It was re-affirmed in *Crim* v. *Handley*, 94 U. S., 652 [XXIV., 216], and in *Brown* v. *Buena Vista Co.*, 95 U. S., 157 [XXIV., 422].

This is the doctrine recognized and applied by the Supreme Court of Errors of Connecticut in the case of *Pearce* v. *Olney*, 20 Conn., 544. That was a bill in equity to restrain the collection of a judgment recovered in New York, [12] upon the ground that the complainant had a good defense at law to the action, which he was prevented from making by the fraud of the defendant. It was there said by that court: "It is well settled that this jurisdiction will be exercised, whenever a party, having a good defense to an action at law, has had no opportunity to make it, or has been prevented by the fraud or improper management of the other party from making it, and by reason thereof a judgment has been obtained which it is against conscience to enforce." Then stating that the action was founded on an alleged contract, on which the complainant was not personally liable, having been made by him as agent for a corporation, and that this was known to the party suing, the court continue: "If this was all, the plaintiff would have no remedy, however unjust it might be to compel him to pay that judgment. Still, as he was duly served with process in that suit, it was his duty to make defense in it; and an injunction ought not to be granted to relieve him from the consequences of his own neglect."

The court then proceeds to show that he not only had a good defense, but that it was his intention to make it, which he would have done had he not been led by the assurances of the attorney for the plaintiff in the action to believe that it had been abandoned, so that its subsequent prosecution, without further notice, operated as a surprise, tantamount to a fraud; and that, consequently, there was no ground on which to impute laches to the complainant in not defending himself at law.

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A subsequent action was brought in New York upon the same judgment by an assignee of the plaintiff, to which the defendant set up as a bar the Connecticut decree perpetually enjoining its execution, which, by the judgment of the Court of Appeals of New York, was sustained. *Dobson* v. *Pearce*, 12 N. Y., 156. The court said, p. 167: "The decree of the Court of Chancery of the State of Connecticut, as an operative decree, so far as it enjoined and restrained the parties, had and has no extraterritorial efficacy, as an injunction does not affect the courts of this State; but the judgment of the court upon the matters litigated is conclusive upon the parties everywhere and in every forum where the same matters are drawn in question. [13] It is not the particular relief which was granted which affects the parties litigating in the courts of this State; but it is the adjudication and determination of the facts by that court, the final decision that the judgment was procured by fraud, which is operative here, and necessarily prevents the plaintiff from asserting any claim under it."

The same rule, as to the jurisdiction in equity to enjoin the enforcement of judgments at law, was declared by the Supreme Court of Errors of Connecticut in the case of *Carrington* v. *Holabird*, 17 Conn., 530, in these words: "This jurisdiction will be exercised where to enforce a judgment recovered is against conscience, and where the applicant had no opportunity to make defense, or was prevented by accident, or the fraud or improper management of the opposite party, and without fault on his own part."

To the same effect is the case of *Borland* v. *Thornton*, 12 Cal., 440, where the subject is discussed and the authorities cited.

These, then, are the principles which should have governed the Supreme Court of Errors of Connecticut in the proceedings and judgment now under review. It remains to ascertain whether they were, in fact, applied in its dealing with the judgment sought to be enforced by the plaintiff in error.

No question is made of the right of that court to entertain the jurisdiction to enjoin proceedings upon the judgment, notwithstanding it was the judgment of a court of the United States. It had jurisdiction of the person of the plaintiff in error, who was himself seeking the aid of the courts of that State in his suit at law upon the judgment for the purpose of enforcing it.

Nor is any inquiry opened, upon this writ of error, as to any matter of fact found in the record before us. The facts, as ascertained and acted upon by the state court, are assumed to be true. They are contained in the report of the committee appointed to hear the evidence and report his conclusions of fact, which were accepted by the court, and they are not the subject of any exception.

The Supreme Court of Errors of Connecticut state the grounds of their judgment in the report of the case, *Stanton* v. *Embry*, 46 Conn., [14] 595, and hold that upon its circumstances it comes within the rule laid down in *Pearce* v. *Olney*, 20 Conn., 544, already noticed. The conduct of the plaintiff in error, alleged as the ground for granting the relief decreed, is that he "Unintentionally gave them (the complainants) every reason for thinking that he did not believe that he had any right to ask for a judgment for a larger sum and, of course, that he would not; he unintentionally led them to believe and act upon the belief, that the only loss which could possibly ensue from either a partial or a total omission of preparation for trial would be the sum of $2,296.29." The solitary fact upon which these inferences rest is, that the plaintiff in error originally presented an account for payment, claiming that sum, as a commission at the rate of five per cent upon the amount collected, and the complainants refusing to pay any part of it, on the ground of defenses which applied to the whole of it, brought his first suit in Connecticut against them, and in his declaration joined a special count on an agreement for this rate of compensation, with a general count upon a *quantum meruit*. The declaration in the action, in which judgment was rendered by the Supreme Court of the District of Columbia, contained two similar counts. It is argued from this that the claim for $10,000 damages, appropriate to the *quantum meruit count*, could only have been regarded as a form of pleading, not calculated to remove, from the minds of the defendants sued, the effect produced by the precise and explicit statement of the bill of particulars; which, regarding as obtained presumptively from the papers of the decedent, they had a right to treat as equivalent to a declaration that those papers furnished positive evidence that there was a contract calling for payment at that rate; that the plaintiff in error by "No act or word gave any intimation that he considered himself entitled to or intended to claim more;" and that all this was "Calculated to and did in fact produce the belief on their part that no more would in any event be asked of the court than to assess the damages according to the terms of the contract."

It is admitted, however, that the plaintiff in error did not know of the alleged special contract; that he did not intend to give to the defendants in error any assurances on the subject, and that he did not know that they were rely- [15] ing upon what they now allege has misled them.

In all this there is certainly no fraud; in fact, there is not enough to suggest a fault on the part of the plaintiff in error. He presented an account, which (it is now confessed for them, if not by them, that) the defendants in error ought at the time to have paid. This they refused to do, denying all liability for any amount; on the ground that no legal claim could arise for services, such as were rendered, no matter how valuable they had been. Suit was then brought upon the claim, both upon an express and an implied contract. It was contested at every point. The parties were adversaries, and there is no ground whatever for any claim on the part of the defendants in error, that they were relying upon assurances of any character upon the part of Embry. If they took anything for granted, it was upon their own responsibility and at their own risk. They neither expected nor feared a recovery against them for any excess beyond the contract rate, because they were confident they would defeat it altogether. Embry was an administrator. He had sought to obtain payment without litigation, and failed. It was his duty to sue for and recover whatever the law would give him. He owed no duty to his adversaries, except the opportunity of defense. That they have en-

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joyed, if not improved; and if it has not been as available as it would have been, in case they had limited themselves, as they claim their opponent should have done, to the special contract, which they now insist was binding upon both him and them, it was, as found in this record, in part, at least, "Because their counsel had undue confidence in legal defenses against the entire demand and, therefore, did not apprehend the full importance to the interests of his clients of being prepared with proof of the special agreement." That agreement they sought to avoid, on the ground that it was illegal and immoral to contract for any compensation for the services rendered; and having deliberately staked their case upon that single issue, they seek to impute to their adversaries the responsibility of their own mistake.

The laches of the defendants in error is equally manifest. One of them was absent from [16] the trial; the report of the committee states that "His attendance might have been secured by reasonable diligence, if such attendance had been deemed very important." The other was in Washington, but too ill to attend the trial. His counsel asked a postponement on that account, but, as the report continues, "No affidavit was offered in support of the motion, and it was denied. The petitioners' counsel appears to have been content to proceed with the trial in the absence of his clients. He had full and, as it turned out, undue confidence in the legal defenses which appeared by the record to have been set up at the trial, and took it for granted that in no event could more be recovered than $2.296.29." There were two letters from Mr. Atkinson to the defendants in error in their possession, and not known to the plaintiff in error, expressly referring to the special agreement as fixing the rate of compensation, which might have been produced on the trial, but were not. They had escaped the recollection of the active partner, Stanton, who, for the preparation of the defense, had placed in the hands of his counsel in Washington all the papers which he supposed related to the subject of the suit. The letters referred to were not found by him until after the trial and disposition of the case in the Supreme Court of the District of Columbia. It is entirely clear from this statement that the defendants in error are chargeable with carelessness and want of diligence in not making and sustaining the defense on the ground of an express agreement for a fixed rate of compensation. It is fully accounted for by the other facts in the case. The report of the committee states that they were "not alive to the importance of being prepared at the trial in Washington with the proof of the special agreement which the letters furnished;" and for the reason that they took it for granted, without sufficient grounds, as we have already seen, that no recovery could be had for a larger amount, and this was based chiefly on their overweening confidence in their ability to defeat the recovery altogether.

But this is not all. The question whether there was not a special agreement limiting the compensation, as appears by the record in the case, was left to the jury upon evidence submitted. It was one of the points of the issue and was so regarded by both parties. The counsel for the defendants in error asked an instruction to the jury on the subject, and the [17] court did instruct the jury in reference to it. After the verdict, a motion for a new trial was made on the two grounds: first, that the damages were excessive; and, second, that since the trial, evidence, vital to the case, has been discovered. That motion was overruled and an appeal was taken to the General Term, where the judgment was affirmed. The motion for a new trial does not disclose what new evidence had been discovered, nor was any affidavit filed setting out its materiality, the circumstances of its discovery and the reasons why it could not have been produced at the trial. There is no reason to doubt but that the evidence in question consisted of the very letters referred to.

It thus appears that, after the trial and after the consequences of the failure of the defendants in error to make good the defense now relied on had become manifest, they had the opportunity to bring the very matter to the attention of the Supreme Court of the District, and did, in fact, appeal to its discretionary power to grant a new trial for reasonable and sufficient cause. The motion for a new trial was made March 17, 1873, was not overruled at Special Term till April 19, 1873, and the appeal to the General Term was not disposed of until October 27, 1873 and, in fact, owing to an irregularity in the entry of judgment, the verdict was under the control of the court until September 28, 1874. During this interval, there was ample time in which to present the facts and the application, and all illusions as to the intentions of the plaintiff in error had been dispelled by the trial and verdict. If it was not brought forward it was from pure neglect. If it was, as it appears to have been, a court of competent jurisdiction has passed upon the very matter sought to be again litigated in the courts of Connecticut. The judgment of the Supreme Court of the District of Columbia refusing to grant a new trial, was final. It was not, for that cause, subject to be reviewed on an appeal or a writ of error in any superior jurisdiction, and, for the same cause, it is not to be reviewed elsewhere. In the case of *Ins. Co.* v. *Hodgson*, *supra*, the court had refused (6 Cranch, 206) to permit the defendant to file the additional pleas raising the defense which was the basis of the application for relief in equity. 7 Cranch, 332. In the former case the court said (6 Cranch, 217): "This court does not think that the refusal of [18] an inferior court to receive an additional plea, or to amend one already filed, can ever be assigned for error. This depends so much on the discretion of the court below, which must be regulated more by the particular circumstances of every case, than by any precise and known rule of law, and of which the Supreme Court can never become fully possessed, that there would be more danger of injury in revising matters of this kind than what might result now and then from an arbitrary or improper exercise of this discretion." In *Crim* v. *Handley*, 94 U. S., 652-659 [XXIV., 216-218], it was said: "Nor does the allegation that one of his witnesses was sick during the examination, that it impaired his recollection and rendered him incapable of stating material facts within his knowledge, afford any sufficient support to the present application. Accidents of the kind occasionally occur in the course of the trial; but

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the plain remedy for such an embarrassment is an application to the court to postpone the trial or to continue the case, as the circumstances may require. Applications of the kind, if well founded, are seldom or never refused; but if a party elects to proceed and take his chance of success, he cannot, if the verdict and judgment are against him, go into equity and claim to have the judgment enjoined. If a witness is too unwell to testify understandingly, the proper remedy for the party is to move for a postponement of the trial; and if he elects to proceed and is unsuccessful, his only remedy is a motion for new trial to the court where the accident occurred."

The Supreme Court of Errors of Connecticut rest their judgment upon another ground, which it is proper to examine and consider. It may be stated as follows: that Atkinson, himself, if alive, could not have obtained a judgment, except upon his special contract, without such a suggestion of a falsehood as would have made it unconscionable for him to retain it; that the administrator, representing him, stands in no different position, as he is seeking to enforce a judgment which his intestate could not equitably do, and that his having "Failed to come to the knowledge of the truth as to the debt, and in ignorance misled the court into the rendition [19] of a wrongful judgment, does not destroy the right of the petitioners to have the wrong corrected now that it is pointed out."

But, in our opinion, this view cannot be maintained. It seems to constitute the plaintiff the guardian, not only of his own rights but also of his adversary, and to relieve the latter from the obligation of taking any care of himself. We are not prepared to say, that, if Atkinson in his lifetime, had presented his account for the amount now admitted to be due upon the contract, and had been told by Stanton and Palmer that they repudiated all liability on the ground that his services were illegal and against public policy and, therefore, not entitled to compensation at all, he would have been guilty of any breach of law or morals, in insisting upon whatever the law would award for their actual value. Certainly, he was not bound, after that, to confine his claim to the limits of a contract which the other parties refused either to recognize or perform; and if, on suit brought, he left them to use it as a defense, if they saw fit, or to waive it for the chance of defeating his recovery altogether, we know of no principle of equity which would forbid it. It is to be remembered that there is nothing unconscionable or oppressive in the judgment itself, which is the subject of the present complaint. It represents, by the adjudication of a competent judicial tribunal, having full jurisdiction of the parties and the controversy, the reasonable, actual value of beneficial services rendered by Atkinson to the defendants in error. No fraud or unfairness was practiced by the plaintiff in error in procuring it. The defendants in error had abundant opportunity to make the defense they now urge, and if they failed to do so, it was altogether their own fault. The judgment is conclusive between the parties, upon all the points made in the present suit, in the jurisdiction where it was rendered, and was entitled to be so regarded in the courts of Connecticut. In restraining further proceedings upon it, in the terms of the decree under review, the Supreme Court of Errors of that State have not given it that due effect to which, under the authority of the Constitution and laws of the United States, it is entitled. *In that respect, there is manifest error in its decree, to the prejudice of the plaintiff in error, for which it must be reversed. It is, accordingly, so ordered and the cause remanded to the Supreme Court of Errors of the State of Connecticut, with* [20] *instructions to reverse the decree of the Superior Court within and for the County of New London, and to direct that court to render a decree dismissing the bill.*

It is, accordingly, so ordered.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *ex rel.* WARD B. BURNETT, [64]
Plff. in Err.,
v.
HENRY M. TELLER, Secretary of the Interior.

(See S. C., 17 Otto, 64-68.)

Pension, right to—double pension.

1. No pensioner has a vested legal right to his pension. Pensions are the bounties of the Government, which Congress has the right to give, withhold, distribute or recall, at its discretion.

2. One who voluntarily surrendered his pension under a special Act, in order to receive a larger pension to which he became entitled on the passage of a general Act, thereby surrenders his right to the former; he cannot have both.

[No. 1185.]

Submitted Jan. 12, 1883. Decided Jan. 29, 1883.

IN ERROR to the Supreme Court of the District of Columbia.

The history and facts appear in the

Statement of the case by *Mr. Justice* **Woods:**

By an Act passed March 8, 1873, entitled "An Act to Revise, Consolidate and Amend the Pension Laws," 17 Stat. at L., 569, section 4; Rev. Stat., sec. 4698, it was provided that, from and after June 4, 1872, all persons entitled by law to a less pension than thereinafter specified, who, while in the military or naval service of the United States and in the line of duty, had been so permanently and totally disabled as to render them utterly helpless, or so nearly so as to require the regular personal attendance of another person, should be entitled to a pension of $31.25 per month.

Afterwards, by an Act passed June 18, 1874, a pension of $50 per month was granted to the persons described in the Act of March 3, 1873, in lieu of the pension of $31.25 granted by that Act.

By an Act approved June 16, 1880, it was provided as follows: "All soldiers and sailors * * * who are now receiving the pension of $50 per month," under the Act last aforesaid, "shall receive, in lieu of all pensions now paid them by the Government of the United States, and there shall be paid to them, in the same manner as pensions are now paid to such persons, the sum of $72 per month." The Act further declared "That all pensioners whose pensions shall be increased by the provisions of this Act, from

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$50 per month to $72 per month, shall be paid the difference between said sums monthly, from June 17, 1878, to the time of the taking effect of this Act."

Prior to the passage of the last mentioned Act, Congress had passed an Act, which was approved March 3, 1879, "Granting an increase of Pension to Ward B. Burnett," which was as follows: "That the Secretary of the Interior be and he is hereby authorized and directed to place on the pension roll the name of Ward B. Burnett, and pay him a pension of $50 per month, in lieu of the pension he now receives; but nothing in this Act contained shall entitle the said Ward B. Burnett to arrears of pension." 20 Stat. at L., 665.

On October 20, 1882, Ward B. Burnett, the person named in the special Act above mentioned, filed in the Supreme Court of the District of Columbia, as relator, in the name of the United States, a petition against Henry M. Teller, Secretary of the Department of the Interior, in which he recited the foregoing legislation of Congress, and averred that he was a survivor of the war with Mexico, and other wars, in which he was an officer in the Army of the United States; that he was wounded at the battle of Cherubusco on August 24, 1847; that for wounds received in battle he was granted, under a general pension law of Congress, a pension at the rate of $30 per month, which he received from August 1, 1848, until March 3, 1879; that, under the special Act of the date last mentioned, a pension certificate, dated June 6, 1879, signed by the Secretary of the Interior and countersigned by the Commissioner of Pensions, was executed and delivered to him, on which he was paid from March 3, 1879, to June 4, 1882, a pension at the rate of $50 per month.

The petition further alleged that the relator had applied to the Commissioner of Pensions to be paid the increased rates of pension authorized by the said Acts of Congress, approved respectively June 8, 1872, June 18, 1874, and June 16, 1880, and had received another pension certificate, dated July 17, 1882, which recited that the relator was entitled to a pension at the rate of $30 per month, to commence on August 1, 1848, and of $31.25 per month from June 4, 1872, and of $50 per month from June 4, 1874, and $72 per month from June 17, 1878; that, on July 21, 1882, the relator returned to the Secretary of the Interior the pension certificate which had been issued to him under the special Act of Congress passed March 3, 1869, granting him a pension of $50 per month; that, when he returned said certificate, he was without the advice of counsel and was fearful that he would be deprived of his greater pension under the general pension laws; and that, on October 4, 1882, relator respectfully demanded in writing of the Secretary of the Interior that he return to him said certificate, which the Secretary, by his decision made October 18, 1882, refused to do. The petition prayed for the writ of *mandamus* to compel the Secretary to return said certificate to the relator, and to cause to be paid to him the accrued pension due thereon.

The Secretary of the Interior filed an answer to this petition, in which he alleged that since June 4, 1872, the relator had received, under the pension laws, payments as follows: from June 4, 1872, to June 4, 1874, the sum of $750, being at the rate of $31.25 per month; from June 4, 1874, to June 17, 1878, the sum of $2,421.66, being at the rate of $50 per month; from June 17, 1878, to June 4, 1882, the sum of $3,424.80, being at the rate $72 per month; from June 4, 1882, to September 4, 1882, at the same rate, $216, making in all the sum of $6,812.46; and that, in addition to these payments under the general laws, he had received, under the special Act of March 3, 1879, granting him by name a pension at the rate of $50 per month, payments as follows; from March 3, 1879, to June 4, 1882, the sum of $1,951.67, being at the rate of $50 per month.

The answer further alleged that, on July 21, 1882, the relator addressed a letter of that date to the Secretary of the Interior, with which he returned the certificate dated June 17, 1882, issued to him under the special Act of March 3, 1879, granting him a pension of $50 per month. That letter was as follows:

"Washington, *July 21st*, 1882.

Hon. H. M. Teller, *Secretary of the Interior:*

Sir: To relieve your department from further embarrassment in reference to what has been styled Gen. Ward B. Burnett's claim of double pension, I hereby return to you my certificate, and relinquish any claim that I may have under it from date of this letter, made under a special Act of Congress (increase), dated March 3, 1879, upon which I have been drawing $50 per month, and shall be satisfied with receiving my pension under the general pension laws, granted by yourself, under the several opinions of the Attorney-General, dated July 17, 1882, until Congress, in its bounty, shall think proper to increase my pension of $72 per month under said general pension laws again.

I have the honor to be, very respectfully, yours,

Ward B. Burnett."

The case having, by stipulation of parties, been heard in the first instance at the General Term of the Supreme Court of the District, a judgment was rendered dismissing the petition. This writ of error is prosecuted to review that judgment.

Mr. **James H. Manderville,** for plaintiff in error.

Mr. **S. F. Phillips,** *Solicitor-Gen.*, for defendant in error.

Mr. Justice **Woods** delivered the opinion of the court:

The relator does not claim that there is anything due him under the pension laws prior to June 4, 1872. It appears from the answer of the Secretary of the Interior, and there is no evidence to the contrary, that since June 4, 1872, the relator has received every cent that is due him under the general pension laws. The special Act of March 3, 1879 [20 Stat. at L., 665], declared that the pension of $50 thereby granted should be in lieu of the pension the relator was then receiving and, at least, cut off all claim to arrears of pensions under that Act. All, therefore, that is left of his case is his contention that he is entitled not only to the pension of $72 per month allowed him by the general Act of June 16, 1880 [21 Stat. at L., 281], and which has been paid him, but in addition thereto the pension of $50 per month granted him by name by the special Act of March 3, 1879.

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It appears from the answer of the Secretary of the Interior that the relator was, under the advice of the Department of Justice, paid both pensions from March 3, 1879, to June 4, 1882. The complaint of the relator is, that the payment of double pensions is not continued, and it is for the purpose of enforcing his right to his special pension of $50, in addition to the general pension of $72, that he asks that the Secretary of the Interior may be compelled to return the certificate issued to him under the special Act.

The right of the relator to double pensions, if he ever had such right, has been effectually cut off by section 5 of the Act of July 25, 1882 [22 Stat. at L., 174], which declares "That no person, who is now receiving or shall hereafter receive a pension under a special Act, shall be entitled to receive, in addition thereto, a pension under the general law, unless the special Act expressly states that the pension granted thereby is in addition to the pension which said person is entitled to receive under the general law."

[68] It was competent for Congress to pass this Act. No pensioner has a vested legal right to his pension. Pensions are the bounties of the Government, which Congress has the right to give, withhold, distribute or recall, at its discretion. *Walton* v. *Cotton*, 19 How., 355 [60 U. S., XV., 659]. Therefore, the contention of the relator, that having received the pension of $72 under the general law, he is also entitled to the pension of $50 granted him by the special Act, is without ground to rest on.

His pension certificate, issued under the special Act, can be of no service to him unless he wishes to relinquish the pension of $72 under the general law, and fall back upon the pension of $50 granted him by the special Act. But he expresses no such purpose. His object is to get the certificate in order to draw double pensions, which the law says he shall not have. He voluntarily surrendered his pension under the special Act, in order to receive the larger pension to which he became entitled on the passage of the general Act of June 16, 1880. As he is not entitled to any pension money upon the certificate, under the special Act, which he voluntarily surrendered, unless he waives his right to receive the larger pension given him by the general law, which he does not do, a judgment that the certificate be returned to him would be futile. From all that appears by the record, the relator has been accorded by the officers of the Department of the Interior and of the Pension Bureau all his rights. Up to September 4, 1882, he has been paid all the pension money due him under any Act of Congress. After that date he is entitled, under existing laws, to a pension of $72 per month and no more, and this the Pension Bureau is ready to pay him. *The Supreme Court of the District was, therefore, right in refusing the writ of* mandamus *and its judgment must be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN BUSH, *Plff. in Err.*,
v.
COMMONWEALTH OF KENTUCKY.

(See S. C., 17 Otto, 110-123.)

Removal of indictment to Federal Court—when indictment not removable—setting aside panel of jurors—Fourteenth Amendment—grand jury—laws of Kentucky—presumption—citizens of African descent.

1. Under section 641, Revised Statutes, the removal of an indictment from the State Court to the Circuit Court, where it was quashed, does not devest the State Court of jurisdiction thereafter to find a new indictment and to try the prisoner for the crime charged; and an order directing him to be returned to the county in which he was originally indicted that the state authorities might take such further action as they deemed expedient, was proper.

2. After the decision of the Court of Appeals of Kentucky, that the statute of that State excluding citizens of African descent from a grand or petit jury because of their race or color was unconstitutional, a second indictment for the same offense was not removable into the Federal Court for trial under section 641. If any right of the accused under the Constitution or laws of the United States, was denied by the State Court on the trial, his remedy was through the revisory power of the highest court of the State, and ultimately through that of this court.

3. It was not error for the State Court to overrule a motion to set aside a panel of petit jurors made on the ground that only white citizens were selected and summoned, when it was not distinctly shown that the officers, who selected the petit jurors excluded qualified citizens of African descent from the panel because of their race or color.

4. A grand jury selected and formed upon the basis of excluding therefrom, because of their color, all citizens of the African race, is prohibited by the Fourteenth Amendment, and the laws passed by Congress for the enforcement of its provisions.

5. The presumption that Kentucky recognized the Fourteenth Amendment to be binding on its citizens and its government, is overthrown by the fact that twice, after the ratification of that Amendment, the State enacted laws which in terms excluded citizens of African descent, because of their race, from service on grand and petit juries.

6. Where the statutes of Kentucky excluded citizens of African descent, from service on grand and petit juries, because of their race, it will be presumed that prior to the time they were adjudged invalid, they were followed by jury commissioners.

7. Where citizens of African descent have been wrongfully excluded from a grand jury, an indictment found by it should be set aside.

[No. 1130.]

Motion to advance filed Nov. 2, 1882. Granted Nov. 27, 1882. Argued Jan. 16, 1883. Decided Jan. 29, 1883.

IN ERROR to the Court of Appeals of Kentucky.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **L. P. Tarlton, Jr.,** and *J. S. Blair* for plaintiff in error.

Messrs. **J. D. Hunt** and **Wm. C. P. Breckinridge,** for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This court shares the regret expressed by counsel, that the record is, in some respects, so meager and in other respects so confused, that [111 it is impossible to ascertain what facts were before the inferior State Court when it passed certain orders that are commented upon in argument. Some of those orders refer to affidavits and other documents that are not made in any form a part of the record. The difficulties in

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our way have been, in part, removed by the frank concessions of counsel on both sides, and we cheerfully acknowledge the aid we have received from them in our search through the record for the substantial questions to be determined. We may also add, that our embarrassment has been increased by the consideration that the case is one of no small moment, involving, as it does, on the one hand, the life of a citizen, and on the other, the question whether the judicial tribunals of a State have denied to a prisoner rights guarantied by the Constitution of the United States. Whether the record before us shows such a denial, we will now proceed to inquire.

John Bush, a citizen of African descent, was indicted in 1879 in the Circuit Court for Fayette County, Kentucky, for *murder*. Upon his first trial, the jury, as was stated by counsel, being unable to agree, were discharged. At the next trial, he was found guilty and was condemned to suffer death. Upon appeal to the Court of Appeals of Kentucky, that judgment was reversed and a new trial was ordered for errors committed by the court of original jurisdiction: *first*, in neglecting to instruct the jury as to involuntary manslaughter, as distinguished from murder, the evidence being such as to authorize the jury to find the accused guilty of either offense; *second*, in the definition of malice given to the jury; *third*, in failing properly to instruct the jury, whether the death of the deceased was necessarily or probably caused by the wound or ensued from scarlet fever negligently communicated by her physician. *Bush* v. *Commonwealth*, 78 Ky., 268.

Upon the return of the case to the inferior State Court, the accused, as we infer from the record, filed a petition for its removal into the Circuit Court of the United States. That petition, we are informed by counsel, was filed May 24, 1880. It, however, is not in the record. We assume that it was based upon section 641 of the Revised Statutes of the United States, which authorizes, in general, the removal into such court of any criminal prosecution, commenced in a State Court for any cause whatever, against any person who is denied or [112] cannot enforce in the judicial tribunals of the State, or in the part of the State where the prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within their jurisdiction. The record, however, does state that copies of all the proceedings in the inferior State Court were filed by the accused in the Federal Court, and that he was brought before the latter tribunal upon writ of *habeas corpus* addressed to the jailer having him in custody.

On the 19th day of October, 1880, the accused by his counsel moved in the Federal Court that the trial proceed. That motion was denied, and the response by the jailer to the writ of *habeas corpus* was adjudged to be insufficient. The reasons which controlled this action are set forth in the following order:

"And it appearing to the court, from the transcript of the record heretofore filed, that the indictment herein was found by a grand jury, summoned under and in accordance with the provisions of section 1, chapter 62, General Statutes of Kentucky, which excludes all other than white citizens from being summoned, or serving thereon, the court is of opinion that said law is a violation of the 14th Amendment to the Constitution of the United States, and orders said indictment quashed.

The marshal of the court is ordered to return the said John Bush to Lexington, Kentucky, as speedily as possible, and there release him. He will, however, before setting him at liberty notify the Commonwealth's attorney, or, in his absence, the county attorney, or, in his absence, the county judge. This notice shall be in writing, stating the time and place of his release, and he will report his action to this court.

The defendant excepts to so much of this order as requires his return to Lexington, Kentucky."

The accused was subsequently re-arrested by the state authorities, and a new indictment was returned for the same offense. At the Term of the court held on the 6th of December, 1880, he tendered an affidavit, stating that "On the 4th day of February, 1879, the grand jury of Fayette County returned into this court an indictment charging him with the same offense, and upon the same statement of facts charged herein; that he, as he had a right to do under the 641st section of the Revised Statutes of the United States, filed in this court his petition for a [113] transfer of his case to the United States Circuit Court for this district for trial under said indictment; that the prayer of his petition was granted by said Circuit Court, on which, under said statute, all further proceedings were to cease forever; that the jurisdiction of said United States Circuit Court, to which, under said statute, this cause was removed for the trial of this offense, is superior to and in exclusion of that of this court and, that court having taken jurisdiction, this court has no jurisdiction to try the same." Copies of the orders of the United States Circuit Court were made part of that affidavit. The court refused its permission to file such affidavit, and to that ruling the accused excepted. The case was then continued to the succeeding February Term, when a special *venire* issued, commanding the sheriff to summon "one hundred and fifty good and lawful jurors from whom to select a jury for the trial of this (Bush's) case." But at that Term the prosecution was continued, and on May 16, 1881, the case being again called for trial, the sheriff was ordered to summon "A panel of seventy-five additional jurors from whom to select a jury for the trial of this case, and in executing this order he will proceed in his selections without regard to race, color or previous condition of servitude."

We next find, in the record of proceedings in the State Court, under date of May 18, 1881, this order:

"And afterwards, at a Term of said court held for said circuit, May 18, 1881, the Commonwealth came, by attorney, and the defendant appeared in custody. The defendant moves the court *to set aside the indictment* herein against him, because there was a substantial error committed to his prejudice in the selection and formation of the grand jury which found said indictment, in that the said grand jury was selected and formed in violation of the Constitution of the United States and, therefore, is unconstitutional, null and void because all citizens

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of the United States and State of Kentucky, and resident in Fayette County, who were not of the class known as white, though eligible for such service, were excluded from the lists from which said grand jury was selected, and thereby the rights, privileges and immunities of all such citizens so residing, who did not belong to the class known as white, and of the defend-
[114] ant, who is not white, although a citizen of the United States and of Fayette County, Kentucky, were abridged because he and they are not white, and *on account of his and their race and color*, contrary to the Constitution of the United States and the laws in such cases made and provided; which was overruled by the court, and defendant excepts."

The accused then moved to set aside the panel of petit jurors, upon grounds set forth in the following order entered on the same day:

"The defendant now moves the court *to set aside the panel of petit jurors* selected and summoned to try him herein, because there was a substantial error committed to his prejudice, in that said jurors were not summoned as required by law, in that all citizens of the United States and State of Kentucky, resident in Fayette County, of the African race, of which there are very many eligible and qualified to serve as jurors in Fayette County, and to which race this defendant belongs, were excluded and not summoned by the officers whose duty it was to select and summon said panel to serve on said panel from which the jury to try defendant was to be selected, but only such citizens eligible and qualified which belonged to the class known as white were selected and summoned by such officers. Defendant filed a *petition for the transfer of this case to the Circuit Court of the United States for Kentucky*, which motion was overruled, and defendant excepts."

The trial proceeded and the jury returned a verdict of guilty of murder; and, under the power vested in them by the laws of Kentucky, fixed the punishment at death. A judgment having been rendered accordingly, a motion for a new trial was made and overruled. Upon appeal to the Court of Appeals, the judgment was affirmed.

This statement of facts is quite sufficient to indicate the grounds upon which we rest our determination of such of the questions raised by the assignment of errors as we deem it necessary to consider:

1. The proposition in behalf of the accused to which we will first direct our attention is, that the removal of the prosecution under the first indictment, into the Circuit Court of the United States, although the indictment was there quashed, operated to devest the State Court of all jurisdiction thereafter, under any circum-
[115] stances whatever, to try him for the crime charged.

Such a construction of section 641 is wholly inadmissible. The prosecution against Bush could only have commenced in the judicial tribunals of Kentucky. The crime for which he was indicted is an offense against the laws of that State, not against those of the United States. It is not one originally cognizable in the courts of the Union. The removal of the first indictment into the Federal Court was competent only because at that time the accused was denied by the Statutes of Kentucky, rights secured to him by the Constitution and laws of the United States. And when the Federal Court in that mode acquired jurisdiction to proceed with the prosecution as if there commenced, its authority was limited to the trial of the indictment so removed. That court had, pending the prosecution therein, the same power over the indictment that the State Court could have exercised had there been no removal. When, therefore, the Federal Court, in the exercise of the discretion which it unquestionably had, quashed the indictment, it was without jurisdiction further to proceed against the defendant for the crime. He could not have been held for indictment by a grand jury in that court, for the obvious reason already suggested, that his offense was not one against the United States, but against Kentucky. It was for the authorities of the latter alone to determine whether he should be again indicted, or the prosecution abandoned.

It follows that there was no error in the order directing the prisoner to be returned to the county in which he was originally indicted. That course was due to the State to the end that its authorities, being duly notified, might take such further action in the premises as was expedient. *U. S.* v. *McBratney*, 104 U.S., 624 [XXVI., 870]; *Coleman* v. *Tenn.*, 97 U. S., 519 [XXIV., 1123]; *U. S.* v. *Cisna*, 1 McLean, 265.

2. But it is contended, upon behalf of the accused, that his petition for removal, filed after the second indictment was returned, should have been granted, and that the State Court could not thereafter rightfully proceed. The petition referred to is, doubtless, the one described in the order of May 18, 1881. But the record contains no copy of it; nor did it appear in the record sent to the Court of Appeals of [116]
Kentucky. The same question having been raised in that court, it replied properly that "An inspection of the petition is essential to determine whether it contained allegations sufficient to authorize a transfer, and, in its absence, it must be presumed that it was defective in the allegation of jurisdictional facts and, therefore, that the court below did right to disregard it."

But there is another and distinct ground upon which that petition, assuming that it was based upon section 641, was properly disregarded by the inferior State Court. The Court of Appeals of Kentucky, in *Commonwealth* v. *Johnson*, 78 Ky., 511, decided June 29, 1880, and hereafter more fully referred to, had declared that the Statutes of Kentucky excluding citizens of African descent from grand and petit juries because of their race or color, was unconstitutional, and that *thereafter* all officers charged with the duty of selecting or summoning jurors must so act without regard to race or color. That decision was binding as well upon the inferior courts of Kentucky as upon all of its officers connected with the administration of justice. After that decision, so long as it was unmodified, it could not have been properly said *in advance of a trial* that the defendant in a criminal prosecution was denied or could not enforce, in the judicial tribunals of Kentucky, the rights secured to him by any law providing for the equal civil rights of citizens of the United States or of all persons within their jurisdiction. The last indictment was, consequently, not removable into the Federal Court for trial under section 641, at any time after the decision in

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Commonwealth v. *Johnson* had been pronounced. This point was distinctly ruled in *Neal* v. *Del.*, 103 U. S., 392, 393 [XXVI., 572], and is substantially covered by the decision in *Va.* v. *Rives*, 100 U. S., 319 [XXV., 669]. If any right, privilege or immunity of the accused, secured or guarantied by the Constitution or laws of the United States, had been denied by a refusal of the State Court to set aside either that indictment or the panel of petit jurors, or by any erroneous ruling in the progress of the trial, his remedy would have been through the revisory power of the highest court of the State, and ultimately by that of this court. *Va.* v. *Rives* [*supra*]; *Neal* v. *Del.* [*supra*].

[117] 3. It is also assigned for error that the court of original jurisdiction erred in overruling the motion to set aside the panel of petit jurors. We have seen that the ground of this motion was that the petit jurors were not selected and summoned as required by law, in that all citizens of African descent in the county, very many of whom were eligible and qualified to serve as jurors, were excluded from the panel by the officer charged with the duty of selecting and summoning the petit jurors, and that only white citizens were selected and summoned.

It is sufficient for this assignment to say, that the motion was properly overruled, for the reason, amongst others, that the grounds upon which it was rested do not clearly and distinctly show that the officers who selected and summoned the petit jurors excluded from the panel qualified citizens of African descent *because of their race or color*. It may have been true that only white citizens were selected and summoned; yet it would not, necessarily, follow that the officer had violated the law and the special instruction given by the court "to proceed in his selection without regard to race, color or previous condition of servitude." There was no legal right in the accused, to a jury composed in part of his own race. All that he could rightfully demand was a jury from which his race was not excluded *because of their color*. *Va.* v. *Rives* [*supra*]. The allegation, that colored citizens were excluded and that only white citizens were selected, was too vague and indefinite to constitute the basis of an inquiry by the court whether the sheriff had not disobeyed its order by selecting and summoning petit jurors with an intent to discriminate against the race of the accused. This motion was, therefore, properly overruled.

4. But the most important question raised by the assignments of error is that which relates to the overruling of the motion made, before the trial, to set aside the indictment because found by a grand jury selected and formed upon the basis of excluding therefrom because of their color all citizens of the African race resident in Fayette County and eligible for such service.

In several cases heretofore decided in this [118] court we have had occasion to consider the general question whether the 14th Amendment and the laws passed by Congress for the enforcement of its provisions, do not prohibit any discrimination, in the selection of grand and petit jurors, against citizens of African descent because of their race or color.

In *Neal* v. *Del.*, 103 U. S., 386 [XXVI., 570], we said, commenting upon *Strauder* v. *West Va.*, *Va.* v. *Rives*, and *Ex parte Va.*, 100 U.S., 303, 313, 339 [XXV., 664, 667, 676], that a denial to citizens of African descent, *because of their race*, of the right or privilege accorded to white citizens, of participating as jurors in the administration of justice, is a discrimination against the former, inconsistent with the Amendment and within the power of Congress, by appropriate legislation, to prevent; that to compel a colored man to submit to a trial before a jury drawn from a panel from which is excluded, because of their color, every man of his race, however well qualified by education and character to discharge the functions of jurors, is a denial of the equal protection of the laws; and that such exclusion of the black race from juries, because of their color, is not less forbidden by law than would be the exclusion from juries, in the States where the blacks have the majority, of the white race, because of *their* color.

It was also said in that case, that "The presumption should be indulged, in the first instance, that the State recognizes, as is its plain duty, an Amendment of the Federal Constitution, from the time of its adoption, as binding on all of its citizens and every department of its government, and to be enforced within its limits, without reference to any inconsistent provisions in its own Constitution or statutes." 103 U. S., 389 [XXVI., 571].

But it was further said: "Had *the State, since the adoption of the 14th Amendment, passed any statute in conflict with its provisions, or with the laws enacted for their enforcement;* or had its judicial tribunals, by their decisions, repudiated that Amendment as a part of the supreme law of the land, or declared the Acts passed to enforce its provisions to be inoperative and void, there would have been just ground to hold that there was such a denial, upon its part, of equal civil rights, or such an inability to enforce them, in those tribunals, as, under the Constitution and within the meaning of that [sec. 641, R. S.] section, would authorize a removal of the suit [119] or prosecution into the Circuit Court of the United States." 103 U. S., 392 [XXVI., 572].

Again; it was declared that a denial upon the part of the officers of the State, charged with duties in that regard, of the right of a colored man "To a selection of grand and petit jurors without discrimination against his race, because of their race, would be a violation of the Constitution and laws of the United States, which the trial court was bound to redress. As said by us in *Va.* v. *Rives*, 'the court will correct the wrong, will quash the indictment or the panel; or, if not, the error will be corrected in a superior court,' and ultimately in this court upon review." 103 *U. S.*, 394 [XXVI., 573].

Guided by these principles, we proceed to inquire whether there was anything in the action of the State, by means of legislation or otherwise subsequent to the adoption of the 14th Amendment, that requires us to hold, as matter of law, that in the selection and formation of the grand jury which returned the last indictment, there was such a discrimination against the plaintiff in error because of his race, as made it the duty of the court to sustain the motion to set aside that indictment.

By the Revised Statutes of Kentucky, which went into effect on the first day of July, 1852, and were in force when the 14th Amendment became a part of the National Constitution, no

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one was competent to serve as a petit juror who was not "a free white citizen," 2 Rev. Stat. Ky., Stanton's ed., 77; and none except *citizens* could serve on a grand jury. 2 Rev. Stat. Ky., Stanton's ed., 75, 77. By the same statutes it was provided that all free white persons born in Kentucky or in any other State of the Union, residing in that State, all free white persons naturalized under the laws of the United States, residing there, and all persons who have obtained a right to citizenship under former laws, and every child, wherever born, whose father or mother was or shall be a citizen of Kentucky at the birth of such child, shall be deemed citizens of that State. 1 Rev. Stat. Ky., Stanton's ed., 238. So that, by the law of Kentucky at the adoption of the 14th Amendment, no citizen of the African race was competent to serve as a grand juror.

[120] The Revised Statutes of Kentucky were superseded, certainly as to the selection of grand and petit jurors, by the General Statutes, which were formally enacted as the law of the State, and went into effect on the first day of December, 1873. These, whilst declaring, in conformity with the 14th Amendment, all persons born or naturalized in the United States and subject to the jurisdiction thereof, if residing in Kentucky, to be citizens of that State, re-enacted the disqualification of colored persons as petit jurors and also provided that "No person shall be qualified as a grand juryman unless he be a white citizen." Gen. Stat. Ky., 570. And in the new Criminal Code of Practice of Kentucky, which went into effect January 1, 1877, it is expressly provided that "The *selecting*, summoning and impaneling of a grand jury shall be *as prescribed in the* Gen. Stat." Sec. 101.

It thus appears that the Legislature of Kentucky, after the adoption of the 14th Amendment and notwithstanding the explicit declaration therein that "No State shall deny to any person within its jurisdiction the equal protection of the laws," twice expressly enacted that no citizen of the African race should be competent to serve either as a grand or petit juror. And these re-enactments of the prior laws excluding citizens of that race from service on grand or petit juries, remained unchanged by legislation in that Commonwealth until the passage of the Act approved January 26, 1882, whereby the word "white" was stricken out of the sections of the General Statutes prescribing the qualifications of grand and petit jurymen.

In this connection it is necessary to recur to the case of *Commonwealth* v. *Johnson* determined as we have seen in the Court of Appeals of Kentucky on the 29th of June, 1880. In that case it was held, upon the authority of *Strauder* v. *West Va.*, 100 U. S., 303 [XXV., 664] decided on the first day of March, 1880, that so much of the Statute of Kentucky "As excludes all persons other than white men from service on juries is unconstitutional, and that no person can be lawfully excluded from any jury on account of his race or color." The learned court then proceeded: "This question has *not been heretofore passed on by this court*, and as the duty [121] of selecting and summoning juries is devolved upon merely ministerial officers, we ought to assume that, in performing their duties, *they obeyed the statute as enacted by the Legislature, and that they excluded colored persons from the jury because the statute declares them to be incompetent* and, consequently, that the appellee was deprived by the statute of a right which the Supreme Court holds is secured to him by the Constitution.

But the word 'white,' as found in our jury laws, being *now* declared to be no part of that law, it will be incumbent on all officers charged with the duty of selecting or summoning jurors, to make their selections without regard to race or color; and when juries are *hereafter* selected and summoned, it ought to be presumed that the officers did their duty, and ignored the statute so far as it is herein held to be unconstitutional, and that they have not excluded any person from the jury on account of his race or color." 78 Ky., 509.

The indictment upon which the plaintiff in error has been tried, convicted and sentenced to suffer death, was returned by a grand jury selected by jury commissioners who were appointed by the State Court of original jurisdiction at its May Term, 1880. It was, therefore, found by grand jurors who were selected prior to the decision in *Commonwealth* v. *Johnson*. The names of the grand jurors so selected were reported to the court at that Term, as the grand jury for the succeeding Term, at which the indictment upon which Bush was tried was returned. So that the grand jurors who found the indictment were *selected* when Statutes of Kentucky, re-enacted after the adoption of the 14th Amendment, expressly restricted jury commissioners in their selection of grand jurors to white citizens. Further; they were selected at a time when, according to the rule announced by the highest court of Kentucky, it should be assumed that the officers charged with the duty of selecting grand jurors obeyed the local statute by excluding from the list, because of their race, all citizens of African descent.

These considerations bring the case within the principles announced in *Neal* v. *Del.* The presumption that the State recognized the 14th Amendment, from the date of its adoption, to be binding on all its citizens and every department of its government and to be enforced within its limits, without reference to any inconsistent provisions in its own Constitution and laws, is overthrown by the fact that twice, after the ratification of that Amendment, the State enacted laws which in terms excluded citizens of African descent because of their race, from service on grand and petit juries. It was not until after the grand jurors who returned the indictment against Bush had been *selected*, that the highest court of Kentucky, speaking with authority for all the judicial tribunals of that Commonwealth, declared that the local statutes, in so far as they excluded colored citizens from grand and petit juries because of their race, were in conflict with the National Constitution. [122]

But upon this branch of the case the argument by counsel for the Commonwealth of Kentucky is, that the record does not show, by a bill of exceptions or otherwise, that any proof whatever was offered in support of the motion to set aside the indictment; and, consequently, that in disposing of that motion, as presenting simply a question of law arising upon the face of the local statutes, the presumption is that the jury commissioners in their selection, at May Term, 1880, of the Fayette Circuit Court, of grand jurors for

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the succeeding Term, respected the decision in *Strauder* v. *West Va.*, and similar cases and, therefore, disregarded the Statutes of Kentucky. The force of this position would be greatly strengthened if the record furnished any evidence that the court gave to those commissioners such instructions as were given to the sheriff in May, 1881, when that officer was required to select and summon petit jurors for the trial of Bush. We are of opinion that the rule announced by the Court of Appeals in *Commonwealth* v. *Johnson* is consistent with sound reason and public policy; and, in conformity therewith—in the absence of any evidence that the selection of grand jurors, in May, 1880, was in fact made without discrimination against colored citizens, because of their race—it should be assumed that the jury commissioners then appointed followed the Statutes of Kentucky so far as they restricted the selections of grand jurors to citizens of the white race.

For these reasons, it is adjudged that the court [123] of original jurisdiction erred in overruling the motion to set aside the indictment; and, consequently, that the Court of Appeals of Kentucky erred in affirming its judgment.

The judgment of the Court of Appeals of Kentucky is reversed and the cause remanded to that court, to be thence remanded to the Fayette Circuit Court, with directions to set aside the indictment.

Mr. Justice **Field** adheres to the views expressed by him in his dissenting opinions in *Ex parte Va.*, 100 U. S., 349 [XXV., 680], and in *Neal* v. *Del.*, 103 U. S., 398 [XXVI., 574]; and, therefore, dissents from the judgment in this case.

Mr. Chief Justice **Waite**, with whom concurred *Mr. Justice* **Gray**, dissenting:

I am unable to concur in this judgment. In my opinion, it is not to be presumed that the courts or the officers of Kentucky neglected or refused to follow the rulings in *Strauder* v. *W. Virginia* [XXV., 664], after the judgment in that case was pronounced by this court. The Court of Appeals promptly recognized the authority of that case and, in the absence of any proof to the contrary, it seems to me we must assume the inferior courts also did.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

EDWARD BURGESS, *Plff. in Err.*,
v.
JESSE SELIGMAN ET AL., Exrs. of JOSEPH SELIGMAN, Deceased.

(See S. C., 17 Otto, 20-38.)

Liability of stockholders—parol proof—holder of stock as security—Missouri decisions—jurisdiction of Federal Courts—state decisions—rules of property—rule in Federal Courts—collision with State Courts—judgment by consent.

*By a Statute of Missouri, stockholders of a corporation at its dissolution are liable for its debts; but it is provided that no person holding stock as executor, administrator, guardian or trustee, and no person holding stock as collateral security, shall be personally subject to such liability, but the persons pledging such stock shall be considered as holding the same and liable; and the estates and funds in the hands of executors, etc., shall be liable. *Held*,

1. That persons to whom stock of a corporation is pledged as collateral security by the corporation itself are within the exemption of the statute;

2. That certificates of the stock absolute on their face, issued to a creditor as collateral security, or in trust, may be shown to be so held by evidence *in pais*;

3. That the holder of such stock as collateral security, or in trust, though he vote on such stock, is not thereby estopped from showing that the stock belongs to the company and not to him, and that he only holds it as collateral security.

4. The Supreme Court of Missouri, after the transaction arose and after the circuit court had decided this case, made a contrary decision against the same stockholders, at the suit of another plaintiff, holding that the clause of exemption in the statute does not extend to persons receiving stock as collateral security from the corporation itself; and this decision being urged as conclusive upon the Federal Courts; *held*, that this court is not bound to follow the decision of the State Court in such a case.

5. The Federal Courts have an independent jurisdiction in the administration of state laws in cases between citizens of different States, co-ordinate with and not subordinate to that of the state courts; and are bound to exercise their own judgment as to the meaning and effect of those laws.

6. But since the ordinary administration of the law is carried on by the State Courts, it necessarily happens that, by the course of their decisions, certain rules are established which become rules of property and action in the State, and have all the effect of law, especially with regard to the law of real estate and the construction of State Constitutions and statutes; such established rules are always regarded by the Federal Courts, no less than by the state courts themselves, as authoritative declarations of what the law is.

7. But where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence; and when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued.

8. But even in such cases, for the sake of harmony and to avoid confusion, the Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt.

9. Acting on these principles of comity, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well considered decisions of the State Courts.

10. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication.

11. A judgment entered by consent for a specific amount, subject to any credits which the defendant may produce vouchers for, is good as between the parties themselves and their privies.

[No. 186.]

Argued Dec. 14, 15, 1882. Decided Jan. 29, 1883.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

*Head notes by *Mr. Justice* BRADLEY.

NOTE.—*Individual liability of stockholders for corporate debts.* See *note* to Hatch v. Dana, 101 U. S., XXV., 885.

Title to lands by deed and devise governed by lex rei sitæ. See *note* to Clark v. Graham, 19 U. S. (6 Wheat.), 557; *note* to Ehmendorf v. Taylor, 23 U. S. (10 Wheat.), 152; *note* to Darby v. Mayer, 25 U. S. (10 Wheat.), 465; and *note* to Jackson v. Chew, 26 U. S. (12 Wheat.), 158.

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This action was brought in the court below, by the plaintiff in error, to charge the defendants, as stockholders of the Memphis, Carthage and Northwestern Railroad Company, with a judgment debt due from said company.

A jury having been waived and the case submitted to the court, the trial resulted in a judgment in favor of the defendants. Whereupon, the plaintiff sued out this writ of error.

The case is fully stated by the court.

Messrs. **Benjamin H. Bristow, John P. Ellis** and *Joseph Shippen*, for plaintiff in error:

Since the decision of this case at the circuit, the highest court in the State has decided that the Missouri Statute does not include one in the position of the defendant, among those exempted from personal liability as shareholders.

Griswold v. *Seligman*, 72 Mo., 110; *Fisher* v. *Seligman*, 75 Mo., 13.

This construction of the Missouri Statute by the highest court of that State is, under familiar rules, conclusive upon this court.

"This court follows the adjudication of the highest court of the State, in the construction of its statutes. Its interpretation is accepted as the true interpretation, whatever may be our opinion of its original soundness."

Fairfield v. *Gallatin Co.*, 100 U. S., 47, 52 (XXV., 544, 546); *Moores* v. *Bank*, 104 U. S., 625 (XXVI., 870).

There are cases involving questions of municipal bonds, in which this court has held itself bound to follow state decisions as to the validity of the bond.

Venice v. *Murdock*, 92 U. S., 501 (XXIII., 585); *Pine Grove* v. *Talcott*, 19 Wall., 677 (86 U. S., XXII., 233); *Olcott* v. *Supervisors*, 16 Wall., 689 (83 U. S., XXI., 386).

These cases are placed upon the ground that the questions involved are general, not statutory. They are not applicable here. In *Griswold* v. *Seligman*, *supra*, the precise question considered was, whether or not the statute applied to the facts there presented. The question was purely one of statutory construction.

The stockholders' liability attaches to the individual in whose name shares of stock actually stand, no matter in what capacity or under what circumstances such shares may be held.

Upton v. *Tribilcock*, 91 U. S., 45 (XXIII., 203); *Sanger* v. *Upton*, 91 U. S., 56, 63 (XXIII., 220, 223); *Webster* v. *Upton*, 91 U. S., 65 (XXIII., 384); *Chubb* v. *Upton*, 95 U. S., 665 (XXIV., 523).

This is also the rule where the shares are held merely as collateral.

Pullman v. *Upton*, 96 U. S., 328 (XXIV., 818); *Bank* v. *Case*, 99 U. S., (628 XXV., 448); *Wheelock* v. *Kost*, 77 Ill., 296.

This is also the rule where the shares are registered in the name of one individual, who, in fact, holds them under a secret trust for another.

Thompson, Liability of Stockholders, secs. 177 and 178; *Mitchell's Case*, L. R., 9 Eq., 363; *Stover* v. *Flack*, 30 N. Y., 64; *Shellington* v. *Howland*, 53 N. Y., 371; *Bank* v. *Burnham*, 11 Cush., 183.

As against creditors, the same liability is incurred by anyone who acts as a shareholder, even without actual registry or without actual ownership as against the corporation or others.

See the *Upton Cases* above cited.

Bank v. *Case* (*supra*); *Sheffield R. Co.* v. *Woodcock*, 7 Mees. & W., 574; *Cheltenham R. Co.* v. *Daniel*, 2 Eng. Ry. Cas., 728; *Ex parte Besley*, 2 Macn. & G., 176; *Chase* v. *Bank*, 19 Pick., 564, 569; *Bank* v. *Burnham*, 11 Cush., 183; *Lane* v. *Brainard*, 30 Conn., 565, 579; *Adderly* v. *Storm*, 6 Hill, 624; *Matter of Reciprocity Bank*, 22 N. Y., 9, 17; *Hays* v. *R. R. Co.*, 38 Pa., 81; *McHose* v. *Wheeler*, 45 Pa., 32; *Haywood Plank R. Co.* v. *Bryan*, 6 Jones (L.), 83.

This ground of liability is sound upon principle as well as established by authority.

It is based upon two leading doctrines of the law: 1, estoppel by conduct; and 2, election between inconsistent positions.

See, authorities above cited.

Messrs. **James O. Broadhead, Joseph H. Choate** and *H. H. Harding*, for defendants in error:

Was the defendant a stockholder?

Plaintiff claims that defendant was a stockholder because a certificate of stock was issued to the firm of J. & W. Seligman & Co., absolute and unconditional on its face and, therefore, that the defendant is estopped from denying that he held it in any other way than as owner, and that he cannot be permitted to show, by evidence *aliunde*, that he really held it in trust or as a pledge or in escrow. We submit that the decisions are so uniform to the contrary, that this can scarcely be now considered an open question.

McMahon v. *Macy*, 51 N. Y., 155-161; *R. R. Co.* v. *Stein*, 21 Ill., 96-98; *Lathrop* v. *Kneeland*, 46 Barb., 432-438; *Jones* v. *R. R. Co.*, 32 N. H., 544.

Estoppel in pais consists in doings or sayings by a party, by which he designedly induces another one to alter, injuriously to himself, his previous condition. The following well considered cases give the full extent of the doctrine:

Brown v. *Wheeler*, 17 Conn., 345; *Kinney* v. *Farnsworth*, 17 Conn., 355; *Rangeley* v. *Spring*, 21 Me., 130; *Cummings* v. *Webster*, 43 Me., 192; *Heath* v. *Bank*, 44 N. H., 174; *Ketchum* v. *Duncan*, 96 U. S., 666 (XXIV., 871).

On questions of the construction of the Constitution or peculiar statutes of a State, the Federal Courts acquiesce in the settled decisions of the courts of last resort of the State in question, but not on a question of general law or equity, such as is involved in the present case.

The Federal Courts are absolutely independent of the decisions of the State Courts, and only to be influenced by them according to the force of the reasons upon which they are based.

The mere fact that a clause of a state statute is incidentally involved, is not enough to impart to a judgment of the State Courts peculiar sanctity or authority in regard to the question when raised in the Federal Courts.

Venice v. *Murdock*, 92 U. S., 501 (XXIII., 585); *Pine Grove* v. *Talcott*, 19 Wall., 677 (86 U. S., XXII., 233); *Olcott* v. *Supervisors*, 16 Wall., 689 (83 U. S., XXI., 386).

This is as much a question of general jurisprudence as any question of commercial law, and the decisions of this court in very recent cases have emphatically asserted its right to an independent decision upon its own judgment, notwithstanding the decisions of the courts of the State where the controversy arose.

R. R. Co. v. *Bank*, 102 U. S., 14 (XXVI.,

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61); *Oates* v. *Bank*, 100 U. S., 239 (XXV., 580); *Swift* v. *Tyson*, 16 Pet., 1.

The decisions in Missouri, relied upon by the plaintiff, were subsequent to the decision of this case by the circuit court.

And in this connection we call the attention of the court to the doctrine laid down by it in *Pease* v. *Peck*, 18 How., 599 (59 U. S., XV., 520), where the court says: "Nor do we feel bound in any case, in which a point is first raised in the courts of the United States and has been decided in the circuit court, to reverse that decision contrary to our own convictions, in order to conform to a state decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled laws of the State."

Mr. Justice **Bradley** delivered the opinion of the court:

This is an action brought by the plaintiff, Burgess, against J. & W. Seligman & Co. as stockholders of the Memphis, Carthage and Northwestern Railroad Company, under a statute of the State of Missouri, to recover a debt due to him by the company. The plaintiff, in his petition, alleges that on the 5th of November, 1874, judgment was rendered in his favor against the corporation by the District Court of Cherokee County, Kansas, for $73,661, which remains unsatisfied; that in December, 1874, the corporation was dissolved and that the defendants, at the date of the dissolution and of the judgment, were and still are stockholders of the corporation to the amount of $6,000,000, on which there is due and unpaid $1,000,000; and he demands judgment for the amount of his debt. Joseph Seligman, the principal defendant, answered, denying that the defendants were ever stockholders or subscribers to the stock of the corporation; and setting forth certain facts [22] and circumstances, stated in the findings, under which the stock alleged to be theirs was merely deposited in their hands by the corporation in trust for a temporary purpose by way of collateral security, to be returned when that purpose was accomplished.

The cause was tried by the court and judgment was rendered for the defendants on certain findings of fact; and the question here is, whether the facts as found are sufficient to support the judgment.

The principal facts upon which the case must turn are substantially the following:

The Memphis, Carthage and Northwestern Railroad Company was a corporation organized under the general laws of Missouri, with an authorized capital of $10,000,000. On the 10th of March, 1872, a contract in writing was entered into between the corporation and J. & W. Seligman & Co., the defendants, which is set forth in the findings. In the recitals of this contract it was stated that certain municipal subscriptions, in the shape of bonds, to the amount of $645,000, had been obtained in aid of its construction; and that a portion of the road (27 miles) was already graded, bridged and tied, and the right of way obtained, and all paid for by the proceeds of said subscriptions, and that the company now sought additional capital for procuring iron and equipment for the road by the sale of its first mortgage bonds; it was, therefore, agreed that the railroad company should furnish the capital necessary to completely prepare the road for the iron, and would execute and deposit with the defendants its entire issue of first mortgage bonds, to wit: $5,000,000, and a majority of its capital stock authorized to be issued, "said stock to remain in the control of said party of the second part (J. & W. Seligman & Co.) for the term of one year at least." The latter agreed to purchase two thousand tons of railroad iron under the railroad company's direction, and from time to time to make advances of cash during the completion of the road, not exceeding $200,000 (including the amount paid for iron), and to receive interest thereon at the rate of seven per cent per annum until re-imbursed by sale of the bonds. They were to have the privilege for the term of twelve months, of calling any portion of the $5,000,000 of bonds at the rate of seventy cents currency [23] and accrued interest less two and a half per cent, and if more bonds were sold than enough to iron the road, they should advance funds to purchase rolling stock, $2,000 per mile, the balance to remain with them on deposit on interest at the rate of call loans to pay any deficiency in net earnings of the road to meet demands for interest on the bonds. If the bonds, or part of them, could not, for any unforeseen cause, be negotiated during the next twelve months, the company was to repay to J. & W. Seligman & Co. all moneys advanced by them, with interest at the rate of seven per cent per annum and a commission of two and a half per cent on all bonds returned. This is the purport of the written agreement.

On the first of May, 1872, a trust-deed was executed by the company on its railroad and appurtenances to Jesse Seligman and John H. Stewart, trustees, to secure the company's bonds. On the 11th of May, 1872, the following resolution of the directors was passed. "It is ordered by the board of directors that, in making negotiations for money with J. & W. Seligman & Co., certificates for a majority of the capital stock of this company be issued to the said J. & W. Seligman & Co. *to hold in trust* for the period of twelve months, and that such certificates be signed by the president and secretary, with the corporate seal of this company affixed." A stock certificate for 60,000 shares, or $6,000,000, was accordingly issued in the usual form to J. & W. Seligman & Co. This certificate was delivered to the defendants, but the court finds that they never subscribed for the stock, nor agreed to do so, and obtained it only in the manner set forth. The list of stockholders on the stock book of the company, required by law to be kept, contains the names of certain townships which contributed aid to the road, and several individuals, including J. & W. Seligman, but not the amount of shares held. The stock transfer book, also required by law, contained the same list, with date, number of shares and amount carried out opposite to each name. The name of J. & W. Seligman appeared therein as follows: [24]

Names.	Residence.	Date.
J. & W. Seligman	New York, N. Y.	Dec. 20, 1872.

No. of Shares.	Amount in Dollars.
60,000, sixty thousand (held in escrow)	6,000,000, six millions.

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The court further found that, shortly after the contract of March 14, 1872, Joseph Shippen, an attorney, of St. Louis, saw and examined its provisions, and a few days after told Burgess, the plaintiff, of the contract, and that thereby the Seligmans were to have control of the road and of the stock and bonds, and told Burgess it would be well for him to have a talk with Joseph Seligman before entering into contract with the railroad for its construction. Burgess accordingly saw Seligman, and testifies that the following conversation ensued:

"I told him I had been constructing on that Carthage road, and that I understood he was interested in the road now, and I would like to talk to him on that matter; that this company owed me, or Cunningham, who was the president of the corporation; that he owed me then some money for work I had done between there and Pierce City, and I wanted to know what the prospect was for pushing the work forward, the means of getting the iron, and so on, and he said: 'I think the best thing you can do is to go on with the work westward, and we will have ample means to get hold of the local bonds.' It seems Cunningham had represented to him that there was local means enough to grade the road, and he suggested to me then that I would be safe in going on and entering into such a contract, and then he mentioned that he thought it would be better for all parties if the road was built and the work prosecuted westward."

Afterwards, on June 14, 1872, Burgess entered into a contract with the railroad company for the construction of the road from Carthage, Mo., to Independence, Kansas. He immediately began work under the contract, and so continued until the fall of 1873.

The bonds of the company, to the amount of $864,000, were issued and were negotiated and sold by J. & W. Seligman & Co., they themselves becoming holders of over $400,000 thereof. [25]

The stock issued to them was voted on by *proxy* at two successive annual meetings for election of directors.

The company being unable to meet its interest on the bonds, the road and property were delivered to the trustees of the mortgage and sold in December, 1874, and Joseph Seligman and Josiah Macy, as a bondholders' committee, became purchasers thereof, and the railroad corporation was dissolved in conformity with the laws of Missouri about the same time.

On the 5th of November, 1874, Burgess obtained judgment in the District Court of Cherokee County, Kansas, against the railroad corporation for work and materials under his contract, for the sum of $73,661, which judgment recited that it was entered by agreement, with a stipulation that it would be entitled to a credit of the amount which had been paid by the railroad company to subcontractors and laborers of the plaintiff, when the exact amount thereof should have been ascertained and proper vouchers furnished. No credits, however, were claimed. The present action was brought to recover the amount of this judgment.

The findings also set out the contract made by Burgess and his associate with the railroad company, 14th June, 1872, for constructing the road, by which it appeared that they agreed to take their pay in township bonds, so far as the same should be furnished.

Upon these facts, the court gave judgment in favor of the defendants. Burgess brings the case here by writ of error.

The statutory provision upon which the action is founded is the 22d section of article 1 of the Act of Missouri relating to private corporations (1 Wagner's Stat., ch. 37), which declares as follows:

"If any company, formed under this Act, dissolve, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution without joining the company in such suit, and if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable."

By section 9 of article II., of the same chapter, it is enacted as follows: [26]

"No person holding stock in any such company as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as a stockholder of such company, but the person pledging such stock shall be considered as holding the same and shall be liable as a stockholder accordingly; and the estates and funds in the hands of such executor, administrator, guardian or trustee shall be liable, in like manner and to the same extent, as the testator or intestate, or the ward or person interested in such fund, would have been if he had been living and competent to act, and held the stock in his own name."

The first question for consideration is, whether the plaintiff's claim was established. He relied on the judgment recovered by him against the corporation in Kansas. It is contended by the defendants that this judgment does not establish any debt due to the plaintiff. But we think that the objection is not sound. The judgment, as against the corporation and its privies, does establish the debt named therein as due to the plaintiff, but subject to a defeasance for such an amount as might be shown to have been paid to subcontractors and laborers by the corporation. The defendants, as well as the corporation, were at liberty to show any credits which, by the stipulation, were properly applicable in reduction of the amount of the judgment. None such were shown, or attempted to be shown. Until such credits were shown the judgment stood valid for the whole amount. It was not for the plaintiff, but for the defendants, to show that any such credits existed.

The next and principal question is, whether J. & W. Seligman & Co., or J. & W. Seligman, were stockholders of the Memphis, Carthage and Northwestern Railroad Company within the meaning of the law. Did the 60,000 shares of stock belong to them? Or did they hold it by way of trust or as collateral security for the fulfillment of the company's obligations in relation to the bonds? The courts in England and some in this country have gone very far in sustaining a liability for unpaid subscriptions to stock against persons holding the same in any capacity whatever, whether as trustees, guardians or executors, or merely as collateral [27] security. It cannot be denied that, in some

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cases, the extreme length to which the doctrine has been pushed has operated very harshly; and in cases in which the corporation itself has no just right to enforce payment, and where no bad faith or fraudulent intent has intervened, it may be doubted whether creditors have any better right, unless by force or some express provision of a statute. The Missouri Statute recognizes the justice of making a discrimination between those who hold stock in their own right, and those who hold it merely in a representative capacity, or as trustees, or by way of collateral security.

Upon a careful examination of the facts found in this case, we do not see how a reasonable doubt can exist that the Seligmans held the stock in question as trustees and custodians by way of collateral security for themselves and the purchasers of the bonds. That was clearly the intent of the parties, declared in almost so many words; and that intent must prevail unless, by some inadvertency in carrying it out, the Seligmans have been unwittingly caught in some legal snare of which the creditors can take advantage. By the contract executed between them and the corporation, they were to act as its financial agents in the disposal of its bonds, and to make advances of money from time to time to enable the company to get the necessary iron for completing its road and equipment for running it. The company was to prepare the superstructure and procure the ties and everything necessary by way of preparation for laying the iron down; and was to do this by means of the resources it had already secured, and expected to obtain, from the township subscriptions, in order that the mortgage to be given as security for the bonds might be good and valid for that purpose; and the company further agreed to *deposit* with Seligman & Co. a majority of its capital stock, to remain in their control for the term of one year at least. The reasonable inference is, that this deposit of stock was to be made for the purpose alleged in the defendant's answer, namely: as security for the payment of the bonds, and to enable Seligman & Co. to control the corporation and see that its affairs were honestly conducted and the earnings properly applied. The resolution of the directors, adopted for carrying out this agreement, is to [28] the same purport and effect; it directs that, in making negotiations for money with Seligman & Co., certificates for a majority of the capital stock should be issued to them to hold *in trust* for the period of twelve months; and when the stock was entered upon the transfer book in the name of J. & W. Seligman, it was characterized as being "held in escrow."

The terms used may not have been strictly technical. The issuing of the stock in their names may not have been a deposit or an escrow, in the strict sense of those words; but the intent is very clear, that the stock was not to be regarded as their stock, but as belonging to the company, though in their names, and that it was to be held by them simply as a security. They never subscribed for the stock; they never became indebted to the company for it; the company never acquired any right to demand from them a single dollar on account of it. Though issued in form, it was only issued in a qualified sense, to subserve a specific purpose by way of collateral security for a limited period, and was returnable to the company when that purpose should be accomplished. It seems to us that the Seligmans, in taking and holding the stock, held it merely in trust by way of collateral security for themselves and others, and that they were, therefore, within the express exception made by the law in favor of those holding stock in that way.

It is urged, however, that they are estopped from claiming the benefit of this exemption by their conduct in being represented and voting at stockholders' meetings. But if the law allows stock to be held in trust or as collateral security, without personal liability; and if, as we suppose, the clear effect of the contract was to create such a holding in this case, we do not see how the doctrine of estoppel can apply. The only parties to complain would be the other stockholders, who might, perhaps, complain that stock held merely in trust or as collateral security is not entitled to participate with them in the privilege of voting. But from them no complaint is heard. Creditors could not complain; for, on the hypothesis that stock may lawfully be held at all in trust or as collateral security, without incurring liability to them, the act of voting on the stock cannot injure or affect them. In the absence of such a law, the case might be very different. Undoubtedly, it has been held in cases innumerable, that [29] acting as a stockholder binds one as such; but that is where the law does not allow stock to be held at all without incurring all the liabilities incident to such holding. The present is an action at law based upon the supposed liability of the defendants under a statute which makes the distinction referred to, and which does not make all stockholders liable indiscriminately. We think that this makes a material difference. If the defendants can show, as we think they have shown, that they are within the exception of the statute, the statutory liability does not apply to them.

It is by no means clear, however, that J. & W. Seligman did not have a right to vote on the stock, even as against the stockholders. When the law provides that if a person holds stock as a trustee or by way of collateral security only, he shall not be personally liable for the company's debts, it supposes that the stock shall be holden and that the pledgee or trustee shall be the holder. If, then, the law is to have any force or effect, the mere fact of holding cannot be set up as a bar or estoppel against proof of the manner and character of such holding. And if such pledgee or trustee may be a holder of the stock in that character, is he bound to be perfectly passive in his holding? He will not be entitled to any dividends or profits, it is true; or, if he receives dividends or profits, he must account therefor; but is it certain that he may not lawfully vote on the stock? An executor, administrator, guardian or trustee certainly may vote; and where is the rule to be found that a holder for collateral security, under a law which permits such holding, may not vote on the stock so held without losing his character as a mere pledgee? But, as before said, if the pledgee in voting the stock exceeds his rights as such pledgee, it cannot have the effect of

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making the stock his own. No one is injured and no one can complain except the other stockholders whose rights are invaded.

The line of authorities usually quoted to show that those who actually hold stock, and who manifest a voluntary or intentional holding by voting on it, or receiving dividends or other benefit from it, consists mainly of cases in which parties have been held as corporators or associates as between themselves and the corporation [30] or joint stock association, and as such incidentally liable to the creditors of such companies. Sir Nathaniel Lindsley, in his able treatise on Partnership, has amply discussed the whole subject upon the platform of the English decisions. His fundamental proposition is this: "The type then of a member or shareholder of a company is a person who has agreed to become a member, and with respect to whom all conditions precedent to the acquisition of the rights of a member have been duly observed * * * In practice, difficulties are only presented where this standard is not reached; and the important question really is: to what extent it can be departed from and membership be, nevertheless, constituted?" (Vol. 1., p. 128.) He then devotes many pages to show, by adjudged cases, how a man may be held as a corporator by the company itself, by holding himself out as such, as by taking dividends, etc. Now, in the present case the relation of J. & W. Seligman & Co. to the corporation is expressly settled and fixed by the written contract between them. We have already examined that contract and have shown that the stock issued by the corporation to J. & W. Seligman & Co. was issued to them only as trustees and by way of collateral security. The proposition that the corporation could hold them as subscribers to its stock would be in flat defiance of the contract in whole and in every part. We do not know of any iron rule of law which would prevent them from showing this contract relation between them and the company. It is the origin and foundation of their whole connection with it. The sufficiency of the evidence to control their *status* towards the company is another thing. Its competency seems to us free from doubt. When examined, it shows, as before stated, that as between them and the company, the latter has no claim whatever against them in relation to the stock, except to have it returned when properly required, after the purpose of its issue had been accomplished. It belongs to the company, and to it alone. J. & W. Seligman are mere trustees or custodians of it for a special purpose, that purpose being collateral security.

In this connection, we may properly refer to the decision of the Court of Appeals of Maryland in the case of *Matthews* v. *Albert*, 24 Md., 527, which was a case arising upon the Mary- [31] land Statute from which that of Missouri was copied so far as relates to the exception of those holding stock in trust or as collateral security. That was a suit in equity brought against stockholders to render them liable for the company's debts. One of them, by the name of Tieman, had loaned money to the corporation and, as security for its payment, a certificate of stock had been issued to him. After its issue an indorsement was made on it by the president of the corporation, to the effect that it had been deposited with Tieman as collateral security for the loan. The court said:

"The claim of W. H. Tieman is for $2,000, money alleged to be loaned to the company on the 8th of January, 1859. But it is insisted by the appellees, that Tieman, instead of being a non-stockholding creditor, is, according to the evidence, a stockholder, and as much liable as the Alberts. We do not concur in this view of the relation of Tieman to the company. In our opinion, his claim is for money loaned; and the stock transferred to him was held by him as collateral security for his loan and, so holding it, he is not personally subject to any liability as stockholder, but is protected by the provision of the 12th section of the Act of 1852, ch. 338."

A similar decision, in a case arising upon a like statute in New York, was made by the Commissioners of Appeal of that State in the case of *MacMahon* v. *Macy*, 51 N. Y., 155. The New York railroad Act of 1850, as amended by the Act of 1854, made stockholders liable to creditors of the company for the amount unpaid on their stock; but the 11th section of the Act contained precisely the same provision as that in the 9th section of the Missouri law, that no person holding stock as executor, administrator, guardian or trustee, and no person holding stock as collateral security, should be personally subject to any liability as stockholders; imposing the liability, however, as the Missouri law does, on the pledger or *cestui que trust*. Macy was sued as a stockholder, and it was shown on the trial that the stock held by him was transferred to him as collateral security. The referee refused to give any effect to this evidence, holding that parol evidence could not be received to contradict or vary the written assignments or transfers, which were absolute in form. The Commissioners of Appeal, on this branch of the case, said: "In this he erred. It is always [32] competent to show that an assignment or conveyance absolute in form, was only intended as a security. There is nothing in any statute which makes the books of the company incontrovertible evidence of ownership of stock. A person may be the absolute legal and equitable owner of stock without any transfer appearing upon the books." All the Judges of the Commission concurred in this opinion.

We do not well see how any different conclusion could logically have been arrived at. If the law declares that stock held as collateral security shall not make the holder liable, surely it must be competent to show that it is so held. And when this fact is once established, there is an end of the application of estoppel, unless it can be invoked by some party who has been specially misled by the conduct of the defendants.

It is urged by the plaintiff, in this case, that the defendants are estopped as to him, because of a certain conversation between Joseph Seligman and himself before he entered into the contract for construction. We have carefully examined the account given of this conversation by the plaintiff himself, and we see nothing in it which at all compromits the defendants on the question of their actual *status* and position in the affairs of the company. Especially may this be said in view of the fact that, prior to that conversation, an attorney, who had in-

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spected the contract of Seligman & Co., told him of it, and that it would be well for him to have a talk with Joseph Seligman before entering into contract with the railroad company for its construction. The general purport of the conversation which he afterwards had with Seligman was, that Seligman advised him to take the contract and go on with the work, as the best thing for all parties, as there would be ample means to get hold of the local bonds, which would be sufficient to grade the road. Surely there was nothing in this conversation to estop the defendants from showing what their real position was with regard to the stock which they held.

But the appellant's counsel, with much confidence, press upon our attention the decisions of the Supreme Court of Missouri on the questions involved in this case, and on the very transactions which we are considering. That [33] court, since the determination of this case by the circuit court, has given judgment in two cases adversely to the judgment in this, and to the views above expressed. The first case was that of *Griswold* v. *Seligman* [72 Mo., 110], decided in November, 1880; the other, that of *Fisher* v. *Seligman* [75 Mo., 13], decided in February, 1882, in which the former case was substantially followed and confirmed. The case of *Griswold* v. *Seligman*, seems to have been very fully and carefully considered. We have read the opinion of the court and the dissenting opinion of one of the Judges with much attention, but we are unable to come to the conclusion reached by the majority.

We do not consider ourselves bound to follow the decision of the State Court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the circuit court, no construction of the statute had been given by the state tribunals contrary to that given by the circuit court. The Federal Courts have an independent jurisdiction in the administration of state laws, co-ordinate with and not subordinate to that of the State Courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State Courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State Constitutions and Statutes. Such established rules are always regarded by the Federal Courts, no less than by the State Courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions or when there has [34] been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid and in most cases do avoid any unseemly conflict with the well considered decisions of the State Courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States, was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the margin, but it is not deemed necessary to discuss them in detail.*

In the present case, as already observed, when [35]

* McKeen v. Delancy's Lessee, 5 Cranch, 32; Polk v. Wendal, 9 Cranch, 98; Thatcher v. Powell, 6 Wheat., 127; Preston v. Bowmar, 6 Wheat., 581; Daly v. James, 8 Wheat., 535; Elmendorf v. Taylor, 10 Wheat., 159-165; Shelby v. Guy, 11 Wheat., 367; Jackson v. Chew, 12 Wheat., 167-168; Fullerton v. Bank, 1 Pet., 614; Gardner v. Collins, 2 Pet., 85; U. S. v. Morrison, 4 Pet., 136; Green v. Neal, 6 Pet., 295-300; Groves v. Slaughter, 15 Pet., 497; Swift v. Tyson, 16 Pet., 18-20; Carpenter v. Ins. Co., *Id.*, 511; Carroll v. Safford, 3 How., 460; Lane v. Vick, *Id.*, 476; Rowan v. Runnels, 5 How., 139; Smith v. Kernochen, 7 How., 219; Nesmith v. Sheldon, *Id.*, 818; Williamson v. Berry, 8 How., 558-9; Van Rensselaer v. Kearney, 11 How., 318; Webster v. Cooper, 14 How., 504; Ohio L. & T. Co. v. Debolt, 16 How., 431-2; Beauregard v. New Orleans, 18 How., 500-503 [59 U. S., XV., 471, 472]; Watson v. Tarpley, *Id.*, 519 [59 U. S., XV., 510]; Pease v. Peck, *Id.*, 598, 599 [59 U. S., XV., 520]; Morgan v. Curtenius, 20 How., 1 [61 U. S., XV., 823]; League v. Egery, 24 How., 266 [66 U. S., XVI., 656]; Suydam v. Williamson, 24 How., 433 [65 U. S., XVI., 745]; *S. C.*, 6 Wall., 736 [73 U. S., XVIII., 972]; Leffingwell v. Warren, 2 Black, 603 [67 U. S., XVII., 262]; Mercer Co. v. Hackett, 1 Wall., 95, 96 [68 U. S., XVII., 550]; Gelpcke v. Dubuque, 1 Wall., 175 [68 U. S., XVII., 520]; Seibert v. Pittsburg, 1 Wall., 273-4 [68 U. S., XVII., 553]; Havemeyer v. Iowa Co., 3 Wall., 303 [70 U. S., XVIII., 41]; Thomson v. Lee Co., 3 Wall., 330 [70 U. S., XVIII., 178]; Christy v. Pridgeon 4 Wall., 203 [71 U. S., XVIII., 324]; Mitchell v. Burlington, 4 Wall., 274-5 [71 U. S., XVIII., 352]; Lee Co. v. Rogers, 7 Wall., 183-7 [74 U. S., XIX., 161]; Butz v. Muscatine, 8 Wall., 583 [75 U. S., XIX., 494]; City v. Lamson, 9 Wall., 485 [76 U. S., XIX., 729]; Olcott v. Supervisors, 16 Wall., 678 [83 U. S., XXI., 382]; Supervisors v. U. S., 18 Wall., 81 [85 U. S., XXI., 774]; Boyce v. Tabb, 18 Wall., 548 [85 U. S., XXI., 757]; Pine Grove v. Talcott, 19 Wall., 677 [86 U. S., XXII., 233]; Elmwood v. Marcy, 92 U. S., 294 [XXIII., 713]; State R. R. Tax Cases, 92 U. S., 617 [XXIII., 674]; Ober v. Gallagher, 93 U. S., 207 [XXIII., 831]; Ottawa v. Perkins, 94 U. S., 260, 267-8 [XXIV., 154, 157]; Davie v. Briggs, 97 U. S., 637-8 [XXIV., 1089]; Fairfield v. Gallatin Co., 100 U. S., 47, 55 [XXV., 544, 547]; Oates v. Bank, 100 U. S., 245 [XXV., 583]; Douglass v. Pike Co., 101 U. S., 686-7 [XXV., 971]; Barrett v. Holmes, 102 U. S., 655 [XXVI., 292]; Thompson v. Perrine 103 U. S., 816 [XXVI., 617]; *S. C.*, Oct. T., 1882 [*ante*, 208].

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the transactions in question took place, and when the decision of the circuit court was rendered, not only was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the circuit court was called upon and which we are now called upon to consider. It can hardly be contended that the Federal Court was to wait for the State Courts to decide the merits of the controversy and then simply register their decision; or that the judgment of the circuit court should be reversed merely because the State Court has since adopted a different view. If we could see fair and reasonable ground to acquiesce in that view, we should gladly do so, but in the exercise of that independent judgment, which it is our duty to apply to the case, we are forced to a different conclusion. The cases of *Pease* v. *Peck*, 18 How., 598 [59 U. S., XV., 520], and *Morgan* v. *Curtenius*, 20 How., 1 [61 U.S., XV., 823], in which the opinions of the court were delivered by *Mr. Justice* Grier, are precisely in point.

The cardinal position assumed by the State Court is, that, inasmuch as certificates of stock were in fact issued to and accepted by J. and W. Seligman, and they voted on the stock, they are absolutely estopped from denying that they are the owners of the stock, subject to all the liabilities incident to that relation; and that they cannot have the benefit of the exception accorded by the law to those who hold stock as collateral security, because, as the court holds, that exemption only applies to those who have received stock in that way from some stockholder who can be made liable as a stockholder, and not to those who have received stock from the corporation itself by way of collateral security.

The first position, that the acceptance of the stock and voting upon it, absolutely precluded the defendants from denying that they are owners of the stock, has been already considered. [36] The great mass of authorities relied on by the Supreme Court of Missouri, on this part of the case, English as well as American, are cases in which parties have been held as corporators or associates as between themselves and the corporation, and upon that footing have been held responsible to creditors when the rights of creditors have been in question. We think that we have sufficiently shown that these authorities cannot govern the case in hand, if any effect is to be given to the law of Missouri exempting from personal liability those who hold stock in a fiduciary character or by way of collateral security. We will, therefore, briefly examine the other position, that this law does not apply to those who receive stock as collateral security from the corporation itself.

The argument that the exemption from liability in cases of stock held as collateral security, applies only to those who have received it from third persons who were stockholders and who can be proceeded against as such, seems to us unsound and contrary both to the words and the reason of the law. It takes for granted that stock cannot be received as collateral security from the corporation itself and still belong to the corporation, and yet we know that such transactions are very common in the business of this country. The words of the statute are positive and relate to all holders of stock for collateral security. They are as follows: "No person holding stock in any such company as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company." The reason of this law is derived from the gross injustice of making a person liable as the owner of stock when he only holds it in trust or by way of security, and from the inexpediency of putting a clog upon this species of property, which will have the effect of making it unavailable to the owner, or of deterring prudent and responsible men from accepting positions of trust where any such property is concerned. It seems to us that not only the law but the reason upon which it is founded applies to the holders of stock as collateral security, whether received from an individual or from the corporation itself. It is argued, however, that the remaining words of the law are repugnant to this view. These words are as follows: "But the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estates and funds in the hands of such executor, administrator, guardian or trustee shall be liable, in like manner and to the same extent, as the testator or intestate, or the ward or person interested in such fund, would have been if he had been living and competent to act, and held the stock in his own name." The argument is, that these words imply that there must always be some person or estate to respond for the stock, or else the exemption cannot take effect. The obvious answer is, that this clause fixes the liability upon the pledger as a stockholder, where there is a pledger who can be made liable in that character. When the corporation pledges its own stock as collateral security, though it cannot be proceeded against as a stockholder *eo nomine*, the reason is because it is primarily liable, before all stockholders, for all its debts. In such a case the clause last quoted would not strictly apply to it; but the holder of its stock as collateral security would be within both the letter and the spirit of the first clause. It is supposed that some flagrant injustice would ensue if there was not some one who could be reached as a stockholder in every case of stock pledged as collateral security; hence, stock pledged by the corporation itself must be regarded as belonging to the pledgee, though no other pledgee of stock is treated in this way. Where is the justice of this? Why should the stock be necessarily considered as belonging to some one besides the corporation itself? Is anyone harmed by considering the corporation as its true owner? If the stock had not been issued as collateral security, it would not have been issued at all; it would not have been in existence. Would the creditors have been any better off in such case? They are better off by the issue of the stock as collateral, because the general assets of the company have received the benefit of the moneys obtained by means of the pledge. The more closely the matter is examined, the more unreasonable it seems to deny to a pledgee of the corporation the same exemption which is extended to the pledgee of third persons. We think that the one equally with the other is protected by the express words and true spirit of the law. [37]

We might pursue the subject further, and [38]

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examine in detail the suggestions and authorities adduced by the learned court which decided the cases of *Grinwold* v. *Seligman* [72 Mo., 110] and *Fisher* v. *Seligman* [75 Mo., 18], but it is unnecessary. What we have said is sufficient to indicate substantially the grounds on which we feel obliged to dissent from its conclusions. *In our judgment, the facts found by the court below make out a clear case of stock held in trust and by way of collateral security only, and the judgment rendered thereon was correct. Judgment affirmed.*

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 541; 109 U. S., 126, 257, 379; 111 U. S., 563; 114 U. S., 353.

JOSEPH L. HALL, *Appt.*,

v.

NEAL MACNEALE AND HERMAN URBAN, Partners, as MACNEALE & URBAN.

(See S. C., 17 Otto, 90-97.)

Letters patent—construction of—prior public use.

*1. Whether claim 3 of letters patent No. 67046, granted to Joseph L. Hall, July 23, 1867, for an "improvement in connecting doors and casings of safes," namely: "3. The conical or tapering arbors 1, in combination with two or more plates of metal, in the doors and casings of safes and other secure receptacles, the arbors being secured in place in the plates by keys, 2, or in other substantial manner," claims arbors which are tapped into two or more plates; or whether it excludes, as a part of it, screw threads cut on the arbors, is immaterial in the present case, because, under the former view, the defendants are not shown to have used arbors with screw threads on any part of the arbor that is within the plates; and, under the latter view, the claim is invalid.

2. The whole invention existed in letters patent granted to said Hall, September 25, 1860, for an "improvement in locks."

3. A cored conical bolt with a screw thread on it having been shown in the patent of 1860, and a solid conical bolt having existed, there was no invention in adding the screw thread to the latter bolt.

4. Solid conical bolts without screw threads having been used in two safes made and sold by the inventor more than two years before his patent was applied for, the invention covered by said claim 3 was in public use and on sale, with the consent and allowance of the inventor, so as to make such claim invalid under sections 7 and 15 of the Act of July 4, 1836, 5 Stat. at L., 117, and section 7 of the Act of March 3, 1839, 5 Stat. at L., 353.

5. Such use was not a use for experiment.

[No. 163.]

Argued Jan. 25, 26, 1883. Decided Feb. 5, 1883.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The bill in this case was filed in the court below, by the appellant, to recover damages, alleged to have been sustained through the infringement of certain letters patent, and for an injunction.

The court below having entered a decree dismissing the bill, the complainant appealed to this court.

The facts of the case are fully stated by the court.

Messrs. **Edward N. Dickerson, Thomas A. Logan** and *William C. Cochran*, for appellant.

Mr. **James Moore**, for appellees.

*Head notes by *Mr. Justice* BLATCHFORD.

Mr. Justice **Blatchford** delivered the opinion of the court:

This suit is brought on letters patent No. 67046, granted to Joseph L. Hall, the appellant, July 23, 1867, for an improvement in connecting doors and casings of safes. The only claim alleged to have been infringed is claim 3, which is in these words: "3. The conical or tapering arbors 1, in combination with two or more plates of metal, in the doors and casings of safes and other secure receptacles, the arbors being secured in place in the plates by keys, 2, or in other substantial manner." In regard to what is embraced in this claim the specification says: "The [91] nature of this invention consists in * * * securing a series of plates forming a casing or door of the safe by means of conical or tapering arbors, which, being tapped in from the outside of the door or casing and keyed upon the inside, present serious obstacles to the removal of successive plates forming the body of the safe. Figure 1 represents a perspective view of a safe embodying my invention. Figure 2 is a horizontal section of part of the same. Figure 3 is a detail view, in cross section, of the door of the safe, showing the shape of, and manner of securing, an arbor. The most approved manner of securing together the numerous plates forming the casings and doors of safes is by means of screws tapped in from one series of pairs or triplets of plates from the inside, presenting no rivet heads upon the outside surface of the safes. * * * In the doors of safes, the outer plate D is secured to the plates E F by screws *b*, countersunk in the plate F. * * * The fourth plate, I, has about the same area as the plate E. It is secured to the plate F by screws *e*, which pass through the inner plate K, in which they are countersunk. * * * In order to still further secure together the plates forming the door of the safe, I use a conical arbor, 1, or a number, if necessary; they are introduced in openings through the series of plates, being tapped into the two innermost of all the plates, and keyed in position. A smooth surface in the plane of the outer face of the door is presented, giving no means of removing the arbors 1, even should the key, 2, be removed. * * * Since the doors of safes are more exposed than any other part of them, it is necessary to embody in their construction such devices, which in themselves are the simplest, as shall effectually bar forcible entrance to the safes. The introduction of arbors for the purpose of more effectually binding in one compact mass the series of alternate iron and steel plates in the doors or bodies of safes will very much protract the labors of the burglar; indeed, it will be necessary, in order to remove one sheet in succession, to cut out the arbors, which are made of the hardest steel. The arbors may be tapped through the entire series of plates, and the inner end rivet headed instead of keyed, as shown in the drawing or the inner plate, as well as other in the series of plates, may be put together in sections and, fitting into notches in the arbor or arbors, secure them in position. In this latter [92] construction, the arbors need not be conical but may have any cross section, tapering longitudinally."

When the specification says that the conical arbors are "tapped in from the outside," it means that screw threads are cut on them and take into screw threads in the body, and that the

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arbors are screwed in and have their smaller end towards the inside. The drawing, figure 3, shows this, there being five plates, and the arbor being in position, and tapering from the outside to the inside, the larger end being towards the outside, and a screw thread being cut on the arbor for the distance of the thickness of the two innermost plates, and the arbor extending through the five plates, from the outer surface of all to the inner surface of all, and a key extending from the inside, lengthwise of the arbor, the distance of the length of the screw thread. The arbors, the specification says, "May be tapped through the entire series of plates," that is, the entire length of the arbor may have a screw thread cut on it, and the inner end may be rivet headed, that is, headed down into a rivet instead of being keyed. A peculiarity of the conical arbors is stated in the specification to be that they are tapped in from the outside and keyed upon the inside, in contradistinction to the then existing most approved method of having screws with conical heads, the heads being countersunk in one of the plates, and the cone shape of the heads holding the screws so as to make it unnecessary to rivet them on the outside of the safe, the screws not going through all the plates, the head of the screw being towards the inside of the safe and the other end of it not projecting beyond the outside. Whether claim 3, in claiming "*the* conical or tapering arbors 1 in combination," etc., is to be held, in view of the description in the text of the specification and of the drawing, figure 3, to necessarily claim arbors which are tapped into two or more plates, or whether that claim excludes, as a part of it, screw threads cut on the arbors, is not material to this case. If the former, the appellees are not shown to have used arbors with screw threads on any part of the arbor that is within the plates. If the latter, then, infringement being shown, we are satisfied that claim 3 cannot be sustained. The contention of the appellant [93] is, that the invention covered by that claim requires only a conical hole, conical through the entire series of plates to be secured, and a conical bolt corresponding thereto and secured in place in the plates by a key, or in any other substantial manner.

A patent was issued to the appellant September 25, 1860, for an improvement in locks. The specification of that patent says: "Resting upon the front plate B of the lock, as shown in figure 4, are seen two conical blocks, I I', a plan of which is represented in figure 11. These are precisely alike in their construction, and they are adapted to the two stems G and H, as will appear. They are of a length corresponding with the thickness of the door M, to which the lock is applied, so that, when introduced into appropriate apertures in the door, their outer faces will be flush with the outer face of the door, and their inner faces flush with the inner face of the door, and against the front face of the lock, when the same is properly fixed upon the door. The blocks I I' enter their apertures in the door by a screw thread, and they are held from turning therein, so as to return outwardly, by an ordinary key driven into a key seat drilled from the inside of the door before the lock is applied to its place. * * * The conical blocks are cored or drilled out in a peculiar manner to receive the two-part revolving arbor, as shown, the part p (p'), entering the narrow end of the conical blocks, being of a cylindrical form, and the part q (q'), entering the large end of the conical blocks, being of a conical form." These revolving arbors turn the stems G and H, and thus the tumblers are adjusted and the bolt of the lock is thrown. The drawing of the patent shows that the conical blocks I I' as passing entirely through the door, the larger end of the cone on the outside, and each end flush with its proper face. These conical blocks were screw threaded on their surface in the door, and were keyed from the inside. They were cored to admit the revolving arbors, but their bodies operated in all respects like the conical arbors of the patent sued on.

In 1868 John Farrell and Jacob Weimar applied for a patent for the same thing covered by claim 3 of the patent sued on, and the Patent Office declared an interference between their application and that patent. The appellant was examined as a witness on his own behalf, in October, 1868, in that interference, and testified as follows: "3d Int. State what knowl- [94] edge you have had, in manufacturing safes, of the use of a series of plates united by conical bolts, made drill proof, and when and where you first had knowledge of their use. Ans. The first was in the year 1858 or 1859. I came across one John P. Lord's lock, which was said to be a combination, no-key-hole bank lock. I negotiated with the parties representing it, to try and introduce it and manufacture it. I then began to examine into it more particularly, and found that the knob or dial projecting through the door seemed to be very insecure in its construction. I set myself about so as to invent some better way of securing the protection to the lock and also the plates of the doors. I then invented a double and single conical shaped arbor or plug, made drill proof, composed of wrought iron and steel welded together, the design of which was to fully protect the lock against sledge hammers or other tools for driving the plug or plugs in, or from being drilled into, they being hardened. The further design of the said drill proof plugs or arbors was to secure together a series of plates of wrought iron and steel or other suitable metal whereby they could not be separated or pulled apart, more firmly binding them together than had been our former method of making safes, or joining together such series of plates. Some time after, during the year 1859 or 1860, the exact period of time I cannot remember fully, we made burglar proof safes, of a series of plates composed of iron and steel joined together, in which we had used more of the conical, drill proof bolts or arbors than we had formerly been in the habit of doing, for the express purpose of more securely fastening the plates together. We made them in the City of Cincinnati, in our factory, which was situated about the middle of the square bounded by Columbia, Sycamore, Front and Main Streets. We have also used them to a very considerable extent since that time, in our factory situated at the southwest corner of Plum and Pearl Streets. I secured a patent for my double, conical, drill proof arbor in the year 1860. My design of that was to secure full protection to combination no-key-hole bank locks. My single arbor I don't think I

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made any claim on at that time, but used it for the express purpose of binding the series of plates together. This was also a conical, drill [95] proof bolt, made of iron and steel. Our modes of fastening the above described arbors were in different ways. Some we made conical, at the smaller end were made soft, so that we could rivet them down into a countersunk plate; others we cut a thread upon at the small end of the arbor or drill proof bolt, which was done, and, when fitted up, the conical shaped arbor or bolt was tempered; others were made with a thread cut upon the end of them, designed for a nut, which was designed to be used on the smaller end of them to fasten them more securely, so that they could not be withdrawn from the outside. The conical shaped arbor, with the thread cut upon the arbor, was designed to be screwed into the inner plate of a series of plates, and then a key seat cut in each of the threads of the plate and of the arbor, so that keys could be driven in to prevent their being unscrewed and withdrawn from the ouside, thereby making them secure against the drill or the use of the sledge hammer or other tools for forcing them in, being of a conical shape, or from removing any of the series of plates through which they passed."

It is apparent from this testimony, that the appellant regarded the double, conical shaped arbor or plug, that is, the cored conical block, and the single, conical shaped arbor or plug, as being the same invention. He was endeavoring to carry back to 1858 or 1859 the invention covered by claim 3 of his patent of 1867. The only difference he makes between the double and the single arbor is that the former had a core removed from it. The latter was solid. Both, he says, were drill proof, and had the same further design or object, namely: to secure together a series of plates in safes. He also says, that in 1859 or 1860, he made burglar proof safes of a series of plates composed of iron and steel joined together, using in them these single conical bolts or arbors, for the express purpose of more securely fastening the plates together. He then describes the cutting of a thread upon the arbor and one of the plates to screw the arbor into the inner plate, and cutting a key seat in the two threads, and putting in a key to prevent the arbor from being unscrewed from the outside. All this describes exactly what is covered by claim 3 of the patent sued on.

In his testimony in the present suit, the ap- [96] pellant states that he made three safes between 1859 and 1864 which were burglar proof, and had conical bolts for fastening together the different plates of metal. One of them had the double conical bolt and no single bolt, and was sold to a firm in Dayton, Ohio. One was made in 1858 or 1859, to be exhibited at a fair in Ohio, and was sold to a banker in Lafayette, Indiana. It had the single, drill proof conical arbors in the doors. The third one was made to be exhibited at a fair held in 1860, and was sold to the treasurer of Loraine County, Ohio. It had a few of the single conical arbors. It does not distinctly appear that the single conical bolts in the Lafayette and Loraine County safes had screw threads cut on them, but the appellant testifies in this case that the double arbor of his patent of 1860 had a screw thread cut upon it running through one or more of the inner plates, for the purpose of holding it.

It clearly appears, from the testimony of the appellant himself, that the idea of making a claim to the invention covered by claim 3 of the patent sued on arose from the introduction into safes, in 1866 or early in 1867, of plates of steel and iron welded together. This enabled the value of the screw threaded conical bolt to be more fully developed, because the screw thread could be made more effective the whole length of the bolt. But the whole invention existed in the bolt of the patent of 1860. There was no invention in adding to the solid conical bolt the screw thread of the cored conical bolt.

Moreover, the use and sale of the solid conical bolts in the Lafayette and Loraine County safes, even though those bolts had no screw threads on them, constituted a use and sale of the invention covered by claim 3 of the patent in suit. The application for that patent was made in March, 1867, and the patent was granted under the provisions of the Act of July 4, 1836, 5 Stat. at L., 117, and of the Act of March 3, 1839, 5 Stat. at L., 353. Within the meaning of sections 7 and 15 of the Act of 1836, as modified by section 7 of the Act of 1839, the invention covered by claim 3 of the patent in suit was in use and on sale more than two years before the appellant applied for that patent, and such use and sale were, also, with the consent and allowance of the appellant, and the use was a public use. It is contended that the safes were experimental and that the use was a use for experiment. But we are of opinion that [97] this was not so and that the case falls within the principle laid down by this court in *Coffin* v. *Ogden*, 18 Wall., 120 [85 U. S., XXI., 821]. The invention was complete in those safes. It was capable of producing the results sought to be accomplished, though not as thoroughly as with the use of welded steel and iron plates. The construction and arrangement and purpose and mode of operation and use of the bolts in the safes were necessarily known to the workmen who put them in. They were, it is true, hidden from view, after the safes were completed, and it required a destruction of the safe to bring them into view. But this was no concealment of them or use of them in secret. They had no more concealment than was inseparable from any legitimate use of them. As to the use being experimental, it is not shown that any attempt was made to see if the plates of the safes could be stripped off, and thus to prove whether or not the conical bolts were efficient. The safes were sold and, apparently, no experiment and no experimental use were thought to be necessary. The idea of a use for experiment was an afterthought. An invention of the kind might be in use and no burglarious attempt be ever made to enter the safe, and it might be said that the use of the invention was always experimental until the burglarious attempt should be made, and so the use would never be other than experimental. But it is apparent that there was no experimental use in this case, either intended or actual. The foregoing views, which are controlling to show that claim 3 of the patent in suit cannot be sustained, are in accordance with those announced by this court in *Egbert* v. *Lippmann*, 104 U. S., 333 [XXVI., 735].

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The decree of the Circuit Court dismissing the bill is affirmed, and the same decision is made in No. 165.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—114 U. S., 11.

HENRY A. TURNER, *Plff. in Err.*,
v.
STATE OF MARYLAND.

(See S. C., 17 Otto, 38-59.)

Maryland statute—construction of—constitutionality of inspection laws—charge for services.

*1. Section 41 of chapter 346 of the laws of Maryland of 1864, as amended and re-enacted by chapter 291 of the laws of 1870, provides as follows: "After the passage of this Act, it shall not be lawful to carry out of this State, in hogsheads, any tobacco raised in this State, except in hogsheads which shall have been inspected, passed and marked agreeably to the provisions of this Act, unless such tobacco shall have been inspected and passed before this Act goes into operation; and any person violating the provisions of this section shall forfeit and pay the sum of $300, which may be recovered in any court of law of this State, and which shall go to the credit of the tobacco fund; *Provided*, That nothing herein contained shall be construed to prohibit any grower of tobacco, or any purchaser thereof, who may pack the same in the county or neighborhood where grown, from exporting or carrying out of this State any such tobacco without having the same opened for inspection; but such tobacco so exported or carried out of this State without inspection shall in all cases be marked with the name in full of the owner thereof, and the place of residence of such owner, and shall be liable to the same charge of outage and storage as in other cases, and any person who shall carry or send out of this State any such tobacco, without having it so marked, shall be subject to the penalty prescribed by this section." Under that proviso, no requirement of the Act of 1864 is dispensed with, except that of having the hogshead opened for inspection. The hogshead must still be delivered at a state tobacco warehouse and there numbered and recorded and weighed and marked and be found to be of the dimensions prescribed by statute, and to have been packed and marked as required.

2. Said section 41, as so amended and re-enacted, is not, in its provisions as to charges for outage and storage, in violation of clause 2 of section 10 of article 1 of the Constitution of the United States, as respects any impost or duty imposed by it on exports, or in violation of the clause of section 8 of article 1 which gives power to the Congress "To regulate commerce with foreign Nations and among the several States."

3. The charge for outage, under the proviso of said section 41, as so amended and re-enacted, is an inspection duty, within the meaning of the Constitution.

4. Dispensing with an opening for inspection of the hogsheads mentioned in said proviso, does not, in view of the other provisions of the tobacco inspection statutes of Maryland, deprive those statutes of the character of inspection laws.

5. The characteristics of inspection laws considered, with references to the legislation of the American Colonies and the States on the subject.

6. It is not foreign to the character of an inspection law to require every hogshead of tobacco to be brought to a state tobacco warehouse.

7. Whether it is not exclusively the province of Congress, and not at all that of a court, to decide whether a charge or duty, under an inspection law, is or is not excessive, *quære*.

8. Said section 41, as so amended and re-enacted, is not a regulation of commerce or unconstitutional, as discriminating between the state buyer and manufacturer of leaf tobacco and the purchaser who buys for the purpose of transporting the tobacco to another State or to a foreign country, or as discriminating between different classes of exporters of tobacco.

9. The charge for outage in this case appears to be a charge for services properly rendered.

[No. 490.]

Argued Jan. 11, 12, 1883. Decided Feb. 5, 1883.

IN ERROR to the Court of Appeals of the State of Maryland.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **John K. Cowen** and **E. J. D. Cross**, for plaintiff in error:

We contend that this Act of 1870, ch. 291, which repealed and re-enacted section 41, of the Act of 1864, ch. 346, is unconstitutional.

First. Because it is clearly a regulation of interstate and foreign commerce and a law levying a duty upon exports, and it does not fall within the class of laws known as inspection laws, as it expressly provides that the articles of export are not to be inspected.

Second. Because the law, even if it were an inspection statute, is unconstitutional, since it discriminates against the non-resident buyer and manufacturer of leaf tobacco, and in favor of the state buyer and manufacturer.

Third. Because it discriminates between different classes of exporters of the same article of commerce.

Upon the principles announced by the court in *Welton* v. *Mo.*, and *Webber* v. *Va.*, the Act is unconstitutional.

Woodruff v. *Parham*, 8 Wall., 123 (75 U. S., XIX., 382); *State Freight Tax*, 15 Wall., 232 (82 U. S., XXI., 146); *Welton* v. *Mo.*, 91 U. S., 275 (XXIII., 347); *Henderson* v. *Mayor*, 92 U. S., 260 (XXIII., 543); *R. R. Co.* v. *Husen*, 95 U. S., 465 (XXIV., 527); *Cook* v. *Pa.*, 97 U. S., 566 (XXIV., 1015); *Machine Co.* v. *Gage*, 100 U. S., 676 (XXV., 754); *Guy* v. *Baltimore*, 100 U. S., 434 (XXV., 743); *Packet Co.* v. *Catlettsburg*, 105 U. S., 559 (XXVI., 1169); *Tiernan* v. *Rinker*, 102 U. S., 123 (XXVI., 103); *Webber* v. *Va.*, 103 U. S., 344 (XXVI., 565); *Mobile Co.* v. *Kimball*, 102 U. S., 691 (XXVI., 238); *Jackson Min. Co.* v. *Aud.-Gen.*, 32 Mich., 488.

Mr. **Charles J. M. Gwinn**, *Atty. Gen. of Maryland*, for defendant in error:

The power of each State to enact inspection laws was recognized by necessary implication, in sub-clause 2, sec. 10, art. I., of the Constitution.

Brown v. *Md.*, 12 Wheat., 438; *Woodruff* v. *Parham* (*supra*); *Machine Co.* v. *Gage* (*supra*).

Each State was left as much at liberty to provide by law for the improvement of the quality of articles produced by its labor, or for identifying them as the growth of its soil, or for fitting such articles for exportation or domestic use, as it was before the Articles of Confederation were adopted, or as it was while those Articles remained in force.

Federalist, No. 32; *Gibbons* v. *Ogden*, 9 Wheat., 203; *Ward* v. *Md.*, 12 Wall., 428 (79 U. S., XX., 452); *Webber* v. *Va.* (*supra*).

Inspection laws, indeed, form a part of that immense mass of legislation, embracing every power capable of being exercised by a State within its territory, which has not been surrendered to the General Government, and can be exercised most advantageously by the State itself.

Sturges v. *Crowninshield*, 4 Wheat., 195; *Gibbons* v. *Ogden* (*supra*); *N. Y.* v. *Miln*, 11 Pet.,

*Head notes by *Mr. Justice* BLATCHFORD.

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141; *Passenger Cases*, 7 How., 398; *License Tax Cases*, 5 Wall., 471 (72 U. S. XVIII., 501); *U. S.* v. *De Witt*, 9 Wall., 48 (76 U. S., XIX., 594); *Patterson* v. *Ky.*, 97 U. S., 508 (XXIV., 1116).

They are considered, though particularly mentioned in the Federal Constitution, as being, nevertheless, parts of the police legislation of each State.

License Cases, 5 How., 592; *Passenger Cases*, 7 How., 424; *N. Y.* v. *Miln*, 11 Pet., 141.

They meet the commercial power of the Union in dealing with subjects under the protection of that power, although they exercise an authority, which can only be exerted under peculiar circumstances and to a limited extent.

Passenger Cases, 7 How., 408, 415; *License Cases*, 5 How., 608, 625, 627, 631; *Baldwin, Const. Views*, 189-192, 195, 196 (IX., Law. ed., 873).

They are, indeed, the exercise of powers, which do not admit of a uniform system of national legislation.

Wilson v. *Blackbird Creek Co.*, 2 Pet., 245.

Each State, in exercising its continuing powers under the Federal Constitution to enact inspection laws, has the right to use a fair legislative discretion.

Cooley v. *Board of Wardens*, 12 How., 313.

They are laws, which the State enacting them may, under the express terms of art. 1, sec. 10, sub-clause 2, of the Federal Constitution, execute by imposing duties on exports.

Brown v. *Md.*, 12 Wheat., 438; *Neilson* v. *Garza*, 2 Woods, 290; *N. Y.* v. *Miln*, 11 Pet., 141; *Packet Co.* v. *St. Louis*, 100 U. S., 429 (XXV., 690); *Vicksburg* v. *Tobin*, 100 U. S., 432 (XXV., 691).

The power of a State to lay such imposts or duties, is, within the limits of the grant, a power as exclusive as any power vested in Congress.

Ward v. *Md.*, 12 Wall., 427 (79 U. S., XX., 452); *Foster* v. *N. O.*, 94 U. S., 248 (XXIV., 123).

The provisions of law to which every hogshead, containing tobacco grown in Maryland, remains subject, were intended to act upon such hogshead before it became an article of foreign commerce or of commerce among the States, and to prepare it for that purpose.

Gibbons v. *Ogden*, 9 Wheat., 203; *License Cases*, 5 How., 577; *Hall* v. *DeCuir*, 95 U. S., 488 (XXIV., 548); *Foster* v. *N. O.* (*supra*); *Brown* v. *Md.*, 12 Wheat., 438.

The charge of "outage" is one which accrues in the due administration of the inspection laws of Maryland. It is simply a compensation required for services properly rendered.

In the case under consideration, having due regard to that latitude of discretion which the State of Maryland was entitled to exercise in the selection of the means of attaining a constitutional object, it cannot be said, that the charge imposed is excessive or that it amounts to an infringement of the constitutional provision referred to; nor that it is a tax or duty, instead of what it purports to be; a fee or a charge for the employment of that instrumentality which the circumstances of the case render necessary for the protection of the State.

Pace v. *Burgess*, 92 U. S., 375 (XXIII., 659); *Packet Co.* v. *Keokuk*, 95 U. S., 84 (XXIV., 379); *Packet Co.* v. *St. Louis*, 100 U. S., 429 (XXV., 690); *Vicksburg* v. *Tobin*, 100 U. S., 432 (XXV., 691).

It may be true that the imposition of this charge has a remote and considerable influence on commerce. The charge is not objectionable on that account.

State Tax on Railway Gross Receipts, 15 Wall., 293 (82 U. S., XXI., 167); *Sherlock* v. *Alling*, 93 U. S., 103 (XXIII., 820).

Even if the charge imposed is a duty on an export, and even if such charge is a regulation of commerce, the duty imposed and the regulation made were both within the power of the State under the express and implied terms of art. I., sec. 10, subsection 2, of the Constitution of the United States.

Gibbons v. *Ogden*, 9 Wheat., 203; *R. R. Co.* v. *Husen*, 95 U. S., 472 (XXIV., 530).

Such charge and regulation, by whatever name they are called, do not invade any part of that domain of legislation which belongs exclusively to the Congress of the United States.

Henderson v. *Mayor*, 92 U. S., 272 (XXIII., 549); *R. R. Co.* v. *Husen* (*supra*).

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a writ of error to the Court of Appeals of the State of Maryland, and the question presented for our consideration is the constitutional validity of certain provisions in the tobacco inspection statutes of Maryland.

The plaintiff in error, Turner, was indicted in the Criminal Court of Baltimore. The indictment contained two counts. The first count alleged that Turner packed in a hogshead tobacco grown by him on a farm belonging to him in Charles County, in Maryland, and marked the hogshead with his full name and his place of residence in said county, and shipped it to the City of Baltimore; that it was not delivered at any tobacco warehouse in said city, under the management or control of any inspector of tobacco appointed for said warehouse by the Governor of the State of Maryland, under the Constitution and laws of said State, nor to any one of said inspectors of tobacco, nor to any one acting under the authority of anyone of said inspectors of tobacco, to be weighed, passed or marked, and it was not weighed, passed and marked by any such inspector of tobacco, nor by any person acting under the authority of [40] anyone of said inspectors of tobacco; but that the said Turner exported it from said city to Bremen, in Germany, without having procured it to be weighed, passed and marked by any such inspector of tobacco, or by any person acting under the authority of any one of said inspectors of tobacco. The second count contained the same allegations and the further averment that the said Turner did not, prior to said exportation, pay or cause to be paid any sum of money due for outage, or any sum of money due for storage, to the State of Maryland, on said hogshead, to any such inspector of tobacco, or to any other person having authority to receive the same, although certain sums of money were due and payable by him to said State for outage and storage on said hogshead.

Separate demurrers were filed to each count of the indictment, and then a written stipulation was filed by the parties, as follows: "It is agreed in this case, 1. That the matters and facts charged in the indictment in this case are true, as therein stated. 2. That for the more

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speedy final determination of the questions of law involved in this case the demurrers which the traverser has entered to this indictment shall be overruled *pro forma* by the court. 3. That after such overruling of the demurrers, the case shall be forthwith submitted to the court, without the intervention of a jury, upon the admission contained in the first paragraph of this agreement." The demurrers were then overruled. The court then rendered a judgment that Turner pay a fine of $300. On the same day, Turner, by petition to said criminal court, setting forth that he had been adjudged guilty of a misdemeanor, and by the judgment of said court ordered to pay the sum of $300 to said State, prayed an appeal to the Court of Appeals of Maryland, assigning errors in the record. That court affirmed the judgment, and Turner has brought the case into this court by a writ of error, alleging that the Statutes of Maryland on which the indictment was founded, and the validity of which was sustained by the state court, are repugnant to the Constitution of the United States.

It is claimed by the defendant in error that the statutory provisions, the validity of which is denied by the plaintiff in error, are "inspec-
[41] tion laws," within the meaning of clause 2 of section 10 of article 1 of the Constitution of the United States, which clause is as follows: "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net proceeds of all duties and imposts laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

By chapter 346 of the laws of Maryland of 1864, a new tobacco inspection law was enacted, as part of the Code of public local laws, in place of and expressly repealing certain portions of said Code. It provides, section 1, for the appointment of five tobacco inspectors, one for each state tobacco warehouse in the City of Baltimore. By section 5 each tobacco inspector is required to employ such clerks and laborers, and provide and keep on hand such books, implements and materials, as may be necessary for the economical and effective discharge of his duties as such inspector, and the salaries of the various clerks and laborers are prescribed, to be paid from the receipts in the respective offices, with the requirement that the inspectors shall at no time employ more labor than shall be necessary for the effective performance of the work to be done. There are provisions to facilitate the landing of tobacco at the wharves in front of the warehouses and its removal therefrom, and to secure the safe preservation of the tobacco after its delivery at the warehouse. Section 10 is as follows: "It shall be the duty of each tobacco inspector to cause each hogshead of tobacco landed or delivered at the warehouse to which he is appointed to be numbered in succession as received, and to cause said number to be entered in a book kept for that purpose, together with the time said hogshead was received, the name of the vessel or other conveyance, if known to him, by which said hogshead was brought to the City of Baltimore, and of the owner or consignee of said tobacco, and the initials or other marks on said hogshead, identifying the same; and, when said hogshead shall be removed from said warehouse, he shall cause an entry to be made, in some book kept for that purpose, of the time when the same was so removed, the name of the person to whom the same was delivered, [42] and of the vessel or other conveyance by which the same was taken away." It is provided by section 12 that each inspector shall cause all the tobacco in the warehouse to which he may have been appointed to be inspected as speedily as practicable, in regular order, as numbered; and by section 13 that he shall cause each hogshead of tobacco, before it is uncased, to be weighed, and the tobacco in each hogshead and the cask itself to be separately weighed, and the weight of each hogshead, as first weighed, and the gross and net weight of the tobacco therein contained, after inspection, to be entered in a proper book, with sufficient reference to its marks and numbers as previously recorded; and by section 14, that he shall mark on the side of each hogshead, with a marking iron, its warehouse number and weight, and the net weight of tobacco contained therein, and its warehouse number on each head, with blacking; and, by succeeding sections, that he shall uncase and break all tobacco, in whatever State raised, and draw samples from each hogshead, and tie each lot of samples together, and label it with the warehouse number of the hogshead, and the number of the warehouse, and the date of inspection, and the name of its owner, or, if known, the initials or other marks on the hogshead, and deliver it sealed, if the tobacco be merchantable, to the owner, with a certificate stating the date of inspection, the warehouse mark and number of the hogshead, the weight thereof, and the net weight of the tobacco in it, and that unmerchantable tobacco shall be re-conditioned, packed, re-weighed and re-inspected, and then sampled and certified; and by section 27, that every hogshead shall be liable to the charge of $1.50 outage, if weighing less than 1,100 pounds, and to 15 cents additional for every 100 pounds, which shall be paid by the purchaser thereof to the inspector, before it is removed. Penalties are imposed by section 40 for erasing, altering or adding to any mark placed by the inspector on any hogshead or any label of any sample, and for fraudulently taking any tobacco from a sample or substituting other tobacco for any in such sample, and for counterfeiting any inspector's certificate or seal. Section 41 is as follows: "After the passage of this Act, it shall not be lawful to carry out of this State, in hogsheads, any tobacco raised in this State, except in hogs- [43] heads which shall have been inspected, passed and marked agreeably to the provisions of this Act, unless such tobacco shall have been inspected and passed before this Act goes into operation; and any person violating the provisions of this section shall forfeit and pay the sum of $300, which may be recovered in any court of law of this State, and which shall go to the credit of the tobacco fund." This section was amended by chapter 291 of the laws of 1870, by re-enacting it with the following addition: "*Provided*, That nothing herein contained shall be construed to prohibit any grower of tobacco, or any purchaser thereof, who may

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pack the same in the county or neighborhood where grown, from exporting or carrying out of this State any such tobacco, without having the same opened for inspection; but such tobacco so exported or carried out of this State without inspection shall, in all cases, be marked with the name in full of the owner thereof, and the place of residence of such owner, and shall be liable to the same charge of outage and storage as in other cases, and any person who shall carry or send out of this State any such tobacco, without having it so marked, shall be subject to the penalty prescribed by this section." Section 42 prescribes the size of the casks in which tobacco raised in Maryland shall be packed, and forbids the inspector to inspect or pass it until packed in a hogshead of proper dimensions.

By chapter 36 of the laws of 1872, entitled "An Act to Add a New Article to the Code of Public General Laws Regulating the Inspection of Tobacco," some additional regulations were made, and some existing provisions were reenacted, and some changes were made, and all inconsistent provisions of law were repealed, but the only material additions or changes made, so far as the present case is concerned, were these: by section 11, every inspector shall have uncased, and break, every hogshead of tobacco delivered for inspection, in so many places for Maryland and Ohio, and in so many places for Kentucky and Virginia and, if the tobacco is sound, take a sample, and mark the hogshead with its number, the year of inspection, and the initials of the owner on each head and on the bilge and the tare and net weight on the bilge. By section 15, each inspector shall keep in a book "The name of the owner, the number, gross, tare and net weight of every hogshead of tobacco inspected by him, the State where grown, the consignee of the same, the name of the vessel by which shipped out, and the name of the party shipping the same, and for every hogshead so inspected by him he shall issue his certificate or note, stating in such certificate or note the name or initials of the owner, the number of the hogshead, the State where grown, the date of inspection, and the gross, tare and net weight of the hogshead, and he shall make no delivery of inspected tobacco, from his warehouse except upon surrender of the certificate or note corresponding with the number of the hogshead." By section 26, "No tobacco of the growth of this State shall be passed or accounted lawful tobacco unless the same be packed in hogsheads not exceeding fifty-four inches in length of the staves, nor exceeding forty-six inches across the head, and the owner, or his agent, of tobacco packed in any hogshead of greater dimensions shall repack the same in hogsheads of the size herein prescribed, at his own expense, before the same shall be passed."

[44]

By chapter 228 of the laws of 1872, the charge for outage is fixed at $2 for every hogshead not exceeding one thousand one hundred pounds, and twelve and one half cents additional on every one hundred pounds over one thousand one hundred pounds, to be paid by the shipper of the tobacco, or his agent.

In order to determine whether the statutory provisions in question are obnoxious to the objection made, their meaning must be ascertained. The Act of 1864 requires the inspector to examine the hogshead to ascertain whether it is of the required dimensions, and then to inspect the tobacco itself by sampling the contents and, when this has been done, and the weight ascertained, the hogshead is passed. In regard to the addition made by the Act of 1870, chapter 291, to section 41 of the Act of 1864, the grower or purchaser of tobacco packed in the county or neighborhood where it is grown, is permitted to export the same without having the hogshead opened for inspection by sampling its contents, but the Act requires such hogshead to be marked with the name and residence of the owner, and it is made liable to the charge of outage as in other cases, and anyone violating its provisions is subjected to the penalty imposed by section 41 of the Act of 1864. The Act of 1870, in thus permitting the grower or purchaser of tobacco packed in the county or neighborhood where it is grown, to export the same without having the hogshead opened for inspection, does not dispense with any other requirement of the Act of 1864 in regard to inspection. It provides, in express terms, that each hogshead thus packed shall be marked with the name and residence of the owner. It is necessary, therefore, that some one shall ascertain whether these requirements have been complied with and whether the tobacco was, in fact, the growth of the county or neighborhood where it was packed. It also requires that such tobacco shall be liable to the same charge of outage as in other cases, and, as the charge of outage depends upon the weight of the hogshead, it is necessary that some one shall ascertain the weight of such hogshead, in order to determine the amount to be paid. It does not change or in any manner dispense with the statutory requirements in regard to the dimensions of the hogshead in which such tobacco is to be packed, and it is necessary that some one shall see that these requirements are complied with. These and other duties, it is obvious, are to be performed by the inspectors, and when they are performed the hogshead is to be passed and marked as provided by the Act of 1864. When the words "such tobacco so exported or carried out of this State without inspection" are read in connection with the preceding sentence, which permits the grower or purchaser to export such tobacco "without having the same opened for inspection," it is clear that the term "without inspection" refers to inspection by opening the hogshead and sampling the contents.

[45]

The Act of 1872, chapter 36, changes some of the provisions of the Act of 1864, omits others, and in express terms repeals all Acts or parts of Acts inconsistent with its provisions. The penal clause of the Act of 1864, as amended by the Act of 1870, which makes it unlawful to carry out of the State, in hogsheads, tobacco raised in the State, except in hogsheads inspected, passed and marked according to the provisions of the Act, is omitted in the Act, of 1872; but there is nothing, either in the title or the general framework of the Act, or in the manner in which the subject-matter is dealt with, to justify the conclusion that the Legislature intended the Act of 1872 as a substitute for all prior legislation on the subject. The provisions of such prior laws are essential to give completeness to the system of which the Act of 1872 is but a part. That does not, it

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is true, make it unlawful to export tobacco raised in the State unless the same shall have been inspected and passed; but it does provide that no tobacco, the growth of the State, shall be passed or accounted lawful tobacco unless the same be packed in hogsheads of certain prescribed dimensions. It does not say, in so many words, that the tobacco raised in the State and intended for exportation shall be delivered at one of the state tobacco warehouses, but it does provide for the appointment of inspectors of tobacco, clerks and other officials, with fixed salaries, and assigns them to the tobacco warehouses, with no duty to perform unless it be the inspection of tobacco. In thus declaring that no tobacco, the growth of the State, shall be accounted lawful tobacco unless packed in the manner prescribed by the Act, it is plain the Legislature meant it to be the duty of the inspectors appointed by the Act to ascertain whether such tobacco was thus packed in conformity with the requirements of the statute, and this they could not do unless such tobacco should be delivered at the state tobacco warehouses. The Legislature meant and only meant to select certain provisions from the public local law in relation to the inspection of tobacco, and to re-enact these in a public general law, and to leave such portion of the local law which it did not thus re-enact and did not modify or repeal by inconsistent provisions, as existing parts of the local law. The Act of 1872 did not modify or repeal section 41 of the Act of 1864, as modified by the Act of 1870, which constituted part of the local law; and under that section it was the duty of the plaintiff in error to have delivered the tobacco packed by him at one of the state tobacco warehouses, in order that the inspectors might ascertain whether it was packed in hogsheads of the proper dimensions, and whether it was packed in the county or neighborhood where it was grown, and marked as the statute directed. The Legislature did not intend that merely marking the name of the grower or purchaser on the hogshead should release such grower or purchaser from the other requirements of the Act. These views are those which were held by the Court of Appeals of Maryland in its opinion delivered in this case. 55 Md., [47] 240. The result is, that all that the Act of 1870 does in regard to a grower or purchaser of tobacco raised in Maryland, who packs the same in hogsheads in the county or neighborhood where such tobacco is grown, and who exports it or carries it out of the State, is to dispense with the opening of such hogsheads for inspection, but that it does not dispense with any other requirement of the Act of 1864 in regard to inspection; and that it is a part of such inspection for the inspector to see that the hogshead is marked with the name and place of residence of the owner, and to verify the claimed fact that the tobacco was raised in Maryland and packed in the county or neighborhood where it was grown, and to weigh the hogshead in order to determine the charge for outage, and to see that the hogshead conforms in dimensions to the requirement of the statute, so that the tobacco may be passed and accounted lawful tobacco. It is also apparent that, not until the above and other duties have been performed by the inspectors, can the hogshead be passed and marked as required by the Act of 1864. This requires, in regard to the hogsheads specially mentioned in the proviso enacted in 1870 to section 41 of the Act of 1864, that they be delivered at one of the state tobacco warehouses, and that the provisions of section 10 of the Act of 1864 be observed, that is, that the inspector shall number each hogshead in succession, and enter the number in a book, with the time the hogshead is received, and the name, if known, of the conveyance by which it was brought to Baltimore, and the name of the owner or consignee of the tobacco, and the initials or other marks on the hogshead identifying it; and, on its removal, enter in a book the time of removal, and the name of the person to whom it is delivered, and of the conveyance by which it is taken away; that, under section 12 of the Act of 1864, it shall be inspected in all required particulars except opening it; that, under section 13 of that Act, the inspector shall weigh the hogshead unopened and enter such weight in a book, with sufficient reference to its marks and numbers as previously recorded; that, under section 14 of that Act, the inspector shall mark with a marking iron, on the side of each hogshead, its warehouse number and weight, and on each head its warehouse number; and that not until these things have been done is the tobacco to be passed [48] or accounted as lawful tobacco.

The plaintiff in error contends that section 41 of the Act of 1864, as re-enacted by the Act of 1870, violates the Constitution of the United States, because; 1. It is a regulation of interstate and foreign commerce, and a law levying a duty on exports; and does not fall within the class of laws known as inspection laws, because the proviso enacts that the tobacco to which it refers need not be opened for inspection; 2. Said section, even though it is an inspection statute, discriminates against the non-resident buyer and manufacturer of leaf tobacco, and in favor of the state buyer and manufacturer, in imposing burdensome regulations on tobacco intended for export, and laying a tax of at least $2 a hogshead on such tobacco when exported, while tobacco manufactured within the State is free from such regulations and such tax; and thus it discriminates against interstate and foreign commerce in tobacco, and in favor of local manufacturers and the internal trade of the State; 3. Said section discriminates between different classes of exporters of tobacco, in that it permits tobacco exported by persons who pack it in the county or neighborhood where it is grown, to be exported when marked with the full name and residence of the owner, without inspection other than the examination of the outsides of the hogsheads, while exporters of another class must have the contents of their hogsheads subjected to examination.

The provisions of the Constitution of the United States alleged to be violated are clause 2 of section 10 of article 1, before quoted, and that clause of section 8 of article 1 which provides that the Congress shall have power "To regulate commerce with foreign Nations and among the several States."

The Maryland court held that the charge of outage in this case was an inspection duty, within the meaning of the Constitution; that the State had the power to prescribe the dimensions of the hogshead in which tobacco raised in Maryland shall be packed, and to require

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such hogshead to be delivered at one of the state tobacco warehouses, in order that the inspectors may ascertain whether it conforms to the requirements of the law, and whether it is the true growth of the State and packed by the [49] grower or purchaser in the county or neighborhood where it was grown; and that the charge of outage, to re-imburse the State for the expenses thereby incurred, and in consideration of storage of the hogshead, is in the nature of an inspection duty, within the meaning of the Constitution.

The contention of the plaintiff in error is, that a law which otherwise would be an inspection law ceases to be such if no provision is made for opening the package containing the article and examining the quality of its contents. On this subject, the Maryland court held that, in order to constitute an inspection law, an examination of the quality of the article itself is not necessary; but that, to prepare the products of a State for exportation, it may be necessary that such products should be put in packages of a certain form and of certain prescribed dimensions, either on account of the nature and character of such products or to enable the State to identify the products of its own growth and to furnish the evidence of such identification in the markets to which they are exported. In opposition to these views, which appear to us to be sound, we are asked to hold that the provisions under consideration do not fall under the head of inspection laws, in a case where the question is presented without any finding of any facts to show that what *may* be thus necessary, in regard to a product, is not necessary in regard to tobacco, and with every presumption to the contrary arising out of the course of legislation as to the inspection of tobacco, by the State of Maryland. The Legislature of the State of Maryland, from the earliest history of the Colony, and since the formation of the State Government, has made the inspection of tobacco raised in that State compulsory. That inspection has included many features, and has extended to the form, size and weight of the packages containing the tobacco, as well as to the quality of the article. Fixing the identity and weight of tobacco alleged to have been grown in the State, and thus preserving the reputation of the article in markets outside of the State, is a legitimate part of inspection laws, and the means prescribed therefor in the statutes in question naturally conduce to that end. Such provisions, as parts of inspection laws, are as proper as provisions for inspecting quality, and it cannot be said that the absence [50] of the latter provisions, in respect to any particular class of tobacco, necessarily causes the laws containing the former provisions to cease to be inspection laws. It is easy to see that the use of the precaution of weighing and marking the weight on the hogshead and recording it in a book, is to enable it to be determined at any time whether the contents have been diminished subsequently to the original packing, by comparing a new weight with the original marked weight, or if the marked weight be altered, with the weight entered in the warehouse book. The things required to be done in respect to the hogshead of tobacco in the present case, aside from any inspection of quality, are to be done to prepare and fit the hogshead as a unit, containing the tobacco, for exportation, and for becoming an article of foreign commerce or commerce among the States, and are to be done before it becomes such an article. They are properly parts of inspection laws, within the definition given by this court in *Gibbons* v. *Ogden*, 9 Wheat., 203. In a note to the argument of Mr. Emmett in that case, at page 119, are collected references to many Statutes of the States, in the form of inspection laws, showing what features have been generally recognized as falling within the domain of those laws, such as the size of barrels or casks, and the number of hoops on them; what pieces of beef or pork, and what quantity and size of nails, should be in one cask; the length, breadth and thickness of staves and heading, lumber, boards, shingles etc.; and the branding of pot and pearl ashes, flour, fish and lumber, and the forfeiture of them, if unbranded. These were cited as instances of the exercise, by States, of the power to act upon an article grown or produced in a State, before it became an article of foreign or domestic commerce, or of commerce among the States, to prepare it for such purpose. It was in reference to laws of this character that it was said, in argument, in *Gibbons* v. *Ogden*, that the enactments seemed arbitrary, and were not founded on the idea that the things, the exportation of which was thus prohibited or restrained, were dangerous or noxious, but had for their object to improve foreign trade and raise the character and reputation of the articles in a foreign market. It was in reference to such laws, among other inspection laws, that *Chief Justice* Marshall, in *Gibbons* v. *Ogden*, after remarking that a power [51] to regulate commerce was not the source from which a right to pass inspection laws was derived, said: "The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the General Government; all which can be most advantageously exercised by the States themselves." It was not suggested by the court that those particular laws were not valid exercises of the power of the State to fit the articles for exportation; or that, in addition to or even aside from ascertaining the quality of the article produced in a State, the State could not define the form of the lawful package or its weight, and subject form and weight, with or without quality, to the supervision of an inspector, to ascertain that the required conditions in respect to the article were observed.

In addition to the instances cited in *Gibbons* v. *Ogden*, the diligence of the Attorney-General of the State of Maryland has collected and presented to us, in argument, numerous instances,*

*The following are the Acts, and the subjects in reference to which they were passed. *N. H.*: Casks of Flaxseed, 1785, see, Perpetual Laws of N. H., 1789, p. 193. Dimensions of Shingles, Staves and Hoops. *Ibid.*, p. 188. *Mass.*: Shingles, Staves and Hoops. Acts and Resolves of the Province of Mass. Bay, Vol. 3. [1742-1756], p. 128, *et seq.*, ch. 22. Size of Casks for Pickled Fish. *Ibid.*, p. 1000. Act of 1757. *R. I.*: Regulating the inspection of Beef, Pork, Pickled Fish and Tobacco, and ascertaining the assize of

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[52] showing, by the text of the inspection laws of the Thirteen American Colonies and States, in force in 1787, when the Constitution of the United States was adopted, that the form, capacity dimensions and weight of packages were objects of inspection, irrespective of the quality of the contents of the packages. The instances embrace among others, the dimensions of shingles, staves and hoops; the size of casks and barrels for fish, pork, beef, pitch, tar and turpentine; and the size of hogsheads of tobacco. In Maryland, the dimensions of tobacco hogsheads were fixed by various statutes passed from the year 1658 to the year 1768. By the Act of 1763, ch. 18, sec. 18, it was enacted that all tobacco packed in hogsheads exceeding 48 inches in the length of the stave, and 70 inches in the whole diameters within the staves, at the croze and bulge, should be accounted unlawful tobacco and should not be passed or received. Like provisions, fixing the dimensions of hogsheads of tobacco, have been in force in Maryland from 1789 till now. In view of such legislation existing at the time the Constitution of the United States was adopted and ratified by the original States, known to the framers of the Constitution who came from the various States, and called [53] "inspection laws" in those States, it follows that the Constitution, in speaking of "inspection laws," included such laws, and intended to reserve to the States the power of continuing to pass such laws, even though to carry them out and make them effective, in preventing the exportation from the State of the various commodities, unless the provisions of the laws were observed, it became necessary to impose charges which amounted to duties or imposts on exports to an extent absolutely necessary to execute such laws. The general sense in which the power of the States in this respect has been understood since the adoption of the Constitution, is shown by the legislation of the States since that time, as collected in like manner by the Attorney-General of Maryland,† covering the form, capacity, dimensions and weight of [54] packages containing articles grown or produced in a State, and intended for exportation. These laws are none the less inspection laws because, as was said by this court in *Gibbons* v. *Ogden*, they "may have a remote and considerable influence on commerce." It is a circumstance of weight that the laws referred to in the Constitution are by it made "subject to the revision and control of the Congress." Congress may, therefore, interpose, if at any time any statute, under the guise of an inspection law, goes beyond the limit prescribed by the Constitution, in imposing duties or imposts on imports or exports. These and kindred laws of Maryland have been in force for a long term of years, and there has been no such interposition.

Objection is made that the Maryland laws are not inspection laws, but are regulations of commerce, because they require every hogshead of [55] tobacco to be brought to a state tobacco warehouse. But we are of opinion that, it being lawful to require the article to be subjected to the prescribed examination by a public officer before it can be accounted a lawful subject of commerce, it is not foreign to the character of an inspection law to require that the article shall be brought to the officer instead of sending the officer to the article. It is a matter as to which the State has a reasonable discretion, and we are unable to see that such discretion has been exercised in any such manner as to carry the statutes beyond the scope of inspection laws.

There is another view of the subject which has great force. Recognized elements of inspection laws have always been: quality of the article, form, capacity, dimensions and weight of package, mode of putting up, and marking and branding of various kinds, all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, as it did or did not answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not

Casks, Clap-Boards, Shingles, Boards, etc., Public Laws of Rhode Island and Providence Plantations, ed. 1798, pp. 509, 512, 522. *Conn.:* Statutes of Conn., ed. 1786. For ascertaining the assize of Casks used for Liquor, Beef, Pork and Fish, pp. 18, 312. There were sworn packers of tobacco, whose duty it was to brand casks. *N. Y.:* Laws, ed. 1789. All flour for exportation to be packed in casks of a certain size and make. No flour to be exported without having been inspected. 1785, ch. 35, p. 197. No pot or pearl ashes to be exported before inspection. *N. J.:* Capacity of Meat Barrels. Act of April 6, 1676. Leaming and Spicer, p. 116. Capacity of Barrels, *Ibid.*, p. 120; Bricks, *Ibid.*, p. 459; Barrels, *Ibid.*, 508. Assize of Bread, *Ibid.*, 545, 546, 547. Size of Casks, Act of 1725. Staves, Hoops, Shingles, etc. Act of September 26, 1772. Size of Casks, Act of September 26, 1772. *Pa.:* Laws of Pa., A. J. Dallas, 1797. Dimensions of Casks for Beer, Ale, Pork, Beef, etc., p. 27, *et seq.* Dimensions of Staves, Headings, Boards and Timber. *Ibid.*, 380. Flour Casks, how to be made and dimensions of, *Ibid.*, p. 452, Act of 1781, chap. 201. *Md.:* Gauge of Barrels for Pork, Beef, Pitch, Tar, Turpentine, and tare of Barrels for Flour or Bread, 1745, ch. 15. Flour Barrels, 1771, ch. 20; 1781, ch. 12. Staves and Headings, 1745, ch. 15; 1771, ch. 20; 1786, ch. 17. Salted Provisions, 1745, ch. 15; 1786, ch. 17. Hay and Straw, 1771, ch. 20. Flour, 1781, ch. 12. Fish, 1786, ch. 17. Liquor Casks, 1774. ch. 23; 1777, ch. 17; 1784, ch. 83; 1785, ch. 87. Many other Maryland provincial laws, prescribing the length, superficial and solid measure, weight and capacity of domestic products, are collected on pages 45-47 of the Report of Mr. J. H. Alexander on the Standards of Weight and Measurement in Maryland. *Va.:* Laws of Va. Revisal 1783, pp. 47, 188, 192. Pork, etc., required to be packed in barrels before exportation. As to contents, quality and stamps of Barrels of Pork, Beef, Pitch, Tar and Turpentine, see *Ibid.*, p. 47, Act of 1776, chap. 43. Inspection of Tobacco, and Size of Tobacco Hogsheads. Act of 1783, ch. 10, secs. 1, 15, 20. *N. Carolina:* Iredell's Laws of N. C., ed. 1791. Dimensions of Beef, Pork and Fish Casks, Staves and Headings and of Boards, Planks and Shingles. Act of 1784, chap. 36. *S. Carolina:* Grimke's Public Laws. Dimensions and Capacity of Beef and Pork Barrels, p. 209. *Georgia:* Watkins' Digest. Casks for Beef and Pork. Size of Barrels for Pitch, Tar and Turpentine. Act of 1766, No. 140, amended by Act of 1768, No. 179. In the legislation of the Province and State of Maryland, in reference to tobacco, the *dimensions* or *gauge* of *tobacco hogsheads* was fixed by the Acts of 1658, ch. 2, 1676, ch. 9, 1694, ch. 5, 1699, ch. 4, 1704, ch. 53, 1711, ch. 5, 1715, ch. 38, 1716, ch. 8, 1717, ch. 7, 1723, ch. 25, 1747, ch. 26, 1753, ch. 22, 1763, ch. 18, and 1789, ch. 36.

†*Pennsylvania:* Beef and Pork intended for exportation, when packed, or repacked, in Philadelphia: 1 Brightly, Purdon's Digest, 1873, pp. 157, 158; Butter and Lard, *Ibid.*, 188, 189; Domestic Distilled Spirits, *Ibid.*, 525; Flaxseed, *Ibid.*, 708; Flour and Meal, *Ibid.*, 711. *Delaware:* Size of Casks for exportation of Breadstuffs. Revised Statutes, 1874, page 363. *Virginia:* Tobacco, Code 1873, pp. 739, 740; Fish, *Ibid.*, 750; Pitch, Tar, Turpentine, Salt, Staves, Shingles and Lumber, *Ibid.*, 751. *Rhode Island:* Public Statutes, 1882; Beef and Pork Casks, ch. 3, page 294: Lime Casks, *Ibid.*, 298: Fish Casks, *Ibid.*, ch. 114, p. 299. *Maine:* R. S., 1871; Lime, ch. 39, sec. 3; Pot and Pearl Ashes. *Ibid.*, sec. 9; Nails, *Ibid.*, sec. 17; Fish, *Ibid.*, ch. 40, secs. 7, 8 and 11; Cord Wood, *Ibid.*, ch. 41, sec. 1; Charcoal Baskets,

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necessary, that all of these elements should coexist in order to make a valid inspection law. Quality alone may be the subject of inspection, without other requirement, or the inspection may be made to extend to all of the above matters. When all are prescribed, and then inspection as to quality is dropped out, leaving the rest in force, it cannot be said to be a necessary legal conclusion that the law has ceased to be an inspection law.

As is suggested in *Neilson* v. *Garza*, 2 Woods, 287, by *Mr. Justice* Bradley, it may be doubtful whether it is not exclusively the province of Congress, and not at all that of a court, to decide whether a charge or duty, under an inspection law, is or is not excessive. There is nothing in the record from which it can be inferred that the State of Maryland intended to make its tobacco inspection laws a mere cover for laying revenue duties upon exports. The case is not like that of *Mining Co.* v. *Auditor-Gen.*, 32 Mich., 488, where a state tax imposed on mineral ore exported from the State before being smelted, was held to be a tax on interstate com-
[56] merce, no such tax being imposed on like ore reduced within the State. The question of the right of Maryland, under the Constitution of the United States, to require that the dimensions and gross weight of a hogshead containing tobacco grown upon its soil shall be ascertained by its officers before the tobacco shall be exported, is a question of law, because the question is as to whether such law is an inspection law. Moreover, the question as to whether the charges for such examination and its attendant duties are "absolutely necessary," was not before the state court, and was not passed upon by it, and cannot be considered by this court.

It is urged, however, that the Maryland law is a regulation of commerce and unconstitutional, because it discriminates between the state buyer and manufacturer of leaf tobacco and the purchaser who buys for the purpose of transporting the tobacco to another State or to a foreign country. But the State, having the right to prescribe the form, dimensions and capacity of the packages in which its products shall be encased before they are brought to or sold in the public market, has enacted, Laws of 1872, ch. 36, sec. 26, that no tobacco of the growth of the State shall be passed or accounted lawful tobacco unless it be packed in hogsheads of a specified size. This regulation covers all tobacco grown in the State and packed in hogsheads, without reference to the purpose for which it is packed. If the tobacco is to be dealt in within the limits of the State, the examination as to dimensions is properly left to the contracting parties, probably under the view that the seller for the home market will have a sufficient stimulus to observe the requirement of the law, in a desire to maintain the reputation of his commodity. But, if the tobacco is to be exported as lawful tobacco, the State may, with equal propriety, prescribe and enforce an examination by an officer, within the State, of a hogshead containing tobacco grown in the State, and intended for shipment beyond the limits of the State, in order to ascertain, before the hogshead is carried out of the State, and before it becomes an article of commerce, that it is of the dimensions prescribed as necessary to make it lawful tobacco. In *Cooley* v. *Board of Wardens*, 12 How., 299, a law of Pennsylvania provided that a vessel not taking a pilot should pay half pilotage, but that this should
[57] not apply to American vessels engaged in the Pennsylvania coal trade. It was held that the general regulation as to half pilotage was proper, and that the exemption was a fair exercise of legislative discretion acting upon the subject of the regulation of the pilotage of the

Ibid., sec. 7; Packed Shingles, *Ibid.*, sec. 16; Staves and Hoops, *Ibid.*, secs. 18, 19; Beef and Pork Barrels, *Ibid.*, ch. 38, secs. 16 and 17. *N. H.*: Gen. Laws, 1878. No salted beef to be exported except in tierces, barrels, or half barrels of particular quality, weight and dimensions, and duly branded; ch. 126, secs. 4 and 5; Butter and Lard Casks, ch. 127, page 305; Fish Barrels, Tierces and Casks, ch. 129, p. 310; Casks of Pot and Pearl Ashes, ch. 130, p. 114. *Massachusetts*: Gen. Stat., 1860; Casks for Pickled Fish, ch. 49, sec. 44; Alewives, *Ibid.*, sec. 50; Staves, *Ibid.*, sec. 85; Hogshead Hoops, *Ibid.*, sec. 86; Casks for Pot and Pearl Ashes, *Ibid.*, sec. 167; Kegs for Butter and Lard, *Ibid.*, sec. 14. *Conn.*: Gen. Stat., 1875; Fish Barrels, p. 275, sec. 19. *Vt.*: Rev. L. of 1880, p. 715, Barrels of Flour, Weight, etc. *N. J.*: Revision 1877; Beef and Pork Barrels, Flour and Meal Casks, *Ibid.*, 437; Herring Casks, *Ibid.*, 478. *Ga.*: Code 1867; Flour Barrels, sec. 1562; Turpentine Barrels, *Ibid.*, sec. 1573. *La.*: Digest of Statutes, Vol. 2, 1870; Beef and Pork Barrels, p. 38, sec. 28. *Wis.*: Statutes of, Fish Casks, p. 856, sec. 22. *Michigan*: Comp. Laws, 1871, Vol. 1, pp. 474-485, Size and Weight of Beef, Pork and Fish Barrels, Butter and Lard Barrels; Flour and Meal Casks; Pot and Pearl Ash Casks. *S. C.*: Gen. Stat.; Flour Barrels, p. 275; Beef Barrels, *Ibid.*, 279; Staves and Shingles, *Ibid.*, 280. *N. C.*: Battle's Revisal; Flour Barrels, ch. 61, sec. 34, p. 496; Beef or Pork Casks, *Ibid.*, sec. 50, p. 499; Fish Barrels, *Ibid.*, sec. 53, p. 499; Turpentine, Tar and Pitch Barrels, *Ibid.*, sec. 54, p. 500. *Tenn.*: Stat., 1871; Butter or Lard Casks, sec. 1832; Flour Barrels, 1834. *Fla.*: Digest of Laws, 1881, p. 579; Sizes of Tar and Turpentine Barrels. *Mississippi*: Flour and Pork Barrels; Rev. Code 1880, sec. 949, page 280. *Ohio*: R. S., 1880, Vol. 1; Hogsheads of Tobacco, p. 234, sec. 391; Fish Barrels, *Ibid.*, sec. 4300; Spirit Barrels, sec. 4327; Oil Barrels, sec. 4293; Pot and Pearl Ash Barrels, sec. 4291; Beef or Pork Barrels, sec. 4285; Flour and Meal Barrels, sec. 4281.

The legislation of Maryland, since 1787, affords the following instances: Pot and Pearl Ashes, intended for exportation from Baltimore, or Georgetown, in Montgomery County, were required to be packed in a particular manner in casks, and to be inspected and weighed. 1792, ch. 65. A similar provision was made to prevent the exportation of unmerchantable flour and unsound salted provisions from Havre de Grace, by the Act of 1796, ch. 21; and from Chester, by the Act of 1797, ch. 7. By the Act of 1781, ch. 12, provision was made to prevent the exportation of bread and flour which were not merchantable, from the Town of Havre de Grace. This Act was enacted for a limited time only and expired. It was revived and enacted into a permanent law by the Act of 1801, ch. 102, sec. 2, and is set forth in a note to the section last referred to, in the Acts of 1801. By section 6 of the Act of 1801, chapter 102, the size of all flour casks brought to Baltimore Town for exportation, the character of the materials and make, the manner of hooping and nailing such hoops, the particular length of the staves, the diameter of the casks at the heads, and the number of pounds of flour to be in each cask, are specifically prescribed. The size of laths and the mode of packing them was regulated by the Act of 1811, ch. 69. The number and character of hoops upon casks of ground black oak bark, exported from the Port of Baltimore, was prescribed by the Act of 1821, ch. 77. The gross weight of a hogshead of tobacco, as well as its net weight, was required to be marked on the hogshead by the Act of 1789, ch. 26, sec. 21. The dimensions of the hogsheads in which tobacco was required to be packed was prescribed by section 35 of the Act last cited. Further illustration may be found in the following legislation: Weighing Wheat, 1858, ch. 256, sec. 5; *Frazier* v. *Warfield*, 13 Md., 300-304; Fish Barrels and Tierces, Public Local Laws, art. 4, sec. 309; Flour, *Ibid.*, sec. 352; Domestic Distilled Liquors, *Ibid.*, Sec. 360; Flour Barrels, 1 Md. Code, art. 96, sec. 20.

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Port of Philadelphia. The court said, that, in making pilotage regulations, the legislative discretion had been constantly exercised, in this and other countries, in making discriminations, founded on differences both in the character of the trade and in the tonnage of vessels engaged therein. Any discrimination appearing in the present case is of the same character as that in the pilotage case, and fairly within the discretion of the State. Such discretion reasonably extends to exempting from opening for internal inspection an article grown in the State, when it is marked with the name of an ascertained owner, and to requiring that an article grown in the State shall be opened for internal inspection when it is not intended to be put on the market on the credit of an ascertained owner and is not identified by marks as owned by him. So, too, in the exercise of the same discretion, and of its power to prescribe the method in which its products shall be fitted for exportation, it may direct that a certain product, while it remains "in the bosom of the country" and before it has become an article "of foreign commerce or of commerce between the States," shall be encased in such a package as appears best fitted to secure the safety of the package and to identify its contents as the growth of the State, and may direct that the weight of the package, and the name of the owner of its contents, shall be plainly marked on the package, and may also exempt the contents from inspection as to quality, when the weight of the package and the name of the owner are duly ascertained to be marked thereon. Such a law is an inspection law, and may be executed by imposing a "tax or duty of inspection," which tax, so far as it acts upon articles for exportation, is an exception to the prohibition on the States against laying duties on exports, the exception being made because the tax would otherwise be within the prohibition. *Brown* v. *Md.*, 12 Wheat., 419, 438. At the same time we fully recognize the principle, that any inspection law is subject to the paramount [58] right of Congress to regulate commerce with foreign Nations and among the several States.

The general provision of the Maryland Statute is, that it shall not be lawful to carry out of the State, in hogsheads, any tobacco raised in the State, except in hogsheads which shall have been inspected, passed and marked agreeably to the provisions of the Act. These provisions include the doing of many things in addition to an inspection of quality. If the tobacco is grown in the State and packed in the county or neighborhood where grown, it may be carried out of the State without having its quality inspected, if it be marked in the manner prescribed. But it still is necessary it should be inspected in all other particulars, and inspected also to ascertain that it was grown in the State and packed where grown and is marked as required. If it does not answer the latter requirements it is to be further inspected as to quality. The necessity thus existing for subjecting the hogshead to inspection under all circumstances, a charge of some kind was proper for outage that is, a charge payable, on withdrawing the hogshead, for labor connected with receiving and handling it and doing the other things above mentioned. Such charge appears to be a charge for services properly rendered.

The above views cover the objection made that the Maryland law discriminates between different classes of exporters of tobacco, and favors the person who packs it for exportation in the county or neighborhood where it is grown, as against other exporters. Whatever discrimination in this respect or in respect of purchases for exportation, before referred to, results from any provisions of the law, is a discrimination which, we think, the State has a right to make, resulting, as it does; wholly from regulations which affect the article before it has become an article of commerce, and which attach to it as and when it is grown, and before it is packed or sold. The tobacco is grown with these regulations in force, and the State has a right to say what shall be lawful merchantable tobacco. This is really all that has been done in regard to the tobacco in question.

In this case no inspection is involved except that of tobacco grown in Maryland, and we must not be understood as expressing any opinion as to any provisions of the Maryland laws [59] which refer to the inspection of tobacco grown out of Maryland.

The judgment of the Court of Appeals of Maryland is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 61.

HENRY Z. CHAPMAN, HEMAN ELY, EXT. [348]
of CHARLES A. ELY, Deceased, and WILLIAM A. ELY, In His Own Right and as Admr. of LOUISE C. ELY Deceased, *Appts.*,

v.

BOARD OF COUNTY COMMISSIONERS of the COUNTY OF DOUGLAS.

(See S. C., 17 Otto, 348-361.)

Land purchased by county—change in Statute of Limitations—rescinding contract.

1. Where land is conveyed to a county for a poorhouse, under an agreement made by the county commissioners in excess of their authority to pay for it at a definite time, the grantor, on default of payment, is entitled to a decree that the county surrender possession and reconvey to him, unless payment shall be made of the amount due therefor within such reasonable time to be fixed by the court, as may be necessary to raise the same by taxation.

2. An existing right of action cannot be taken away by mere legislation, as by shortening the period of limitation to a time which has already run.

3. Where a lawful contract for the sale of land for a lawful purpose, as for a poorhouse, is made with a county, which agrees to pay for the same in a manner not authorized by statute, the other party may waive performance according to its terms, and wait a reasonable length of time for the county to make the payment in the mode made lawful by the statute, before the Statute of Limitations will begin to run; or may bring an action to rescind the contract for failure of consideration, and for a reconveyance.

[No. 148.]

Argued, Jan. 17, 18, 1883. Decided Feb. 5, 1883.

APPEAL from the Circuit Court of the United States for the District of Nebraska.

The history and facts of the case appear in the statement by the court.

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Statement of the case by *Mr. Justice* **Matthews**:

This is a bill in equity filed in the circuit court on September 10, 1877, the appellant Chapman, a citizen of Tennessee, joining as complainant for their benefit with the other appellants, being the representatives of Charles A. Ely, deceased, and citizens of Ohio; the appellee being a municipal Corporation of Nebraska.

The object of the bill is declared to be, and the prayer corresponds to it, to compel the County of Douglas to surrender possession of two certain tracts of land therein described, one of one hundred and sixty acres and one of ten acres; and to reconvey and release the title thereto, which the county acquired under a deed made by Chapman to the county on March 5, 1859; and for an account of the rents and profits thereof; or, "In case said County of Douglas and the corporate authorities thereof shall elect and request to be allowed to retain and hold the land described, then and in that case to compel said county and the corporate authorities thereof to pay to or for your orators, [349] as the court shall direct, the reasonable price and value of said land, as stated in said deed of conveyance, with lawful interest thereon from the date of said deed to the time of the making of such payment"

It appears that on March 4, 1859, an agreement in writing and under seal was entered into between Chapman and the County of Douglas, the latter acting by the County Commissioners, whereby Chapman agreed to sell and convey the premises in controversy "On the following conditions, to wit: that the party of the second part shall pay to the party of the first part, at the ensealing and delivery of a warrantee conveyance from the party of the first part to the party of the second part of the real estate aforesaid two thousand dollars ($2,000) in county orders of the County of Douglas aforesaid on the treasurer of said County of Douglas, and the balance of six thousand ($6,000) dollars in four equal annual payments, together with interest on the amount due at ten (10) per cent per annum until paid, and the said party of the first par will, when required, resign to and give up the possession of said property to the party of the second part, or its assigns or agents, immediately on the payment of the first payment hereinbefore enumerated, and put the said County of Douglas or its agents in full and peaceable possession of said described property. And the said party of the second part agrees to purchase said property on the terms aforesaid, of and from the party of the first part, and for the security of the deferred payments, as hereinbefore set forth, to give a mortgage upon said described property to the party of the first part."

On the next day, March 5, 1859, in pursuance of this agreement, Chapman and wife executed and delivered to the County Commissioners a deed to the County of Douglas for the land, which was accepted and placed by them on record. The first installment of the purchase money, $2,000 in county orders, was paid at that time, when, also, the County Commissioners, in the name of the county, executed and delivered to Chapman the four promissory notes required by the agreement, payable in one, two, three and four years from that date, respectively, and a mortgage, in the usual form of a conveyance in fee, with a defeasance, to secure the payment of the same, which was accepted and recorded.

The property was purchased for the use of [350] the county for a poorhouse and farm. Possession of it was taken immediately by the county authorities, and it has been improved and used for that purpose continuously ever since. The title of Chapman as to the one hundred sixty acre tract was perfect, but as to the ten acre tract, has failed.

On November 26, 1860, the notes and mortgage were assigned, for value, to Charles A. Ely, who having since deceased, his rights have devolved upon his legal representatives. On June 13, 1868, Wm. A. Ely, a minor and the devisee of Chas. A. Ely, by his next friend and guardian, commenced a suit in the District Court for Douglas County for the foreclosure of the mortgage, to which a demurrer was interposed, on the ground that the notes and mortgage were void, *ab initio*, for want of power on the part of the county to make them, and also because any action on them was barred by the Statute of Limitations. This demurrer having been sustained, the plaintiff dismissed the action on July 21, 1868, without prejudice. On August 8, 1868, a similar suit, by bill in equity, was begun in the Circuit Court of the United States, which, on November 19, in the same year, was dismissed without prejudice; and, on March 15, 1869, a similar bill was filed in the same court, to which the same defenses, as above stated were raised upon a demurrer, which was sustained, and subsequently, on December 30, 1872, the bill was dismissed without prejudice.

The answer to the present bill admits that no part of the $5,000 of the original purchase money has been paid, and that the rents, issues and profits of the premises, since the county has been in possession of them, exceed the amount of the first installment which was paid, and sets up the same defenses as before, that the mortgage and notes are void for want of power on the part of the county to make them, and that any action accruing to the complainants is barred by lapse of time and the statutes of limitation. It also admits "That both the said Commissioners and the said Chapman believed that the said county had full power and authority to purchase said lands and execute the said notes and mortgage for the unpaid part of the purchase price, and that all the actings and doings of the said parties in that behalf were had, made and done in perfect good faith and for good and [351] sufficient considerations, in all things conformable to equity and good conscience, save as is hereinafter stated." This saving is, that "The sum paid by this defendant for said lands, to wit: $2,000 was the full, fair value thereof at the time of the said purchase and sale, and the amount of the said notes and mortgage was just so much in excess of the true value thereof. This defendant is informed and believes, and now here charges, that the said notes and mortgage were made between the said Chapman and the said Commissioners, acting in the name of said county, with the full knowledge on the part of all of them that the full and fair value of the premises had been already paid therefor by the said county, and that the agreement to give the said notes and mortgage was unjust

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and oppressive toward the said county; and that, in fact, they were without consideration, and that the giving thereof was induced by some secret and fraudulent agreement or understanding between the said Commissioners or some of them, on the one side, and the said Chapman on the other." It also admits that during the delay of the complainants in bringing their suit, "The evidences of the fraudulent, corrupt, oppressive and unjust contract of purchase have disappeared." No evidence in support of the alleged fraud is, therefore, offered, and the defendant is constrained to rely upon the statutes of limitation, if any cause of action ever existed. In reference to the allegation of the oppressive amount of the price agreed to be paid, in addition to the fact admitted in the answer, that the rents and profits accrued to the county since it has been in possession amounted in value to more than the payment made, it is also urged in argument by its counsel against a rescission of the contract, that "There has been such a change of circumstances that that mode of relief would be most oppressive. This land, purchased when the county was very sparsely settled, and situated very near to a town which has recently grown to great importance, must have greatly appreciated in value. Besides which fact, there is the further one already adverted to, that the county has improved it to the extent of $30,000." It is, therefore, insisted that the county should be permitted to retain the land without paying for it.

[352] On final hearing the bill was dismissed, and the decree, to that effect, is brought here for review by this appeal.

Messrs. **C. C. Bonney** and **George Willey**, for appellants.

Messrs. **J. M. Woolworth** and **J. C. Cowin**, for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

The Statute of Nebraska, in force at the date of the transaction in question, conferring power on the County Commissioners over the subject, R. S. Neb., ch. XL., provided, section 17, "That the county commissioners in each county are authorized, whenever they see fit to do so, to establish a poor-house;" and, in the next section, that "They may take to the county, by grant, devise or purchase, any tract of land, not exceeding six hundred and forty acres, for the purposes of said poor-house." Section 19 of the same chapter declares, that "Said commissioners are hereby empowered to receive donations to aid in the establishment of such poor-house; and also empowered, from time to time, as they shall see fit, to levy and collect a tax, not exceeding one per cent, on the taxable property in the county, and to appropriate the same to the purchase of land, not exceeding the aforesaid six hundred and forty acres; and to erect and furnish buildings suitable for a poor-house, and to put into operation and to defray the actual expenses of said poor-house, should the labor of the inmates be inadequate thereto." By section 23 of the same Act, the commissioners are authorized, if they deem it to be for the interest of the county, to appropriate out of any other money belonging to the county any sum not exceeding $2,500 for the purpose of purchasing a farm and erecting thereon suitable buildings, as contemplated in the sections before referred to.

These provisions of the statute were construed by the Supreme Court of Nebraska in the case of *Stewart* v. *Otoe Co.*, 2 Neb., 177. It does not appear from the report when this decision was made, but, as the case arose upon a contract dated in January, 1870, it must, of course, have been long after the making of the contract, which is the foundation of the present litigation. The decision of the Supreme Court [353] of Nebraska referred to was rendered in an action brought upon a contract, similar in its character to the one between Chapman and Douglas County, to recover against Otoe County damages for its refusal to accept a deed and execute the note and mortgage contemplated. A judgment against the plaintiff sustaining a general demurrer to the petition was affirmed, on the ground that the contract was illegal and void. The court said:

"There is no authority of law for the County Commissioners to bind the county in the manner contemplated. They cannot give a promissory note, nor can they mortgage the property of the county. Should they formally do so, their action would be a nullity. In the purchase of land for a poor-farm, the authority of the commissioners of a county is very clearly set forth. The mode of raising the money, and paying it over, are all definitely stated. These statutes set a limit, beyond which they cannot go. They are a guide, not only to the commissioners, but equally so to all persons dealing with them, who must see to it that their contracts are within the boundaries thus described. * * * Here we find the authority, and indeed the only authority, for the purchase and payment of money for a poor-farm by the County Commissioners; and here, too, is specially designated the money that may be used for that purpose, together with the mode of raising it. But there is not one word about mortgaging the property of the county to secure the payment of the purchase money at a given time. The statutes provide the only security that can be given. The public faith is pledged; and a tax, not exceeding one per cent may be levied upon all the taxable property of the county annually and, when collected, paid to the person entitled thereto by an order upon the treasurer of the county, payable out of that special fund."

The doctrine of this decision has been accepted by all parties to this suit, and we are not asked to consider any question as to its correctness, or as to our obligation to adopt it. We, therefore, assume it to be the law of Nebraska, applicable to the case, and the basis of further inquiry as to the relative rights of the parties to this litigation.

It is expressly declared by the Supreme Court of Nebraska, in this case, that it is clear that the County Commissioners had power to purchase a poor-farm. The point of the decision is, that this power does not extend to an agreement to pay at a definite time, or to give as security for payment a lien upon the land. The vendor must either receive the purchase money on delivery of the deed, or wait for its payment in [354] the due course of administration, by the appropriation of the taxes levied, collected and paid into the treasury, applicable to that purpose.

If, in the present case, such had been the

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original understanding between the parties, and the deed had been delivered without payment, but upon orders drawn upon the county treasurer payable according to law, the vendor would have been obliged to wait during the reasonable delays of administration. "Whoever," said the Supreme Court of Nebraska, in *Brewer* v. *Otoe Co.*, 1 Neb., 373, "deals with a county and takes in payment of his demand a warrant of the character of these, no time of payment being fixed, does so under an implied agreement that if there be no funds in the treasury out of which it can be satisfied, he will wait until the money can be raised in the ordinary mode of collecting such revenues. He is presumed to act with reference to the actual condition and the laws regulating and controlling the business of the county. He cannot be permitted, immediately upon the receipt of such warrant, to resort to the courts to enforce payment by judgment and execution, without regard to the condition of the treasury at the time, or the laws by which the revenues are raised and disbursed."

Accordingly, in that case it was decided that the Statute of Limitations did not apply to cases of such claims against counties. The court, on that point, said, "But these warrants do not, nor was it the intention of the Legislature that they should, fall within the operation of this Act. * * * Nor can any action be brought on such warrant until the fund is raised, or at least sufficient time has elapsed to enable the county to levy and collect it in the mode prescribed in the revenue laws. That the Legislature never intended that county warrants should be affected by the limitation Act before referred to, is evident, I think, from the whole course of legislation respecting them. As late as the 12th of February, 1866, it was enacted that 'all debts heretofore incurred by the county commissioners of any county, acting in good faith, and duly recorded at the time on their books, shall be deemed valid, and the county shall be held liable for the same.' Ch. V., sec. 1, R. S. * * * From these, as well as numerous other [355] enactments of the Legislature that might be cited, I have reached the conclusion that the plea of the Statute of Limitations cannot be successfully made against these warrants, and that whenever it can be shown that the funds have been collected out of which they can be paid, or sufficient time has been given to do so in the mode pointed out in the statute, their payment may be demanded, and if refused, legally coerced."

And if, in such cases, a proceeding in *mandamus* should be considered to be the more appropriate and, perhaps, the only effective remedy, it also is not embraced in the Statute of Limitations prescribed generally for civil actions. The writ may well be refused when the relator has slept upon his rights for an unreasonable time, and especially if the delay has been prejudicial to the defendant, or to the rights of other persons, though what *laches*, in the assertion of a clear legal right, would be sufficient to justify a refusal of a remedy by *mandamus* must depend, in a great measure, on the character and circumstances of the particular case. *Chinn* v. *Trustees*, 32 Ohio, 236; Moses, Mand., 190. There is no Statute of Limitations in Nebraska applicable to that proceeding.

In the present case, however, it was not the understanding of the parties that the vendor should await the collection of taxes, as prescribed by the statute, for the payment of the purchase money; but, on the contrary, there was an agreement for payment in a definite time without regard to the condition of the county treasury, and for security by way of notes and mortgages. The agreement, as we have assumed, so far as it relates to the time and mode of payment, is void; but the contract for the sale itself has been executed on the part of the vendor by the delivery of the deed, and his title at law has actually passed to the county. As the agreement between the parties has failed by reason of the legal disability of the county to perform its part, according to its conditions, the right of the vendor to rescind the contract and to a restitution of his title would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown. As was said by this court in *Marsh* v. *Fulton Co.*, 10 Wall., 676-684 [77 U. S., XIX., 1040-1042], and repeated in *La. v. Wood*, 102 U. S., 294-299 [XXVI., 153, 155], "The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." And see, also, *Miltenberger* v. *Cooke*, 18 Wall., 421 [85 U. S., XXI., 864]. The illegality in the contract related, not to its substance, but only to a specific mode of performance, and does not bring it within that class mentioned by *Mr. Justice* Bradley in *Thomas* v. *Richmond*, 12 Wall., 349-356 [79 U. S., XX., 453-457]. The purchase itself, as we have seen, was expressly authorized. The agreement for definite times of payment and for security alone was not authorized. It was not illegal in the sense of being prohibited as an offense; the power in that form was simply withheld. The policy of the law extends no further than merely to defeat what it does not permit, and imposes upon the parties no penalty. It thus falls within the rule, as stated by Mr. Pollock, in his Principles of Contract, 264: "When no penalty is imposed, and the intention of the Legislature appears to be, simply, that the agreement is not to be enforced, then neither the agreement itself nor the performance of it is to be treated as unlawful for any other purpose." *Johnson* v. *Meeker*, 1 Wis., 436. [356]

The principle was applied in the case of *Morville* v. *Am. Tract Society*, 123 Mass., 129, 137, where it was said: "The money of the plaintiff was taken and is still held by the defendant under an agreement which, it is contended, it had no power to make, and which, if it had power to make, it has wholly failed on its part to perform. It was money of the plaintiff, now in the possession of the defendant, which in equity and good conscience it ought now to pay over and which may be recovered back in an action for money had and received. The illegality is not that which arises where the contract is in violation of public policy or of sound morals, and under which the law will give no aid to either party. The plaintiff himself is chargeable with no illegal act, and the corporation is the only one at fault in exceeding its corporate powers by making the express contract. The plaintiff is not seeking to enforce that contract, but only to recover his own money and

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prevent the defendant from unjustly retaining the benefit of its own illegal act. He is doing nothing which must be regarded as a necessary [357] affirmance of an illegal act." The decision of this court in *Hitchcock* v. *Galveston*, 96 U. S., 341-351 [XXIV., 659-662], covers the very point. There a recovery was allowed for the value of the benefit conferred upon the municipal corporation, notwithstanding and, indeed, for the reason, that the contract to pay in bonds was held to be illegal and void. "It matters not," said the court, "that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds, because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law."

This doctrine was fully recognized by the Supreme Court of Nebraska as the law of that State in the case of *Clark* v. *Saline Co.*, 9 Neb., 516, in which it adopts, from the decision of the Supreme Court of California in *Pimental* v. *San Francisco*, 21 Cal., 362, the following language: "The city is not exempted from the common obligation to do justice which binds individuals. Such obligations rest upon all persons, whether natural or artificial. If the city obtains the money of another by mistake or without authority of law, it is her duty to refund it, from this general obligation. If she obtain other property which does not belong to her, it is her duty to restore it, or, if used, to render an equivalent therefor, from the like obligation. *Argenti* v. *San Francisco*, 16 Cal., 282. The legal liability springs from the moral duty to make restitution."

The conveyance by Chapman to the County of Douglas passed the legal title, but upon a condition in the contract which it was impossible in law for the county to perform. There resulted, therefore, to the grantor the right to rescind the agreement upon which the deed was made, and thus to convert the county into a trustee, by construction of law, of the title for his benefit, according to the often repeated rule, as stated by Hill on Trustees, 144, that "Whenever the circumstances of a transaction are such that the person who takes the legal estate in property cannot also enjoy the beneficial interest, without necessarily violating some established principle of equity, the court will immediately raise a constructive trust and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties who, in equity, are entitled to the beneficial enjoyment." Upon this principle, the vendor of real [358] estate is treated as trustee of the title for the purchaser; and the mortgagee, having the legal title, after payment of the mortgage debt, is a trustee for the mortgagor. The analogy is complete between these, and every case, of which the present is one, where the holder of the legal title is under a duty to convey to another.

But, admitting that Chapman was entitled to call for a reconveyance, it is alleged, that the Statute of Limitations of Nebraska, which bars the right to recover the title to real estate in ten years from the time it first accrued, defeats the recovery.

The Statute of Limitations in force on March 5, 1859, which was the date of the deed, prescribed twenty-one years after the cause of action shall have accrued, as the period within which an action for the recovery of the title to lands must be brought. R. S. Neb. 1866, p. 395, sec. 6.

On February 12, 1869, the Legislature of Nebraska passed an Act, which took effect July 1, 1869, which amended this section so as to reduce the limitation to ten years. It is not denied that if Chapman's cause of action first accrued to him on March 5, 1859, this amendment could not operate upon it because to give it that effect, would be to take away an existing right of action by mere legislation, as the ten years would then have fully expired. It is, therefore, claimed that his right of action for a reconveyance of the title, could only have first accrued when the first installment of the purchase money became due, that is, on March 5, 1860, which left eight months after the statute took effect before the ten years' limitation would expire, which, it is claimed, would be a reasonable time within which to require that suits upon existing causes of action should be brought. But this view cannot be supported; for the original contract for payment, at a fixed time, is rendered invalid, for the same reason that avoided the notes and mortgage, the objection being, according to the decision of the Supreme Court of Nebraska, that the county had no power to bind itself to pay, in any other manner than that prescribed by the statute. Hence, it must be held, in this aspect of the case, that the right of action was not postponed, after the date of the deed, by the credit given, and if it accrued at that time, the limitation was twenty- [359] one years, according to the statute then in force, within which the present suit was in fact brought.

But the more satisfactory answer to this defense is, that none of the statutes of limitation referred to apply to the case at all. We have already seen that by the decision in the case of *Brewer* v. *Otoe Co.*, 1 Neb., 373, it is the declared law of Nebraska that the claim against the county for the purchase money, on the supposition that the understanding had been to accept payment according to the terms of the statute, was not liable to the bar of the limitation Acts. So that the obligation of the county to pay would not be extinguished by the statutory lapse of time. Now, although the right of Chapman to rescind the contract and demand a reconveyance accrued at the very date of the deed, he was not bound to exercise the right, and his cause of action did not accrue, until he had made manifest his election. He had the right to treat as null that part of the contract which was illegal, and having executed it on his part, to waive performance according to its terms, on the part of the county, and wait a reasonable length of time for the county to make the payment in the mode made lawful by the statute, before exerting his power to rescind the contract. Until that time had elapsed, and until, after that, Chapman had elected to rescind, there was no existing cause of action, and consequently nothing upon which the Statute of Limitations could begin to take effect. When that reasonable time expired we have no means of determining. It would depend upon circumstances not disclosed in the record, such as the state of the county treasury, the extent of its other obligations, the value of the taxable property, and its general financial condition. There

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is nothing whatever to show that the delay that has taken place in filing the present bill, has been unreasonable. It is impossible, therefore, to say that any statute of limitations has even begun to run against the cause of action, much less, that its bar has become complete.

There is nothing, therefore, to prevent the relief prayed for being granted, if it can be done without injustice to the defendant. On this point, it is said, it would be inequitable to decree a rescission of the contract and a restora-
[360] tion of the title to and possession of the property, because the parties cannot be placed *in statu quo;* that the circumstances have greatly changed by the increase in the value of the property and the expensive improvements that have been put upon it by the county. If the relief asked and expected was an unconditional reconveyance of the title and surrender of possession, this would undoubtedly be true. But such is not the case. Any such injurious and inequitable results as are deprecated may easily be averted by the simple payment of the amount due on account of the purchase money, which the appellants consent to receive, which is within the statutory powers of the county, and for which proper provision may be made in the decree.

The principles on which we proceed to establish the right of the appellants to the relief prayed for, were announced and acted upon by this court in the case of *Parkersburg* v. *Brown* [*ante*, 238], decided at the present Term, in which it was also held that the equity of the original grantor of the property sought to be reclaimed passed by an assignment of the void securities. This settles the relative rights of Chapman and his co-complainants, the representatives of Ely, and entitles the latter, in the name of the former, to the relief prayed for in the bill.

And conversely, the right of the county, represented by its taxpayers, to require a rescission of such a contract, on condition of a surrender of the void securities on the part of the vendor, and a reconveyance of the title in consideration of which they were issued, was recognized by this court in the case of *Crampton* v. *Zabriskie*, 101 U. S., 601 [XXV., 1070].

In not granting this relief, the Circuit Court erred, and its decree must be reversed, with directions to ascertain the amount due from the County of Douglas on account of the purchase money of the poor-farm, making any proper allowance as a compensation for the failure of the title to the ten acre tract, and thereupon to render a decree, unless the amount so found due be paid within a reasonable time, to be fixed by the court, having reference to the necessity of raising the same by taxation, as regulated by the statute, that the County of Douglas be required by its Commissioners to execute and deliver a deed, releasing to Chapman all the title acquired by it by virtue of the deed from him
[361] of March 5, 1859, to be conveyed by Chapman to William A. Ely, his co-complainant, and sole representative of Charles A. Ely, upon such terms as the equities of the case may require.

It is accordingly so ordered.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 575.

See 17 OTTO.

PEOPLE OF THE STATE OF NEW YORK,

Plffs. in Err.,

v.

COMPAGNIE GÉNÉRALE TRANSATLANTIQUE.

(See S. C., 17 Otto, 59-63.)

New York law taxing immigrants, void—inspection laws—construction of words in Constitution.

*1. The Statute of New York of May 31, 1881, imposing a tax on every passenger from a foreign country landing in the Port of New York, who is not a citizen of the United States, and holding the vessel which brings him liable for the tax, is a regulation of commerce within the exclusive power of Congress. Henderson v. The Mayor, and Chy Lung v. Freeman, 92 U. S., 259-275 [XXIII].

2. The tax is not relieved from this constitutional objection by saying in the title of the statute that it is in aid of a law called an inspection law, which authorizes passengers to be inspected with reference to their being criminals, paupers, lunatics, orphans or infirm persons, liable to become a public charge.

3. Such facts are not to be ascertained by any inspection law, as that word was understood at the time the Constitution was formed nor since, as guilt and poverty and orphanage and lunacy are not to be ascertained by inspection alone.

4. Inspection laws and the words imports and exports, as used in article I., section 10, clause 2, of the Constitution, have reference to property and not to persons, and can have no reference to free human beings.

5. This is apparent from the language of section 9 of the same article, where, as regards persons of the African race, the word "migration" is used in reference to the carrying of free persons, and "importation" in regard to slaves.

6. The tax in question is void because forbidden by the Constitution of the United States.

[No. 867.]

Motion to advance submitted Oct. 9, 1882. Granted Oct. 16, 1882. Case to be taken up under section 7, Rule 26.

Argued Dec. 18, 19, 1882. Decided Feb. 5, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the opinion of the court.

Messrs. **Wm. M. Evarts, Lewis Sanders** and *George N. Sanders*, for plaintiffs in error.

Mr. **Frederic R. Coudert,** for defendant in error.

Messrs. William Allen Butler and *Thomas E. Stillman*, representing certain interested steamship companies, by leave of the court, filed a brief against the validity of the Act in question.

Mr. Justice **Miller** delivered the opinion of the court:

This was an action commenced in the Court of Common Pleas for the City and County of New York, to recover of the defendant the sum of $1 for each alien passenger brought into New York by its vessels, for whom a tax had not before been paid, with penalties and interest. The case was removed into the Circuit

*Head notes by *Mr. Justice* MILLER.

NOTE.—*Power of Congress to tax commerce; state licenses; power of States to tax commerce.* See *note* to Gibbons v. Ogden, 22 U. S. (9 Wheat.), 1; and *note* to Brown v. Maryland, 25 U. S. (12 Wheat.), 419.

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Court of the United States for the Southern District of New York, which court, on demurrer to the complaint, rendered a judgment in favor of the defendant. To that judgment this writ of error is prosecuted.

[60] The tax in this case is demanded under section 1 of a Statute of New York, passed May 31, 1881, entitled "An Act to Raise Money for the Execution of the Inspection Laws of the State of New York." The section reads thus:

"Section 1. There shall be levied and collected a duty of one dollar for each and every alien passenger who shall come by vessel from a foreign port to the Port of New York for whom a tax has not heretofore been paid, the same to be paid to the chamberlain of the City of New York by the master, owner, agent or consignee of every such vessel within twenty-four hours after the entry thereof into the Port of New York."

It has been so repeatedly decided by this court that such a tax as this is a regulation of commerce with foreign Nations, confided by the Constitution to the exclusive control of Congress, and this court has so recently considered the whole subject in regard to similar Statutes of the States of New York, Louisiana and California, that unless we are prepared to reverse our decisions and the principles on which they are based, in the cases of *Henderson* v. *Mayor of N. Y.*, and *Chy Lung* v. *Freeman*, 92 U. S., 259-275 [XXIII., 543-550], there is little to say beyond affirming the judgment of the circuit court, which was based on those decisions.

The argument mainly relied on in the present case is, that the new Statute of New York, passed after her former statutes had been declared void in the *Passenger Cases*, 7 How., 283, and in the recent case of *Henderson* v. *Mayor*, is in aid of the inspection laws of the State. This argument is supposed to derive support from another statute passed three days earlier, entitled "An Act for the Inspection of Alien Emigrants and their Effects, by the Commissioners of Emigration."

This Act empowers and directs the commissioners of emigration "To inspect the persons and effects of all persons arriving by vessel at the Port of New York from any foreign country, as far as may be necessary, to ascertain who among them are habitual criminals, or pauper lunatics, idiots or imbeciles, or deaf, dumb, blind, infirm, or orphan persons, without means or capacity to support themselves and subject to become a public charge, and whether their persons or effects are affected [61] with any infectious or contagious disease, and whether their effects contain any criminal implements or contrivances."

Subsequent sections direct how such characters, if found, shall be dealt with by the board. Other sections of the Act of May 31 direct the chamberlain of the city to pay over to the commissioners of emigration all such sums of money as may be necessary for the execution of the inspection laws of the State of New York, and the net produce of all duties received by him under that Act, after the necessary payments to the commissioners of emigration, to the Treasury of the United States.

These two statutes, construed together, it is argued, are inspection laws within the meaning of article I, section 10, clause 2, of the Constitution of the United States, to wit: "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the Treasury of the United States, and all such laws shall be subject to the revision and control of the Congress."

What laws may be properly classed as inspection laws under this provision of the Constitution, must be determined largely by the nature of the inspection laws of the States at the time the Constitution was framed.

In the opinion of this court in the case of *Turner* v. *Maryland* [*ante*, 370], delivered by *Mr. Justice* Blatchford, contemporaneously with the one in the present case, an elaborate examination of those statutes, many of which are cited, is to be found, and similar citations are found in a foot note to the report of *Gibbons* v. *Ogden*, 9 Wheat., 119.

We feel quite safe in saying, that neither at the time of the formation of the Constitution nor since has any inspection law included anything but personal property as a subject of its operation. Nor has it ever been held that the words, imports and exports, are used in that instrument as applicable to free human beings by any competent judicial authority.

We know of nothing which can be exported from one county or imported into another that is not in some sense property; property in regard to which some one is owner, and is either [62] the importer or the exporter.

This cannot apply to a free man. Of him it is never said he imports himself, or his wife or his children.

The language of section 9, article I, of the Constitution, which is relied on by counsel, does not establish a different construction:

"The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."

There has never been any doubt that this clause had exclusive reference to persons of the African race. The two words "migration and importation" refer to the different conditions of this race as regards freedom and slavery. When the free black man came here he migrated; when the slave came he was imported. The latter was property, and was imported by his owner as other property, and a duty could be imposed on him as an import. We conclude that free human beings are not imports or exports within the meaning of the Constitution.

In addition to what is said above, it is apparent that the object of these New York enactments goes far beyond any correct view of the purpose of an inspection law. The commissioners are "To inspect all persons arriving from any foreign country, to ascertain who among them are habitual criminals, or pauper lunatics, idiots or imbeciles * * * or orphan persons, without means or capacity to support themselves and subject to become a public charge."

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It may safely be said that these are matters incapable of being satisfactorily ascertained by inspection.

What is an inspection? Something which can be accomplished by looking at or weighing or measuring the thing to be inspected or applying to it at once some crucial test. When testimony or evidence is to be taken and examined, it is not inspection in any sense whatever.

Another section provides for the custody, the support and the treatment for disease, of these persons, and the retransportation of criminals. Are these inspection laws? Is the ascertainment of the guilt of a crime to be made by inspection?

[63] In fact, these statutes differ from those heretofore held void, only in calling them in their caption "inspection laws," and in providing for payment of any surplus, after the support of paupers, criminals and diseased persons, into the Treasury of the United States; a surplus which, in this enlarged view of what are the expenses of an inspection law, it is safe to say will never exist.

A State cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease, and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title.

Since the decision of this case in the circuit court, Congress has undertaken to do what this court has repeatedly said it alone had the power to do. By the Act of August 3, 1882 [22 Stat. at L., 214], entitled "An Act to Regulate Immigration," a duty of fifty cents is to be collected, for every passenger not a citizen of the United States, who shall come to any port within the United States by steam or sail vessel from a foreign country, from the master of said vessel by the collector of customs. The money so collected is to be paid into the Treasury of the United States, and to constitute a fund to be called "the immigrant fund," for the care of immigrants arriving in the United States, and the relief of such as are in distress. The Secretary of the Treasury is charged with the duty of executing the provisions of the Act and with supervision over the business of immigration. No more of the fund so raised is to be expended in any port than is collected there. This legislation covers the same ground as the New York Statute, and they cannot co-exist.

The judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court. U. S.

Cited—107 U. S., 702; 112 U. S., 598.

UNITED STATES, *Plff. in Err.*,
v.
ERIE RAILWAY COMPANY.

(See S. C., 17 Otto, 1-3.)

Judgment for tax.

A judgment, for a tax of five per cent on interest, paid in coin by a railroad company to foreign bondholders, rendered at a time when coin and currency are equal in value, may be simply a general judgment for the amount due, although the law imposing the tax provides for its collection in legal tender currency of an amount equal in value with the coin.

[No. 11.]

Petition filed Feb. 5, 1883. Decided Feb. 5, 1883.

ON petition for rehearing.

The history and facts of the case appear in the report of the decision of this court on the merits. *Ante*, 151.

Mr. **S. F. Phillips**, *Solicitor-Gen.*, for plaintiff in error.

Mr. **Wm. D. Shipman**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

When this case was argued, no special claim was made for a judgment based on the currency value of the pounds sterling at the time the taxes sued for ought to have been paid, and for that reason a judgment was ordered for the present value of pounds sterling in lawful money. We are now asked to rehear the case for the purpose of considering that question.

The Company was liable for taxes of five per cent on the amounts of interest paid. As the payments were all made in pounds sterling, the computations must necessarily be on that basis. The Act of July 13, 1866, ch. 184, sec. 9, 14 Stat. at L., 138, made it the duty of the Company to return a list of the prescribed taxes to the assessor. In making up such lists, the law required (p. 147) that it should be declared whether the amounts were stated according to their values in legal tender currency or in coined money. [2] When stated in coined money, it was the duty of the assessor to reduce them to their equivalent in legal tender currency, according to the value of coined money in currency for the time covered by the returns. All lists furnished the collectors by the assessors were required to "contain the several amounts of taxes assessed, estimated, or valued in legal tender currency only."

In *Bank* v. *U. S.*, 19 Wall., 240 [86 U. S., XXII., 82], it was decided that a suit at law might be maintained for the recovery of a tax on interest paid, even though no list had been returned and no assessment made, and in the opinion it was said: "No other assessment than that made by the statute was necessary to determine the extent of the bank's liability. An assessment is only determining the value of the thing taxed, and the amount of tax required of each individual. It might be made by the designated officers or by the law itself. In the present case, the statute required every savings bank to pay a tax of five per cent on all undistributed earnings made, or added during the year to their contingent funds. There was no occasion or room for any other assessment. This was a charge of a certain sum upon the bank, and without more it made the bank a debtor."

In the present case, no list was returned by the Company and no assessment made by the assessor. Consequently, no list was ever furnished the collector, and the amount to be paid in currency was never officially ascertained. This suit is, therefore, for the debt which the Company owes, to wit: five per cent of the pounds sterling it has paid as interest on its bonds. If the debt had been paid at the time it was due, the officers chargeable with the collection could have accepted nothing but legal tender currency,

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and to an amount equivalent to the value of the coin which was owing. In other words, the debt was in the nature of an obligation to pay in coin, but which the Government would not receive in anything but legal tender currency of equal value with the coin. This is a suit for the recovery of that debt as a debt. If there were now any difference in value between coin and currency, it would have been proper to render the judgment for the coin or its equiv-
[3] alent in currency; *Gregory* v. *Morris*, 96 U. S., 624 [XXIV., 741]; but as there is no such difference, a general judgment for the amount due is all that is necessary. The amount of the debt was always a fixed sum in pounds sterling. The provision for the estimation of the value of this debt in legal tender currency was, in our opinion, a regulation of the mode of collection, and not a change in the amount of the obligation. As promptness was required in the payment of taxes, and the amount to be paid in currency would not, ordinarily, exceed the value of the coin which was due, it was thought proper by the Government to require its officers to make collections in currency. For that reason, it was provided that, in making out the tax lists, the amount necessary to discharge coin taxes in currency should be set down, rather than the amount of the coin that was owing. In this way, there would be less opportunity for confusion in the accounts between the Government and its officers.

As upon this application we have had the benefit of a printed brief by the Solicitor-General on behalf of the United States, and upon full consideration are satisfied that the judgment as it stands is right, notwithstanding the claim that is now made, the application for a rehearing is denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ORSON ADAMS, Substituted for GEORGE E. BOWDEN, as Receiver of the FIRST NATIONAL BANK OF NORFOLK, VA., *Appt.*,

v.

JACOB C. JOHNSON ET AL.

(See S. C., "*Bowden* v. *Johnson*," 17 Otto, 251-264.)

Liability of stockholder of bank—transfer of shares—decision of comptroller—substitution of receiver.

*1. Where the holder of shares of stock in a national bank, possessed of information showing that there is good ground to apprehend the failure of the bank, colludes with an irresponsible transferee, with the design of substituting the latter in his place, and of thus leaving no one with any ability to respond for the individual liability imposed by the provisions of section 12 of the Act of June 3, 1864, 13 Stat at L., 102, and transfers his shares to such transferee, the transaction will be decreed to be a fraud on the creditors of the bank, and the transferrer will be held to the same liability to the creditors as before the transfer.

2. Notwithstanding the answer on oath of the transferrer and the transferee, to a bill in equity filed by the receiver of the bank to enforce such liability against the transferrer, calling for an answer on oath, the evidence in this case was held to be sufficient to outweigh the averments of the answer.

3. The bill being one for discovery as well as relief, and the transfer being good between the parties, and only voidable at the election of the plaintiff, the case is one of equitable cognizance.

4. A letter addressed to the Receiver, and signed by the comptroller of the currency, directing the Receiver to institute legal proceedings to enforce against every stockholder of the bank owning stock at the time the bank suspended, his or her personal liability, as such stockholder, under the statute, is sufficient evidence that the comptroller decided, before the suit was brought, that it was necessary to enforce the personal liability of the stockholders.

5. The liability of the stockholders bears interest from the date of said letter.

6. The decree of the circuit court, dismissing the bill, was entered after a new Receiver had been appointed. An appeal to this court was taken in the name of the old Receiver, as plaintiff, the new Receiver becoming a surety in the appeal bond. In this court the new Receiver moved to be substituted as plaintiff and appellant, without prejudice to the proceedings already had; and the appellees moved to dismiss the appeal on the ground that none was ever lawfully taken. The first motion was granted and the second motion was denied.

[No. 166.]

Argued Jan. 30, 1883. Decided Mar. 5, 1883.

APPEAL from the Circuit Court of the United States for the District of New Jersey.

The bill in this case was filed in the court below, by the predecessor of the appellant, as Receiver of the First National Bank of Norfolk, Va., to set aside a transfer of one hundred thirty shares of the stock of said bank, and to recover the par value thereof from the defendant Johnson, on his personal liability as holder.

The court below having entered a decree dismissing the bill, the complainant appealed to this court.

The facts of the case are fully stated by the court.

Messrs. **Jno. A. Creswell** and *L. L. Lewis*, for appellant.

Mr. **Thos. N. McCarter**, for appellees.

Mr. Justice **Blatchford** delivered the opinion of the court:

George E. Bowden, as Receiver of the First National Bank of Norfolk, Virginia, brought this suit in equity against Jacob C. Johnson and Mrs. B. Valentine, alleging, in the bill, that Johnson, owning 130 shares of the capital stock of the bank, of $100 each, in order to exonerate himself from liability to the creditors of the bank, transferred said shares to Mrs. B. Valentine, on the books of the bank; that the transfer was made without legal consideration, and with a view to such exoneration; that Mrs. B. Valentine is and was known by Johnson, at the time of the transfer, to be utterly insolvent; that the transfer was made with a view of defrauding the creditors of the bank and, therefore, was and is void; and that the plaintiff had been appointed, by the Comptroller of the Currency, Receiver of the bank, and had been directed by said comptroller to proceed to enforce the personal liability of all persons owning the capital stock of the bank on the 26th of May, 1874, the day on which the bank failed to redeem one of its circulating notes, and was in default in the payment of its circulating notes generally. The bill alleges that Johnson visited Norfolk for the purpose of examining into the condition of the affairs of the bank and becoming satisfied, from such examination and from other information in relation to the bank, that its affairs were in a critical condition, as in fact they were, and that a suspension of the bank was inevitable, returned to New York and

*Head notes by *Mr. Justice* BLATCHFORD.

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immediately thereafter made said transfer. The prayer of the bill is, that Johnson and Mrs. B. Valentine answer it on oath; that the transfer of the stock be set aside, and that Johnson be decreed to pay to the plaintiff, as such Receiver, the par value of the 130 shares.

The joint answer of the defendants admits [253] that Johnson became the owner of the 130 shares in 1869. It avers that Johnson visited Norfolk in November, 1873, but not for the purpose of examining into the condition and affairs of the bank. It denies that Johnson, on said visit, became satisfied that the affairs of the bank were in a critical condition and that a suspension of the bank was inevitable. It avers that Johnson went to Norfolk, at that time, to inspect a farm which it was proposed to exchange with him for said stock. It denies that Johnson "then, during that visit, or at any other time, saw anything in the condition of the said bank," except that William Lamb, who was at that time the president of the said bank, and who went with Johnson to inspect said farm, at the same time proposed that Johnson should lend to the bank $25,000, and proposed to secure the loan by mortgage on the real estate of the bank, which loan Johnson declined to make. Johnson admits that he, on December 5, 1873, sent his said stock to the bank, with the power and direction to have the same transferred to Mrs. Valentine, but he denies expressly that such transfer was made in order to exonerate himself from liability to the creditors of the bank. The answer avers that the actual transfer of the stock, on the books of the bank, was delayed for some time, without the knowledge and against the will of the defendants. It denies that the transfer of the stock was made without legal consideration, or with any view to exonerate Johnson from liability as stockholder. It denies that the defendant Valentine, is or was, at the time of said transfer, known by Johnson "to be utterly insolvent, or that such transfer was made with a view of defrauding the creditors" of the bank. It avers that it is not true that Mrs. Valentine was, at the time of said transfer, insolvent, or that said transfer was made for any such purpose as is alleged in the bill, but avers that it was made in good faith and for a valuable and lawful consideration.

The principal question in this case is as to the circumstances attending the transfer of the stock to Mrs. Valentine. This question divides itself into two branches: (1) the information which Johnson had in regard to the affairs of the bank; (2) the real nature of the transaction between Johnson and Mrs. Valentine.

(1) Lamb, the president of the bank, gives [254] the following testimony: in the latter part of 1873, Lamb, owing to the straitened condition of the bank, was anxious to make a loan on its real estate, and wrote to Mr. Cole, the former president, then living in New York, to assist him in doing so. Cole wrote to Lamb that he had a friend, Johnson, who he thought was able to make the loan, and would do so if proper representation could be made to him, and that he would bring Johnson down to Norfolk. Some time in November, 1873, Johnson went to Norfolk with Cole, when Lamb endeavored to get Johnson to make a loan on the banking building of the bank. Lamb told Johnson that the need of a loan was urgent, that he thought the security was good, and he appealed to Johnson as a stockholder to make the loan. Johnson promised, when he returned, to look into his affairs, and to make the loan if he could conveniently do so. Lamb says: "I cannot remember any of the details of the conversation, nor the full extent given him by me as to the condition of the bank, but my impression is that I called attention to the fact that our capital had been seriously impaired by the Elkton suit, and other litigation, and that the panic had caused us to lose business and be very hard up, and the necessity of having ready money to retain our business and to recover our position. I think I asked for a loan of $25,000 on the building. My conversation was of such a confidential character as I would have only had with one largely interested in the bank. * * * I don't remember whether he examined the books and papers of the bank." Lamb says that the Elkton suit was one in which a bank obtained a judgment against his bank, after long and expensive litigation, for $30,000; and that the result destroyed about one half of the capital stock of his bank, which was $100,000.

Chamberlain, who was cashier of the bank, says that Johnson visited Norfolk the latter part of November or about the first of December, 1873.

Hunter, who was bookkeeper of the bank and remembers Johnson being at the bank, says that he believes the reports and statements showing the condition of the bank, made up by the witness as bookkeeper, were taken into the president's room while Johnson was in it, but he cannot state whether they were exhibited to Johnson.

The foregoing is all the direct evidence there [255] is as to Johnson's knowledge of the condition of the bank at the time he returned from Norfolk. Within a very few days after his return he wrote a letter to Lamb, dated December 5, 1873, saying: "I regret to say that I will be unable to comply with your wishes in letting the First National Bank have $25,000. I cannot raise the money. I was depending for the greater part of it on my folks in San Francisco, and they send me word that they cannot let me have the money, as they need all they can lay their hands on to get through the winter. The bulk of my means is in real estate and cannot readily be converted into cash. I have disposed of my stock in the First National Bank of Norfolk, and enclose certificate of my shares, with power of attorney, etc., to transfer. Please have the stock transferred to Mrs. B. Valentine, and send the certificate to her at Belleville, Essex County, New Jersey." This letter contained the certificate of stock with the power of attorney to transfer it.

Lamb, instead of transferring the stock, wrote as follows to Cole, inclosing Johnson's letter: "I send you the inclosed to show you Mr. Johnson. Please let me know who Mrs. B. Valentine is. I shall make an assessment on our stockholders of 50 per cent. If she is not able to pay it I will not transfer the stock. Please return this letter." Cole replied: "Mrs. Valentine is the sister of Johnson, the wife of a poor man that Johnson employs on his farm. I would not transfer the stock, but notify him at once that you have made an assessment of 50 per cent."

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These letters were written, Lamb says, in December, 1873. Lamb also says, that he was not satisfied from Cole's reply, but found, after obtaining legal advice, that he had no right to refuse the transfer and, therefore, he made it, on January 15, 1874.

On the 14th of February, 1874, Lamb wrote as follows to Johnson: "I find the enclosed certificate has not been forwarded to Mrs. Valentine, although issued a month ago; please hand it to her. I regret not hearing from you in regard to the proposition made by the directors. Something must be done at once. The bank cannot go on as affairs are now, and if I [256] surrender it to a receiver I know our stock will be worthless; the margin is too small. If I could have gotten the refusal of all the stock, I might have induced some capitalists to come in but I am afraid it is too late now. With $4,000 cash I could have infused new life into our stock and built it right up. Please let me hear from you, as I suppose you must feel an interest in Mrs. Valentine's stock."

Johnson did not offer himself as a witness.

(2) Mrs. Valentine was called as a witness by the plaintiff. Her deceased daughter was the wife of Johnson. She herself was divorced from her husband, and he was not dead that she knew of. Johnson had no children. Her daughter died in 1864. She herself lived in California with her husband for 13 years. She came from California in 1865 or 1866, and went to live at Mr. Johnson's house in Kearney Township, New Jersey, in 1871. She was examined as a witness in August, 1877. She endeavors to make out a consideration for the transfer of the stock to her, in this way: Mr. Johnson owed me for services rendered after we came to live where we are. He was to pay me $1,000 a year for my services. He was away a great deal of the time, and I took care of everything while he was gone. He went away two winters to California, and I had the care and responsibility of everything, the entire place, while he was gone. * * * We have been at the place six years. He was away the second winter; then two winters intervened, and he was away another winter. * * * Q. Please explain why Mr Johnson should have paid you by the assignment of the Norfolk Bank stock instead of money, if he was indebted to you and wished to make payment? A. Because I preferred that. He would have paid money if I had wished it. I thought it would be less trouble for me in that way, already invested, and I had to pay no taxes. Q. Did Mr. Johnson's engagement to pay you $1,000 per year for services commence at the time you moved to Kearney Township, six years ago, as you have said? A. It did. Q. Mr. Johnson has not been indebted to you, has he, for any other matter or thing except such service for the last six years? A. Since my daughter's death I have had all the charge of Mr. Johnson's clothes, and of his house at San Francisco, [257] and here also. There was no agreement between us for compensation till we came here to Kearney. I always supposed he would compensate for these. Q. What price were you to allow Mr. Johnson in payment for that stock? A. Fifty cents on the dollar; that was the price Mr. Lamb, the president of the bank, offered for it at the time Mr. Johnson transferred it to me. Q. Did you suggest to him or he to you the purchase of this stock? A. I really can't tell. I think I proposed to him to take it instead of money. I am not positive. I think that was the way. Q. Please explain, if you can, how you came to the knowledge that he was the owner of the Norfolk Bank stock. A. He told me that he had the stock before he went to Norfolk to see the land that he then thought of exchanging the stock for. I think that was the first I knew of it. Q. And when he came back, or soon after, he proposed to you to take the stock, did he not? A. It was a long time after he came back; several months, I think. Q. Are you not mistaken in saying it was several months? A. It may not have been several months after; it was some time after. Q. Really, Mrs. Valentine, on reflection, was it more than one month? A. Perhaps not. I cannot remember. Q. When Mr. Johnson proposed that you should purchase the stock, what did he propose? Please give me, as near as you can, the language he used in relation thereto. A. I cannot remember the language used. Q. Have you now, or had you at the time you took the assignment of this stock from Mr. Johnson, any money, or any property, to purchase the stock, other than the alleged indebtedness for annual services rendered by you to Mr. Johnson? A. I am not dependent entirely; I am not destitute; have enough to keep me from want. Q. Did you give any money or other valuable thing to Mr. Johnson for the transfer of the stock other than his alleged indebtedness to you for service? A. I told him at the time, he might consider all my jewelry his for part compensation. Q. He did not accept of the jewelry, did he? A. Well, it remained in the house, as it always had. Q. The stock that Mr. Johnson transferred to you was not paid for by either your obligation or promise of payment further than the alleged indebtedness to you, was it? [258] A. It was not. Q. Had you, at that time, any other stock, bonds, bank account, or money in hand, or on deposit in any bank or banks, or in anywise invested for you or for your use? A. I had no bank account, no stock. I am never without any money to use. I have no bonds. Q. The money that you had were merely pocket funds, of small amount, were they not? A. Yes, sir. Q. In what month was the arrangement made between you and Mr. Johnson about the stock? A. In December, 1873. Q. You stated, in reply to the 32d direct question, that you thought you proposed to Mr. Johnson to take the stock instead of money. Did you mean to be understood, by any subsequent answer, that the proposition for you to take the stock arose with Mr. Johnson? A. No."

The circuit court dismissed the bill, taking, as we think, an erroneous view of Mrs. Valentine's testimony in one important particular. It was assumed that she testified that she had had charge of Johnson's house and family, since the death of Mrs. Johnson, in 1864, at the fixed compensation of $1,000 per year; that is, that the compensation was for taking charge of Johnson's house and family from 1864 until the stock was transferred in 1873, and that the compensation of $1,000 a year was fixed in 1864. Whereas, what Mrs. Valentine says expressly is, that the engagement to pay her $1,000 a year for her services commenced in 1871, when she moved to Kearney Township, and not till then;

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and that what Johnson owed her for was for services rendered after that. The winters Johnson was away were the winters of 1872 and 1875. At most, according to Mrs. Valentine's own story, less than 3 years' services, at $1,000 a year, had been rendered by her when she took this stock at $6,500. No alleged indebtedness accruing subsequently to the transfer of the stock in December, 1873, can be looked at. Mrs. Valentine says she supposed Johnson would compensate her for what she had done before she went to Kearney in 1871, but she does not pretend that there was any such obligation recognized by Johnson, or any debt for the same. That Mrs. Valentine, knowing that the alleged indebtedness to her did not amount to the alleged price of the stock, was conscious that the transaction was not an honest one, is shown by her admission that the stock was not paid for by her to Johnson, by either her obligation or [260] promise of payment, further than the alleged indebtedness to her. This was less than $3,000 in December, 1873. To make up the difference between the indebtedness and the $6,500, she resorts to the bald suggestion that she told Johnson at the time that he might consider all her jewelry as his, "for part compensation" for the transfer of the stock, the jewelry remaining in the house as it always had. Equally bald is the suggestion that she was saving trouble in making an investment in a stock that was worth only fifty cents on the dollar.

The conclusion of the circuit court was that there was no bad faith or fraud in the transfer. But what are the facts proved? Johnson, being a stockholder, goes to Norfolk and has interviews with the officers of the bank in regard to making a loan of $25,000 to the bank. He is appealed to as a stockholder to make the loan. His position as a stockholder involved not merely the value of his stock, but his liability for $13,000 more. The urgency of the needs of the bank is pressed upon him. The facts that the capital of the bank had been impaired, and that it had lost business, are brought to his attention. The bank had made a dividend in July, 1870, and one in February, 1873, and none since. Can it be doubted, from the foregoing testimony, and Johnson's subsequent action, that he examined into the affairs of the bank sufficiently to satisfy himself that the failure of the bank, and the loss of its entire capital stock, and the attaching of the statutory liability of the stockholders, were impending in the near future? He was at Norfolk the last of November or the first part of December. Mrs. Valentine says that the arrangement between her and Johnson about the stock was made in December. He sends the certificate and the power to Lamb on the 5th of December. He loses no time in assigning his stock. Lamb understood what Johnson was doing. He sent to Cole the letter from Johnson, and directed Cole to inquire as to Mrs. Valentine's responsibility. He received information that she had none, and that she was Johnson's sister. With that knowledge he acted as Johnson's attorney in transferring the stock. He evidently thought there was no *bona fides* in the transfer, for, in his letter sending the certificate to Johnson, although Johnson had in- [260] structed him to send it to Mrs. Valentine at a given address, he addresses Johnson as if he were still a stockholder. He refers to the future and to the necessity of doing something at once, and to the prospective worthlessness of the stock, and winds up with the sarcastic remark that he supposes Johnson must feel an interest in Mrs. Valentine's stock. Mrs. Valentine was wholly unable to respond for any liability as a stockholder. This was known to her and to Johnson. Johnson, notwithstanding all the testimony on the part of the plaintiff, is not sworn as a witness for himself. It is worthy of note, that the answer does not set forth what the consideration, was for the transfer to Mrs. Valentine. The bill alleges that there was no legal consideration. The answer merely avers that the transfer was not without legal consideration, and that it was made in good faith and for a valuable and lawful consideration. It is manifest that, at the very best, on Mrs. Valentine's evidence, supposing it to be entitled to credit, and on her statement of the price at which she took the stock, there was only $2,500 of consideration, at the rate of $1,000 a year for two years and a half, leaving the transfer as to eighty shares of the stock without consideration. The entire theory of the defense is that there was a sale, and not that there was any gift.

The provisions of section 12 of the Act of June 3, 1864, 13 Stat. at L., 102, which govern the present case, are as follows: "The capital stock of any association formed under this Act shall be divided into shares of $100 each, and be deemed personal property and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association; and every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of the shares, and no change shall be made in the articles of association by which the rights, remedies or security of the existing creditors of the association shall be impaired. The shareholders of each association formed under the provisions of this Act, and of each existing bank or banking association that may accept the provisions of this Act, shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addi- [261] tion to the amount invested in said shares." The answer sets forth that Johnson became the purchaser and owner of the one hundred thirty shares in 1869. As such shareholder, he became subject to the individual liability prescribed by the statute. This liability attached to him until, without fraud as against the creditors of the bank, for whose protection the liability was imposed, he should relieve himself from it. He could do so by a *bona fide* transfer of the stock. But where the transferrer, possessed of information showing that there is good ground to apprehend the failure of the bank, colludes and combines, as in this case, with an irresponsible transferee, with the design of substituting the latter in his place, and of thus leaving no one with any ability to respond for the individual liability imposed by the statute, in respect of the shares of stock transferred, the transaction will be decreed to be a fraud on the creditors, and the transferrer will be held to the same liability to the creditors as before the trans-

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fer. He will be still regarded as a shareholder *quoad* the creditors, although he may be able to show that there was a full or a partial consideration for the transfer, as between him and the transferee.

The appellees contend that the statute does not admit of such a rule, because it declares that every person becoming a shareholder by transfer succeeds to all the liabilities of the prior holder, and that, therefore, the liabilities of the prior holder, as a stockholder, are extinguished by the transfer. But, it was held by this court in *Nat. Bk.* v. *Case*, 99 U. S., 632 [XXV., 449], that a transfer on the books of the bank was not in all cases enough to extinguish liability. The court, in that case, defined as one limit of the right to transfer, that the transfer must be out and out, or one really transferring the ownership as between the parties to it. But there is nothing in the statute excluding, as another limit, that the transfer must not be to a person known to be irresponsible, and collusively made, with the intent of escaping liability, and defeating the rights given by statute to creditors. Mrs. Valentine might be liable as a shareholder succeeding to the liabilities of Johnson, because she has voluntarily assumed that position, but that is no reason why Johnson should not, at the election of creditors, still be treated as a [262] shareholder, he having, to escape liability, perpetrated a fraud on the statute. This is the view enforced by the decision of the *Chief Justice*, in *Davis* v. *Stevens*, 17 Blatchf., 259.

It is urged that, as the bill prays that Johnson may answer its allegations on oath, the answer is evidence in his favor, and is to be taken as true, unless it is overcome by the testimony of one witness and by corroborating circumstances equivalent to the testimony of another witness. Under the view we have taken of the case, the only material questions which are controverted are the knowledge and intent of Johnson and the insolvency of Mrs. Valentine and the knowledge of the latter fact by Johnson at the time. Although Johnson executed the transfer and power of attorney on December 5, he did not deliver it to Mrs. Valentine. He sent it to Lamb for him to act as attorney. Mrs. Valentine had no agency in it. When the transfer had been made on the books of the bank, and the new certificate was made out, it was sent to Johnson on February 14, for him to deliver it to Mrs. Valentine. The letter of that date from Lamb to Johnson, which inclosed it, was full notice to Johnson that the condition of the bank was growing worse. His contract with Mrs. Valentine, if there was one, was not fully consummated on his part till after that. There was no delivery of anything by him to her till after that. On the whole evidence, the intent of Johnson, though denied in the answer, is abundantly proved, because the facts from which the conclusion as to such intent flows are satisfactorily established, to an extent sufficient to satisfy the rule of equity. As to Mrs. Valentine's insolvency, she herself proves it conclusively, and she states facts which show that Johnson must have known it. She could give him nothing, according to her story, to answer for the $4,000 balance due him on the stock, and was reduced to telling him he might consider her jewelry his, for part compensation. Under all these circumstances, the omission of Johnson to testify as a witness for himself, in reply to the evidence against him, is of great weight. This case on the whole, is brought within the principle asserted by *Chief Justice* Marshall, speaking for this court, in *Clark* v. *Riemsdyk*, 9 Cranch, 153, as a case where the evidence arising from circumstances is stronger than the testimony of any single witness. In 3 Greenleaf, [263] Evidence, section 289, it is stated as a rule, that the sufficient evidence to outweigh the force of an answer may consist of one witness, with additional and corroborative circumstances, which circumstances may sometimes be found in the answer itself, or it may consist of circumstances alone, which, in the absence of a positive witness, may be sufficient to outweigh the answer even of a defendant who answers on his own knowledge.

It is contended for the appellees, that this is not a case of equitable cognizance, because a plain, adequate and complete remedy may be had at law. But the case is one of a transfer of the legal title to the stock, made to defraud the creditors of the bank. The evidence of title to the stock is the formal assignment on the books of the bank. This being a bill for discovery as well as relief, and the fraudulent transfer being good between the parties, and only voidable at the election of the plaintiff, it is clear that equity has jurisdiction to set it aside and enforce the liability of the transferrer.

Objection is taken here, by the appellees, to the sufficiency of the proof that the comptroller of the currency decided, before this suit was brought, that it was necessary to enforce the personal liability of the stockholders. The plaintiff, as a witness, testified that he received written instructions from the comptroller of the currency to enforce the whole of the personal liability of the stockholders. The defendant, Johnson, objected that the written evidence referred to must be produced. The record states that the plaintiff reserved the right to file the paper, or a duly certified copy of it, with the deposition, before the same should be closed. Before the deposition was closed, the witness was recalled and produced, as the record states, the original letter, addressed to him and signed by the comptroller, and it was filed with the deposition. No objection was made to it, and no requirement of further proof was made. It directs the receiver to institute legal proceedings to enforce against every stockholder of the bank owning stock at the time the bank suspended, his or her personal liability, as such stockholder, under the statute. This was sufficient.

The liability of the defendant bears interest from the date of said letter, August 13, 1875. *Casey* v. *Galli*, 94 U. S., 677 [XXIV., 169].

In June, 1878, Orson Adams was appointed [264] Receiver of the bank, in place of Bowden, the plaintiff. The decree of the circuit court was not made till January, 1879. The appeal to this court was taken in the name of Bowden, Adams not having been substituted as plaintiff. Adams became surety in the appeal bond, and thus treated the decree as valid and adopted the appeal. Adams now moves to be substituted as plaintiff and appellant in place of Bowden, without prejudice to the proceedings heretofore had. The appellees and their counsel first heard of the appointment of Adams from the papers

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served on the motion for substitution, and the appellees now move to dismiss the appeal, on the ground that none was ever lawfully taken. We think that the motion of Adams should be granted, and that of the appellees should be denied. Adams prosecuted the appeal in the name of Bowden, who was and is in life, and had a representative capacity. The power of amendment to this extent is authorized by section 954 of the Revised Statutes. It is of the same character as that exercised by this court in *Gates* v. *Goodloe*, 101 U. S., 612 [XXV., 895], where a writ of error was sued out by two bankrupts after their discharge in bankruptcy, and this court, on a motion to dismiss the writ, and a counter motion by the assignee in bankruptcy, to be substituted as plaintiff in error, denied the former motion and granted the latter.

The motion of Adams is granted, and that of the appellees is denied, and the decree of the Circuit Court is reversed, with costs, and the cause is remanded to that court, with directions to enter a decree in favor of the substituted plaintiff, as Receiver, setting aside, as against him, the transfer of the one hundred thirty shares of stock by Johnson to Mrs. Valentine, and decreeing that Johnson pay to said Receiver the sum of $13,000, with interest thereon, at the lawful rate in the State of New Jersey, from August 13, 1875, with costs.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 483.

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[69] JOHN N. CUSHING AND WILLIAM CUSHING, In Their Own Right and as Exrs. of NICHOLAS JOHNSON, Deceased, MARY A. JOHNSON, Exrx. of HENRY JOHNSON, Deceased, KETURAH M. PRITCHARD, Admrx. of THOMAS PRITCHARD, JR., Deceased, AND ELIZABETH H. PRITCHARD, Exrx. of WILLIAM PRITCHARD, Deceased, *Appts.*,

v.

JOHN LAIRD, Jr. AND J. P. GIRAUD FOSTER AND JAMES THOMPSON, Garnishees.

J. P. GIRAUD FOSTER AND JAMES THOMPSON, Garnishees, *Appts.*,

v.

JOHN N. CUSHING ET AL.

(See S. C., 17 Otto, 69-84.)

Appealable decree in admiralty—estoppel by decree.

*1. When persons, summoned as garnishees in a libel in admiralty *in personam*, are adjudged by the court to have a fund of the principal defendant in their hands and to pay it into court, and the libelant afterwards obtains a final decree against him with an award of execution against the fund in their hands, the first order is interlocutory, and they can appeal from the last decree only.

2. A final decree of acquittal and restitution to the only claimant in a prize cause determines nothing as to the title in the property, beyond the question of prize or no prize; and another person, who actually conducts the defense in the prize cause in behalf and by consent of the claimant, without disclosing his own title under a previous bill of sale from the claimant, is not estopped to contest the claimant's title in a subsequent suit brought by creditors attaching the property or its proceeds as belonging to the claimant.

[Nos. 22, 113.]

Argued Feb. 28, Mar. 1, 1882. Decided Mar. 5, 1883.

APPEALS from the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **J. Langdon Ward** and **R. D. Benedict**, for libelants.

Messrs. **C. Van Santvoord, A. J. Vanderpoel**, *J. Hubley Ashton* and *Jas. Thomson*, for garnishees.

Mr. Justice **Gray** delivered the opinion of the court:

This is a libel in admiralty, filed in the District Court for the Southern District of New York, by John N. Cushing and others against John Laird, Jr., to recover damages for the destruction of the libelants' vessel, The Sonora, by The Alabama. The defendant was not found and never appeared in the cause, and his credits and effects were attached in the hands of Foster & Thompson, garnishees.

The garnishees answered that they had in their hands a fund amounting to $31,441.62, known as the proceeds of the steamer Wren, which was the property of Charles K. Prioleau, and not of Laird. Upon the trial of the issue raised by this answer, the district court, in April, 1873, adjudged that the fund belonged to Laird, and ordered the garnishees to pay it into court. See [*Cushing* v. *Laird*], 6 Ben., 408. From that decree the garnishees appealed to the circuit court. The district court afterwards, in September, 1873, entered a decree in favor of the libelants against Laird, for the sum of $143,298.70, and costs, "And that the libelants have execution thereon, to satisfy this decree, against the property of the said respondent, and especially against his property, credits and effects in the hands of Foster & Thomson, garnishees." From this decree, also, the garnishees appealed to the circuit court. [70]

The circuit court dismissed the first appeal, and retained the cause for hearing on the second appeal only; and, upon consideration, entered a decree by which it was adjudged that the fund in the hands of the garnishees was not the property of Laird, and could not be subjected to the payment of the decree against him, the attachments against the garnishees were discharged, and both decrees of the district court, so far as affected them and the fund in their hands, were reversed, with costs. See [*S. C.*], 15 Blatchf. C. C., 219.

The findings of fact by the circuit court are printed at length in 15 Blatchf. C. C. 220-236, and, so far as they are material to be stated, are as follows:

The steamer Wren was built at Birkenhead, England, in 1864, by Laird Brothers, and was registered on the 24th of December, 1864, at Liverpool, in accordance with the laws of Great Britain, in the name of John Laird, Jr., as owner; a certificate of the registry was issued in due form; the vessel sailed from Liverpool, having

*Head notes by *Mr. Justice* GRAY.

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the certificate on board as part of her ship's papers, and it did not appear that she ever again entered a British port. On the 3d of January, 1865, after she had left Liverpool, Laird executed to Charles K. Prioleau, of Liverpool, a member of the firm of Fraser, Trenholm & Company, for the consideration of £15,450, a bill of sale of the vessel, which, on the first of May, 1865, was duly entered at the custom-house in Liverpool, and the vessel registered in the name of Prioleau as owner. On the 13th of June, 1865, on the high seas, on a voyage from Havana to Liverpool, by the way of Halifax, Nova Scotia, some of the crew took forcible possession of the vessel, overcame her officers, ran her into Key West, and there delivered her to the naval authorities of the United States.

On the 16th of June, 1865, the Attorney of [71] the United States for the Southern District of Florida filed in the district court for that district an information against the vessel as prize of war. She was taken into the custody of the marshal, and a monition issued to all persons interested to appear on the 27th of June and show cause against a decree of condemnation. On the 26th of June, Edward C. Stiles, master of the vessel, appeared in court and filed a claim, stating that he was the master and, as such, the lawful bailee of the vessel, and claimed the same for the owner thereof; and that Laird, a British subject, residing in England, was the true and *bona fide* owner of the vessel, and that no other person was the owner thereof, as appeared by her register in the possession of the court, and as he was informed and believed; denying that she was a prize of war, and praying restitution and damages.

The only certificate of registry found on board was that granted on the 24th of December, 1864, upon which were noted, at the British Consulate in Havana, changes of masters on the 24th of March and the 10th of June, 1865, and at the foot of which was the following: "Note. A certificate of the registry granted under the Merchant Shipping Act, 1854, is not a document of title. It does not necessarily contain notice of all changes of ownership, and in no case does it contain an official record of any mortgage affecting the ship."

On the 17th, 19th and 20th of June, 1865, the depositions of the master and other officers of the vessel were taken *in preparatorio;* and on the 27th of June the court proceeded to hear the case upon the allegations and pleadings, the depositions taken *in preparatorio*, and the papers, letters and writings found on board the vessel. On the 29th of June the court, of its own motion, directed the prize commissioner to take immediately the testimony of the officers, and of any other witnesses who might be produced by the claimants from persons on board the vessel, upon specified interrogatories; of two persons named, and any others on board produced by the captors, upon some of the same interrogatories; and of any witnesses, produced either by the captors or the claimants from persons not on board, upon certain other interrogatories; and allowed two days to the parties to produce witnesses. Under this order, testimony was taken; and on the 3d of July the court re- [72] sumed the hearing upon the allegations and pleadings, the depositions taken *in preparatorio*, the papers found on board, and the depositions taken under the order allowing further proof.

The court, on the 8th of July, announced its opinion, condemning the vessel, but, on account of exceptions taken to some rulings, delayed making a decree in form until the 15th of August, when it was duly entered, reciting that a claim had been interposed by the master in behalf of Laird, that the case had been heard as aforesaid, and that it appeared to the court that The Wren was, at the time of capture, the property of enemies of the United States; and adjudging her to be condemned and forfeited to the United States as lawful prize of war, and to be sold by the marshal, and the proceeds to be deposited with the Assistant Treasurer of the United States, subject to the order of the court. From that decree the claimant, on the same day, appealed to this court. The vessel was afterwards sold, and the proceeds of the sale deposited with the Assistant Treasurer.

Prioleau still resided in England, and it did not appear that he had any actual knowledge of the proceedings for condemnation until after the entry of the decree. He afterwards retained Foster & Thomson, the garnishees in this case, attorneys and counselors at law in the City of New York, to do whatever might be necessary for the protection of his interests; and they procured a copy of the record of the district court and had the appeal docketed in this court, and employed additional counsel, who argued the case here on the record sent up. No additional testimony was taken and no change in the pleadings made or applied for. Upon the argument in this court, the counsel for the United States insisted that it appeared from the evidence that the vessel, at the time of the capture, was the public property of rebel enemies and, in support of this position, referred to the testimony of witnesses who swore that Frazer, Trenholm & Company were her owners. The counsel for the appellant insisted that there was not a particle of evidence that she was ever enemies' property, but that the evidence was conclusive that she was at all times the property of Laird, a British neutral.

This court, at December Term, 1867, ["*The* [73] *Wren*" v. *United States*, XVIII., 876], reversed the decree of the district court, and remanded the cause, with directions to restore the vessel to the claimant, without costs. *Mr. Justice* Nelson, in delivering the opinion, said that the only question in the case was whether the vessel was the property of enemies of the United States; and, in discussing this question, observed that, upon the proofs that the claimant built the vessel and put the master in command in this, her first voyage, the presumption would seem to be very strong, if not irresistible (nothing else in the case), that he continued the owner for the short period of six months that elapsed after she was built and before the seizure took place; that in addition to this she was in command of a master claiming to represent Laird as owner; that these acts, in connection with the registry, afforded strong evidence that the title of the vessel was in the claimant, and that, although it was not unnatural to suspect, from the surrounding facts and circumstances, that the so-called Confederate States or their agents had some interest in or connection with her, there

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was no sufficient legal proof that they owned the vessel.

After that decree of this court, Foster & Thomson made and sent to Prioleau a draft of a power of attorney to be executed by Laird and by Stiles, and in due time received from Prioleau the power so executed, authorizing Foster & Thomson to receive from the United States, or from any officer or depositary thereof, restitution of the proceeds of the sale of The Wren; and obtained a mandate from this court, and sent it, together with a copy of their authority, to the attorney of the United States for the Southern District of Florida, requesting him to see the appropriate decree entered and a draft upon the Assistant Treasurer in New York for the payment of the money to their order transmitted to them, and also employed F. A. Dockray, an attorney in Florida, to aid them in procuring the money from the registry of the court; and did not, in any of their letters to the District Attorney or to Dockray, mention that any other person than Laird was or pretended to be the owner of the fund in court.

Some of the libelants in this case, having filed a libel in that court to recover for the wrong complained of in the present suit, with a prayer [74] for an attachment of the fund in the registry, and an attachment having been made accordingly, an arrangement was made between Foster & Thomson and J. L. Ward, proctor for the libelants, with a view of transferring the litigation to New York for the convenience of the parties, and of having the fund transmitted to Foster & Thomson in New York, as authorized attorneys in fact of Laird, to be held by them long enough to enable process to be served upon them in behalf of the libelants. Pursuant to that arrangement, Dockray, acting under his employment by Foster & Thomson, appeared in behalf of Laird in the libel filed against him in Florida, and claimed the proceeds of The Wren in the registry of that court, and exhibited the mandate of this court; and upon his motion, with Ward's consent, the attachment was dismissed, and a decree entered, by which, after reciting the decree of this court reversing the decree of condemnation and ordering the property to be restored to the claimant, it was ordered, adjudged and decreed that the proceeds of The Wren, after deducting costs, charges and expenses, and amounting to $31,441.62, on deposit with the Assistant Treasurer of the United States at New York, be paid to said John Laird, claimant; and, it appearing that Foster & Thomson were his lawfully authorized attorneys, that said proceeds be paid to them. That sum was accordingly transmitted to Foster & Thomson, and is the matter in controversy in this case. In the course of the negotiations which preceded that arrangement, Ward was in no manner given to understand that there was any ownership or claim of ownership of the fund, other than such as appeared on the face of the record and the power of attorney filed with the mandate and, in point of fact, he did not know or have any reason to believe that Foster & Thomson were acting in any other capacity than as attorneys for Laird and Stiles, representing their several interests, as disclosed by the record in this court. Foster & Thomson never had any personal communication with Laird, nor received any instructions from him, but were actually employed by Prioleau, and communicated with Laird through him only.

The libelants requested the circuit court to make the following conclusions of law: "1. The Prize Court in Florida condemned The Wren as enemy property. 2. The Supreme [75] Court, in reversing that decree, decided that The Wren was not enemy property but was the property of John Laird, Jr. 3. The garnishees, acting for Prioleau, procured the Supreme Court to make that decision. 4. Prioleau is chargeable with notice of all the proceedings in the Prize Court and in the Supreme Court. 5. The proceeds of The Wren in the Prize Court were subject to the attachment served upon them in the District Court of Florida at the time when the consent of the libelants' proctor to the dissolution of such attachment was obtained. 6. The decision of the Supreme Court binds the garnishees herein and Prioleau, and is conclusive against them, and cannot be re-examined in this suit. 7. Prioleau is estopped from denying in this suit that John Laird, Jr., was the owner of The Wren and of the proceeds thereof when the same were attached herein. 8. The garnishees are estopped from setting up that these funds in their hands are not subject to the attachment in this suit; and also from setting up that John Laird, Jr., was not the owner thereof, or that Prioleau was the owner thereof, when the attachment herein was served."

The circuit court declined to make the conclusions of law proposed by the libelants, and made and filed the following conclusions of law: "1. As Prioleau was, in fact, the owner of The Wren at the time of her capture, he was in law the owner of the proceeds in the registry of the court after her sale. 2. The sentence of acquittal in the prize cause relieved the fund in court from all claim on the part of the captors, and left the owners free to assert their rights as against the world. 3. The decree in the prize suit did not adjudge the fund to Laird as owner, or deprive Prioleau of his interest. 4. The delivery of the fund to Foster & Thomson, as agents of Laird, placed them in the same situation in respect to it that would have been occupied by Laird if it had been put into his hands instead of theirs. 5. As Laird was not the real but only the apparent owner of the fund, he would have taken it, if payment had been made to him, in trust for Prioleau. 6. Foster & Thomson, as his agents, hold it upon the same trust, and are not accountable to the libelants in this action. 7. The decree of the district court, requiring Foster & Thomson to pay the fund into court, and subjecting [76] it to the payment of the amount found due the libelants from Laird, was wrong and should be reversed."

The circuit court allowed a bill of exceptions tendered by the libelants, in which they excepted to each of its conclusions of law, and to its refusal to make each of the conclusions of law proposed by them.

The libelants appealed from the last decree of the circuit court in favor of the garnishees; the garnishees appealed from the earlier decree of that court, dismissing their appeal from the first order of the district court against them; and the two appeals have been argued together.

In a court of admiralty, as in a court of common law, a process of foreign attachment is auxiliary and incidental to the principal cause.

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Second Rule of Practice in Admiralty, 3 How., iii. [Book XX., Law. ed., 921]; *Manro* v. *Almeida*, 10 Wheat., 473; *Atkins* v. *Disintegrating Co.*, 18 Wall., 272 [85 U. S., XXI., 841]. Neither the principal defendant nor the garnishees can appeal until after a final decree against them. The first decree against these garnishees, ascertaining their liability, was interlocutory only, and, if the libelants had ultimately failed to recover judgment against the principal defendant and execution against the garnishees, would have been of no avail to the libelants, and of no effect against the garnishees. The appeal of the garnishees from this interlocutory order of the district court was, therefore, rightly dismissed by the circuit court, and the order of dismissal must be affirmed.

Upon the merits of the case, as presented by the appeal of the libelants from the final decree of the circuit court in favor of the garnishees, this court, after full consideration of the elaborate arguments of counsel, is satisfied of the correctness of that decree upon principle and authority.

Prize courts are not instituted to determine civil and private rights, but for the purpose of trying judicially the lawfulness of captures at sea; according to the principles of public international law, with the double object of preventing and redressing wrongful captures, and of justifying the rightful acts of the captors in the eyes of other Nations. The ordinary course of proceeding in prize causes is ill adapted to [77] the ascertainment of controverted titles between individuals. It is wholly different from those which prevail in municipal courts of common law or equity, in the determination of questions of property between man and man.

In *Lindo* v. *Rodney*, 2 Doug., 613, 614, *Lord* Mansfield said: "The end of a prize court is, to suspend the property till condemnation; to punish every sort of misbehavior in the captors; to restore instantly, *velis levatis* (as the books express it, and as I have often heard Dr. Paul quote), if, upon the most summary examination, there don't appear a sufficient ground; to condemn finally, if the goods really are prize, against everybody, giving everybody a fair opportunity of being heard. A captor may and must force every person interested to defend, and every person interested may force him to proceed to condemn, without delay."

From the necessity of the case, and in order to interrupt as little as may be the exercise of the belligerent duties of the captors, or the voyage and trade of the captured vessel if neutral, the proceedings are summary. The libel is filed as soon as possible after the prize has been brought into a port of the government of the captors, and does not contain any allegation as to title, nor even set forth the grounds of condemnation, but simply prays that the vessel may be forfeited to the captors as lawful prize of war. The monition, issued and published upon the filing of the libel, summons all persons interested to show cause against the condemnation of the property as prize of war, and is returnable within a very few days; too short a time to allow of actual notice to or appearance or proof in behalf of owners residing abroad.

The law of Nations presumes and requires that in time of war every neutral vessel shall have on board papers showing her character, and shall also have officers and crew able to testify to facts establishing her neutrality. The captors are, therefore, required immediately to produce to the prize court the ship's papers, and her master or some of her principal officers or crew, to be examined on oath, upon standing interrogatories and without communication with or instruction by counsel. The cause is heard in the first instance upon these proofs, and if they show clear ground for condemnation or for acquittal, no further proof is ordinarily required or permitted. If the evidence *in preparatorio* shows no ground for con- [78] demnation, and no circumstances of suspicion, the captors will not ordinarily be allowed to introduce further proof, but there must be an acquittal and restitution. *The Aline & Fanny*, Spinks, Prize Cas., 322, and 10 Moore (P. C.), 491; *The Sir William Peel*, 5 Wall., 517, 534 [72 U. S., XVIII., 696, 699]. When further proof is ordered, it is only from such witnesses and upon such points as the prize court may in its discretion think fit.

It is doubtless true, as said by *Chief Justice* Marshall, in the passage cited by these libelants from *Jennings* v. *Carson*, 4 Cranch, 2, 23, that "The proceedings of that court are *in rem*, and their sentences act on the thing itself. They decide who has the right, and they order its delivery to the party having the right. The libelant and the claimant are both actors. They both demand from the court the thing in contest." But the point there adjudged was that, pending the proceedings, the property was in the possession of the court, and not left in the possession of either party, without security; and there is no intimation that a claimant, who proves his right, as against the captors, to have the possession of the vessel restored to him, must also prove his title in the vessel as against other persons not before the court.

The prize court will not, indeed, permit a stranger to dispute the right of the captors, and generally requires a claim to be made by or in behalf of the general owner, and upon oath. But the claimant is required to give evidence of a title to the property, not for the purpose of having that title established by the decree of the Prize Court, but only for the purpose of showing that he is acting in good faith, and is entitled to contest the question of prize or no prize, and to have restitution of possession in case of acquittal. From the necessity of the case, the claim is often put in by the master on behalf of the owner, and it is sufficient if the master's oath is to belief only.

By the practice prevailing in England at the time of the Declaration of Independence, and for some years before and after, the master often put in a general claim for himself and all others interested, without naming them. *The Hendric & Alida*, Marriott, 96, 99, 123; *The Prosperité*, Id., 164; *The Jungfre Maria*, Id., 273, 283. In [79] the report made in 1758 by Sir George Lee, Judge of the Prerogative Court, Dr. Paul, Advocate General, Sir Dudley Ryder, Attorney-General, and afterwards *Chief Justice*, and Mr. Murray, Solicitor-General, and afterwards *Lord* Mansfield, which was embodied in the famous answer to the Prussian Memorial, the only requisite mentioned of a claim of ship or goods is that it "must be supported by the oath of somebody, at least as to belief." 1 *Collectanea Juri-*

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dica, 129, 135. Sir William Scott and Sir John Nicholl, in their letter to *Chief Justice* Jay when Minister to England in 1794, stating the general principles of proceeding in prize causes in British courts of admiralty, observed that those principles could not be more correctly or succinctly stated than in an extract which they gave from that report, including the passage just quoted; and, in describing the measures which ought to be taken by the neutral claimant, said: "The master, correspondent or consul applies to a proctor, who prepares a claim, supported by an affidavit of the claimant, stating briefly to whom, as he believes, the ship and goods claimed belong, and that no enemy has any right or interest in them." Wheaton, Captures, 311, 314.

It has often been said by judges of high authority that the claimant has the burden of proving his title to the property. But in the leading cases in which this was said there was but a single claimant, and either, as in *The Walsingham Packet*, 2 C. Rob., 77, 87, and *The Bremen Flugge*, 4 C. Rob., 90, 92, the words "support his title" were used as equivalent to the general expression "prove the neutrality of the property;" *Croudson* v. *Leonard*, 4 Cranch, 434, 437; *The Mary*, 9 Cranch, 126, 146; Story, *note*, 1 Wheat., 506; *The Amiable Isabella*, 6 Wheat., 1, 77; or else the neutral claimant asserted a title in property appearing to have once belonged to an enemy, as in *The Rosalie & Betty*, 2 C. Rob., 343, 359; *The Countess of Lauderdale*, 4 C. Rob., 283; and *The Soglasie*, 2 Spinks, 101; *S. C.*, Spinks, Prize Cases, 104. And in *The Maria*, 11 Moore (P. C.), 271, 286, 287, *Lord Chief Justice* Cockburn, delivering the judgment of himself, *Lords Justices* Knight, Bruce and Turner, *Sir* Edward Ryan, *Sir* John Dodson [80] and *Mr. Justice* Maule, reversing upon the facts a decree of *Dr.* Lushington, emphatically declined to assent to the application of the rule to a case in which the property appeared to be neutral, although not shown to belong to the claimant.

The proceedings of a prize court being *in rem*, its decree, as is now universally admitted, is conclusive, against all the world, as to all matters decided and within its jurisdiction. *Williams* v. *Armroyd*, 7 Cranch, 423; *Bradstreet* v. *Neptune Ins. Co.*, 3 Sumn., 600. But it does not, as *Chief Justice* Marshall observed, "establish any particular fact, without which the sentence may have been rightfully pronounced." If the vessel is condemned as prize and sold by order of the court, the decree of condemnation and sale is conclusive evidence of the lawfulness of the capture and of the title of the purchaser. But if, as is usual, it does not state the ground of condemnation, it is not even conclusive that the vessel is enemy's property, for it may have been neutral property condemned for resisting a search, or attempting to enter a blockaded port; and, "of consequence, this sentence, being only conclusive of its own correctness, leaves the fact of real title open to investigation." *Maley* v. *Shattuck*, 3 Cranch, 458, 488.

So a decree of acquittal and restitution conclusively determines as to all the world that the vessel is not lawful prize of war. *The Apollon*, 9 Wheat., 362; *Magoun* v. *Ins. Co.*, 1 Story, 157. But, as it operates *in rem*, it is not invalidated by the fact that pending the proceedings the sole claimant has died and his representatives have not been made parties. *Penhallow* v. *Doane*, 3 Dall., 54, 86, 91; Story, *note*, 2 Wheat. App., 68; 3 Phillim. Inter. L., sec. 492. It does not establish the title of any particular person, unless conflicting claims are presented to the court and passed upon. In *Penhallow* v. *Doane*, *Mr. Justice* Iredell said: "In case of a *bona fide* claim, it may appear to be good by the proofs offered to the court, but another person living at a distance may have a superior claim which he has no opportunity to exhibit. It is true, a general monition issues and this is considered notice to all the world, but though this be the construction of the law from the necessity of the case, it would be absurd to infer in fact that all the world had actual notice and, therefore, no superior claimant to the one before the court [81] could possibly exist." 3 Dall., 91.

When no other person interposes a claim, restitution of ship or goods is ordinarily decreed to the master as representing the interests of all concerned, or to the person who by the ship's papers or by the master's oath appears to be the owner. As said by *Mr. Justice* Story, and repeated by *Sir* Robert Phillimore, "The property, upon a decree of restitution, may be delivered to the master as agent of the shipper, for in such case the master is agent of the shipper, and is answerable to him." 2 Wheat. App., 70; 3 Phillim. Inter. L., sec. 495. See, Letter of Sir William Scott and Sir John Nicholl to *Chief Justice* Jay, above cited; and *Rose* v. *Himely*, 4 Cranch, 241, 277, in which *Chief Justice* Marshall said: "Those on board a vessel are supposed to represent all who are interested in it; and if placed in a situation which requires them to take notice of any proceedings against a vessel and cargo, and enables them to assert the rights of the interested, the cause is considered as being properly heard, and all concerned are parties to it."

Even when conflicting claims of title are put in, the prize court will not ordinarily determine between them, unless one of the claimants is a citizen of its own country.

Thus, in a case in which an American vessel was taken by the Danes and captured from them by an English ship of war and brought into the High Court of Admiralty as prize, the master made affidavit that he had previously sold her, under the pressure of necessity, by reason of injuries from perils of the sea, to one Ormsby, an American, from whom the Danes took her; and separate claims were presented in behalf of Ormsby and of Coit and Edwards, also Americans, who were admitted to be the original owners and whose names appeared as such in the register and other papers of the ship; *Sir* William Scott, after observing upon the circumstances attending the sale by the master, said: "But the court is not called upon to determine upon the validity of the title, which may be matter of discussion hereafter in the American courts. It is only required to give possession." "The ship's register and all the papers point to Coit and Edwards as the owners of the vessel, and I have no hesitation in restoring the possession to them." "I, therefore, restore the pos- [82] session of the vessel to the persons appearing by the register and ship's papers to be the owners, without prejudice to such rights as Mr. Ormsby, or any other persons, may have acquired by purchase, or otherwise as shall appear to the

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proper court of justice in America." *The Fanny & Elmira*, Edw. Adm., 117, 120, 121.

In *The Lilla*, 2 Sprague, 177, affirmed on appeal, 2 Cliff., 169, an American vessel owned by Maxwell, a citizen and resident of Maine, was taken by a confederate privateer and carried into Charleston, South Carolina, and there condemned and sold by a tribunal, acting under the assumed authority of the Confederate States, to persons who took her to England, where she was registered in the name of one Bushby, after which she was captured on the high seas and brought in by a United States gunboat. Claims were presented by Maxwell and by Bushby, and after hearing counsel in behalf of each claimant, as well as of the captors, the court decided against the claim of Bushby, and ordered the vessel to be restored to Maxwell, on condition of payment of salvage to the recaptors. But the opinion of *Judge* Sprague shows that jurisdiction over the question of title was exercised only to protect the rights of one of our own citizens against foreigners, to property in the possession of the court, and that if the question of ownership were wholly between foreigners, the court might refuse to decide it. 2 Sprague, 187.

As incidental to the question of the lawfulness of the capture, prize courts have, doubtless, jurisdiction to determine the liability of the captors for damages, expenses and costs, occasioned by their own wrongful acts, or by the fault of those in charge of the prize while in their custody. *Le Caux* v. *Eden*, 2 Doug., 594, 610; *The Siren*, 7 Wall., 152 [74 U. S., XIX., 129]; 1 Kent, Com., 359. But the learning and research of counsel have failed to furnish a single case, where there was but one claimant of property libeled as prize of war, in which a prize court has undertaken to pass upon the validity of his title as against other persons, or in which its decree has been set up in a subsequent suit as an adjudication of that title as between him and them.

All the proceedings in the case of The Wren were according to the usual practice in prize causes. The libel was filed within three days, [83] and the monition was returnable, and the hearing upon the evidence *in preparatorio* had, within fourteen days, after the capture. The only claim put in was by the master, under oath, stating positively that he was the master and as such lawful bailee of the vessel, and claimed her for the owner. The further statement in the claim that Laird and no other person was the true and *bona fide* owner of the vessel, was only upon information and belief, and reference to her register in the possession of the court. That register was dated at Liverpool six months before, showed Laird to have been the owner, and had at its foot a memorandum stating that by the Merchant Shipping Act, 1854 (St. 17 & 18 Vict., ch. 104), it was not a document of title, and did not necessarily contain notice of all changes of ownership. The court ordered further proof from certain witnesses on specified interrogatories to be taken forthwith; and, after a final hearing upon the whole evidence, announced, within twenty-two days from the filing of the libel, its decree of condemnation, which was afterwards entered in form.

The decree of this court, on appeal, merely reversed the decree of condemnation and directed the vessel to be restored to the claimant. The references in the argument of counsel before this court, and in its judgment delivered by *Mr. Justice* Nelson, to the evidence upon the question whether she was the property of Laird or of other persons, were only by way of assisting in the determination of the sole question at issue, whether she was or was not enemy's property and, therefore, lawful prize. *The Wren*, 6 Wall., 582 [73 U.S., XVIII., 876]. The final decree of the district court recited the decree and mandate of this court, and in conformity therewith ordered the proceeds to be paid to Laird, the person appearing to be the owner by the ship's papers, and according to the best information and belief of the master, as stated in the claim put in by him. Neither the decree of this court nor the subsequent decree of the district court determined, or assumed to determine, any question of title as between Laird and Prioleau or other persons who had not appeared in the cause nor contested Laird's claim.

The libelants, in this suit against Laird personally, and against Foster & Thomson as his [84] garnishees, have the burden of proving that the fund in the hands of the garnishees belongs to Laird. There is nothing in the acts of Prioleau or of the garnishees as his attorneys which estops the garnishees to deny that fact and to put the libelants to proof of it. He had no knowledge of the prize proceedings until after the decree of condemnation. Having a title to the vessel under the bill of sale from Laird, he prosecuted the appeal from that decree in Laird's name and by Laird's authority. Whatever effect Prioleau's omission to disclose his own interest might have had, if discovered, upon the issue in the prize cause, or might have, by way of estoppel, if the present suit were brought by the United States, he has done nothing which Laird or Laird's creditors have been misled by or have acted upon. The title in the vessel, as between Laird and Prioleau, was in Prioleau. The garnishees, being attorneys both of Laird and of Prioleau, received the proceeds in the name of Laird, but for Prioleau. There being no estoppel, either of record or *in pais*, the libelants fail to prove that the fund belongs to Laird, and cannot, therefore, maintain their attachment.

This case does not present the question whether, if Prioleau were plaintiff or actor, seeking affirmative relief against Laird or against these libelants, he must be considered as standing in such a position by reason of his having concealed from the prize court his own title to the vessel, and of his having permitted restitution to be decreed to Laird, that the court would decline to assist him, upon the principle applied in *De Metton* v. *De Mello*, 12 East, 233, and 4 Camp., 420.

Decrees affirmed.

Mr. Justice **Blatchford** did not sit in this case, and took no part in its decision.

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JAMES D. RUSSELL ET AL., *Appts.*,

v.

ANNE R. ALLEN, EXRX., and WILLIAM R. ALLEN ET AL., EXRS. of THOMAS ALLEN, Deceased.

(See S. C., 17 Otto, 163-173.)

Charitable gift, when valid.

*William Russell, of St. Louis, "for the purpose of founding an institution for the education of youth in St. Louis County, Missouri," granted lands and personal property in Arkansas to John S. Horner and his successors, in trust "for the use and benefit of the Russell Institute of St. Louis, Missouri," with directions to the grantee to sell them, and to account for and pay over the proceeds "to Thomas Allen, President of the Board of Trustees of the said Russell Institute at St. Louis, Missouri," whose receipt should be a full discharge to the grantee. Held, that this was a charitable gift, valid against the donor's heirs and next of kin, although the institution was neither established nor incorporated in the lifetime of the donor or of Allen.

[No. 51.]

Argued Oct. 25, 1882. *Decided Mar. 5, 1883.*

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The bill in this case was filed in the court below, by the appellants, as heirs of William Russell, deceased, to have a certain trust, created by the said William Russell by certain instruments executed by him before his death for the purpose of founding an educational institution in St. Louis, declared invalid, and to establish in lieu thereof a trust in favor of the heirs of the said William Russell, and for an account.

The court below having sustained a general demurrer and dismissed the bill, the complainants appealed to this court.

The facts of the case are fully stated by the court.

Messrs. **William Brown** and *W. M. Springer*, for appellants:

There must be a donee capable of administering the fund in accordance with the intention of the donor.

Beekman v. *Bonsor*, 23 N. Y., 299; *Andrew* v. *N. Y. Bib. Soc.*, 4 Sandf., 156.

This was conceded in *Vidal* v. *Girard*, 2 How., 127; *Chambers* v. *St. Louis*, 29 Mo., 543.

This defect cannot be remedied by a Court of Chancery in this country.

White v. *Fisk*, 22 Conn., 53, 54, and cases there cited; *LePage* v. *McNamara*, 5 Iowa, 124; *Andrew* v. *New York Bib. Soc.*, 4 Sandf., 156; *Williams* v. *Williams*, 8 N. Y., 527; *Fontain* v. *Ravenal*, 17 How., 382 (58 U. S., XV., 85).

In the following cases the trust has been held invalid because of uncertainty of the charitable use.

White v. *Fisk*, 22 Conn., 50-54; *Trustees Bap. Asso.* v. *Hart*, 4 Wheat., 1; *Grimes* v. *Harmon*, 35 Ind., 198; *LePage* v. *McNamara*, 5 Iowa., 124; *Wheeler* v. *Smith*, 9 How., 55; *Owens* v. *Miss. Soc.*, 14 N. Y., 387; *Williams* v. *Williams*, 8 N. Y., 527; *Fontain* v. *Ravenal* (*supra*); *Wilderman* v. *Baltimore*, 8 Md., 551; *Dashiel* v. *Atty-Gen.*, 5 Har. & J., 392.

In cases which have been upheld, a discretion with power was given to some one to bring the trustee or donee into existence, or the use was so clearly defined as to be capable of being specifically executed by a Court of Chancery.

Ould v. *Wash. Hosp.*, 95 U. S., 303 (XXIV., 450); *Inglis* v. *Sailors' Snug Har.*, 3 Pet., 99.

The Statute of 43 Elizabeth is not suited to our condition of society, or institutions.

Williams v. *Williams*, 8 N. Y., 546; *Incorporated Soc.* v. *Richards*, 1 Dru. & War., 301; (S. C.) 4 Ir. Eq., 177; *Ould* v. *Hospital* (*supra*); *Chambers* v. *St Louis*, 29 Mo., 543.

Messrs. **Chester H. Krum** and *W. R. Donaldson*, for appellees:

A trust for educational purposes is a charity in a legal sense.

Perin v. *Carey*, 24 How., 465 (65 U. S., XVI., 701).

The education of youth was a charitable use under the express terms of the Statute of 43 Elizabeth, ch. 4.

The English statute is in force, both in Arkansas and Missouri, each having adopted the common law.

Wag. Stat., 886, sec. 1; *Guest* v. *Farley*, 19 Mo., 147; Gantt, Dig. Ark. Stat., sec. 772.

The later decisions, however, have exploded the doctrine that equity jurisdiction was at all dependent upon that statute.

Ould v. *Hospital*, 95 U. S., 303 (XXIV., 450); *Vidal* v. *Phila.*, 2 How., 128; *Fontain* v. *Ravenal*, 17 How., 379 (58 U. S., XV., 92); *Schmidt* v. *Hess*, 60 Mo., 595; 2 Story, Eq. Jur., sec. 1187.

"A devise to a corporation to be created by the Legislature is good as an executory devise. A distinction is taken between a devise *in præsenti* to one incapable, and a devise *in futuro*, to an artificial being to be created and enabled to take."

Ould v. *Hospital* (*supra*); *Inglis* v. *Sailors' Snug Har.*, 3 Pet., 99; *Pawlet* v. *Clark*, 9 Cranch, 292; *Vidal* v. *Girard*, 2 How., 197; *University* v. *Indiana*, 14 How., 268; *Beatty* v. *Kurtz*, 2 Pet., 566.

"It is immaterial whether the person to take be *in esse* or not * * * or how uncertain the objects may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to those objects."

Witman v. *Lex*, 17 Serg. & R., 88; 2 Story, Eq. Jur., secs. 1165-6 and cases cited; Adams, Eq., p. 66; *Schmidt* v. *Hess*, 60 Mo., 595; Ang. & Ames, Corp., sec. 184.

Mr. Justice **Gray** delivered the opinion of the court:

This is a bill in equity, filed on the 16th of April, 1878, by two of the heirs at law and next of kin of William Russell, of St. Louis, against Thomas Allen, to establish a trust in favor of Russell's heirs at law and next of kin, and for an account.

The bill alleges that on the 19th of July, 1855, William Russell and John S. Horner executed four indentures of trust, by each of which Russell, in consideration of $1 paid, "And for divers other good and valuable considerations, but chiefly for the purpose of founding an institu- [164]

*Head note by *Mr. Justice* GRAY.

NOTE.—*What is a charity; bequests valid for charitable purposes and those not.* See *note* to Vidall v. Girard's Exrs., 43 U. S. (2 How.), 127.

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tion for the education of youth in St. Louis County, Missouri," granted and conveyed to Horner, his executors and administrators or successors, in trust forever, certain lands and personal property in the State of Arkansas, to have and to hold the same unto him, his executors, administrators and successors, in trust "To and for the following uses and purposes, to wit: the said property is conveyed for the use and benefit of the Russell Institute of St. Louis, Missouri;" and empowered and directed him and them to sell the same as soon as conveniently might be, and to account for and pay over the proceeds yearly or oftener, deducting the reasonable expenses of executing the trust, "To Thomas Allen, President of the Board of Trustees of the said Russell Institute at St. Louis, Missouri, and his receipt therefor shall be a full discharge of the said party of the second part for the amount so paid and the application thereof;" and Horner's trust to be brought to a close and the net proceeds paid over as soon as conveniently might be, and if not concluded within ten years, the property remaining undisposed of to be sold by public auction and the proceeds paid over as before required. In each of the four indentures, reference was made to the three others, and it was "Declared that all of said conveyances, including this, are made to one and the same person for one and the same use and purpose, and that the same are and are to be deemed and taken and accounted for as one trust, according to the conditions of the deeds respectively, it having been intended by said deeds and this present one to convey all of the remaining property of the said William Russell in the said State of Arkansas to the said party of the second part, to and for the use and benefit of the said Russell Institute of St. Louis, Missouri." After this clause, in one of the indentures, were added the words "represented by their president as aforesaid." Each indenture contained a covenant by Horner "faithfully to perform the trust hereby created."

The bill further alleges that Horner, in the execution of his trust, has converted a large portion of the property into money; has paid over to Allen the sum of about $50,000; and [165] has conveyed and transferred to Allen the property remaining unsold, and that Allen holds and controls the whole fund, and has never applied to any court for aid in the disposition and application thereof, and has in no way used or recognized the fund as held by him in trust for the uses declared by Russell.

The bill further alleges that there was not at the time of the execution of the indentures aforesaid, nor before or since, any such educational institution as was referred to therein; that at the time of such execution Russell was, from paralysis, infirm in body and weak in mind; and that, while he then manifestly proposed to found such an institution, yet in his increasing incapacity of body and mind during the short period that intervened between that time and his death, he failed to accomplish his philanthropic purpose; that he died in 1856, without ever having founded such an institution, or delegated to Horner or to Allen, or to any other person or corporation, authority to organize a Russell Institute, and that no such authority has hitherto been exercised or claimed by any person or corporation, and there is and has been no donee capable of receiving, holding and administering the trust fund created by the indentures; that the beneficiaries of the trust, so far as can be determined by the terms of the indentures, are uncertain and indefinite, and the trust is invalid; and, there being no debts outstanding against Russell's estate, the trust fund belongs to his next of kin.

To this bill, Allen filed a general demurrer, which was sustained and the bill dismissed. [*Russell* v. *Allen*], 5 Dill., 235. The plaintiffs appealed to this court. Pending the appeal, Allen has died, and his executors have been made parties in his stead.

The deeds of gift state that they are made "Chiefly for the purpose of founding an institution for the education of youth in St. Louis County, Missouri;" they convey the property to Horner and his successors in trust "For the use and benefit of the Russell Institute of St. Louis, Missouri;" they direct him to sell the property and account for and pay over the proceeds "To Thomas Allen, President of the Board of Trustees of the said Russell Institute of St. Louis, Missouri," whose receipt shall be a full discharge of Horner; and they end by declaring that all these conveyances shall be deemed taken and accounted for as one trust, and that it is the [166] intention of the donor to convey the property included in all of them "to and for the benefit of the said Russell Institute of St. Louis, Missouri," to which one of the deeds adds "represented by their president as aforesaid."

The donor thus clearly manifests his purpose to found an institution for the education of youth in St. Louis, to be called by his name; and he executes this purpose by conveying the property to Horner in trust, to hold and convert into money and pay that money to the officers of the institute when incorporated and a board of trustees appo nted. The direction to pay the money to Allen, as president of the board of trustees, and the mention, at the close of one of the deeds, of the institute as represented by its president as aforesaid, clearly show that the fund is not to be paid to Allen individually; and while they imply the donor's wish that Allen should be the first president of the board of trustees of the institute, they do not make his appointment to and acceptance of that office a condition of the validity of the gift or of the carrying out of the donor's charitable purpose. The terms of the deeds clearly show that the donor did not contemplate or intend doing any further act to perfect his gift. It is not pretended that the allegations in the bill as to his weakness of body and mind amount to an allegation of insanity, and they are irrelevant and immaterial.

The principal grounds upon which the plaintiffs seek to maintain their bill are that the deeds create a perpetuity; that the uses declared are not charitable; and that, if the uses are charitable, there are no ascertained beneficiaries and no donee capable of assuming and administering the trust, and the uses are too indefinite to be specifically executed by a court of chancery. But these positions, as applied to the facts of the case, are inconsistent with the fundamental principles of the law of charitable uses, as

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established by the decisions of this and other courts exercising the ordinary jurisdiction in equity.

By the law of England from before the Statute of 43 Eliz., ch. 4, and by the law of this country at the present day (except in those States in which it has been restricted by statute or judicial decision, as in Virginia, Maryland and, [167] more recently, in New York), trusts for public charitable purposes are upheld under circumstances under which private trusts would fail. Being for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities; and the instruments creating them should be so construed as to give them effect if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form or manner pointed out by him cannot be followed. They may and, indeed, must be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity. If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery; and an omission to name trustees, or the death or declination of the trustees named, will not defeat the trust, but the court will appoint new trustees in their stead.

The previous adjudications of this court upon the subject of charitable uses, go far towards determining the question presented in this case. As the extent and effect of these adjudications have hardly been appreciated, it will be convenient to state the substance of them.

The case of *Baptist Asso.* v. *Hart*, 4 Wheat., 1, in which a bequest by a citizen of Virginia "To the Baptist Association that for ordinary meets at Philadelphia annually," as a "perpetual fund for the education of youths of the Baptist denomination who shall appear promising for the ministry," was declared void, was decided upon an imperfect survey of the early English authorities, and upon the theory that the English law of charitable uses, which, it was admitted, would sustain the bequest, had its origin in the Statute of Elizabeth, which had been repealed in Virginia. That theory has since, upon a more thorough examination of the precedents, been clearly shown to be erroneous. *Vidal* v. *Girard*, 2 How., 127; *Perin* v. *Carey*, 24 How., 465 [65 U. S., XVI., 701]; *Ould* v. *Washington Hospital*, 95 U. S., 303 [XXIV., 450]. And the only cases in which [168] this court has followed the decision in *Baptist Asso.* v. *Hart*, have, like it, arisen in the State of Virginia, by the decisions of whose highest court charities, except in certain cases specified by statute, are not upheld to any greater extent than other trusts. *Wheeler* v. *Smith*, 9 How., 55; *Kain* v. *Gibboney*, 101 U. S., 362 [XXV., 813].

In *Beatty* v. *Kurtz*, 2 Pet., 566, the owners of a tract of land, afterwards part of Georgetown, laid it out as a town, and made and recorded a plan of it, marking one lot as "for the Lutheran Church;" and the Lutherans of the town, a voluntary society not incorporated, erected and used a building upon this lot as a church for public worship, and fenced in and used the land as a churchyard, for the burial of others as well as of Lutherans, for fifty years. Upon these facts, it was held that the Bill of Rights of Maryland, affirming the validity of any sale, gift, lease or devise of land, not exceeding two acres, for a church and burying ground, recognized, to this extent at least, the doctrine of charitable uses, under which no specific grantee or trustee was necessary; that this land had been dedicated to a charitable and pious use, beneficial to the inhabitants generally, which might at all times have been enforced through the intervention of the government as *parens patriæ*, by its Attorney-General or other law officer; and that a committee of the society might maintain a bill in equity to restrain by injunction the heirs of the original owners from disturbing that use.

In *Inglis* v. *Sailors' Snug Harbor*, 3 Pet., 99, a citizen of New York devised land to the Chancellor of the State, the Mayor of the City, and others, designating them all by their official titles only, and to their respective successors, in trust out of the rents and profits to build a hospital for aged, decrepid and worn out sailors, as soon as the trustees should judge that the proceeds would support fifty such sailors, and to maintain the hospital and support sailors therein forever; and further declared it to be his will and intention, that if this could not be legally done without an Act of incorporation, the trustees should apply to the Legislature for such an Act, and that the property should, at all events, be forever appropriated to the above uses and purposes. An Act incorporating the trustees was passed and the hospital was established. A majority of the court held that the trustees took personally and not in [169] their official capacities, and that upon their incorporation the legal title vested by way of executory devise in the corporation as against the heirs at law; and the dissenting Judges differed only as to the legal title, and not as to the validity of the charitable trust.

In *McDonogh* v. *Murdoch*, 15 How., 367, a citizen of Louisiana, declaring his chief object to be the education of the poor of the Cities of New Orleans and Baltimore, made a devise and bequest to the two cities, one half to each, the income to be applied by boards of managers, who should be appointed by either city, but whose powers and duties he defined, and who should obtain acts of incorporation, if necessary, for the education of the poor and other charitable purposes, in various ways specified. And in case the two cities should combine together and knowingly and willfully violate the conditions, then he gave the whole property to the States of Louisiana and Maryland, in equal halves "for the purpose of educating the poor of said States under such a general system of education as their respective Legislatures shall establish by law." The court held that the devise to the cities was valid, and that the testator's directions as to the management of the income "must be regarded as subsidiary to the general objects of his will, and whether legal and practicable, or otherwise, can exert no influence over the question of its validity;" and expressed the opinion that the failure of the devise to the cities would not have benefited the heirs at law, for in that event the limitation

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over to the States of Louisiana and Maryland would have been operative. 15 How., 404, 415.

In *Fontain* v. *Ravenal*, 17 How., 369 [58 U. S., XV., 80], a testator, residing at the time of his death in Pennsylvania, appointed his wife and three others to be executors of his will, and authorized his executors or the survivor of them, after the death of his wife, to dispose of the residue of his estate "For the use of such charitable institutions in Pennsylvania or South Carolina as they or he may deem most beneficial to mankind, and so that part of the colored population in each of the said States of Pennsylvania and South Carolina shall partake of the benefits thereof." In that case, the testator had not himself defined the nature of the charitable uses, nor authorized anyone but his [170] executors to designate them; and the point decided was that, they having all died without doing so, the Circuit Court of the United States for the District of Pennsylvania could not sustain a bill to establish them, filed by charitable institutions in Pennsylvania and South Carolina in the name of the administrator *de bonis non* and next of kin of the testator. The question there was, whether the authority of a court of chancery, under such circumstances, belonged to its ordinary jurisdiction over trusts, or to its prerogative power under the sign manual of the Crown, which last has never been introduced into this country. See, Boyle, Charities, 238, 239; *Jackson* v. *Phillips*, 14 Allen, 539, 576, 588. No question of the validity of the gift as against the next of kin was presented; and even *Chief Justice* Taney, who, differing from the rest of the court, alone asserted that "If the object to be benefited is so indefinite and so vaguely described that the bequest could not be supported in the case of an ordinary trust, it cannot be established in a court of the United States upon the ground that it is a charity," distinctly admitted that a suit by an heir or representative of the testator to recover property or money bequeathed to a charity could not be maintained in a court of the United States if the bequest was valid by the law of the State. 17 How., 395, 396 [58 U. S., XV., 91]. Accordingly, in *Lorings* v. *Marsh*, 6 Wall., 337 [73 U. S., XVIII., 802], the court dismissed a bill by the next of kin to set aside a bequest by a citizen of Massachusetts "in trust for the benefit of the poor," by means of such incorporated charitable institutions as should be designated by three persons appointed by the trustees or their successors; such a bequest being valid under the law of Massachusetts as habitually administered in her courts.

In *U. S.* v. *Fox*, 94 U. S., 315 [XXIV., 192], this court, affirming the judgment of the Court of Appeals of New York in 52 N. Y., 530, held a devise of land in New York to the United States, for the purpose of assisting to discharge the debt contracted by the war for the suppression of the rebellion, to be invalid, solely because by the law of New York, as declared by recent decisions of the Court of Appeals, none but a natural person, or a corporation created by that State with authority to take by devise, could be a devisee of land in that State. Where not prohibited by statute, a devise or bequest [171] for such a purpose is a good charitable gift. *Nightingale* v. *Goulburn*, 5 Hare, 484, and 2 Phil., 594; *Dickson* v. *U. S.*, 125 Mass., 311.

In *Ould* v. *Hospital* [*supra*], a citizen of Washington devised land in the District of Columbia to two persons named, in trust to hold it "as and for a site for the erection of a hospital for foundlings," to be built by a corporation to be established by Act of Congress and approved by the trustees or their successors and, upon such incorporation, to convey the land to the corporation in fee. It was contended for the heirs at law that the devise was void, because it was to a corporation to be established in the future, and might not take effect within the rule against perpetuities, and because of the uncertainty of the beneficiaries; and reference was made to the Maryland Statute of Wills of 1798, still in force in the District of Columbia, providing that no will should "Be effectual to create any interest or perpetuity, or make any limitation, or appoint any uses, not now permitted by the Constitution or laws of the State," and to a series of decisions in Maryland, holding that the Statute of Elizabeth was not in force in that State, and that charitable uses were there governed by the same rules as private trusts. But those decisions having been made since the separation of the District of Columbia from the State of Maryland, the court held that the case must be determined upon general principles of jurisprudence, and that the devise was valid.

The objection to the validity of the gift before us, as tending to create a perpetuity, is fully met by the cases of *Inglis* v. *Sailors' Snug Harbor*, *McDonogh* v. *Murdoch* and *Ould* v. *Hospital*, above cited, which clearly show that a gift in trust for a charity not existing at the date of the gift, and the beginning of whose existence is uncertain, or which is to take effect upon a contingency that may possibly not happen within a life or lives in being and twenty-one years afterwards, is valid, provided there is no gift of the property meanwhile to or for the benefit of any private corporation or person. Those cases are in accord with English decisions of the highest authority, of which it is sufficient to refer to the leading case of *Downing College*, reported under the name of *Atty-Gen.* v. *Downing*, in Wilmot, 1 Dick., 414 and 2 Amb., 550, [172] 571, and under the name of *Atty-Gen.* v. *Bowyer*, in 3 Ves., 714, 5 Ves., 300 and 8 Ves., 256, and to the recent case of *Chamberlayne* v. *Brockett*, L. R. 8 Ch. App., 206. See, also, *Sanderson* v. *White*, 18 Pick., 328, 336; *Odell* v. *Odell*, 10 Allen, 1.

That the gift is for a charitable use cannot be doubted. All gifts for the promotion of education are charitable, in the legal sense. The Smithsonian Institution owes its existence to a bequest of James Smithson, an Englishman, "To the United States of America, to found at Washington, under the name of the Smithsonian Institution, an establishment for the increase and diffusion of knowledge among men." See, Acts of Congress of first July, 1836, ch. 252 [5 Stat. at L., 64]; 10th August, 1846, ch. 178 [9 Stat. at L., 102]. This was held by *Lord* Langdale, Master of the Rolls, in *U. S.* v. *Drummond*, decided in 1838, to be a good charitable bequest. The decision on this point is not contained in the regular reports, but appears by the letters of Mr. Rush, then Minister to England (printed in the documents relating to the Origin and History of the Smithsonian Institution, published by the Institution in 1879), to have been

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made after full argument in behalf of the United States by Mr. Pemberton (afterwards Mr. Pemberton Leigh and *Lord* Kingsdown), and on deliberate consideration by the Master of the Rolls. History of Smithsonian Institution, 15, 19, 20, 56, 58, 62. And it was cited as authoritative in *Whicker* v. *Hume*, 7 H. L. Cas., 124, 141, 155, in which the House of Lords held that a bequest in trust to be applied, in the discretion of the trustees, "For the benefit and advancement and propagation of education and learning in every part of the world, as far as circumstances will permit," was a valid, charitable bequest and not void for uncertainty.

"Schools of learning, free schools and scholars in universities," are among the charities enumerated in the Statute of Elizabeth; and no trusts have been more constantly and uniformly upheld as charitable than those for the establishment or support of schools and colleges. Perry, Trusts, sec. 700. That the gift "For the purpose of founding an institution for the education of youth in St. Louis County, Missouri," [173] to be managed by a board of trustees, is sufficiently definite, is shown by the decisions of this court in *Perin* v. *Carey* and *Ould* v. *Hospital*, above cited, as well as by that of the House of Lords in *Dundee Magistrates* v. *Morris*, 3 Macq., 134.

The law of Missouri, as declared by the Supreme Court of that State, sustains the validity of this gift. In *Chambers* v. *St. Louis*, 29 Mo., 543, a devise and bequest to the City of St. Louis, in trust "To be and constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis on their way *bona fide* to settle in the West," which was objected to for indefiniteness in the object, as well as for want of capacity in the trustee to take, was held to be valid. And in *Schmidt* v. *Hess*, 60 Mo., 591, a grant of a parcel of land to the Lutheran Church for a burial ground was held to be a valid, charitable gift, which equity would execute by compelling a conveyance to the trustees of a church proved to be the church intended by the testator, although it was not incorporated at the time of the gift. We have been referred to nothing having any tendency to show that the law of Arkansas, in which the lands granted lie, is different.

The money paid and the lands conveyed by Horner to Allen, stand charged in the hands of Allen and his executors with the same charitable trust to which they were subject in the hands of Horner.

Steps to organize such an institution as is described in the deeds, may be taken either by the Attorney-General or other public officer of the State, or by individuals. Whenever an institute for the education of youth in St. Louis shall have been incorporated and shall claim the property, it will then be a matter for judicial determination in the proper tribunal whether it meets the requirements of the gift. The only question now presented is of the validity of the gift as against the donor's heirs at law and next of kin.

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 179.

WALLACE S. JONES, Surviving Exr. of [174] GEORGE NOBLE JONES, Deceased; WILLIAM H. HARRISON, Exr. of MARY G. HARRISON, Deceased; ANNE M. CUTHBERT, Widow, and ALFRED CUTHBERT, Jr., and MARY C. CUTHBERT, Children and Heirs at Law of ALFRED CUTHBERT, Deceased, and WILLIAM A. RITCHIE, *Appts.*,

v.

WILLIAM N. HABERSHAM, and WILLIAM HUNTER, Exrs. of MARY TELFAIR, Deceased; TRUSTEES OF THE INDEPENDENT PRESBYTERIAN CHURCH OF SAVANNAH, THE UNION SOCIETY OF SAVANNAH, THE WIDOWS' SOCIETY OF SAVANNAH, THE PRESBYTERIAN CHURCH OF THE CITY OF AUGUSTA, THE GEORGIA HISTORICAL SOCIETY AND VIRGINIA GOULD.

(See S. C., 17 Otto, 174-191.)

Will, suspension of legacies—Georgia law—charitable devise, when valid—law of State—devise for church purposes—for relief of widows and orphans—for schools—for public library—for hospital—rule against perpetuities—restrictions by charter—Georgia Constitution.

*1. In a will containing many legacies, bequests and devises, each present and immediate in form, to individuals and to charitable institutions, a clause expressing a wish and direction that none of the legacies, bequests or devises "shall be executed or take effect until" a certain memorial hall (in fact nearly finished at the time of the execution of the will and of the testator's death) on land previously conveyed by the testator in trust, "shall be completed and entirely paid for out of my estate," does not suspend the vesting, but only the payment and carrying out of the various legacies, bequests and devises.

2. Section 2419 of the Code of Georgia of 1873 does not invalidate a charitable devise contained in a will executed within ninety days before the testator's death, unless he leaves a wife or child or descendants of a child.

3. The validity of a charitable devise as against the heir at law depends upon the law of the State where the land lies.

4. The validity of a charitable bequest as against the next of kin, depends upon the law of the State of the testator's domicil.

5. The law of charities is fully adopted in Georgia, as far as is compatible with a free government where no royal prerogative is exercised.

6. A parcel of land, with buildings thereon, was devised to the Trustees of the Independent Presbyterian Church in Savannah, an incorporated religious society, "upon the following terms and conditions, and not otherwise:" 1. That the Trustees should appropriate annually out of the rents and profits the sum of $1,000 "To one or more Presbyterian or Congregational Churches in the State of Georgia in such destitute and needy localities as the proper officers of said Independent Presbyterian Church may select, so as to promote the cause of religion among the poor and feeble churches of the State. 2. That the Trustees should not materially alter the pulpit or galleries of the present church edifice, or sell the lot on which the Sabbath School room of the church stood. 3. That the Trustees should keep in order the burial place of the testa-

*Head notes by *Mr. Justice* GRAY.

NOTE.—*What is a charity; bequests valid for charitable purposes and those not.* See *note* to Vidall v. Girard's Exrs., 43 U. S. (2 How.), 127.

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tor, which he devised to them for that purpose. Held, that, under the Code of Georgia of 1873, section 3157, the charitable purposes named in the first and third conditions were good charitable uses, sufficiently defined; that the Trustees were capable of taking the devise, and that its validity was not impaired by the conditions subsequent.

7. A devise to a society incorporated "for the relief of distressed widows and the schooling and maintaining of poor children," of buildings and land, to "use and appropriate the rents and profits for the support of the school and charities of said institution, without said lot being at any time liable for the debts or contracts of said society," is a good charitable devise.

8. A devise to a society incorporated "for the relief of indigent widows and orphans in the City of Savannah," of buildings and land, "the rents and profits to be appropriated to the benevolent purposes of said society," is a good charitable devise.

9. The rule against perpetuities does not apply to charities; and if a devise is made to one charity in the first instance, and then over, upon a contingency which may not take place within the limit of that rule, to another charity, the limitation over to [175] the second charity is good.

10. Restrictions imposed by the charter of a corporation upon the amount of property that it may hold, cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the State.

11. The provision of the Constitution of Georgia of 1868, which declares that "The General Assembly shall have no power to grant corporate powers and privileges to private companies (with certain exceptions), but it shall prescribe by law the manner in which such powers shall be exercised by the courts," does not take away from the General Assembly the power to amend the charters of existing corporations by modifying or enlarging their powers.

12. A devise, to a historical society, of a house containing a collection of books, documents and works of art, in trust to keep and preserve the same, with the collection therein, and other books and works of art to be purchased by the officers of the society out of the income of a fund bequeathed by the devisor for the purpose, "as a public edifice for a library and academy of arts and sciences," and "to be open for the use of the public" on such terms and under such reasonable regulations as the society may prescribe, is a good charitable devise, and is not invalidated by a requirement to place and keep over the entrance a marble slab with the name of the testator engraved thereon; and if the society is incapable of executing the trust, a court of equity, in the exercise of its ordinary jurisdiction, and under section 3195 of the Code of Georgia of 1873, may appoint a new trustee.

13. A devise and bequest in trust for the building, endowment and maintenance of "A hospital for females within the City of Savannah, on a permanent basis, into which sick and indigent females are to be admitted and cared for in such manner and on such terms as may be defined and prescribed by" certain directresses named and their associates, who are to obtain an Act of incorporation for the purpose, is a valid charitable devise and bequest, although no time is limited for the erection of the building or the obtaining of the charter.

14. A bequest "To the first Christian church erected or to be erected in the Village of Telfairville in Burke County, or to such persons as may become trustees of the same," is a good charitable bequest.

[No. 82.]

Argued Nov. 13, 14, 1882. Decided Mar. 5, 1883.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

The bill in this case was filed in the court below, by the appellants as heirs at law of Mary Telfair, deceased, to have the devises and bequests of the will of said Mary Telfair adjudged void, and a resulting trust declared in their favor.

The probate of the will had been contested in the state courts by various classes of relatives of the testatrix, and had been established and admitted to probate against their opposition.

Wetter v. *Habersham*, 60 Ga., 198; *Jones* v. *Habersham*, 60 Ga., 203; *Jones* v. *Habersham*, 63 Ga., 146.

The court below having dismissed the bill, on general demurrer, the complainants appealed to this court.

The case is fully stated by the court.

Messrs. **W. W. Montgomery**, *Charles N. West* and *Salem Dutcher*, for appellants.

Messrs. **A. R. Lawton, W. S. Chisholm** and *C. Jones, Jr.*, for appellees.

Mr. Justice **Gray** delivered the opinion of the court:

This is a bill in equity, by the heirs at law and next of kin of Miss Mary Telfair of Savannah, against the executors of her will and the devisees and legatees named therein, to have the devises and bequests adjudged void and a resulting trust declared in favor of the plaintiffs. The will, which was executed the day before the testatrix died and was afterwards admitted to probate in the court of appropriate jurisdiction of the State of Georgia, disposed of property amounting to more than $650,000, contained many devises and bequests to individuals and to charitable objects, and appointed the executors of the will trustees under its provisions. The defendants filed a general demurrer. The opinion delivered by *Mr. Justice* Bradley in the circuit court sustaining the demurrer and dismissing the bill, is reported in 3 Woods, 443. [176]

The plaintiffs, in the first place, contend that, by the 22d clause of the will, all the devises and bequests, as well those to private persons as those for charitable purposes, are brought within the rule against perpetuities, by which every devise or bequest is void which may by possibility not take effect within a life or lives in being and twenty-one years afterwards. That clause is as follows:

"Twenty-second. It is my wish, and I hereby so direct, that none of the legacies, bequests and devises in any of the clauses of this my will shall be executed or take effect until the building and other improvements on the lot on the corner of Gaston and Whittaker Streets, and known as the Hodgson Memorial Hall, which I have conveyed in trust to the Georgia Historical Society, shall be completed and entirely paid for out of my estate."

The bill, which was filed nearly four years after the death of the testatrix, alleges and the demurrer admits, that the building and other improvements referred to were in course of construction at the time of her death, but were not completed until many months thereafter, but whether they were yet entirely paid for, the plaintiffs were not certainly informed; and that, if not paid for, it was the only debt known to them, now existing against the estate:

Reading the 22d clause in connection with the other parts of the will, and in the light of the attending facts, it is quite clear that the words "take effect" are used by the testatrix as synonymous with or equivalent to the word "executed," with which they are coupled, and [177] not as signifying that the devises and bequests shall not vest immediately, but only that they shall not be paid or carried out until the debt contracted by the testatrix for the construction of the Hodgson Memorial Hall shall have been paid out of her estate. Each devise and

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bequest is present and immediate in form, introduced by the words "I give, devise and bequeath." The bill shows that the building and improvements referred to were, at the time of the death of the testatrix, in the course of construction, and so far advanced that they were actually completed within some months afterwards, so that the probable cost must have been capable of estimation at the time of the making of the will. The 22d clause is but a declaration of what the law would require, that the debt of the testatrix for the construction of the memorial hall must be first paid out of her estate before her devisees and legatees receive any benefit therefrom.

The next objection, which touches all the devises to charitable purposes, is based on the following provision of the Code of Georgia of 1873:

"Section 2419. No person leaving a wife or child, or descendants of child, shall by will devise more than one third of his estate to any charitable, religious, educational or civil institution, to the exclusion of such wife or child; and in all cases the will containing such devise shall be executed at least ninety days before the death of the testator, or such devise shall be void."

The plaintiffs contend that the latter part of this section applies to every will containing a charitable devise, whether the testator does or does not leave a wife or child or the descendants of a child; and that, therefore, although this testatrix left no issue and had never been married, yet the will having been executed less than ninety days before her death, the charitable devises contained therein are void.

In support of this position, reference is made to cases in the courts of New York and Pennsylvania. *Harris* v. *Slaght*, 46 Barb., 470; *S.C.*, *nom.*, *Harris* v. *Am. Bible Soc.*, 2 Abb. App., 316; *Lefevre* v. *Lefevre*, 59 N. Y., 434; *Price* v. *Maxwell*, 28 Pa., 23; *McLean* v. *Wade*, 41 Pa., [178] 266; *Miller* v. *Porter*, 53 Pa., 292; *Rhymer's Appeal*, 93 Pa., 142. But the statutes under which those cases were decided were quite different from that of Georgia.

The enactment in New York formed part of an Act for the incorporation of charitable societies, and is as follows: "Any corporation formed under this Act shall be capable of taking, holding or receiving any property, real or personal, by virtue of any devise or bequest contained in any last will or testament of any person whatsoever, the clear annual income of which devise or bequest shall not exceed the sum of $10,000; *Provided*, No person leaving a wife or child or parent, shall devise or bequeath to such institution or corporation more than one fourth of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of such one fourth; and no such devise or bequest shall be valid in any will which shall not have been made and executed at least two months before the death of the testator." Statute of N. Y. of 1848, ch. 319, sec. 6; 2 N. Y. R. S. (ed. 1859), ch. 18, tit. 7, sec. 6. The leading clause of that section, to which the last clause of the same section was held to relate, and which is wholly omitted in the Georgia Statute, spoke of devises and bequests of charitable corporations "contained in any last will or testament of any person whatsoever."

The provision of the corresponding Statute of Pennsylvania was still plainer; for it did not mention wife or child at all, but enacted in the most positive words that "No estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic, or to any person, in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible and, at the time, disinterested witnesses, at least one calendar month before the decease of the testator or alienor; and all dispositions of property contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin or heirs, according to law; *Provided*, That every disposition of property within said period, *bona fide* made for a fair valuable consideration, shall not be hereby avoided." Stat. Pa. of 1855, ch. 347, sec 11; Purd. Dig., 10th ed., 208.

But in the provision on which the appellants [179] rely, which is inserted in the chapter on wills, of the Code of Georgia, and is the only provision as to charitable devises contained in that chapter, the leading clause is limited to the will of a person leaving a wife or child or descendants of a child, containing a devise to a charitable institution to the exclusion of such wife or child; and the words in the subsequent clause, "In all cases the will containing such devise," naturally, if not necessarily, refer to a will containing a devise to such an institution by a person leaving a wife or issue. The provision has been so construed by the Supreme Court of Georgia in a case decided in 1867, and again in 1878 in the case of this very will. *Reynolds* v. *Bristow*, 37 Ga., 283; *Wetter* v. *Habersham*, 60 Ga., 193, 194, 203. It is suggested by the learned counsel for the appellants that what was said upon this point in each of those cases was *obiter dictum*, because the question at issue was not of the construction or effect of the will, but only whether it should be admitted to probate. But the reports clearly show that the court considered that the question whether the will was illegal and void, so far as regarded the charitable devises, because in contravention of this statute, was presented for adjudication upon the offer of the whole will for probate.

The separate objections taken to the several charitable devises and bequests remain to be considered.

According to the uniform course of the decisions of this court, the validity of these devises, as against the heirs at law, depends upon the law of the State in which the lands lie, and the validity of the bequests, as against the next of kin, upon the law of the State in which the testatrix had her domicil. *Vidal* v. *Girard*, 2 How., 127; *Wheeler* v. *Smith*, 9 How., 55; *McDonogh* v. *Murdoch*, 15 How., 367; *Fontain* v. *Ravenel*, 17 How., 369, 384, 394 [58 U. S., XV., 80, 86, 90]; *Perin* v. *Carey*, 24 How., 465 [65 U. S., XVI., 701]; *Lorings* v. *Marsh*, 6 Wall., 337 [73 U. S., XVIII., 802]; *U. S.* v. *Fox*, 94 U. S., 315 [XXIV., 192]; *Kain* v. *Gibboney*, 101 U. S. 362 [XXV., 813]; *Russell* v. *Allen*, *ante*, 397.

The Code of Georgia of 1873 contains the following provisions on the subject of charitable uses:

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"Sec. 2468. A devise or bequest to a charitable use will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode [180] in which he directs it to be done fails from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator."

"Sec. 3155. Equity has jurisdiction to carry into effect the charitable bequest of a testator, or founder, or donor, where the same are definite and specific in their objects, and capable of being executed.

Sec. 3156. If the specific mode of execution be for any cause impossible, and the charitable intent be still manifest and definite, the court may, by approximation, give effect in a manner next most consonant with the specific mode prescribed.

Sec. 3157. The following subjects are proper matters of charity for the jurisdiction of equity: 1. The relief of aged, impotent, diseased or poor people. 2. Every educational purpose. 3. Provisions for religious instruction or worship. 4. For the construction or repair of public works, or highways, or other public conveniences. 5. The promotion of any craft or persons engaging therein. 6. For the redemption or relief of prisoners or captives. 7. For the improvement or repair of burying grounds or tombstones. 8. Other similar subjects, having for their object the relief of human suffering, or the promotion of human civilization.

Sec. 3158. A charity once inaugurated is always subject to the supervision and direction of a court of equity, to render effectual its purpose and object."

These provisions were evidently enacted to clear up the doubts created by previous conflicting decisions and opinions of the Supreme Court of Georgia. *Beall* v. *Fox*, 4 Ga., 404; *Am. Col. Soc.* v. *Gartrell*, 23 Ga., 448; *Walker* v. *Walker*, 25 Ga., 420; *Beall* v. *Drane*, 25 Ga., 430. They show, as was well observed by *Mr. Justice* Bradley in the circuit court, "That the law of charities is fully adopted in Georgia, as far as is compatible with a free government where no royal prerogative is exercised." [*Jones* v. *Habersham*], 3 Woods, 469. And such has been the construction given to the corresponding sections of the Code of 1865 by the Supreme Court of the State in a well considered judgment, in which it was held that charitable bequests, the general objects of which the testator had pointed out, or fixed any means for pointing out, were sufficiently "definite and specific in their objects, and capable of being [181] executed," under the provisions of the Code and the ordinary jurisdiction of courts of chancery; and, therefore, that a bequest to a county court of a sum of money to be placed in the hands of four men, who were to give security, and lend out the principal, and pay over the interest annually to that court, "to pay for the education of poor children belonging to the county," was a good charitable bequest. *Newson* v. *Starke*, 46 Ga., 88.

In the will before us, the first of the devises to charitable uses is as follows:

"Tenth. I do hereby give, devise and bequeath to the Trustees of the Independent Presbyterian Church of the City of Savannah all that full lot of land in the City of Savannah on the southwest corner of Broughton and Bull Streets, with the buildings and improvements thereon, to have and to hold the same on the following terms and conditions, and not otherwise, to wit: First: That the Trustees of the said Independent Church shall appropriate annually, out of the rents and profits of said lot and improvements, the sum of $1,000 to one or more Presbyterian or Congregational Churches in the State of Georgia, in such destitute and needy localities as the proper officers of said Independent Presbyterian Church may select, so as to promote the cause of religion among the poor and feeble churches of the State. Second. This gift and devise is made on the further condition that neither the Trustees nor any other officer of said Independent Presbyterian Church will have or authorize any material alteration or change made in the pulpit or galleries of the present church edifice on the corner of Bull and South Broad Streets, but will permit the same to remain substantially as they are, subject only to proper repairs and improvements; nor shall they sell or aliene the lot on which the Sabbath School room of said church now stands, but shall hold the same to be improved in such manner as the trustees or pew-holders may direct. Third. Upon the further condition that the Trustees of said Independent Presbyterian Church will keep in good order, and have thoroughly cleaned up every spring and autumn, my lot in the cemetery of Bonaventure, and that no interment or burial of any person shall ever take place either in the vault or within the enclosure of said lot; and for the purpose of having the same protected and cared for, I hereby give, devise and bequeath my said lot in the Bonaventure Cemetery to the Trustees of the Independent Presbyterian Church and [182] their successors."

The Act of the Legislature of Georgia of the 8th of December, 1806, incorporating the Trustees of the Presbyterian Church of the City of Savannah, whose name, by a subsequent Act of the 16th of May, 1821, has been changed to that by which they are called in the will, provides, in section 2, that they "And their successors in office shall be invested with all manner of property, real and personal, all moneys due and and to grow due, donations, gifts, grants, privileges and immunities whatsoever, which shall or may belong to said Presbyterian Church at the time of the passing of this Act, or which shall or may at any time or times hereafter be granted, given, conveyed or transferred to them, or their successors in office, to have and to hold the same to the said trustees, and their successors in office, to the only proper use, benefit and behoof of the said church forever;" in section 4, that "Nothing herein contained shall be construed to vest in the said trustees any right or title to any estate or property whatsoever, real or personal, other than such as doth, or may rightfully and lawfully, belong to the said Presbyterian Church or congregation, hereby made a body corporate;" and in section 5, that "It shall not be lawful for said Trustees or their successors in office, at any time or times hereafter, to grant, bargain, sell, aliene or convey any real estate whatsoever, belonging to the said church, to any person or persons, under any pretense or upon any consideration whatso-

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ever, so as to dispose of the fee simple thereof."

It is objected that this corporation is not empowered under its charter to accept and administer this charity. But it is a novel proposition, as inconsistent with the rules of law, as it is with the dictates of religion, that a Christian church or religious society cannot receive and distribute money to poor churches of its own denomination so as to promote the cause of religion in the State in which it is established.

To hold this gift to be too indefinite and uncertain, would be to disregard the elementary principles of the law of charitable uses. The appropriation of a certain sum annually to one or more churches of a certain denomination in such destitute and needy localities as the trustees may select, so as to promote the cause of religion among the poor and feeble churches of the State, describes the general nature of the [183] charitable purpose, while leaving the selection of the particular objects to the trustees, and is a good charitable use, sufficiently defined. *Bartlet* v. *King*, 12 Mass., 537; *Going* v. *Emery*, 16 Pick., 107; *Universalist Society* v. *Fitch*, 8 Gray, 421.

The other objections to the validity of this devise are equally unavailing. The condition that no material alteration or change, but only proper repairs and improvements, shall be made in the pulpit or galleries of the present church (even if illegal, which we see no reason for supposing), is a condition subsequent, relating to the care and use of the property after the gift shall have vested in the devisee, and cannot, therefore, affect the original validity of the gift.

The condition that the trustees shall not alienate the land on which the schoolroom stands is also a condition subsequent, and is in accordance with the 5th section of their charter, and with the general law upon the subject. It will not prevent a court of chancery from permitting, in case of necessity arising from unforeseen change of circumstances, the sale of the land and the application of the proceeds to the purposes of the trust. Tudor, Charitable Trusts, 2d ed., 298; *Stanley* v. *Colt*, 5 Wall., 119, 169 [72 U. S., XVIII., 502, 510].

The condition as to the care and keeping of the tomb or burial place of the testatrix is likewise a condition subsequent and, even if invalid, would not defeat the charitable gift. *Giles* v. *Fatherless & Widows Society*, 10 Allen, 355. In England there has been a difference of opinion upon the question whether the maintenance and repair of the tomb or monument of the donor is a good charitable use. Down to the time of the American Revolution, as by the civil law, it appears to have been held that it was. 3 Inst., 202; *Masters* v. *Masters*, 1 P. Wms., 421, 423 and *note*; *Durour* v. *Motteux*, 1 Ves., Sr., 320; *Gravenor* v. *Hallum*, 2 Ambl., 643; Boyle, Charities, 45–51; Justinian's Inst., lib. 2, tit. 1, secs. 8, 9; Dig. 11, 7, 2, 5; 47, 12, 3, 2. According to the later English cases, it is not. *Doe* v. *Pitcher*, 3 M. & S., 407; *Same* v. *Same*, 6 Taunt., 359; *S. C.*, 2 Marsh., 61; *Willis* v. *Brown*, 2 Jur., 987; *Hoare* v. *Osborne*, L. R., 1 Eq. Cas., 585; *Fiske* v. *Atty-Gen.*, L. R., 4 Eq., 521; *In re Birkett*, 9 [184] Ch. D., 576. See, also, *Dexter* v. *Gardner*, 7 Allen, 243, 247. But it is unnecessary to examine and weigh these conflicting authorities, or to determine whether the devise of the burial place of the testatrix, and the direction to keep it in good order, could be upheld in the absence of local statute, because they are clearly valid under the Code of Georgia, which enumerates among charitable uses "the improvement or repair of burying grounds or tombstones." Code of Georgia of 1873, section 3157, cl. 7.

The 11th clause of the will contains a devise to the Union Society of Savannah of a parcel of land in that city, with the buildings and improvements thereon, "But on the express condition that said society shall not sell or alienate said lot, but shall use and appropriate the rents and profits of the same for the support of the school and charities of said institution, without said lot being at any time liable for the debts or contracts of said society." The Union Society was incorporated by a statute of the 14th of August, 1786, "For the relief of distressed widows and the schooling and maintaining of poor children."

The 12th clause devises to the Widows' Society of Savannah another parcel of land in that city, "On which the improvements now consist of four brick tenement buildings, the rents and profits of the same to be appropriated to the benevolent purposes of said society, but this devise is made on condition the said Savannah Widows' Society shall not sell or alienate said lot or improvements, nor hold the same subject to the debts, contracts or liabilities of said society." The Widows' Society was incorporated, as stated in the title and repeated in the body of its charter granted in 1837, "For the relief of indigent widows and orphans in the City of Savannah."

"The relief of aged, impotent and poor persons" is within the very words of the Statute of 43 Eliz., ch. 4, sec. 1, and of the Code of Georgia of 1873, sec. 3157; and all educational purposes are within the terms of that Code, and within the scope and principle of the Statute of Elizabeth. *Russell* v. *Allen* [*ante*, 397]. The fact that the gift to the Widows' Society is directed "To be appropriated to the benevolent purposes of said society," does not affect its validity, because the charter of the society shows that all its purposes are charitable, in the legal sense. It is only when a gift might be applied [18 to benevolent purposes which are not charitable in that sense, that the gift fails. *Saltonstall* v. *Sanders*, 11 Allen, 446; *Suter* v. *Hilliard*, 132 Mass., 412; *DeCamp* v. *Dobbins*, 29 N. J. Eq., 36; *Adye* v. *Smith*, 44 Conn., 60; *In re Jarman's Estate*, 8 Ch. D., 584. The conditions subsequent have no greater effect than the corresponding conditions in the 10th clause, already considered.

The next clause of the will contains a provision applicable to the 10th, 11th and 12th clauses, and is as follows:

"Thirteenth. Should either one or more of the corporate bodies or institutions named in the preceding items of my will attempt to sell, alienate or otherwise dispose of the property and estate therein devised, contrary to the terms and conditions therein set forth, or should there be any levy on the same to satisfy the debts of said corporation, then I hereby direct my executors or legal representatives to repossess and enter upon said property or estate as to which the conditions may be so broken or violated, and in that event I do hereby give and devise the said property so entered upon and

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repossessed unto the Savannah Female Orphan Asylum."

There is nothing in this clause, by which the heirs at law or next of kin can be benefited, in any possible view. If the conditions against voluntary alienation and levy of execution are invalid, the previous devises stand good. If these conditions are valid, the devise over to the Savannah Female Orphan Asylum, an undoubted charity, will take effect; for as the estate is no more perpetual in two successive charities than in one charity, and as the rule against perpetuities does not apply to charities, it follows that if a gift is made to one charity in the first instance, and then over to another charity upon the happening of a contingency which may or may not take place within the limit of that rule, the limitation over to the second charity is good. *Christ's Hospital* v. *Grainger*, 16 Sim., 84, 100; 1 Macn. & Gord., 460; 1 Hall & Twells, 533; *McDonogh* v. *Murdoch*, 15 How., 367, 412, 415; *Russell* v *Allen* [*supra*].

The 14th clause of the will contains a devise and bequest to the Georgia Historical Society to establish a public library and museum, and is as follows:

"Fourteenth. I hereby give, devise and be-
[186] queath to the Georgia Historical Society and its successors all that lot or parcel of land, with the buildings and improvements thereon, fronting on St. James Square, in the City of Savannah, and running back to Jefferson Street, known in the plan of said city as lot letter N, Heathcote Ward, the same having been for many years past the residence of my family, together with all my books, papers, documents, pictures, statuary and works of art or having relation to art or science, and all the furniture of every description in the dwelling-house and on the premises (except bedding and table service, such as china, crockery, glass, cutlery, silver, plate and linen), and all fixtures and attachments to the same; to have and to hold the said lot and improvements, books, pictures, statuary, furniture and fixtures to the said Georgia Historical Society and its successors, in special trust, to keep and preserve the same as a public edifice for a library and academy of arts and sciences, in which the books, pictures and works of art herein bequeathed, and such others as may be purchased out of the income, rents and profits of the bequest hereinafter made for that purpose, shall be permanently kept and cared for, to be open for the use of the public on such terms and under such reasonable regulations as the said Georgia Historical Society may from time to time prescribe; but this devise and bequest is made upon condition that the Georgia Historical Society shall cause to be placed and kept, over and against the front porch or entrance of the main building on said lot, a marble slab or tablet, on which shall be cut or engraved the following words, to wit: TELFAIR ACADEMY OF ARTS AND SCIENCES, the word 'Telfair' being in larger letters and occupying a separate line above the other words; and on the further condition that no part of the buildings shall ever be occupied as a private residence or rented out for money, and none but a janitor and such other persons as may be employed to manage and take care of the premises shall occupy or reside in or upon the same, and that no part of the same shall be used for public meetings or exhibitions, or for eating, drinking or smoking, and that no part of the lot or improvements shall ever be sold, alienated or encumbered, but the same shall be preserved for the purposes herein set forth. And it is my wish that whenever the walls of the building shall require renovating by paint or otherwise, the present color and design shall be adhered to as
far as practicable. For the purpose of provid- [187]
ing more effectually for the accomplishments of the objects contemplated in this item or clause of my will, I hereby give, devise and bequeath to the Georgia Historical Society and its successors one thousand shares of the capital stock of the Augusta and Savannah Railroad of the State of Georgia, in special trust, to apply the dividends, income, rents and profits, arising from the same, to the repairs and maintenance of said buildings and premises, and the payment of all expenses attendant upon the management and care of the institution herein provided for, and then to apply the remaining income, rents and profits in adding to the library, and such works of art and science as the proper officers of the Georgia Historical Society may select, and in the preservation and proper use of the same, so as to carry into effect in good faith the objects of this devise and bequest."

The Georgia Historical Society was incorporated by a statute of the 19th of December, 1839, the preamble of which recites that "The members of a society instituted in the City of Savannah for the purpose of collecting, preserving and diffusing information relating to the history of the State of Georgia in particular, and of American history generally, have applied for an Act of incorporation." The 1st section makes them a corporation with the usual powers, and especially "To purchase, take, receive, hold and enjoy, to them and their successors, any goods and chattels, lands and tenements, and to sell, lease, or otherwise dispose of the same, or any part thereof, at their will and pleasure; *Provided*, That the clear annual income of such real and personal estate shall not exceed the sum of $5,000; and, *Provided, also*, That the funds of the said corporation shall be used and appropriated to the purposes stated in the preamble of this Act, and those only." And the 4th section declares that the Act of incorporation shall be a public Act, "And shall be construed benignly and favorably for every beneficial purpose therein intended."

It is stated in the bill and admitted by the demurrer, that the net income of the Georgia Historical Society from property held by it at the time of the death of the testatrix, was between $3,000 and $4,000, and that the income of the property now bequeathed to it will add $7,000 to that income. It is argued for the appellants
that, because the effect of the gift will be to in- [188]
crease the property of the corporation to double the amount which the corporation is allowed by the proviso in the 1st section of its charter to hold, the whole gift is void.

But there are two conclusive answers to this argument: 1. Restrictions imposed by the charter of a corporation upon the amount of property that it may hold cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the State which created it. *Runyan* v. *Coster*, 14 Pet., 122, 131; *Smith* v. *Sheeley*, 12 Wall., 358, 361 [79 U. S., XX., 430,

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431]; *Bogardus* v. *Trinity Church*, 4 Sandf. Ch., 633, 758; *DeCamp* v. *Dobbins*, 29 N. J. Eq., 36; *Davis* v. *Old Colony R. R. Co.*, 131 Mass., 258, 273.

2. By an Act of amendment of the 28th of October, 1870, the provisos in the 1st section of the original charter are repealed. It is contended that the Act of 1870 is unconstitutional and void, as being a grant by the Legislature, of corporate powers and privileges, in contravention of this provision in the Constitution of the State: "The General Assembly shall have no power to grant corporate powers and privileges to private companies, except to banking, insurance, railroad, canal, navigation, mining, express, lumber, manufacturing and telegraph companies; nor to make or change election precints; nor to establish bridges or ferries; nor to change names of legitimate children; but it shall prescribe by law the manner in which such powers shall be exercised by the courts." Constitution of Georgia of 1868, art. 3, sec. 6, sec. 5; Code of 1873, sec. 5068. But the words "corporate powers and privileges," as here used, signify the corporate franchise, the aggregate powers and privileges which constitute a corporation, not every separate power and privilege which may be conferred upon a corporate body. The object is to take away from the Legislature, and to vest in the courts, under its direction for the future, the creation of private corporations for literary, religious, charitable or other purposes, except those specially excepted; but not to prevent the Legislature from amending the charters of corporations already existing, and modifying or enlarging their powers, either by repealing former restrictions or otherwise. The Act of 1870 is, therefore, constitutional and valid.

[189] That a devise and bequest "to keep and preserve as a public edifice" a house containing a library and an academy or museum of works of art and science, "to be open for the use of the public" on such terms and under such reasonable regulations as the trustees may from time to time prescribe, is a valid charity, cannot be doubted. *British Museum* v. *White*, 2 Sim. & Stu., 594; *Drury* v. *Natick*, 10 Allen, 169; *Donohugh's Appeal*, 86 Pa. St., 306. The directions tending to perpetuate the memory of the founder do not impair its public character or its legal validity. In the cases of *Thomson* v. *Shakespeare*, H. R. V. Johns. [Eng.], 612, and 1 DeG. F. & J., 399, and of *Carne* v. *Long*, 2 DeG. F. & J., 75, on which the appellants rely, the gifts failed because not exclusively devoted to a public charitable use, the definition in the one case including purposes that might not be charitable, and the bequest in the other being to a private library established for the benefit of the subscribers alone. See, *Beaumont* v. *Oliveira*, L. R. 4 Ch., 309, 314, 315.

A corporation may hold and execute a trust for charitable objects in accord with or tending to promote the purposes of its creation, although such as it might not, by its charter or by general laws, have authority itself to establish or to spend its corporate funds for. A city, for instance, may take a devise in trust to maintain a college, an orphan school, or an asylum. *Vidal* v. *Girard*, 2 How., 127; *McDonogh* v. *Murdoch*, 15 How., 367; *Perin* v. *Carey*, 24 How., 465 [65 U. S., XVI., 701]. There is some ground for holding that the objects of a historical society would be promoted by administering a devise and bequest to maintain for the public instruction and benefit a house containing a collection of books, documents and works of art, with other such books and works to be selected by the officers of the society and purchased out of the surplus income; and that the purposes of the trust are, in the words of *Mr. Justice* Story in *Vidal* v. *Girard*, 2 How., 189, "germane to the objects of the incorporation," and "relate to matters which will promote, and aid, and perfect those objects."

But if any doubt remains of the capacity of the Georgia Historical Society to assume and execute those charitable trusts, it would be within the ordinary jurisdiction of a court of equity to appoint other trustees in its stead, according to the maxim, expressly affirmed in the Code of Georgia, that a trust shall never fail for the want of a trustee. *Reeve* v. *Atty-Gen.*, 3 Hare, 191; *Winslow* v. *Cummings*, 3 Cush., 358; Code of Georgia of 1873, sec. 3195. [190]

The residuary clause of the will disposes of real and personal estate to the amount of $300,000, and is as follows:

"Twenty-first. All the residue of my estate, of whatever the same may consist, real, personal and mixed, and wherever situated, I hereby give, devise and bequeath to my executors hereinafter named, and to the survivor of them, and to the successors in this trust of said survivor, in trust, to use and appropriate the proceeds arising from the same to the building and erection and endowment of a hospital for females within the City of Savannah, on a permanent basis, into which sick and indigent females are to be admitted and cared for in such manner and on such terms as may be defined and prescribed by the trustees or directresses provided for in this item or clause in my will. The income, rents and profits of such portion of the residuum of my estate as may not be expended in the building, erection and furnishing said hospital shall be annually appropriated to the support and maintenance of the same. My desire and request is that a thoroughly convenient hospital, of moderate dimensions suited to the wants of the City of Savannah, and capable of enlargement if necessity should require, may be built and erected, with no unnecessary display connected with it. And I do hereby nominate, as the first trustees, managers or directresses of said hospital, Mrs. Louisa F. Gilmer, Sarah Owens, Mary Elliott (formerly Habersham), Susan Mann, Florence Bourquin, Eva West and Eliza Chisolm, all of Savannah, Georgia, and do request and instruct my executors to advise and consult with the ladies named, as to the construction, arrangement and furnishing of said hospital. It is further my wish and desire, and I do hereby request, that a suitable and proper Act of incorporation for said hospital shall be obtained from such tribunal in the State of Georgia as may have jurisdiction in the premises, to be called and known as the 'Telfair Hospital for Females,' with the ladies above named, or such of them as may consent to serve, and such others as they may apply for to be associated with them, as the first trustees, managers or directresses under said Act of incorporation, with power to fill any vacancies that occur in their number. And for the purpose of

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accomplishing the objects contemplated in this [191] item or clause of my will, I do hereby authorize and empower my executors, or the survivor of them, to sell and convey all or any portion of the real estate, or any interest in the same, which I may have or be entitled to, and not given or devised in any of the previous items or clauses of this my will, using their discretion as to private or public sales, and as to whether and at what time such sales shall be made."

That this devise and bequest to establish a hospital for sick and indigent females in the City of Savannah is sufficiently definite, and that its validity is not impaired by the provision of the will requiring an Act of incorporation to be obtained, are clearly settled by the cases of *Inglis* v. *Sailors' Snug Harbor*, 3 Pet., 99; *Ould* v. *Hospital*, 95 U. S., 303 [XXIV., 450]; and *Russell* v. *Allen*, *ante* [397].

The bequest, in the 23d clause of the will, of $1,000 "To the first Christian church erected or to be erected in the Village of Telfairville in Burke County, or to such persons as may become trustees of the same," is supported by the same authorities, and is directly within the decisions of *Lord* Thurlow in *Atty-Gen.* v. *Bishop of Chester*, 1 Bro. Ch., 444, of *Sir* John Copley, Master of the Rolls, afterwards *Lord* Lyndhurst, in *Soc. for Propagation of the Gospel* v. *Atty-Gen.*, 3 Russ., 142, and of *Lord* Hatherley in *Sennett* v. *Herbert*, L. R., 7 Ch., 232; see, also, *Cumming* v. *Reid Memorial Church*, 64 Ga., 105.

The result is, that all the devises and bequests contained in Miss Telfair's will are valid as against her heirs at law and next of kin.

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

JOSEPH B. CLOSE ET AL., *Appts.*,

v.

GLENWOOD CEMETERY.

CHARLES BORCHERLING, *Appt.*,

v.

GLENWOOD CEMETERY.

(See S. C., 17 Otto, 466–478.)

Cemetery company—right to lands—construction of contract—receiver—rights of.

1. A cemetery company was incorporated in 1854 by an Act of Congress, which authorized it to purchase and hold ninety acres of land in the District of Columbia, and to receive gifts and bequests for the purpose of ornamenting and improving the cemetery; enacted that its affairs should be conducted by a president and three other managers, to be elected annually by the votes of the proprietors, and to have power to lay out and ornament the grounds, to sell or dispose of burial lots, and to make by-laws for the conduct of its affairs and the government of lot holders and visitors; fixed the amount of the capital stock, to be divided among the proprietors according to their respective interests; and provided that the land dedicated to the purposes of a cemetery should not be subject to taxation of any kind, and no highways should be opened through it, and that it should be lawful for Congress thereafter to alter, amend, modify or repeal the Act. Presently afterwards thirty of the ninety acres were laid out as a cemetery, the cemetery was dedicated by public religious services, and a pamphlet was published, containing a copy of the charter, a list of the officers, an account of the proceedings at the dedication, describing the cemetery as "altogether comprising ninety acres, thirty of which are now fully prepared for interments," and the by-laws of the Corporation, which declared that all lots should be held in pursuance of the charter. No stock was ever issued. But the owner of the whole tract, named in the charter as one of the original associates, and in the list published in the pamphlet as the president and a manager of the Corporation, knowing all the above facts, and never objecting to the appropriation of the property as appearing thereby, for more than twenty years managed the Cemetery, sold about two thousand burial lots, and gave to each purchaser a copy of the pamphlet, and a deed of the lot, signed by himself as president, bearing the seal of the Corporation, and having the by-laws printed thereon. In 1877 Congress passed an Act, amending the charter of the Corporation, providing that its property and affairs should be managed, so as to secure the equitable rights of all persons having any vested interest in the cemetery, by a board of five trustees to be elected annually, three by the proprietors of lots owned in good faith upon which a burial had been made, and two by the original proprietors; and that of the gross receipts arising from the future sale of lots, one fourth should be annually paid by the trustees to the original proprietors and the rest be devoted to the improvement and maintenance of the cemetery. Held, that the Act of 1877 was a constitutional exercise of the power of amendment reserved in the Act of 1854; that the owner of the land was estopped to deny the existence of the Corporation, the setting apart of the whole ninety acres as a cemetery, and the right of the lot holders to elect a majority of the trustees; and that he was in equity bound to convey the whole tract to the Corporation in fee, and to account to the Corporation for three fourths of the sums received by him from sales of lots since the Act of 1877; and the corporation to pay him one fourth of the gross receipts from future sales of lots.

2. Pending a bill in equity against the owner of land to compel a conveyance of the title, subject to certain rights of his in the rents and profits, a receiver appointed in another suit against him, and to whom he had by order of court in that suit assigned his interest in the land, applied to be and was made a defendant, and answered, and also filed a cross-bill against both the original parties, which was afterwards ordered to be stricken from the files, with leave for him to apply for leave to file a cross-bill; but he never applied for such leave. The case was heard upon pleadings and proofs, and a final decree entered ordering the original defendant to convey to the plaintiff, and the plaintiff to account to him or his assigns for part of the rents and profits, and that this decree be without prejudice to the rights of the receiver. Held, that the receiver was not aggrieved.

[Nos. 108, 832.]

Argued Nov. 27, 28, 1882. Decided Mar. 5, 1883.

APPEALS from the Supreme Court of the District of Columbia.

The history and facts of the case appear in the opinion of the court.

Messrs. **J. Hubley Ashton** and **Nathaniel Wilson**, for Close and Clendenin, appellants:

The grant of corporate franchises contained in the Act of July 27, 1854, was not accepted by the persons therein named; the charter never took effect; and no corporation, *de facto* or *de jure*, was *in esse* at the time of the transactions set forth in the bill, capable of acquiring title, legal or equitable to the land in controversy.

The case is, therefore, within the principle that "If a man grants his estate to an imaginary corporation, which exists only in his own mind, no title passes."

Russell v. *Topping*, 5 McLean, 201.

*Head notes by *Mr. Justice* GRAY.

NOTE.—*Reserved power to alter, amend or repeal charters.* See *note* to Greenwood v. Freight Co., 105 U. S., XXVI., 961.

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The rule that a grant does not become operative until accepted, applies in full force to a grant of the franchise to be a corporation (1 Bl. Com., 123), and no charter of incorporation is of any effect until it is accepted by at least a majority of those who are intended to be incorporated.

Ang. & Ames, sec. 81; *Dart. Coll. Case*, 4 Wh., 688; *Ellis* v. *Marshall*, 2 Mass., 279; *Falconer* v. *Campbell*, 2 McLean, 196; *State* v. *Dawson*, 16 Ind., 41; *Shortz* v. *Unangst*, 3 Watts & S., 52; *Com.* v. *Cullen*, 13 Pa., 143.

That the Act of February, 1877, repeals the Act of 1854, and provides a different corporation composed of the lot holders, seems to be plain upon the face of it. It is merely a colorable amendment of the Act of 1854, which can operate only as the grant of a new charter, and of new franchises, for a different corporation from that contemplated by the Act of 1854.

"The intention to repeal is sufficiently manifested when the provisions of the two enactments are so inconsistent that they cannot stand together."

State v. *Comrs.*, 37 N. J. L., 230.

The corporations, if any, existing under the Act of 1854, being dissolved by the repeal of that Act by the Act of 1877, its rights of property revert to the original donor, the defendant.

Bacon v. *Robertson*, 18 How., 480 (59 U. S., XV., 499); *Lum* v. *Robertson*, 6 Wall., 277 (73 U. S., XVIII., 743).

If it should be held that the Act of February, 1877, is to be construed as an alteration and not as a repeal of the Act of 1854, we submit that the Act is unconstitutional, as not the exercise of a power properly legislative, and as depriving the defendant of his property without due process of law, and taking private property for public use without just compensation.

Davidson v. *N. Orleans*, 96 U. S., 107 (XXIV., 620).

The Act of 1877 cannot be defended as a lawful exercise of the power of Congress to alter or modify the charter.

Sinking Fund Cases, 99 U. S., 700 (XXV., 496); *Com.* v. *Essex Co.*, 18 Gray, 253; *R. R. Co.* v. *Maine*, 96 U.S., 499 (XXIV., 836); *Sage* v. *Dillard*, 15 B. Mon., 240; *Allen* v. *McKeen*, 1 Sumn., 277; *R. R. Co.* v. *Chapman*, 38 Conn., 70; *Detroit* v. *P. R. Co.*, 43 Mich., 147.

We submit, therefore, that the Act of 1877, which takes the management and property of the supposed Corporation out of the hands of the defendant, the real owner, and arbitrarily appropriates three fourths of the receipts from sales of lots to the so-called "improvement of the cemetery," and reduces the defendant to the condition of a mere creditor in respect to the residue, is not a valid amendment of the charter.

Messrs. **Cortlandt Parker** and *W. D. Davidge*, for Borcherling, appellant.

Messrs. **T. W. Bartley, William F. Mattingly** and *T. J. Miller*, for appellee.

Mr. Justice **Gray** delivered the opinion of the court:

This is a bill in equity, filed on the 25th of October, 1877, by the Glenwood Cemetery, claiming to be a Corporation established by Act of Congress, against Joseph B. Close, William S. Humphreys, Randolph S. Evans and George Clendenin, praying for a conveyance of the legal title in a tract of land containing ninety acres, situated in the District of Columbia, known as the Glenwood Cemetery; and for an account. The bill was afterwards dismissed by consent as against Humphreys and Evans. The material facts, as shown by the proofs, are as follows:

In June, 1852, Humphreys, for the sum of $9,000, bought of Junius J. Boyle the tract of land in controversy, and took from him a deed of it, and immediately set about preparing it for use as a cemetery. He inclosed with a high fence, and laid out with drives and walks, and improved and embellished thirty acres of it, leaving the other sixty acres in their original unimproved condition; and in March, 1853, put Clendenin in charge as superintendent. Humphreys conveyed to Close an undivided half of the premises in April, 1853, and the whole tract in June, 1854. The two deeds were absolute in form, but were, in fact, intended as security; the first for the repayment of $20,000, advanced to Humphreys by Close, for the purpose, as Close knew, of converting the estate into a cemetery; and the second for the repayment of other advances to the amount of $7,000, already made to him by Close, for the same purpose, and of subsequent like advances, of the amount of which there is no evidence but Close's own vague and unsatisfactory testimony, unsupported by books or vouchers; and the parties agreed in writing that if Humphreys should meet his obligations, he should have back one half of the land. Humphreys thenceforward managed the property, acting for himself and Close, through Clendenin as superintendent, until September, 1859, when, having failed to [469] meet his engagements, he relinquished all his interest in the property to Close, and Close became sole owner, and assumed control of the property, retaining Clendenin as his superintendent to manage the cemetery.

On the 27th of July, 1854, Congress passed an Act entitled "An Act to Incorporate the Proprietors of Glenwood Cemetery," by which twelve persons named, eight of them residents of the District of Columbia, and the other four being Close and William Phelps (since deceased), residents of New Jersey, and Humphreys and Evans, residing in New York, were created a Corporation by the name of "The Proprietors of Glenwood Cemetery in the District of Columbia," and were empowered "To purchase and hold not exceeding one hundred acres of land in the District of Columbia, north of the limits of the City of Washington; to sell and dispose of such parts of said land as may not be wanted for the purpose of a cemetery, provided that at least thirty contiguous acres shall be forever appropriated and set apart as a cemetery; with authority to said corporation to receive gifts and bequests for the purpose of ornamenting and improving said Cemetery;" and it was enacted that the affairs of the Corporation should be conducted by a president and three managers, to be "elected annually by a majority of the votes of the proprietors," and "each proprietor entitled to one vote for each share held by him," and that until the first election the four last-named persons should be managers; that the president and mangers should have power, among other things, "to lay out and ornament the grounds," "to lay out and

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sell or dispose of burial lots," and "to make such by-laws, rules and regulations as they may deem proper for conducting the affairs of the Corporation, for the government of lot holders and visitors to the Cemetery, and for the transfer of stock and the evidence thereof;" that "the capital stock of said Company shall be represented by two thousand shares of $50 each, divided among the proprietors according to their respective interests, and transferable in such manner as the by-laws may direct;" that "no streets, lanes, alleys, roads or canals of any sort shall be opened through the property of said Corporation, exclusively used and appropriated to the purpose of a Cemetery; provided, that [470] nothing herein contained shall authorize said Corporation to obstruct any public road or street or lane or alley now actually opened and used as such;" that any person willfully destroying, injuring or removing any tomb, monument, gravestone, fence, railing, tree or plant within the limits of the Cemetery, should be considered guilty of a misdmeanor; that "each of the stockholders in the said Company shall be held liable in his or her individual capacity for all the debts and liabilities of the said Company, however contracted or incurred;" that "burial lots in said Cemetery shall not be subject to the debts of the lot holders thereof, and the land of the Company dedicated to the purposes of a Cemetery shall not be subject to taxation of any kind;" that a certificate, under seal of the Corporation, of the ownership of any lot, should have the same effect as a conveyance of real estate; and that "it may be lawful for Congress hereafter to alter, amend, modify or repeal the foregoing Act." 10 Stat. at L., 789.

On the 2d of August, 1854, the ceremony of dedicating the Cemetery by appropriate religious services and addresses was performed on the spot in the presence of a number of people. Immediately afterwards, a pamphlet was published and generally circulated, containing a copy of the charter, a list of the officers, including Close, Phelps, Humphreys and Evans, managers; Close, president; Humphreys, treasurer; and Clendenin, superintendent; a full account of the proceedings at the dedication, in which the property was spoken of as set apart and consecrated for the burial of the dead, and as "altogether comprising ninety acres, thirty of which are now fully prepared for interments;" and the by-laws of the Cemetery, of which the first was, "All lots shall be held in pursuance of 'An Act to Incorporate the Proprietors of Glenwood Cemetery,' approved July 27, 1854, and shall be used for the purposes of sepulture alone."

Close soon after received a copy of this pamphlet from Humphreys, and from that time to the filing of the bill never objected to the appropriation of the property in the manner appearing thereby. In the course of the next twenty years, about two thousand lots were sold, and each purchaser was given a copy of the pamphlet, and a certificate or deed of his lot, signed by [471] Close as president, bearing the seal of the Company, and having the by laws printed thereon. The gross receipts from the time of the opening of the Cemetery to 1876 were $160,000. No stock was ever issued as provided in the charter.

No taxes were ever paid on any part of the ninety acres. At different times from 1871 to 1876, taxes were assessed or proposed to be assessed, by the municipal authorities, upon the sixty acres which had not been improved. But Close and Clendenin, by representing to the assessors and collector that the whole tract had been dedicated to burial purposes in accordance with the charter, and by exhibiting to them the charter and the pamphlet containing the account of the dedication, induced them to recognize the exemption of the whole tract from taxation.

On the 28th of February, 1877, Congress passed an Act, amending the Act of the 27th of July, 1854; changing the name of the Corporation to "The Glenwood Cemetery;" providing that its property and affairs should be under the control of a board of five trustees, any three of whom should be a quorum, to be elected annually, "three by the proprietors of lots in said Cemetery" (each to be "entitled to one vote for each lot owned by him in good faith, upon which a burial has been made") "and two by the original proprietors," and to have authority to fill temporary vacancies in the board; that these trustees should so conduct the affairs of the Cemetery "As to secure the equitable rights of each and every person having in any way any vested interest in the said Cemetery; and the Cemetery shall be amenable and subject to the jurisdiction of the equity courts of the District of Columbia for any disregard of the rights or interests of any person whatsoever;" that "The words 'the proprietors,' where they occur in the original Act of incorporation hereby amended, shall be interpreted and construed to mean and shall signify the proprietors of lots in said Cemetery, and which is hereby now declared by this amendment to be the true intent and meaning of said words;" and that, of the gross receipts arising "from the sale of lots hereafter sold of the ground now dedicated to burial purposes," one fourth should be annually paid by the trustees to the original proprietors, and the rest be devoted to the improve- [472] ment and maintenance of the Cemetery. 19 Stat. at L., 266.

Pursuant to this Act, the owners of lots chose three trustees, who, on the refusal of Close to recognize the Corporation as existing, or to appoint two other trustees, filled up the vacancies in the board and, on the refusal of Close and of Clendenin, as his agent, to deliver up possession to them, filed this bill to compel a conveyance of the legal title and a delivery of possession of the whole tract, and an account of the proceeds of any lots sold since the organization under the Act of 1877.

The defenses set up by Close and Clendenin, in their answers and at the argument, are, that there never was any acceptance of the Act of 1854, or formal organization of the Corporation under it, but the property remained the private property of Close, except such lots as had been sold, for which he was ready to give a legal title to the holders; that the Act of 1877 was unconstitutional and void, as depriving him of his property without adequate compensation; and that no part of the sixty acres not inclosed was ever dedicated to the purposes of a cemetery in such a way as to interfere with his absolute control over it.

After Close and Clendenin had put in their answers, Charles Borcherling filed a petition to

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be admitted as a defendant to the bill, alleging that he had been appointed receiver under a decree for alimony rendered in a suit for divorce brought against Close by his wife in the Court of Chancery of New Jersey, and that, in obedience to an order of that court, Close had executed to him as such receiver an assignment of all his personal estate, the rents and profits of his real estate, and "Especially the capital stock of the Glenwood Cemetery in Washington in the District of Columbia, and all profits, dividends or other moneys to me coming therefrom, or from any office thereof." This petition of Borcherling was granted, and he filed an answer to the original bill, setting up these facts. He also filed a cross-bill, praying that Close convey the title in the Cemetery to the Corporation, and that the Corporation issue and deliver to Borcherling, as receiver as aforesaid, stock to the amount of $100,000. On motion of Close and Clendenin, the court afterwards ordered the [473] cross-bill of Borcherling to be stricken from the files, with leave to him to apply for leave to file a cross-bill. He never applied for such leave. But the Corporation filed a general replication to the answers of Close, Clendenin and Borcherling; proofs were taken, and the case was heard and decided upon the merits.

By the final decree of the court below, it was adjudged that Close convey the whole tract of ninety acres to the plaintiff Corporation in fee simple; that Close and Clendenin deliver to the plaintiff all books, plans, records and personal property belonging to or used in connection with its business, and be perpetually enjoined from interfering with or obstructing the plaintiff in the possession and management of the Cemetery; and the court being further of opinion that Close was entitled to be compensated for the transfer of his title in the land, as the original proprietor thereof, and that the provision made for this object by the Act of Congress of 1877 was an equitable adjustment of the rights of Close, and a reasonable compensation for his title and interest in the property, both in amount and in mode of payment, regard being had to the needs of the Cemetery, it was further adjudged that the plaintiff annually hereafter account for and pay to him or his assigns one fourth of the gross receipts from sales to be made of lots in the Cemetery; and that an account be taken of his receipts from the Cemetery since the Act of 1877 took effect, and that he be charged in favor of the plaintiff with all sums, over and above one fourth of the gross receipts from sales of lots, which had been applied to his own use and not properly disbursed on account of the Cemetery, and that he pay the costs of suit; and that this decree be without prejudice to the claims of Borcherling as receiver as aforesaid.

From that decree appeals have been taken and argued, by Close and Clendenin and by Borcherling.

The appeal of Borcherling may be briefly disposed of. The order striking his cross-bill from the files reserved leave to him to apply to the court for leave to file a cross-bill. He never made any such application, but, after replication filed to the answers of himself and of the other defendants, suffered proofs to be taken upon the issues so made up, and the case to pro- [474] ceed to a final decree; and the final decree is expressed to be made without prejudice to his rights as receiver. Under these circumstances, there is nothing in the proceedings of the court below prejudicial to those rights, or which entitles him to a reversal of the final decree and to a re-opening of the whole case.

Upon the merits of the case as presented by the appeal of Close and Clendenin, it will be convenient to consider first the question whether, assuming that the charter granted by Congress in 1854 must be held to have been duly accepted by the Corporation, and the Corporation to have been legally organized under it, the Act of 1877 is within the power of alteration, amendment and repeal, reserved to Congress in the original charter.

The terms of that charter show that it was not intended to create a mere land company, for the exclusive benefit of the original associates and their successors holding shares in the stock of the Corporation; but that the ultimate and principal object was to establish and permanently maintain a Cemetery for the burial of the dead, which, if not a strictly charitable use, is in some aspects a pious and public use, and was evidently so regarded by Congress. If the Corporation were to be exclusively a private business corporation, created for the sole benefit of the original associates and their successors as holders of shares, Congress would hardly have inserted in the charter the provision authorizing the Corporation to receive gifts and bequests for the purpose of ornamenting and improving the Cemetery, or the provisions exempting the property from all taxation, and prohibiting the future laying out of any public ways through it.

At first, indeed, the whole immediate benefit derived from the property would be that resulting to the shareholders from the sale of lots, by way of dividend, out of so much of the moneys received as might not be needed to be expended or reserved for the laying out, ornamenting and maintenance of the Cemetery. But as fast as lots were sold, the property and interest of those purchasing and holding the land for its ultimate use of the permanent burial of the dead would increase, and the interest of the original associates would diminish. The profits to be derived from the sale of the land [475] would cease, as to each parcel, as soon as it was sold for a burial lot. When the lots were all sold, the pecuniary interest of the associates or shareholders would disappear; but the duty to keep up the Cemetery would remain, and the owners of lots would be the only persons having a peculiar interest in keeping it up. The Corporation, in short, was established to secure and maintain, not merely the right of sale, but the right of burial, and was the representative, not only of the original proprietors of the land, but also of the subsequent purchasers of lots therein.

At the beginning, before any lots were sold, the owners of shares, divided among the proprietors according to their respective interests, would, necessarily, be the only persons concerned, or who could elect the officers of the Corporation and managers of the Cemetery. But with the gradual change of interest, resulting from the sale of lots, it was in full accord with the provisions of the charter, and best tended to carry out the main purpose of permanently

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maintaining a cemetery for the burial of the dead, that the holders of lots should take part in the election and so have a voice in the management.

After the Cemetery had been laid out, improved and used for the burial of the dead for more than twenty years, and two thousand burial lots had been sold, it was a reasonable exercise of the reserved power of Congress to authorize the owners in good faith of lots upon which burials had been made, to elect a majority of the trustees, in whom should be vested the control and management of the Cemetery, with a due regard to the equitable rights of all persons having any vested interest therein; and to provide that a portion only of the receipts arising from the future sale of lots should be paid to the original proprietors, and the rest be devoted to the improvement and maintenance of the Cemetery. Every legislative Act is to be presumed to be a constitutional exercise of legislative power until the contrary is clearly established; and there is nothing in the record before us to show that the proportion of one fourth of the gross receipts from future sales of lots, which is fixed by the Act of Congress of 1877 and by the decree of the court below, as a compensation for the title and interest of the original proprietors and associates, is not a reasonable one.

[476] It follows that the Act of Congress of 1877 must be deemed constitutional and valid, within the principle affirmed by this court in the case of *The Holyoke Dam*, that a power reserved to the Legislature to alter, amend or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the Legislature may deem necessary, to secure either that object or any public right. *Comrs. on Inland Fisheries* v. *Water Power Co.*, 104 Mass., 446, 451; *Holyoke Co.* v. *Lyman*, 15 Wall., 500, 522 [82 U. S., XXI., 133, 140]. In the exercise of such a power by the United States, as was observed by the *Chief Justice* in delivering the opinion of the court in the *Sinking Fund Cases*, "It is not only their right, but their duty, as sovereign, to see to it that the current stockholders do not, in the administration of the affairs of the corporation, appropriate to their own use that which in equity belongs to others." 99 U. S., 700, 725 [XXV., 496, 503].

The question then recurs whether, as against Close, the Corporation must be held to have been duly organized under the Act of Congress of 1854.

Upon this question the facts are these: Close knew that the Act of incorporation had been granted by Congress, in which he was named as one of the original associates; that the Cemetery had been dedicated and set apart by public religious ceremonies for the burial of the dead; that a pamphlet had been published, containing a full account of those ceremonies, the names of a full board of officers, including himself as president and one of the managers, and Clendenin as superintendent, and a code of by-laws, by the very first of which all lots were to be held in pursuance of the Act of incorporation and to be used for the purposes of sepulture alone. With full knowledge of these facts, Close, for more than twenty years, exercised through Clendenin the sole management of the Cemetery, and issued deeds and certificates of burial lots to the number of more than two thousand, bearing the corporate seal, and his own signature as president of the Corporation, and having the by-laws printed on them. Being himself the owner of the whole land, he dealt with it in all respects as if it belonged to the Corporation, and so represented it to the pur- [477] chasers of lots. As no other person owned any part of the land or was entitled to a share in the Corporation, the fact that no stock has been issued or divided is immaterial.

One who deals with a corporation as existing in fact is estopped to deny as against the corporation that it has been legally organized. And in a court of equity, at least, the owner of land, who stands by and sees it conveyed as belonging to another, cannot afterwards set up his own title against the grantee. The present case is yet stronger. Close did not merely deal with the Corporation, and permit the Corporation to convey parts of his land to purchasers of lots. But he himself assumed to act as the Corporation, and himself made the conveyance and the accompanying representations to every purchaser.

By his acts he represented to the purchasers of lots that the Cemetery had been created and the land was owned by the Corporation under the charter of 1854, and, as a necessary consequence, that the Corporation and all rights derived from it, were subject to the provisions of that charter, including the reservation to Congress of the power of alteration, amendment or repeal. It is upon these representations that the purchasers of lots have acquired their title and have parted with their money; and the Corporation, whose existence he, at least, cannot deny, has the right and the duty, as the representative and in behalf of all the purchasers of lots, to enforce against him the obligation which he has thereby assumed. He holds the fee of the Cemetery in trust for the Corporation, and is entitled to nothing, as against the Corporation and those whom it represents, but such compensation for his interest as original proprietor or stockholder, as is consistent with the state of things which he has represented to exist.

It is argued by the learned counsel for the appellants that the estoppel and the obligation of Close cannot extend beyond the thirty acres which had been actually laid out. This argument appears to us to be fully met and answered in the able and thorough opinion of the court below, delivered by *Mr. Justice* Cox, who says: "It was held out to the lot holders, not only that the ground immediately available for burial should remain set apart for that object, [478] but that the Cemetery should be forever under the protection of a perpetual corporation, charged with the duty of laying out and ornamenting the grounds, capable of receiving gifts and bequests, and empowered to make by-laws for the regulation of the affairs of the Corporation; and the whole property was described as dedicated to the purposes of the Cemetery, not necessarily that the whole should be laid out into lots, but that it should all belong to the Institution and be available for its general objects. This was not to be a mere graveyard in which

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each lot holder acquired a piece of ground in which to bury his dead, and at the same time become chargeable with the sole care of his particular lot; but the lot holders themselves became subject to by-laws and regulations having reference to the institution as an entirety, and the perpetual preservation of the Cemetery as an ornamental and convenient place for interment and for resort by the relatives of the dead." *Glenwood Cemetery* v. *Close*, 7 Washington Law Rep., 214, 218.

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[98] GREEN BAY AND MINNESOTA RAILROAD COMPANY, *Plff. in Err.*,

v.

UNION STEAMBOAT COMPANY.

(See S. C., 17 Otto, 98-102.)

Power of railroad company to contract with steamboat company.

*A railroad corporation, whose railroad extends across the State of Wisconsin from Lake Michigan to the Mississippi River, and which is authorized by its charter to make "Such contracts with any other person or corporation whatsoever as the management of its railroad and the convenience and interest of the corporation and the conduct of its affairs may in the judgment of its directors require;" and, by general laws, to make such contracts with any railroad company, whose road terminates on the eastern shore of Lake Michigan, "As will enable them to run their roads in connection with each other in such manner as they shall deem most beneficial to their interest," and "to build, construct and run, as part of its corporate property, such number of steamboats or vessels as they may deem necessary to facilitate the business operations of such company or companies;" and also "to accept from any other State or Territory of the United States, and use, any powers or privileges applicable to the carrying of persons and property by railway or steamboat in said State or Territory;" has the power, for the purpose of carrying passengers and freight in connection with its own railroad and business, to enter into an agreement with the proprietors of steamboats running, by way of the Great Lakes, between its eastern terminus and Buffalo in the State of New York, by which it guaranties that the gross earnings of each boat for two years shall amount to a certain sum.

[No. 155.]

Argued Jan. 22, 1883. Decided Mar. 5, 1883.

IN ERROR to the Circuit Court of the United States for the Western District of Wisconsin.

The history and facts of the case are sufficiently stated by the court.

Messrs. **Walter Cranston Larned** and *E. C. Larned*, for plaintiff in error.

Mr. **F. J. Lamb**, for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

This is an action brought by the Union Steamboat Company, a Corporation established by the laws of the State of New York at Buffalo in that State, against the Green Bay and Minnesota Railroad Company, a Corporation established by the laws of the State of Wisconsin, and having its principal place of business in this State.

The declaration alleges that the defendant was charted in 1866, and was organized to construct and operate a railroad across the State of Wisconsin east and west from the City of Green Bay to the Mississippi River, and its road was built and actually opened for business in December, 1873; that "It became important for said defendant to make arrangements, in regard to the business of carrying passengers and freight [99] carried eastwardly over its road and destined for points east of said City of Green Bay and out of the State, for their transportation east, as well as to secure business of carrying passengers and freight arriving at or being moved west by way of the defendant's route and railway;" and on the 9th of September, 1873, the plaintiff and defendant entered into a contract under seal, whereby, in consideration that the plaintiff would, during the season of navigation in 187 and in 1877, run between Buffalo and Green Bay, by the way of the Great Lakes, and touching at intermediate ports, two steam propellers, then belonging to the plaintiff, for the purpose of carrying passengers and freight to and from Green Bay, in connection with the defendant's railway and business and docks at that place, the defendant duly undertook and guarantied to the plaintiff that the gross earnings of each propeller in such business should be for each of the two years the sum of $45,000 at least; and that if it should be less, the defendant would pay the difference to the plaintiff on or before the first of January next succeeding the close of navigation in each year.

The plaintiff further alleges that it duly put the propellers on the route and kept them running thereon, in connection with the defendant's business and in accordance with the contract, during the seasons of 1876 and 1877, and in all respects duly performed all the conditions of the contract on its part; that the gross earnings of each propeller for each season fell short of the amount guarantied by a certain sum named, which thereupon became due and payable to the plaintiff from the defendant, according to the contract, on the first of January following, and that the two Corporations were duly authorized and empowered by their respective charters and the laws of Wisconsin to make the contract.

The answer denies that the defendant was so empowered, and avers that it has no information or knowledge sufficient to form a belief as to whether the plaintiff was so empowered; admits the making of the contract stated in the declaration, and sets forth other provisions of that contract, with which it alleges that the plaintiff had not complied. The plaintiff filed a replication denying the allegations of the answer. Upon a trial in June, 1878, a verdict was [100] returned for the plaintiff for $78,876.13, and judgment rendered thereon, and the defendant sued out this writ of error.

No bill of exceptions having been seasonably tendered, the only question presented by the record is, whether, under the general laws of the State of Wisconsin, and the defendant's charter, which by those laws (as existing at the times of the granting of the charter, and of the trial; R. S. of 1858, ch. 5, sec. 2) was declared to be a public Act, the contract sued on, as set forth in the declaration and admitted in the answer, is *ultra vires* of the defendant Corporation.

The general doctrine upon this subject is now

*Head note by *Mr. Justice* GRAY.

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well settled. The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited. *Thomas* v. *R. R. Co.*, 101 U. S., 71 [XXV., 950]· *Atty-Gen.* v. *R. Co.*, 5 App. Cas., 473; *Davis* v. *R. R. Co.*, 131 Mass., 258.

The railroad of this Corporation extends across the State of Wisconsin from its eastern boundary on Lake Michigan to the Mississippi River; and its charter empowers the directors to make such agreements with any person or corporation whatsoever "As the construction of their railroad or its management and the convenience and interest of the company and the conduct of its affairs may in their judgment require." Priv. L. Wis. 1866, ch. 540, sec. 7. It was within the powers of the Corporation, as incidental to its own proper business, to agree to transport as a carrier, over connecting railroad and steamboat lines, passengers and freight intrusted to it for carriage over its own line. *R. Co.* v. *McCarthy*, 96 U. S., 258 [XXIV., 693]. The general laws of Wisconsin, in force at the time of the grant of this charter, authorize any railroad company in this State, to made such contracts with any railroad company, whose road terminates on the eastern shore of Lake Michigan within the State of Michigan, "As will enable said companies to run their roads in [101] connection with each other in such manner as they shall deem most beneficial to their interest," and "to build, construct and run, as a part of their corporate property, such number of steamboats or vessels as they may deem necessary to facilitate the business operations of such company or companies." Gen. L. Wis., 1853, ch. 76. And by the general railroad Act of 1872, "Any railroad company, heretofore or hereafter incorporated by or under the laws of this State, may exercise all its rights, franchises and privileges in any other State or Territory of the United States, under and subject to the laws of the State or Territory where it may exercise, or attempt to exercise, the same, and may accept from any other State or Territory, and use, any additional or other powers or privileges applicable to the carrying of persons and property by railway or steamboat in said State or Territory, or otherwise applicable to the doings of said company in said State or Territory." Gen. L. Wis., 1872, ch. 109, sec. 51.

These statutes show that the Legislature of Wisconsin, recognizing the fact that, from the geographical situation of the State, the railroads which traverse it from east to west form part of a line of transportation extending across the continent, intended to confer upon the corporations owning such railroads very large powers of contracting with other corporations owning railroads or steamboats, whose course includes connecting parts of the same great line of transportation.

To build and run, as part of the defendant's corporate property, such number of steamboats on Lake Michigan as it might deem necessary to facilitate its business, would be within the power expressly conferred by the Statute of 1853; and we are of opinion that, taking into consideration all the statutes above quoted, it was equally within its corporate powers to hire, either by the trip or by the season, steamboats belonging to others, running from its eastern terminus along the Great Lakes eastward; or to employ such steamboats to carry passengers and freight, in connection with its own railroad and business, under an agreement by which it guarantied to the proprietors of the boats that their gross earnings for the season should not fall below a certain sum.

There is, therefore, nothing in the record be- [102 fore us to show that the agreement sued on was beyond the corporate powers of this Railroad Company.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

CASSIUS H. READ, *Plff. in Err.*, [56
v.
CITY OF PLATTSMOUTH.

(See S. C., 17 Otto, 568-580.)

Limit on municipal power—statute confirming bonds—title to statute—what is sufficient—bonds of a city.

1. Under the power conferred upon a municipal body, to borrow money for any purpose within its discretion without reference to any limit in amount, it cannot borrow for a schoolhouse more than the sum named as a limit in an Act expressly authorizing it to build schoolhouses, and conferring authority to borrow money for that purpose.

2. A statute, confirming bonds of a municipal corporation, issued without authority, to pay a just and equitable demand, is not a retroactive law nor a special Act conferring any new corporate power.

3. Under the Constitution of a State which declares that "No bill shall contain more than one subject, which shall be clearly expressed in its title:" an Act to legalize proceedings of a city council, etc., in reference to the construction of a high school building, etc., sufficiently expresses the subject, which necessarily includes the issue of the bonds authorized by it for that purpose.

4. Under such constitutional provision, an Act to legalize certain taxes therein mentioned, which legalizes certain municipal bonds and the taxes levied to pay them, does not embrace two diverse subjects; for to legalize the taxes necessarily makes the bonds valid.

5. The bonds in controversy, of the City of Plattsmouth, issued under the Nebraska Acts of 1873 and 1875, are valid.

[No. 167.]

Argued Jan. 30, 31, 1883. Decided Mar. 5, 1883.

IN ERROR to the Circuit Court of the United States for the District of Nebraska.

The history and facts fully appear in the

Statement of the case by *Mr. Justice* **Matthews**:

The plaintiff in error, who was plaintiff below, sought to recover, in an action at law, the amount of certain overdue interest coupons upon bonds issued by the defendant, dated October 1, 1872. Each bond contains a recital that it "Is one of a series of twenty-five of like tenor, date and amount, issued in pursuance of the orders of the city council of the City of Plattsmouth, in the State of Nebraska, for the construction of a high-school building in said City, authorized by a vote of the legal voters of said City of Plattsmouth, and in compliance with the laws of the State of Nebraska, and for

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the payment of which the good faith, property and effects of said City are hereby pledged."

It is alleged and not denied that these bonds were issued for the purpose of constructing a high-school building in the City of Plattsmouth; that the City sold them, and their proceeds were used to construct such building; that such building is now in actual use by the City, and that the City paid interest on the bonds for four years.

On the trial, the plaintiff proved that he [569] bought the entire issue of the bonds for full value, without notice of any informality in their issue. There was no evidence offered in defense, and the court instructed the jury to find a verdict for the defendant, to which the plaintiff excepted, and for the alleged error in this ruling, the judgment rendered upon the verdict in favor of the defendant in error, is now sought to be reversed.

This judgment rests upon the assumption that the bonds in question are void, and this depends on these two propositions: first, that, at the time they were issued, there was no law which authorized them; and, second, that certain Acts of the Legislature of Nebraska, subsequently passed, purporting to validate them, are themselves void.

The legislation bearing upon the question appears to be as follows:

The City of Plattsmouth was originally organized as a municipal corporation under that name, by a special Act of the Legislature of Nebraska, while it was under a territorial government, March 14, 1855. That Act created the City a body corporate with all the powers and attributes of a municipal corporation. The 41st section was as follows:

"The council is authorized to borrow money for any object in their discretion, if at a regularly notified meeting, under a notice stating distinctly the nature and object of the loan, and the amount thereof as nearly as practicable, the voters of the City may determine in favor of the loan by a majority of two thirds of the legal voters at the said election, and the said loan can in no case be diverted from the specified object."

The territorial Legislature in 1867 (Territorial L., 1867, p. 38) also passed "An Act to Authorize the Common Council of the City of Plattsmouth to Raise Money Enough to Erect a Central or High-School Building and for Other Purposes."

So much of that Act as is material here is contained in the following:

"Sec. 1. *Be it enacted by the Council and House of Representatives of the Territory of Nebraska*, That the mayor and common council of the City of Plattsmouth shall, by virtue of their office, be commissioners of the schoolhouse fund in and for said City, and the common council shall perform all the duties of such commissioners, and shall possess all the rights, powers and authority, and be subject to the same restraints of township boards of education, for the purpose of raising money required for erecting, purchasing and leasing school- [570] houses and procuring sites therefor, and the fitting up and furnishing thereof."

"Sec. 4. All common, graded and central schools organized within the City of Plattsmouth shall be public and free to all children residing within the City. And the common council, by a vote of the majority of all the council elected, are hereby authorized to include in the general annual city tax list such additional sum as in their opinion, with the public school moneys for the year, will be sufficient to support the school system of said City.

Sec. 5. The common council shall have power and it shall be the duty:

First. To designate and purchase or lease in said city all necessary sites for schoolhouses therein, and to improve and fence the same, as to them shall appear suitable and proper.

Third. To make such by-laws and regulations as they may deem necessary for the proper security and preservation of the schoolhouses and other property owned by the City for school purposes."

"Sec. 7. The mayor and common council are hereby authorized and directed to raise by loan in anticipation of the taxes, when deemed necessary, moneys not exceeding in the aggregate, $15,000, required for erecting, purchasing, or leasing schoolhouses and procuring sites therefor.

Sec. 8. That, for the purpose of effecting such loan, the mayor and common council are authorized to issue the bonds of said City, under the seal of the said City, to the amount of $15,000, and no more, and bearing interest at a rate not exceeding 10 per centum per annum, redeemable in one, two, three, four, five and six years."

"Sec. 17. The title of all schoolhouses, sites, lots, furniture, and all other school property, shall be vested in the City of Plattsmouth."

"Sec. 20. The general school laws of this Territory in force at the time of the passage of this Act, shall, so far as the same are applicable, be taken and construed as part of this Act." Territorial Laws, 1867, p. 38.

The Constitution of Nebraska, which took effect March 1, 1867, soon after the passage of the foregoing Act, provided in article 1, section 16, that "It shall be the duty of the Legislature to pass suitable laws to encourage schools and the means of instruction." Section 1, article 8, [571] declared that "The Legislature shall pass no special Act conferring corporate powers." And section 4 of the same article, that "The Legislature shall provide for the organization of cities and incorporated villages by general laws," etc.

Immediately after the admission into the Union, of the State, under this Constitution, the Legislature of Nebraska made a revision of its general school laws (Laws Neb., 1867, pp. 102, 110), and provided, in section 60 of the Act, that "Nothing in this Act shall be construed so as to interfere with or abrogate any of the rights, privileges and immunities, duties or liabilities, conferred or prescribed by special enactment for any school district comprised within any incorporated city."

And, accordingly, the provisions of the special school law of 1867 were continued in force, and were in substance re-enacted in the Act of February 18, 1873, "To regulate the public schools of Plattsmouth City and provide means for their support."

The same authority to borrow money and to issue bonds therefor, for school and schoolhouse purposes, and subject to the same limitations, is conferred by this Act as that contained

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in the original statute restricting the amount to $15,000.

The original charter of the City of Plattsmouth was superseded under the Constitution by a general law organizing municipal corporations, under which Plattsmouth became a city of the second class. This Act, passed March 1, 1871 (Laws, Neb., 1871, p. 26), authorized the City "To borrow money on the credit of the City and pledge the credit, revenue, and public property of the City for the payment thereof," without any limit as to amount, where the city council was instructed to do so by a majority of all the votes cast at an election held in such city for that purpose. Gen. Sta's. Neb., 1873, p. 148.

After the issue of the bonds in suit the Legislature of Nebraska passed the following Act:

"*An Act to Legalize the Proceedings of the City Council of the City of Plattsmouth, in Reference to the Construction of a High-School Building, and to Authorize the City Council to Complete the Same.*

"*Whereas*, At a session of the city council of the City of Plattsmouth, County of Cass, and State of Nebraska, held on the first day of July, [572] A. D. 1872, the proposition of issuing the bonds of said City to the amount of $25,000, for the purpose of erecting a high-school building, was submitted to the voters of said City; and,

"*Whereas*, At a special election held in said City, for the purpose of voting on said proposition, on the 22d day of July, 1872, a majority of the votes cast were in favor of issuing said bonds; and,

"*Whereas*, In pursuance of said submission and vote, the city council of said City of Plattsmouth have issued and sold said bonds, and with the proceeds thereof have proceeded to let the contract for the construction and completion of said house, and have appointed C. F. Driscoll and M. L. White superintendents of the construction of the same, and the work on said building has commenced; therefore,

"*Be it enacted by the Legislature of the State of Nebraska:*

"Section 1. That all acts and proceedings of the city council of said City of Plattsmouth, in relation to issuing said bonds and letting the contract for the construction of said high-school building, and the appointment of said C. F. Driscoll and M. L. White to superintend the construction of the same, and all matters and proceedings connected therewith, which may in any way affect the validity of said bonds, or of the contract for the construction of the said school-house, be and the same are hereby legalized, confirmed, and made valid in law.

Section 2. *And be it further enacted*, That the city council of the said City of Plattsmouth are hereby authorized and empowered to proceed with the construction of said high-school building until its completion; and for that purpose shall have full and exclusive control of all funds realized from the sale of bonds issued by the said City of Plattsmouth for that purpose.

Section 3. All funds now in the hands of the said city treasurer of the said City of Plattsmouth, which have been created by the sale of the high-school bonds of the said City, shall be applied to the erection of said high-school building, and shall not be appropriated or diverted to other use or purpose whatever.

Section 4. *And be it further enacted*, That the right and title of the said City of Plattsmouth in and to block number twenty-four in said City, which has heretofore been platted and designated on the recorded plat of said City, as a park, and dedicated to public use, and on which the said school-house is being erected, shall vest and remain in the said City of Plattsmouth for school purposes, and the same shall be held exclusively for said purpose.

Section 5. This Act shall take effect and be in force from and after its passage.

Approved February 18, 1873." Sess. Laws, [573] 1873, p. 72.

Subsequently, in 1875, the Legislature passed another statute, entitled "An Act to Amend an Act to Incorporate Cities of the Second Class and to Define their Powers, Approved March 1, 1871, and to Legalize Certain Taxes therein Mentioned."

The text of the Act is as follows:

"*Be it enacted by the Legislature of the State of Nebraska:*

Sec. 1. That no tax heretofore levied in any city of the second class shall be held to be invalid, illegal or irregular because the same was not levied within the time prescribed by the law in force when the same was so levied; nor on account of any mere irregularity in the time or manner of assessment of property, or other irregularity or omission not affecting the equality or substantial justice of such tax, and such taxes shall be inserted in the tax list and shall be collected in the same manner as other general taxes are.

Sec. 2. That all bonds heretofore issued by any city of the second class in good faith for the erection of, or to procure the means for erecting, a high-school building within such city, or for heating or furnishing the same, whether issued under a general or special law providing therefor, or any bonds hereafter issued by such city in exchange for any such bonds, shall be legal and valid; and any tax heretofore or hereafter levied to pay the interest or a portion of the principal of any such bonds, not exceeding five mills on the dollar valuation of the taxable property in the city in any one year, shall be legal and valid.

Sec. 3. That in all cases in which cities of the second class have collected and expended, for the use and benefit of such cities, either in works of internal improvement or otherwise, moneys collected from licenses for the sale of intoxicating liquors, such expenditures are hereby declared to be legal, and the same is hereby ratified and confirmed, and such cities of the second class are hereby exonerated from any and all liability therefor.

Sec. 4. This Act shall take effect and be in force from and after its passage.

Approved February 25, 1875." Laws, Neb., 1875, p. 205.

Messrs. **John F. Dillon**, *Wager Swayne*, *Clinton Briggs*, *Geo. E. Pritchett* and *W. W. Wilshire*, for plaintiff in error:

The City had authority to issue the bonds:

Gelpcke v. *Dubuque*, 1 Wall., 175, 220 (68 U. S., XVII., 520, 530); *Meyer* v. *Muscatine*, 1 Wall., 384 (68 U. S., XVII., 564); *Rogers* v. *Burlington*, 3 Wall., 654 (70 U. S., XVIII., 79); *Van Hostrup* v. *Madison*, 1 Wall., 291 (68 U.

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S., XVII., 538); *James* v. *Milwaukee*, 16 Wall., 159 (83 U. S., XXI., 267); *Woodhull* v. *Beaver Co.*, 3 Wall., Jr., 274.

If the City did not have the power originally to issue the bonds, they have been validated by subsequent legislation.

The principle is elementary and fundamental that, in the absence of special constitutional restrictions, the Legislature is competent to enact retrospective statutes to validate an irregular or defective execution of a statutory power, or of the powers of a municipal or public corporation.

See, cases cited. Dill. Mun. Corp., sec. 544; see, also, *Randall* v. *Kreiger*, 23 Wall., 137 (90 U. S., XXIII., 124); *St. Joseph* v. *Rogers*, 16 Wall., 666 (83 U. S., XXI., 339); *Thompson* v. *Lee Co.*, 3 Wall., 327 (70 U. S., XVIII., 177); *Beloit* v. *Morgan*, 7 Wall., 619 (74 U. S., XIX., 205); *City* v. *Lamson*, 9 Wall., 485 (76 U. S., XIX., 729); *Campbell* v. *Kenosha*, 5 Wall., 195 (72 U. S., XVIII., 610); *Marsh* v. *Fulton Co.*, 10 Wall., 676 (77 U. S., XIX., 1040); *Clark* v. *Saline Co.*, 9 Neb., 516; *Pimental* v. *San Francisco*, 21 Cal., 362; *Paul* v. *Kenosha*, 22 Wis., 266; *Bridge Co.* v. *Frankfort*, 18 B. Mon., 41; Dill. Mun. Corp., sec. 720, 2d ed.; sec. 938, 3d ed.

Mr. **John L. Webster,** for defendant in error.

[574] *Mr. Justice* **Matthews** delivered the opinion of the court:

We cannot accept the conclusion, urged upon us by the counsel for the plaintiff in error, that the City of Plattsmouth had authority to issue the bonds in question, under the power conferred upon it as a municipal body, "to borrow money for any purpose within its discretion," without reference to the limit, as to the amount, imposed by the Act of 1867, expressly authorizing it to build schoolhouses. Whatever implications of power as to school buildings might have been admissible, if the law conferring municipal powers had stood alone, must give place to the express declarations, with the accompanying qualifications, contained in the statute that dealt by name with the very subject. And we must, therefore, assume, at the beginning, that while the City of Plattsmouth was authorized to erect a high-school building, it could not lawfully borrow money or issue its bonds for that purpose in excess of $15,000.

We are, therefore, required to consider whether the issue of bonds involved in this litigation can be supported by the subsequent legislation which sought to cure the defects of their origin.

No objection is made to either of the statutes relied on, on the ground that the Constitution of Nebraska of 1867 forbade retroactive legislation. The 12th section of article 1 of that instrument declares that "No bill of attainder, *ex post facto* law, or any law impairing the obligation of contracts, shall ever be passed." This prohibition would not include legislation of the class now in question.

They are attacked, however, on other grounds.

The first Act, that of February 18, 1873, it is claimed, is made void by article 8 of section 1 of the Constitution of Nebraska, which declares that "The Legislature shall pass no special Act conferring corporate powers." It is contended that the Act in question, by legalizing bonds of the City, void because it had no power to issue them, is legally equivalent to an Act conferring upon the City power to issue bonds, which is conferring corporate power and, being a special Act, is, therefore, unconstitutional.

But this conclusion we cannot adopt. [575]

The Act in question, so far as it relates to the bonds in suit, does not confer any corporate power upon the City in the sense of the Constitution of the State. The statute operates upon the transaction itself, which had already previously been consummated, and seeks to give it a character and effect different in its legal aspect from that which it had when it was *in fieri*. Whether such an effect may be given by a legitimate exercise of legislative power, depends upon those considerations which draw the line beyond which retroactive laws cannot pass, and is not affected by the supposed form of the enactment as a special or general Act conferring corporate power. For it operates upon the rights of the parties, as determined by the equity of their circumstances and relations, and gives to them the sanction derived from subsequent confirmation, by clothing them with forms which are essential to their enforcement, but not to their existence. Within the usual limitations prescribed by our written Constitutions, such as have been quoted from that of Nebraska, this may be done, provided it can be done without the destruction of rights recognized by the law as vested.

In the present case, the statute in question does not impose upon the City of Plattsmouth, by an arbitrary Act, a burden without consent and consideration. On the contrary, upon the supposition that the bonds issued, as to the excess over $15,000, were void, because unauthorized, the City of Plattsmouth received the money of the plaintiff in error, and applied it to the purpose intended, of building a schoolhouse on property, the title to which is confirmed to it by the very statute now claimed to be unconstitutional, and an obligation to restore the value thus received, kept and used, immediately arose. This obligation, according to general principles of law accepted in Nebraska, was capable of judicial enforcement. *Clark* v. *Saline Co.*, 9 Neb., 516; *La.* v. *Wood*, 102 U. S., 294 [XXVI., 153]; *N. O.* v. *Clark*, 95 U. S., 644 [XXIV., 521]; *Hitchcock* v. *Galveston*, 96 U. S., 341 [XXIV., 659]; *Chapman* v. *Douglas Co.* [*ante*, 378], and *Parkersburg* v. *Brown* [*ante*, 238], decided at the present Term.

As was said by *Mr. Justice* Field, in *N. O.* v. *Clark* [*supra*]: "A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just [576] in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law, no more so than an appropriation Act providing for the payment of a preexisting claim. The constitutional inhibition does not apply to legislation recognizing or affirming the binding obligation of the State, or of any of its subordinate agencies, with respect to past transactions."

As the City of Plattsmouth was bound, by force of the transaction, to repay to the purchaser of its void bonds the consideration received and used by it, or a legal equivalent, the statute which recognized the existence of that obligation and, by confirming the bonds themselves, provided a medium for enforcing it

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according to the original intention and promise, cannot be said to be a special Act conferring upon the City any new corporate power. No addition is made to its enumerated or implied corporate faculties; no new obligation is, in fact, created. The language of the Constitution, forbidding special legislation of that description, evidently refers to grants of authority to be exercised by the body itself and in the future, and a consideration of the evil intended to be remedied by the prohibition will confine it to grants of that character, and will not include a statute like that now under discussion. Here the power of the legislative department of the State is directly exercised upon the transaction itself, and upon a matter clearly within the scope of its authority. It was the constitutional duty of the Legislature "to pass suitable laws to encourage schools and the means of instruction." Under the terms of this authority, having created, as it did, the City of Plattsmouth a separate school district, it might prescribe the number and character of the school-houses to be provided, and impose, if it saw fit, directly, a tax upon the locality to defray the cost of erecting and maintaining them. What the State might properly have done by direct action, it may do through the public agency of a municipal body, such as the City of Plattsmouth, which, in the performance of the duty assigned, does not so much exercise a corporate power of its own as discharge a function of the State. An illustration and example of the distinction is found in the case of *Foster* v. *Wood* [577] *Co.*, 9 Ohio St., 540, where it was held that a public corporation for the construction and repair of highways was really only a part of the machinery of the State, and its officers, county or township officers discharging duties in connection therewith; and that, consequently, an Act of the General Assembly authorizing the body by name to complete the construction of a particular highway, and to make an assessment of the cost upon the property benefited, was not a special Act conferring corporate power within the meaning of the constitutional prohibition. So it was held in *State* v. *Squires*, 26 In., 340, that, while the Legislature would not, in view of the constitutional provision of that State, have the power to pass a special law incorporating an independent school district, it would, nevertheless, have the power to pass a curative Act, legalizing the defective organization of a school district already in existence under the general law authorizing the creation of independent school districts.

In view of the decisions of this court and the courts of the several States in this country, affirming the capacity of municipal corporations to accept and administer trusts of property, given or devised for purposes of public charity, it would not be denied that the City of Plattsmouth might lawfully receive and apply a gift of money bestowed in trust to pay the principal and interest of the bonds involved in this litigation, as having been issued for the purpose of obtaining means with which to erect a public school building. The administration of such a trust would not be contested on the ground that it was an enlargement of its corporate powers. But the duty to repay the consideration for them, employed by it in the same uses, already existed; and its enforcement through the legislative Act, which prescribed a remedy, is not more open to the same objection. It is not a special Act conferring corporate power; it is merely a special Act taking away from the Corporation the power to interpose an unconscionable defense against a just claim, and to avoid an obligation to pay an equivalent for public benefits, which it has continued to enjoy.

The very proposition involved here was maintained by the Supreme Court of Nebraska in the case of *Jefferson Co.* v. *People*, 5 Neb., 127. There it was decided that a special Act of the [578] Legislature, authorizing the county commissioners of Jefferson County to provide funds for the payment of certain outstanding warrants of said county, by issuing bonds, selling the same and using the proceeds in payment of warrants issued to contractors for the erection of a court-house and jail, was valid and effectual. The court said: "That Jefferson County is justly indebted to the relator for the amount of the warrants in question, will not be controverted; and where such is the case, there is no doubt of the power of the Legislature to require the county to issue its bonds for the amount of its indebtedness." In one aspect, this case goes beyond the argument; for it contemplated further action by the Corporation in the issue of its bonds.

The second statute, that of February 25, 1875, is not subject to the objection to the former one just disposed of, for it is a general Act "To Amend an Act to Incorporate Cities of the Second Class and to Define their Powers, Approved March 1, 1871, and to Legalize Certain Taxes There in Mentioned," and the terms of its 2d section embrace the case of the bonds in controversy in this suit. It expressly declares "That all bonds heretofore issued by any city of the second class in good faith for the erection of or to procure the means for erecting a high-school building within such city, or for heating or furnishing the same whether issued under a general or special law providing therefor, or any bonds hereafter issued by such city in exchange for any such bonds, shall be legal and valid; and any tax heretofore or hereafter levied to pay the interest or a portion of the principal of any such bonds, not exceeding five mills on the dollar valuation of the taxable property in the city in any one year, shall be legal and valid."

Accordingly, objections are made to its validity for want of conformity to other provisions of the Constitution of the State, the first of which (that it conflicts with section 19, article 2, which declares that "No bill shall contain more than one subject, which shall be clearly expressed in its title") it is claimed, applies to both Acts.

In regard to the special Act of February 18, 1873, however, it seems to us unnecessary to say more than that the title appears to be a full and apt description of the whole contents of the Act. The proceedings of the city council [579] in reference to the construction of a high-school building, which it is the object of the Act, as expressed in the title, to legalize, necessarily includes the issue of the bonds authorized by it for that purpose.

In *White* v. *Lincoln*, 5 Neb., 505-516, it was said that "The object of this constitutional provision is to prevent surreptitious legislation

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by incorporating into bills obnoxious provisions which have no connection with the general object of the bill, and of which the title gives no indication. It will be sufficient, however, if the law have but one general object, which is fairly expressed in the title of the bill."

Accordingly, it was held in that case, as it was also in *Tecumseh* v. *Phillips*, 5 Neb., 305, that the 3d section of the Act of February 25, 1875, which ratified expenditures by cities of the second class of moneys illegally collected for licenses for the sale of intoxicating liquors, was void, because there was nothing in the title of the Act to indicate the object contemplated by that section. "It is in nowise amendatory," said the court in *Tecumseh* v. *Phillips*, *supra*, "of the general incorporation law for cities of the second class, nor does it make any allusion to the legalization of any taxes whatever." And in the same case, speaking of the entire Act, the court said: "But we fail to discover wherein it is in any particular amendatory of the general Act relating to cities of the second class."

The Act, therefore, may be considered as if its title were simply that of "An Act to Legalize Certain Taxes therein Mentioned."

The 2d section, which is the only one material in this controversy, does legalize taxes theretofore or thereafter levied to pay the interest on certain bonds, namely: such as having been theretofore issued by any city of the second class, in good faith for the erection of, or to procure the means for erecting, a high-school building within such city, or for heating or furnishing the same, whether issued under a general or special law providing therefor, etc., are thereby declared to be legal and valid.

It is impossible to say that legalizing the bonds and the taxes levied to pay them are two diverse subjects, when to legalize the taxes [380] necessarily makes the bonds valid; for nothing more strongly confirms an invalid bond than to make provision for its payment. We have no hesitation, therefore, in upholding the 2d section of the Act of February 25, 1875, as a valid enactment, so far as the present objection is concerned.

As we do not consider it as an Act to amend the general law incorporating cities of the second class, rejecting that portion of the title, it is not subject to the further objection, that it does not conform to the constitutional requirement that "No law shall be revived or amended, unless the new Act contain the entire Act revived and the sections amended."

The remaining objection is not to its validity, but to its application to the present case. It is argued that the 2d section of the Act relates only to bonds that have been issued "under a general or special law providing therefor;" and that the bonds now in controversy were not so issued and cannot, therefore, claim support from this provision.

If by this is meant, that no bonds are within the purview of this section, except such as have been lawfully issued, the conclusion results in an absurdity: for it supposes an Act of the Legislature passed to cure the invalidity of valid bonds.

If, on the other hand, the section is construed to mean that all bonds, that have been issued in good faith, for the purposes mentioned and under color of law, whether general or special, but without actual authority, shall be deemed to be legal and valid, the only rational and worthy effect is given to the enactment that can be deduced from its terms. We do not doubt that such was the purpose of the Legislature, and that it is the meaning of the law.

In our opinion, the bonds in controversy are valid obligations of the City of Plattsmouth, under either of the two Acts, of February 18, 1873, and of February 25, 1875, respectively; and *the Circuit Court erred in its instructions to the jury to the contrary. For that error, the judgment is reversed and the cause remanded, with instructions to grant a new trial.*

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 151; 109 U. S., 738, 740.

WIGGINS FERRY COMPANY, *Plff. in Err.*, *v.* CITY OF EAST ST. LOUIS.

(See S. C., 17 Otto, 365-378.)

Immunity from taxation—tax on ferry—contract—license fee to ferry—when constitutional—ferry between two States—police power of State.

1. Grants of immunity from taxation are never to be presumed. On the contrary, all presumptions are the other way; and, unless an exemption is clearly established, all property must bear its just share of the burdens of taxation.

2. A state statute which declares that a ferry shall be subject to the same taxes which were then or might thereafter be imposed on other ferries within the State, and under the same regulations and forfeitures, simply provides for equality of taxation, and does not constitute a contract between the Ferry Company and the State, exempting the ferry from any state or municipal taxation.

3. An ordinance of the City imposing a license fee for each boat, and the charter of the City, by which the ordinance is authorized, do not impair the obligation of any contract between the Ferry Company and the State.

4. A State may impose a license fee, either directly or through one of its municipal corporations, upon the keepers of ferries living in the State, for boats owned by them and used in ferrying passengers and goods from a landing in the State, across a navigable river, to a landing in another State.

5. A license fee of $100 so imposed, for each boat, is not forbidden by the Constitution of the United States as a regulation of commerce between the States and, therefore, within the exclusive power of Congress, or, because it is a duty of tonnage.

6. When, therefore, a State expressly grants, to an incorporated city, the power to license, tax and regulate ferries, the latter may impose a license tax on the keepers of ferries, although their boats ply between landings lying in two different States.

7. The power of Congress to require vessels to be enrolled and licensed, is derived from the provision of the Constitution which authorizes it to regulate commerce with foreign Nations and among the several States, and does not interfere with the police powers of a State in granting ferry licenses.

[No. 949.]

Submitted Jan. 19, 1883. Decided Mar. 5, 1883.

IN ERROR to the Supreme Court of the State of Illinois.

The history and facts fully appear in the Statement of the case by *Mr. Justice* **Woods:**

NOTE.—*Power of Congress to tax commerce; state licenses; power of States to tax commerce.* See *note* to Gibbons v. Ogden, 22 U. S. (9 Wheat.), 1; and *note* to Brown v. Maryland, 25 U. S. (12 Wheat.), 419.

Tonnage tax. See *note* to Inman S. S. Co. v. Tinker, 94 U. S., XXIV., 118.

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This was an action of debt brought in the City Court of East St. Louis, St. Clair County, Illinois, by the City of East St. Louis against a Corporation of the State of Illinois, known as the Wiggins Ferry Company, to recover from it license money imposed by an ordinance of the City. The Ferry Company pleaded *nil debet*. By consent of parties, the cause was submitted to the court on an agreed statement of facts, which was as follows:

Under and by authority of an Act of the Legislature of Illinois, entitled "An Act to Authorize Samuel Wiggins to Establish a Ferry upon the Waters of the Mississippi," approved March 2, 1819, and amendatory Acts, Wiggins and his associates did establish, maintain and operate a ferry upon and over the Mississippi River, between the City of St. Louis, in the State of Missouri, and the Illinois shore of the river opposite to the City of St. Louis, now within the limits of the City of East St. Louis, from about the time of the passage of the Act of 1819, until the organization of the Wiggins Ferry Company in the year 1853, under and by authority of an Act of the Legislature, entitled "An Act to Incorporate the Wiggins Ferry Company," approved February 11, 1853. In the year 1853, under authority of said Act of 1853, the successors, heirs and assigns of Samuel Wiggins, the then owners of the ferry and ferry franchise, and of all the rights, privileges and immunities granted to Samuel Wiggins and his successors, heirs and assigns, by proper deeds and assignments conveyed the same to defendant, they having become the stockholders of said Ferry Company, and from thence hitherto defendant has remained the lawful owner of said ferry, ferry franchise, rights, privileges and immunities, including the ferry-boats, wharf-boats, wharfs and landings in use by said ferry, and the rights, privileges, immunities and franchises granted by said Act of 1853, and amendatory Acts, and under and by authority of all said grants, fran-
[367] chises, rights, privileges and immunities defendant has maintained and operated said ferry from thence hitherto. The Mississippi River, at the point between the States of Illinois and Missouri, upon and over which the said ferry is established and operated, has, under the laws of the United States and the rules and regulations established thereunder, by the duly authorized officers of the United States, been declared to be and is, a navigable river within the purview of such laws; and under said laws, rules and regulations, and especially in conformity to the Revised Statutes of the United States, title L, "Regulation of vessels in domestic commerce," the defendant for the last twenty years and more has been required to and has had all its ferry-boats, all of which are more than twenty tons burden, regularly enrolled and annually inspected and licensed, at an annual cost of from $75 to $100 per boat, according to tonnage and number of men employed on each. The defendant ever since its organization has paid to the County of St. Clair, as a ferry license, the sum of $300 per annum, under the laws of Illinois and the requirements of the county authorities; and has owned the wharfs and landing used by said ferry in the City of East St. Louis, which is graded and paved at its own expense, and it has never used or employed any wharf or landing belonging to the City of East St. Louis. Defendant, ever since its organization, has annually listed for taxation and paid all taxes legally assessed upon all its property; all its personal property, including its boats and franchise, and all its real estate which is situated within the city limits, and including its wharfs and landings, having been taxed by said City of East St. Louis ever since the organization of said City.

The Illinois and St. Louis Ferry Company and the St. Louis and Cahokia Ferry Company own and operate ferries over and across the Mississippi River between the said City of St. Louis and the Illinois shore, but without the limits of the City of East St. Louis, both in active competition with the ferry of defendant, neither of which are or ever have been required to pay any sum whatever for license to either the City of East St. Louis or any other municipal corporation except the County of St. Clair, to which they both pay license fees.

The St. Louis Bridge Co., which owns and [368]
operates a bridge over the Mississippi River between said Cities of St. Louis and East St. Louis, which has been in active competition with defendant ever since said bridge was opened for use in July, 1874, is required to pay no license fee whatever to the City of East St. Louis. On June 1, 1868, the city council of the City of East St. Louis duly passed and published "Ordinance No. 70," parts of which are as follows:

"Sec. 1. No person, firm, company or corporation shall be engaged in, prosecute or carry on any trade, business, calling or profession hereinafter mentioned without first having obtained a license therefor.

* * * *

Sec. 10. Keepers of ferries shall pay $50 license for each boat plying between this City and the opposite bank of the river for one year, or $25 for each boat for six months."

In compliance with the above ordinance, defendant paid said City a license fee of $50 per annum on each of its ferry-boats, its last license thereunder being from May 1, 1874, to May 1, 1875.

On October 7, 1878, said city council passed ordinance No. 317, which is substantially the same as ordinance No. 70, except that it fixes the license fee at $100 per annum for each boat. On May 1, 1875, and from thence hitherto, the defendant, in the operation of its ferry between said Cities of St. Louis and East St. Louis, has employed eight ferry-boats, including two tugs and one transfer-boat, and since said May 1, 1875, has not taken out any license nor paid any license fee to said City of East St. Louis. Upon the facts here stated, and the laws applicable thereto, the court shall determine the right of plaintiff to demand, and the liability of defendant to pay, the license fee fixed by said ordinance, or either of them, and render judgment accordingly, and this without regard to the pleadings in the case. The Acts of the Legislature, and the laws, rules and regulations of the United States, and the enrollments, inspections and licenses herein mentioned or referred to, and the charter and ordinances of said City of East St. Louis, or copies thereof, may be used and [369]
referred to as a part of the record in this case.

So much of the Act of 1819, referred to in the agreed statement of facts, entitled "An Act to

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Authorize Samuel Wiggins to Establish a Ferry upon the Waters of the Mississippi River," as is pertinent to this case, is as follows:

"Sec. 1. That Samuel Wiggins, his heirs and assigns be, and they are hereby, authorized to establish a ferry on the waters of the Mississippi near the Town of Illinois, in this State, and to run the same from lands at the said place that may belong to him."

"Sec. 4. That the ferry established shall be subject to the same taxes as are now, or hereafter may be, imposed on other ferries within this State and under the same regulations and forfeitures."

So much of the Act of February 11, 1858, "To Incorporate the Wiggins Ferry Company," as is material to this case, is as follows:

After a preamble, which recited the above mentioned Act of 1819 and Acts amendatory thereof, it was enacted:

"Sec. 1. That (certain persons, naming them), and their associates, successors and assigns, are hereby created a body corporate and politic by the name and style of the Wiggins Ferry Company * * * and the said Company shall have full power * * * to purchase, hold, use and enjoy the ferry franchise granted to Samuel Wiggins, his heirs and assigns, by the Act referred to in the preamble of this Act * * * to keep a ferry or ferries at and from any point or points on said land, across the Mississippi River to St. Louis, in the State of Missouri, and use and enjoy all the rights, privileges, franchises and emoluments recited in the preamble of this Act as having been heretofore granted to the said Samuel Wiggins, his heirs and assigns."

"Sec. 7. * * * *Provided*, That nothing in this Act contained shall be construed to create any private right so as to interfere with the powers of any existing municipal corporation, or with the right of the Legislature, at any time hereafter, to create municipal corporations within the limits herein specified, and to confer upon said corporations all such powers of police * * * as may be usually or properly confided to a city corporation under the Constitution of Illinois."

[370] The authority to pass the ordinance under which the plaintiff claimed license money from the defendant was its charter, passed in 1869, which empowered it "to regulate, tax and license ferry-boats." Priv. L. of Ill., 1869, Vol. I., p. 893.

Upon these facts the court found the issues for the plaintiff, and assessed its damages at $1,600, for which sum it rendered judgment against the defendant.

The case was taken by the appeal of defendant to the Appellate Court of the Fourth District of Illinois, by which the judgment of the City Court of East St. Louis was affirmed. The defendant then carried the case, by appeal, to the Supreme Court of Illinois, by which the judgment of the appellate court was affirmed.

To obtain a reversal of this judgment of the Supreme Court, the defendant has brought the case to this court by writ of error.

Messrs. **H. P. Buxton** and *Robert A. Halbert*, for plaintiff in error.

Messrs. **J. M. Freels, M. Millard,** *B. H. Canby* and *John W. Noble*, for defendant in error:

The doctrine that a license is not a tax, in the constitutional sense of that term, is clearly established by the following, among other cases: *People* v. *Thurber*, 13 Ill., 554; *E. St. Louis* v. *Wehrung*, 46 Ill., 394; *Cole* v. *Hall*, 108 Ill., 30; *Wiggins Ferry Co.* v. *E. St. Louis*, 102 Ill., 560; *Ex parte Siebenhauer*, 14 Nev., 371; *Bohlor* v. *Schneider*, 49 Ga., 195; *Ins. Co.* v. *Augusta*, 50 Ga., 530; *Sacramento* v. *Crocker*, 16 Cal., 122.

In a late and well considered case, *Mr. Justice* Field, in delivering the opinion of this court, says: "Against the power (to tax) nothing is to be taken by inference and presumption. Where a doubt arises as to the restriction, it is to be decided in favor of the State."

Bank v. *Tenn.*, 104 U. S., 495 (XXVI., 811); see, also, *R. R. Co.* v. *Comrs.*, 103 U. S., 1 (XXVI., 359); *Wilson* v. *Gaines*, 103 U. S., 417 (XXVI., 401); *R. R. Co.* v. *Hamblen Co.*, 102 U. S., 273 (XXVI., 152); *R. R. Cos.* v. *Gaines*, 97 U. S., 697 (XXIV., 1091); *Ferry Co.* v. *E. St. Louis*, 102 Ill., 570; Burroughs Tax., sec. 68; *Hart* v. *Plum*, 14 Cal., 148.

The regulation of ferries is referable to the police power, which cannot be granted away.

Ferry Co. v. *E. St. Louis*, 102 Ill., 569; *Beer Co.* v. *Mass.*, 97 U. S., 25 (XXIV., 989); *Patterson* v. *Ky.*, 97 U. S., 501 (XXIV., 1115); *Stone* v. *Miss.*, 101 U. S., 814 (XXV., 1079).

It has been repeatedly decided by this court, and by the courts of the several States, that ferries are the creatures of local legislation, and are subject to the laws of taxation and the police powers and regulations of the States by which they are created, and do not fall within this constitutional provision.

Gibbons v. *Ogden*, 9 Wheat., 1; *Conway* v. *Taylor*, 1 Black, 603 (66 U.S., XVII., 191); *Fanning* v. *Gregoire*, 16 How., 534; *Cooley* v. *Board of Wardens*, 12 How., 320; *N. Y.* v. *Miln*, 11 Pet., 141; *Chilvers* v. *People*, 11 Mich., 43; *Marshall* v. *Grimes*, 41 Miss., 27; *Chosen Freeholders* v. *State*, 4 Zab., 718; *People* v. *Babcock*, 11 Wend., 586; *Beer Co.* v. *Mass.* (*supra*); *Patterson* v. *Ky.* (*supra*); *Stone* v. *Miss.* (*supra*).

Mr. Justice **Woods** delivered the opinion of the court:

The first contention of the plaintiff in error is, that the 4th section of the Act of 1819, which declared that the Wiggins Ferry should be subject to the same taxes as were then or might thereafter be imposed on other ferries within the State, and under the same regulations and forfeitures, and the charter of the Wiggins Ferry Company, which authorized said Company to use and enjoy the ferry franchise granted to Samuel Wiggins, and to use and enjoy all the rights, privileges and emoluments recited in the preamble of the Act as having been granted to Wiggins and his heirs and assigns, constituted a contract between the Ferry Company and the State, by which the power to tax the Ferry Company was limited to the imposition of the same taxes as were then or might thereafter be imposed on other ferries within the State; and that the charter of the City of East St. Louis, which authorized the City to regulate, tax and license ferry-boats, and the ordinance of the City imposing a license tax on the ferry-boats of the Company, impaired the obligation of the contract and was, therefore, unconstitutional and void.

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[371] We are of opinion that the charter of the Company cannot be so construed as to exempt it from any taxation which the State might itself see fit to impose or authorize to be imposed by the City of East St. Louis.

It is a rule of interpretation that every grant from the sovereign authority is, in case of ambiguity, to be construed strictly against the grantee and in favor of the government. *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420; *Mills* v. *St. Clair Co.*, 8 How., 569; *Atty-Gen.* v. *Boston*, 123 Mass., 460.

This rule has been frequently applied by this court in cases where exemption from taxation was set up by corporations under the provisions of their charters. In *R. R. Co.* v. *Md.*, 10 How., 376, it was declared that "The taxing power of a State is never presumed to be relinquished unless the intention to relinquish is declared in clear and unambiguous terms;" and in *Bank* v. *Skelly*, 1 Black, 436 [66 U. S., XVII., 173], it was said that "The language of this court has always been cautious and affirmative of the right of the State to impose taxes, unless it has been relinquished by unmistakable words clearly indicating the intention of the State to do so."

So in *R. R. Co.* v. *Comrs.*, 103 U.S., 1 [XXVI., 859], the *Chief Justice*, speaking for the court, declared: "Grants of immunity from taxation are never to be presumed. On the contrary, all presumptions are the other way, and unless an exemption is clearly established, all property must bear its just share of the burdens of taxation. These principles are elementary and should never be lost sight of in cases of this kind." To the same effect see *R. R. Cos.* v. *Gaines*, 97 U. S., 708 [XXIV., 1093].

So in *Bank* v. *Tenn.*, 104 U. S., 493 [XXVI., 810], this court declared, speaking by *Mr. Justice* Field: "That statutes imposing restrictions upon the taxing power of a State, except so far as they tend to secure uniformity and equality of assessment, are to be strictly construed, is a familiar rule. Against the power nothing is to be taken by inference or presumption. When a doubt arises as to the existence of the restriction, it is to be decided in favor of the State."

[372] If any serious doubt could arise concerning the interpretation of section 4 of the Act of 1819, which the plaintiff in error contends was incorporated as a provision of its charter, the authorities cited would settle that doubt in favor of the right of the City of East St. Louis to impose the license tax complained of.

But we are of opinion that the meaning of the section is not doubtful. The ferry of Wiggins had only one of its landings in the State of Illinois; the other was in the State of Missouri. The evident purpose of the section was to prevent the ferry, by reason of that circumstance, from escaping the same burdens of taxation as were imposed on ferries entirely within the State, and not to limit the taxing power of the Legislature. It declares that the ferry of Wiggins shall be subject to the same taxes which were then or might thereafter be imposed on other ferries within the State, and under the same regulations and forfeitures, but it does not intimate that the State shall not impose on it such other taxes within its constitutional power as to it may seem fit.

The most favorable construction for the plaintiff in error that could be placed upon its charter is, that it provided for equality of taxation; that is to say, that the property of the Ferry Company should be valued and taxed by the same rule as other like property, and that the same exactions and forfeitures only as were imposed on like property, similarly situated, should be imposed on it. It certainly cannot be contended that its ferry, on one of the great arteries of commerce, crossing the Mississippi River and having each of its landings in a city, should only pay the same identical taxes and license fees as a country ferry over an inconsiderable stream. All that could be reasonably claimed under its charter is, that it should be subjected to no higher state and municipal taxation and no greater license fees than other like property similarly situated. Giving the charter this construction, the plaintiff in error has no ground of complaint. It is not shown that the state and county taxation bears unequally on the Ferry Company. The ordinance of the City of East St. Louis makes no discrimination in favor of any other ferry similarly situated which it is authorized to regulate, tax and license. The same license fee is exacted of all keepers of ferries within the corporate limits as [373] are imposed upon the plaintiff in error.

But the contention of the plaintiff in error seems to be that, under the terms of its charter, it is exempted from the imposition by the City of East St. Louis of any license fee whatever. So far from this being the fact, the charter, by the proviso to section 1, expressly reserved the power of any existing municipal corporation, or any that might be thereafter created within the limits of the Ferry Company's lands, to exercise all such powers of police as might be properly conferred on a city corporation. The power to license is a police power, although it may also be exercised for the purposes of raising revenue. We cannot say, as a matter of law, that when a municipal corporation is authorized "to regulate, tax and license ferry-boats," the imposition of a license fee of $100 per boat is not within the power to regulate and license and is, consequently, not within the police power.

It follows, therefore, that the ordinance of the City of East St. Louis and the charter of the City by which the ordinance is authorized, do not impair the obligation of any contract between the Ferry Company and the State.

The next question presented by the assignments of error relates to the power of the State to impose a license fee either directly or through one of its municipal corporations upon the keepers of ferries living in the State, for boats owned by them and used in ferrying passengers and goods from a landing in the State, across a navigable river, to a landing in another State. It is insisted by the plaintiff in error that such an exaction is forbidden by the Constitution of the United States: (1) because it is a regulation of commerce between the States and, therefore, within the exclusive power of Congress; and (2) because it is a duty of tonnage, which the States are forbidden by the Constitution to lay without the consent of Congress.

In our opinion, neither of these contentions is well founded. The levying of a tax upon vessels or other water-craft, or the exaction of a license fee by the State within which the property subject to the exaction has its *situs*, is not

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a regulation of commerce within the meaning [374] of the Constitution of the United States. *Gibbons* v. *Ogden*, 9 Wheat., 1; *Passenger Cases*, 7 How., 283; *Morgan* v. *Parham*, 16 Wall., 471 [83 U. S., XXI., 303]. In *Gibbons* v. *Ogden* it was settled that the clause of the Constitution conferring on Congress the power to tax, and the clause regulating and restraining taxation, are separate and distinct from the clause granting the power to Congress to regulate commerce. In all of the cases just cited, the right of a State to tax a ship owned by one of her citizens and having its *situs* within the State, although used in foreign commerce or in commerce between the States, was distinctly recognized. Thus, in *The Passenger Cases*, it was said by *Mr. Justice* McLean: "A State cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce, the same as other property owned by its citizens. A State may tax the stages in which the mail is transported, but this does not regulate the conveyance of the mail any more than taxing a ship regulates commerce; and yet, in both instances, the tax on the property in some degree affects its use."

In the case of *Trans. Co.* v. *Wheeling*, 99 U. S., 273 [XXV., 412], this court sustained a tax levied by the City of Wheeling upon steamboats used in navigating the Ohio River between that city and Parkersburg, and the intermediate places on both sides of the river in the States of West Virginia and Ohio, the company whose property the boats were, having its principal office in Wheeling.

The exaction of a license fee is an ordinary exercise of the police power by municipal corporations. When, therefore, a State expressly grants to an incorporated city, as in this case, the power to license, tax and regulate ferries, the latter may impose a license tax on the keepers of ferries, although their boats ply between landings lying in two different States, and the Act by which this exaction is authorized will not be held to be a regulation of commerce.

In the case of *Fanning* v. *Gregoire*, 16 How., 524, it was declared by this court, speaking of the charter of Fanning to ferry across the Mississippi River at Dubuque, that the exercises of the commercial power by Congress did not interfere with the police power of the States in granting ferry licenses. [375]

And in the case of *Conway* v. *Taylor*, 1 Black, 603 [66 U. S., XVII., 191], *Mr. Justice* Swayne, speaking for the court, in reference to a ferry established across the Ohio River, between the States of Ohio and Kentucky, declared that the power to establish and regulate ferries did not belong to Congress under the power to regulate commerce, but belonged to the States, and lay within the scope of that immense mass of undelegated powers reserved by the Constitution to the States.

The authorities cited, settle, beyond controversy, that the ordinance of the City of East St. Louis imposing upon the keepers of ferries within its limits, and the Act of the Legislature by which such ordinance was authorized, do not invade the exclusive power of Congress to regulate commerce, conferred on it by the Constitution.

It is next insisted by plaintiff in error that the license fee exacted by the ordinance of the City of East St. Louis is a tonnage tax, which the States are forbidden to lay without the consent of Congress. This contention has no ground to rest on. In the first place, the license fee is levied, not on the ferry-boat, but on the ferry-keeper. The 1st section of the ordinance declares that no person shall carry on any trade, business, calling or profession thereinafter mentioned, without having first obtained a license therefor; and the ordinance, after having enumerated many other trades and callings, and fixed the license fee for carrying them on, declares, in section 10, that keepers of ferries shall pay $100 license fee for each boat plying between the City and the opposite bank of the river.

The power of the State of Illinois to authorize any city within her limits to impose a license tax on trades or callings generally, especially those which are *quasi* public, cannot be disputed. Draymen may be compelled to pay a license tax on every dray owned by them; hackmen on every hack; tavern-keepers on their taverns in proportion to the number of the rooms which they keep for the accommodation of guests. We do not think that the Constitution of the United States, by the section which prohibits a State from laying a duty of tonnage, protects the keeper of a ferry from a similar tax upon the boats which he employs. Whether a license fee is exacted under the power to regulate or the power to tax, is a matter of indifference if the power to do either exists. [376] The license fee exacted is, in effect, laid upon the business of keeping a ferry, for it is not laid upon all boats owned by the ferry-keeper, but only on those plying between the two banks of the river, and is graduated by the number of boats used by him.

The exaction of this license fee is identical in kind with the imposition upon a proprietor of hacks and express wagons of a specified sum for every vehicle owned by him and used in carrying passengers or baggage and merchandise from East St. Louis to the City of St. Louis, by way of the bridge connecting those Cities.

In the second place, the amount of the license fee is not graduated by the tonnage of the ferry boats. It is the same whether the boats are of large or small carrying capacity. This, although not a conclusive circumstance, *Steamship Co.* v. *Port Wardens*, 6 Wall., 34 [73 U. S., XVIII., 750], is one of the tests applied to determine whether a tax is a tax on tonnage or not. The *State Tonnage Tax Cases*, 12 Wall., 212 [79 U. S., XX., 373]; *Peete* v. *Morgan*, 19 Wall., 581 [86 U. S., XXII., 201]; *Cannon* v. *New Orleans*, 20 Wall., 577 [87 U. S., XXII., 417]. If the same license fee had been exacted of the keeper of a ferry across a navigable stream entirely within the State of Illinois, Chicago River, for instance, it would scarcely be contended that it fell within the constitutional prohibition. The fact that in this case the ferry crosses a river which divides two States cannot change the nature of the exaction.

As we have already said, the burden imposed by the ordinance is not measured by the tonnage of the ferry-boats; it is not measured by the number of times they cross the Mississippi River or land at the City of East St. Louis. We are of opinion, therefore, that it is not a duty of

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tonnage, nor is it in its essence a contribution claimed for the privilege of using a navigable river of the United States or of arriving or departing from one of its ports and is, therefore, not prohibited by the Constitution of the United States.

Counsel for plaintiff in error contend that if the power of the City of East St. Louis to exact a license fee of $100 from every ferry-boat is conceded, the City could double or treble the fee at will. It is sufficient to say, in reply to this, that it does not follow from the fact that [377] a power is liable to abuse that it does not exist. If the power is abused, the remedy is with the Legislature.

Lastly, it is contended by the plaintiff in error, that the fact that the boats of the Ferry Company have been enrolled, inspected and licensed under the laws of the United States, is a protection against the exaction of any license fee by the State or by its authority.

In the case of *Gibbons* v. *Ogden, ubi supra*, it was said by the court that inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are parts of the immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government. In the subsequent case of *Conway* v. *Taylor, ubi supra*, this court, relying as authority on the declaration just cited, held that the fact that Conway had caused his ferry-boat to be enrolled and licensed, under the laws of the United States, at the custom-house in Cincinnati, to carry on the coasting trade, did not authorize him to carry on the business of a ferry between Cincinnati and Newport, Kentucky, in disregard of the rights of Taylor, who had an exclusive license from the authorities of the State of Kentucky to ferry from the Kentucky to the Ohio side of the river.

The power of Congress to require vessels to be enrolled and licensed, is derived from the provision of the Constitution which authorizes it "To regulate commerce with foreign Nations and among the several States." We have already seen that this court, in *Fanning* v. *Gregoire, ubi supra*, has held that this right of Congress "does not interfere with the police powers of a State in granting ferry licenses."

These authorities show that the enrollment and licensing of a vessel under the laws of the United States does not, of itself, exclude the right of a State to exact a license from her own citizens on account of their ownership and use of such property having its *situs* within the State.

Counsel have argued other assignments, based on the construction given by the Supreme Court of Illinois to the Constitution and Laws of the [378] State. As, in our opinion, all the federal questions presented by the record were rightly decided by that court, it is not our province to consider these assignments. *Murdock* v. *Memphis*, 20 Wall., 590 [87 U. S., XXII., 429].

We find no error in the record. The judgment of the Supreme Court of Illinois must, therefore, be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 74.

TOWN OF PANA, *Plff. in Errr.*,
v.
JAMES H. BOWLER AND ISAAC H. MERRILL, Partners, as BOWLER & MERRILL.

(See S. C., 17 Otto, 529-546.)

Donation to railroad company—defense to town bonds—state decision—irregularity in election—decree, when binding—interest on coupons.

1. The limit in the charter of the Ill. S. E. Railway Company, that any town could not donate to the company to exceed $30,000, was removed by the amendatory Act of 1869.

2. Where bonds recite on their face that an election was held before a certain date, as required by law, the circumstance that the election was irregularly conducted can be of no avail as a defense to the bonds in a suit brought by a *bona fide* holder.

3. The decision of a state court that, in consequence of an irregularity in an election, bonds of a town issued in pursuance of it, which recite on their face that the election was held in accordance with the statute, are void in the hands of *bona fide* holders, is one which falls among the general principles and doctrines of commercial jurisprudence, upon which it is the duty of this court to form an independent judgment.

4. Irregularity in the conduct of an election at which the issue of negotiable bonds was authorized, does not throw on the plaintiff the burden to show that he is a holder for value; the illegality which shifts the burden of proof on the holder, to prove that he paid value, must be something which relates to the consideration of the paper sued on.

5. A decree rendered by a state court, in a proceeding purely *in personam*, does not bind non-residents who were not named in it as parties, and in which there was no personal service upon or appearance by them, and the only notice to them was by publication addressed to the unknown holders and owners of the bonds and coupons of a town.

6 Coupons, after their maturity, bear interest at the rate fixed by the law of the place where they are payable.

[No. 1008.]

Submitted Jan. 19, 1883. Decided Mar. 5, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The history and facts fully appear in the

Statement of the case by *Mr. Justice* **Woods:**

This was an action of *assumpsit*, brought by James H. Bowler and Isaac H. Merrill against the Town of Pana, upon coupons cut from certain bonds issued by the Town, dated June 23, 1873. The defendant pleaded the general issue, and the parties having waived a jury, submitted the case to the court upon the facts as well as the law. The court found the issues of fact for the plaintiffs, and rendered judgment in their favor for $7,272.02. This writ of error is brought by the defendant to review that judgment.

The parties made an agreed statement and the court a special finding of facts. From these and the pleadings in the case, the following facts appear:

On February 25, 1867, an Act was passed by the Illinois Legislature "To incorporate the Illinois Southeastern Railway Company." Sections 9 and 10 of this Act declared as follows:

"Sec. 9. Any town, in any county under township organization, is hereby authorized

NOTE.—*Interest after maturity, at what rate.* See *note* to Ohio v. Frank, 103 U. S., XXVI., 531.

Recitals in negotiable bonds or securities; estoppel by; evidence of the facts recited. See *note* to Mercer Co. v. Hackett, 68 U. S., XVII., 548.

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and empowered to donate to said company any amount, not to exceed $30,000; *Provided*, That no such donation by any such town to said company shall be made, unless the question of making such donation shall have been first submitted to the legal voters of such town at an election hereafter to be provided for; and *Provided, further*, That no donation so made, nor any part thereof, nor any interest accruing thereon or upon any part thereof shall be paid or become due or payable to said company, until said company or its assigns or *employés*, shall have completed their said railroad, or some certain part of said road or its branch, as may have been agreed upon by the contracting parties.

Sec. 10. No such election for the purpose of submitting the question of making a donation by any such town, authorized by section 9 of this Act to donate to this company, shall be held until the directors of said company shall have filed a proposition to the inhabitants of said town with the county clerk of the county wherein such town is situate, and a copy of the same with the clerk of said town and, if there be a newspaper published in said county, said proposition shall be published in full in the same; whereupon, it shall be the duty of the clerk of such town to post up printed or written notices of the time and place of holding such election in at least ten public places in such town, together with a copy of such proposition, at least twenty days before the day for holding [531] such election; at which election the legal voters of such township shall vote for or against such proposition; and if a majority of all the votes cast be for such proposition, the trustees of such town shall so certify the same to the clerk of the county court of the county wherein the town is situated, and such county clerk shall, upon application of the company, after the donation so voted by any such town shall have become due and payable, under the terms and conditions of the proposition under which said election was rendered, compute and assess upon all the taxable property in said town an amount sufficient to pay such donation, or any part or installment of the same so then being due and payable; which taxes so assessed shall be collected as other taxes; and the taxes so collected shall be paid to the treasurer of said company. And the election herein provided for shall be held, canvassed and returned as other regular town elections."

Afterwards, on February 24, 1869, another Act was passed to amend the Act to incorporate the Illinois Southeastern Railway Company, section 10 of which was as follows:

"Sec. 10. That any village, city, county or township organized under the township organization law, or any other law of this State, along or near the route of said railway or its branches, or that are in anywise interested therein, may, in their corporate capacity, subscribe to the stock of said company, or render donations to said company to aid in constructing and equipping said railway; *Provided*, That no such subscriptions or donations shall be made until the same shall be voted for, as hereinafter provided. That, whenever twenty legal voters of any such city, village, county or township shall present to the clerk thereof a written application requesting that an election shall be held to determine whether such village, city, county or township shall subscribe to the capital stock of said company or make a donation thereto, to aid in building or equipping said railway, stating the amount, and whether to be subscribed or donated, and the rate of interest and times of payment of the bonds to be issued in payment thereof, such clerk shall receive and file such application, and shall immediately proceed to post written or printed notices, calling an election to be held by the legal voters of such village, city, county or township, which notice shall be posted in ten of the most public places of such village, city, county or township, for [532] thirty days preceding an election; and said notices shall state fully the object of such election, and such election shall be held and conducted and returns thereof made as in general elections provided by law in this State, and as provided by the charters of any such village or city; *Provided*, That at any election held under the provisions of this Act it shall not be necessary to cause a registration of the voters of such villages, cities, counties or townships; and if a majority of the votes cast at such election shall be in favor of such subscription or donation, then the corporate authorities of such village, city, county or township, organized under the township organization laws of this State, the supervisors of such township shall subscribe to the capital stock of said company or donate thereto, as shall have been determined at such election, the amount so voted at such election, and shall issue the bonds with interest coupons attached * * * said bonds to be signed * * * in case of a township, by the supervisor thereof, and * * * to be countersigned by the clerk of said * * * township," etc.

Afterwards the Springfield and Illinois Southeastern Railway Company, to which the bonds in question in this case were issued, was created by the consolidation of the Pana, Springfield and Northwestern Railroad Company and the Illinois Southeastern Railway Company. The consolidation was authorized by the charters of the two companies, and the new company succeeded to all the rights, franchises and powers of the constituent companies. *Harter* v. *Kernochan*, 103 U. S., 562 [XXVI., 411]. In pursuance of section 10 of the said Act of February 24, 1869, a petition was presented to the town clerk of Pana Township to order an election to be held on April 30, 1870, to decide whether said Township should donate to the Springfield and Illinois Southeastern Railway Company the sum of $100,000 in bonds to fall due in twenty years or, at the option of the Township, in five years from this date, with interest at the rate of eight per cent per annum, payable semi-annually. On April 30, 1870, an election was held in said Township in pursuance of the petition, and a notice thereof given according to law. The meeting at which the election was held was called to order by the town clerk, and one J. W. Stark was, on motion, chosen moderator and was sworn in by the town clerk and presided over the election. At the election thus held four hundred and thirty-eight votes were cast [533] for and twenty-four against said donation.

In the spring, summer and fall of the year 1873, the supervisor and town clerk of said Township, in pursuance of said election and without any other authority of law than said

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election and the charters and amendments above referred to, issued to the Springfield and Illinois Southeastern Railway Company one hundred bonds of the Township of Pana, of $1,000 each, payable and bearing interest according to the rate aforesaid. All the bonds were of like tenor and effect except as to their number. The following is a copy of one of them:

"United States of America.
State of Illinois, County of Christian.
No. 6.] Pana Township. [$1,000.
Eight per cent railroad bond. Registered by auditor of public accounts. Principal and interest collected and paid by the Treasurer of State of Illinois.

Know all men by these presents, that the Township of Pana, in the County of Christian, and State of Illinois, acknowledges itself indebted to the Springfield and Illinois Southeastern Railway Company, or bearer, in the sum of one thousand dollars, with interest from the date hereof, at the rate of eight per cent per annum, payable semi-annually on the first days of January and July of each year, at the agency of the State Treasurer of the State of Illinois, in New York City, on the presentation and surrender of the respective interest coupons hereto attached. The principal of this bond shall be due and payable after five years and within twenty years of the date hereof, at the option of said Township, at said agency in the City of New York.

This bond is one of a series amounting to one hundred thousand dollars, issued by said Township in compliance with the vote of the legal voters thereof at an election held on the 30th day of April, A. D. 1870, under and by virtue of the authority conferred by an Act of the General Assembly of the State of Illinois, entitled 'An Act to Incorporate the Illinois Southeastern Railway Company,' approved February 25, 1867, and an Act amendatory thereof, approved February 24, 1869, and in accordance with the provisions of an Act of said General Assembly, entitled 'An Act to Fund and Provide for Paying the Railroad Debts of Counties, [534] Cities, Townships and Towns,' in force April 16, 1869. And for the payment of said sum of money and accruing interest thereon, in the manner aforesaid, the faith of the said Township of Pana is hereby irrevocably pledged, as is also its property, revenue and resources.

In testimony whereof, the said Township of Pana has caused these presents to be signed by its supervisor and countersigned by its clerk, this twenty-eighth day of June, A. D. 1873.

Grove P. Lawrence, *Supervisor.*
Edwin Sanders, *Clerk.*"

At the time the bonds and coupons were issued, Grove P. Lawrence was the supervisor of said Township of Pana, and Edwin Sanders was its clerk, and their signatures to the bonds and coupons are genuine.

The coupons attached to said bonds were all of the same tenor and effect, except in respect of their numbers. The following is a copy of the coupon attached to the above recited bond:

"$40. The Township of Pana, Christian County, Illinois, will pay the bearer forty dollars on the first of January, 1882, at the agency of her State Treasurer in the City of New York, it being six months' interest on bond No. 6.

Grove P. Lawrence,
Supervisor of said Township."

On the back of every bond was the following indorsement:

"Auditor's Office, Illinois,
Springfield, June 28th, 1873.

I, Charles E. Lippincott, Auditor of Public Accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an Act entitled 'An Act to Fund and Provide for Paying the Railroad Debts of Counties, Townships, Cities and Towns,' in force April 16, 1869.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

[SEAL] C. E. Lippincott, *Auditor, P. A.*"

The Act referred to in this certificate provided that certain taxes, therein specified, should be applied to the payment of the principal and interest of bonds registered in the office of the auditor of public accounts, and that no bonds [535] should be so registered until the railroad, in aid of which the bonds had been issued, should have been completed near to or in the township issuing the bonds, and unless the subscription or donation creating the debt to pay which the bonds were issued, had been first submitted to an election of the legal voters of said township under the provision of the laws of the State, and a majority of the legal voters living in such township had been in favor of such aid, subscription, or donation. And it was made the duty of the supervisor of the township, upon the completion of the railroad near to or through the township by which the bonds were issued, to certify under oath to the state auditor, that all the preliminary conditions required by the Act to be done, to authorize the registration of the bonds and to entitle them to the benefits of the Act, had been complied with. See, Hurd's R. S., 1880, p. 807, sec. 17.

The record in this case showed that the certificate above mentioned in reference to the issue of the bonds in question had been made by Grove P. Lawrence, the Supervisor of Pana Township, and transmitted by him to the auditor of public accounts.

The interest on said issue of $100,000 of bonds was levied and collected and paid for three years by the state treasurer as provided by law.

It further appeared that in the year 1876 the Town of Pana and three taxpayers filed in behalf of themselves and all other taxpayers of the Town, a bill in the Circuit Court of Christian County against the Auditor of Public Accounts of the State of Illinois, the Treasurer of the State of Illinois, the Treasurer and the Clerk of Christian County, Illinois, the town collector of the Town of Pana, and H. N. Schuyler, William E. Hayward, John Vedder and William Houston, and "The unknown holders and owners of said bonds and coupons issued by the Town of Pana," as defendants, in which the complainants prayed that said public officers might be perpetually enjoined from levying a tax with which to pay said bonds and coupons, and that said bonds might be declared void, and that said holders and owners of said bonds might be perpetually enjoined from selling or

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negotiating or suing upon said bonds or the [536] coupons attached to them, or pretending or insisting inany court of law or equity or elsewhere, in any manner whatsoever, that said Town was liable upon said bonds or coupons.

The parties made defendant by name were neither served with process nor voluntarily appeared in the case. It was assumed that the unknown holders and owners of said bonds and coupons were brought in by publication of a notice to them under that designation in a newspaper, according to the laws of the State of Illinois. The Circuit Court of Christian County dismissed the bill, but the appellate court, upon appeal, reversed its decree and directed it to grant the prayer of the bill, and the decree of the appellate court was affirmed by the Supreme Court, to which the case was carried by the defendants. Afterwards, at its November Term, 1879, to wit: on December 17, the circuit court, upon receiving the mandate of the appellate court and of the Supreme Court, entered a decree in favor of the complainants, in accordance with the prayer of the bill.

The coupons offered in evidence being those upon which the suit was brought, were, at the time of the trial and before the commencement of the suit, held and owned by the plaintiffs, who were citizens of the State of Maine.

Such were the material facts of the case. The Town of Pana, plaintiff in error, by its assignments of error, insisted:

1. That there was no authority in the charter of the Springfield and Illinois Southeastern Railway Company to hold an election and issue bonds to the amount of $100,000.

2. That the election held on April 30, 1870, was illegal and void, because it was presided over by a moderator and not by the supervisor, assessor and collector, as required of general elections by the law of the State; and, therefore, conferred no authority upon the supervisor and town clerk to issue said bonds and coupons.

3. That it was incumbent on the plaintiffs below, the bonds having been illegally issued, to prove that they were *bona fide* holders of the coupons for value, which they failed to do.

4. That no judgment could be rendered for the plaintiffs on said coupons after they and the bonds to which they belonged had been [537] declared void by the decree of the Circuit Court of Christian County.

5. That, in any event, the judgment was too large by $572.22.

Mr. **W. J. Henry,** for plaintiff in error:

There is no express repeal of the limitation contained in the charter of thirty thousand dollars; and repeals by implication are not favored.

Wood v. *U. S.*, 16 Pet., 342; *McCool* v. *Smith*, 1 Black, 470 (66 U. S., XVII., 221); *Bowen* v. *Lease*, 5 Hill, 225; *King* v. *Downs*, 3 T. R. 567; Dwar. Stat., 674; *Goldson* v. *Buck*, 15 East, 372; *Clay Co.* v. *Soc. for Sav.*, 104 U. S., 579 (XXVI., 856).

The election was irregular.

There was no vote of the people, in the manner required by law; there was no power conferred by the election, and it was a nullity.

People v. *Santa Anna*, 67 Ill., 57; *People* v. *Laenna*, 67 Ill., 66; *Lippincott* v. *Pana*, 92 Ill., 26.

The law, as settled in these cases, became and was the law of the bonds, and is conclusive of the question that the election conferred no authority whatever upon the supervisor and town clerk to make a donation and issue the bonds.

Schuyler Co. v. *People*, 25 Ill., 181; *Clark* v. *Supervisors*, 27 Ill., 305; *Force* v. *Batavia*, 61 Ill., 99.

Mr. **George A. Sanders,** for defendants in error:

This court has frequently affirmed the power to issue these bonds.

Harter v. *Kernochan*, 103 U. S., 562 (XXVI., 411); *Bonham* v. *Needles*, 103 U. S., 648 (XXVI., 451).

If there is any force in the arguments of counsel for the plaintiff in error in reference to the election, it cannot defeat these bonds, and is at best only an irregularity, as the people were in no way injured thereby, nor do they claim that there was any fraud connected therewith. It was, in any view that may be taken, a substantial compliance with the statute.

E. Lincoln v. *Davenport*, 94 U. S., 801 (XXIV., 322); *Comrs.* v. *January*, 94 U. S., 205 (XXIV., 111), and cases cited; *E. Oakland* v. *Skinner*, 94 U. S., 258 (XXIV., 126); *Henry Co.* v. *Nicolay*, 95 U. S., 619 (XXIV., 394); *Town* v. *Strong*, 96 U. S., 271 (XXIV., 815); *Ray Co.* v. *Vansycle*, 96 U. S., 675 (XXIV., 800); *Co. of Sac.* v. *Cromwell*, 96 U. S., 51 (XXIV., 681); *San Antonio* v. *Mehaffy*, 96 U. S., 313 (XXIV., 817); *Prettyman* v. *Tazewell Co.*, 19 Ill., 406; *Johnson* v. *Stark Co.*, 24 Ill., 90.

This court has passed upon the identical laws involved in the *Lippincott* v. *Pana* case, 92 Ill., 26, in *Harter* v. *Kernochan* (*supra*), *Bonham* v. *Needles* (*supra*), and *Louisville* v. *Sav. Bank*, 104 U. S., 469 (XXVI., 775).

The Town having voted the bonds, the officers having issued them, the state auditor having registered them as sworn statements that conditions precedent, made by the supervisor, had been complied with, and the Town having regularly paid the interest for three years without complaint, it is estopped from denying their validity.

Supervisors v. *Schenck*, 5 Wall., 772 (72 U. S., XVIII., 556); *Harter* v. *Kernochan* (*supra*); *Bonham* v. *Needles* (*supra*); *Buchanan* v. *Litchfield*, 102 U. S., 278 (XXVI., 138); *Pendleton Co.* v. *Amy*, 13 Wall., 305 (80 U. S., XX., 580); *Knox Co.* v. *Aspinwall*, 21 How., 539 (62 U. S., XVI., 208).

Mr. Justice **Woods** delivered the opinion of the court:

The people of the Township of Pana voted almost unanimously for the donation, to pay which the bonds in this case were issued. There is no pretense of any fraud in their issue. It is not disputed that the railroad company complied on its part with all the conditions upon which the bonds were to be issued to it, or that the Township has received all it bargained for in consideration of the issue of the bonds. The bonds were registered in the office of the auditor of public accounts, where no bonds could be registered according to law, unless the election authorizing the donation for which the bonds were issued had been held in pursuance of the statute, and the sworn certificate of the

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supervisor of the township to that effect had been filed with the auditor. The Township has paid the interest on the bonds for three years. Under these circumstances, if the bonds and coupons are in the hands of *bona fide* holders for value, the defenses through which the Township can escape liability will be reduced to narrow limits.

The charter of the Illinois Southeastern Railway Company declared that any town in any county under township organization might donate to said company any amount not to exceed $30,000. The question is raised by the first assignment of error, whether this limit was removed by the amendatory Act of February 24, 1869. We think it was.

Section 10 of the Act last named is an entire revision of sections 9 and 10 of the original charter of the company. The original charter authorized townships only to make donations to the railroad company, and it required that the railroad, or some part of it or its branches, should be completed before the donation was paid. It did not authorize the issue of bonds to pay the donations, but required the assessment and collection of a tax upon all the taxable property of the Town for that purpose. [538]

The amendatory Act authorized not only townships, but also, villages, cities and counties along the route of the railroad to make donations to the company. It prescribed an entirely different condition precedent to the making of a donation, and required the issue of bonds to pay the donation when made, and it did not require the completion of the railroad or any part of it, before the bonds were issued. It did not limit the amount which might be donated to $30,000, but declared that if a majority of the votes cast at the election provided for by the Act, should be in favor of donation, the corporate authorities of the village, city, county or township, as the case might be, should donate to the company the amount so voted at said election, and issue bonds in payment thereof. It thus appears that the section, 10 of the amendatory Act, covered the entire subject embraced by sections 9 and 10 of the original Act. It related to the same railroad company; it prescribed different methods of procedure in reference to the same subject, and embraced entirely new provisions, thus plainly showing that it was intended as a substitute, *pro tanto*, for the original Act. Section 10 of the amendatory Act, therefore, operated as a repeal, by implication, of sections 9 and 10 of the original Act, and removed the restriction limiting to $30,000 the amount which could be donated by a township to the railroad company. *U. S.* v. *Tynan*, 11 Wall., 88 [78 U. S., XX., 153]; *Henderson's Tobacco*, Id., 652 [78 U. S., XX., 235]; *Murdock* v. *Memphis*, 20 Wall., 590 [87 U. S., XXII., 429]; *King* v. *Cornell* [*ante*, 60], decided at the present Term.

The next question raised by the assignments of error relates to the power of the Township of Pana, under the circumstances of this case, to issue the bonds in question. This court has decided in the case of *Harter* v. *Kernochan*, 103 U. S., 562 [XXVI., 411], that bonds issued by the Township of Harter, dated April 1, 1880, signed by the supervisor and countersigned by the clerk of the township, reciting that they were issued in pursuance of the Acts of February 25, 1867, and February 24, 1869, which are the Acts relied on in this case, and in pursuance of an election of the legal voters of the township held on November 10, 1868, were valid obligations of the township.

The power of the Township of Pana, under the same Acts, to issue bonds to pay its donation to the same railroad company is, therefore, settled beyond dispute, unless what the plaintiff in error insists was a defect in the method of conducting the election by which the donation was voted, is fatal to the authority of the officers of the Township to issue the bonds. This defect was that the election was presided over and the returns made, not by the supervisor, assessor, and collector of the Township, *ex officio* judges of elections, but by a moderator chosen by the electors present. [539]

It is insisted by the plaintiff in error, that as the Constitution of Illinois, adopted July 2, 1870, by its second additional section cut off the power of any township or other municipality to subscribe to the capital stock of, or make a donation to, any railroad company, except when such subscription or donation had been authorised under existing laws, by a vote of the people of the municipality prior to the adoption of the Constitution; and as, by reason of the defect just mentioned, there was no legal election, it follows that there was no authority in the officers of the Township of Pana to make the donation or issue the bonds in question in this case, and that the bonds are not binding on the Township. We cannot assent to this conclusion.

It is clear that this case in nowise differs from other cases where the holding of an election and a vote of the people in favor of an issue of bonds is made by law a condition precedent upon which the authority to issue bonds rests.

The bonds in question in this case recite on their face that they were issued by the Township, in compliance with the vote of the legal voters thereof at an election held on April 30, 1870, under and by virtue of the authority conferred by Acts of the General Assembly of the State of Illinois, specifying the Acts of February 26, 1867, and February 24, 1869, above mentioned.

This court has again and again decided, that if a municipal body has lawful power to issue bonds or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such, as a popular election of the constituent body, the holder in good faith has the right to assume that such preliminary proceedings have taken place if the fact be certified on the face of the bonds by the authorities whose primary duty it is to ascertain it. *Lynde* v. *County*, 16 Wall., 16 [83 U. S., XXI., 275]; *Coloma* v. *Eaves*, 92 U. S., 484 [XXIII., 579]; *Johnson Co.* v. *January*, 94 U. S., 202 [XXIV., 110]; *Douglass Co.* v. *Bolles*, Id., 104 [XXIV., 46]; *Warren Co.* v. *Marcy*, 97 U. S., 96 [XXIV., 977]. [540]

The authority to issue the bonds in question in this case resting upon the fact that an election was held in pursuance of law before a certain date, namely, the date when the Constitution of 1870 was adopted, and the bonds reciting on their face the fact that the election was so held before the date mentioned, the circumstance that the election was irregularly conducted can be of no avail as a defense to the

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bonds in a suit brought by a *bona fide* holder.

Our attention has been called to the decision of the Supreme Court of Illinois in the case heretofore mentioned and reported as *Lippincott* v. *Pana*, in 92 Ill., 24, in which it was held that the election relied on in this case as the authority for the issue of the bonds was absolutely void, and the issue of the bonds was, therefore, without authority. Our attention is also called to the cases of *People* v. *Santa Anna*, 67 Ill., 57, and *People* v. *Laenna*, Id., 65, where similar elections under a like statute were held void. These last two cases were decided before the bonds in this case were issued. They were, however, suits brought to restrain the issue of bonds by the township officers, on account of the irregularities in the election. The rights of *bona fide* holders could not, therefore, arise, and were not passed on in those cases. But in the case first mentioned, the bonds had been issued, and were presumptively in the hands of *bona fide* holders. Nevertheless, the Supreme Court of Illinois held the bonds to be void in whosesoever hands they might be.

It is insisted that this court is bound to follow this decision of the Supreme Court of Illinois, and hold the bonds in question void. We do not so understand our duty. Where the construction of a State Constitution or law has become settled by the decision of the state courts, the courts of the United States will, as a general rule, accept it as evidence of what the local law is. Thus, we may be required to yield against our own judgment to the proposition that, under the charter of the railway company, [541] the election in this case, which was held under the supervision of a moderator chosen by the electors present, was irregular and, therefore, void. But we are not bound to accept the inference drawn by the Supreme Court of Illinois, that in consequence of such irregularity in the election, the bonds issued in pursuance of it by the officers of the township, which recite on their face that the election was held in accordance with the statute, are void in the hands of *bona fide* holders. This latter proposition is one which falls among the general principles and doctrines of commercial jurisprudence, upon which it is our duty to form an independent judgment, and in respect of which we are under no obligation to follow implicitly the conclusions of any other court, however learned or able it may be. *Swift* v. *Tyson*, 16 Pet., 1; *Russell* v. *Southard*, 12 How., 139; *Watson* v. *Tarpley*, 18 How., 517 [59 U. S., XV., 509]; *Butz* v. *Muscatine*, 8 Wall., 575 [75 U. S., XIX., 490]; *Boyce* v. *Tabb*, 18 Wall., 546 [85 U. S., XXI., 757]; *Oates* v. *Bank*, 100 U.S., 239 [XXV., 580]; *R. R. Co.* v. *Bank*, 102 U. S., 14 [XXVI., 61]. See, also, *Burgess* v. *Seligman* [*ante*, 359], decided at the present Term, where the question, how far the courts of the United States are bound by the decisions of the state courts, is carefully reexamined, and the rule on the subject stated with precision.

We cannot follow the decision of the Supreme Court of Illinois in *Lippincott* v. *Pana*, *ubi supra*, without overruling a uniform current of the decisions of this court, beginning with the case of *Knox Co.* v. *Aspinwall*, in 21 How., 539 [62 U. S., XVI., 208], and continuing down to the present time. The rights of the *bona fide* holder of negotiable municipal bonds, as we have stated them in this opinion, are too firmly settled by the decisions of this court to be shaken.

Our conclusion is, therefore, that the bonds in question in this case are valid in the hands of a *bona fide* holder, notwithstanding the irregularity in the conduct of the election by which they were claimed to be authorized.

The next question presented by the assignments of error is: does the irregularity in the conduct of the election throw on the plaintiffs the burden of proving that they are holders for value?

It is a general rule that when the holder of a negotiable instrument, regular on its face and [542] payable to bearer, produces it in a suit to recover its contents, and the same has been received in evidence, there is a *prima facie* presumption that he became the holder of it, for value at its date, in the usual course of business. *Murray* v. *Lardner*, 2 Wall., 110 [69 U. S., XVII., 857]; *Bank* v. *Neal*, 22 How., 96 [63 U. S., XVI., 328]; *Collins* v. *Gilbert*, 94 U. S., 753 [XXIV., 170]; *Brown* v. *Spofford*, 95 U.S., 474 [XXIV., 508]. And municipal bonds payable to bearer, are subject to the same rules as other negotiable paper. *Cromwell* v. *Sac Co.*, 96 U. S., 51 [XXIV., 681].

But the plaintiff in error insists that this case falls within an exception to that rule, and cites to sustain his position the cases of *Smith* v. *Sac Co.*, 11 Wall., 139 [78 U. S., XX., 102], and *Stewart* v. *Lansing*, 104 U.S., 505 [XXVI., 866]. The exception relied on by plaintiff in error is well settled, and is this: if, in a suit brought by the indorsee or transferee of a negotiable instrument, the maker or acceptor or any party who is primarily bound by the original consideration, proves that there was fraud or illegality in the inception of the instrument, the burden of proof is thrown on the plaintiff to show that he is a holder for value. *Smith* v. *Sac Co.* and *Stewart* v. *Lansing*, *ubi supra*; *Comrs.* v. *Clark*, 94 U. S., 285 [XXIV., 62]; *Collins* v. *Gilbert*, [*supra*]; *Fitch* v. *Jones*, 5 El. & B., 238; *Smith* v. *Brane*, 16 Ad. & E. (N. S.), 244; *Hall* v. *Featherstone*, 3 Hurl. & N., 284; *Bailey* v. *Bidwell*, 13 Mees. & W., 73; *Vathir* v. *Zane*, 6 Gratt., 246; *Hutchinson* v. *Boggs*, 28 Pa., 294; *Perrin* v. *Noyes*, 39 Me., 384; *Cottle* v. *Cleaves*, 70 Me., 256; *Sistermans* v. *Field*, 9 Gray, 321; *Woodhull* v. *Holmes*, 10 Johns., 231; *Thompson* v. *Armstrong*, 35 Ala., 434; *Harbison* v. *Bank*, 28 Ind., 133; *Fuller* v. *Hutchings*, 10 Cal., 526; *Redington* v. *Woods*, 45 Cal., 406; *Conley* v. *Winsor*, 41 Mich., 253; *Sloan* v. *Union Banking Co.*, 67 Pa., 470; *Holme* v. *Karspar*, 5 Binn., 469; *Vallett* v. *Parker*, 6 Wend., 615; *Munroe* v. *Cooper*, 5 Pick., 412; 1 Dan. Neg. Inst., 3d ed., sec. 815.

In most of the cases above cited the defense relied on was fraud in the inception of the instrument. Thus, in the case of *Smith* v. *Sac Co.* [*supra*], the report shows that the bonds were issued to a contractor to pay for the building of a court-house; that the County Judge who executed and delivered the bonds was bribed to do so; and that the court-house never was built. [543]

In the case of *Stewart* v. *Lansing* [*supra*], the County Judge, assuming to act under authority of a law of the State, rendered a judgment appointing commissioners to execute bonds of the Town of Lansing. This judgment was carried

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by *certiorari* to the Supreme Court and there reversed. The County Judge, the commissioners, and the railroad company to which the bonds were ordered to be issued, all had notice of the writ of *certiorari* and of the subsequent proceedings under it. Before the judgment of reversal, however, the commissioners, notwithstanding the pendency of the writ of *certiorari*, issued the bonds in suit in the case, taking from the railroad company an obligation for their personal indemnity. This court held that, as between the railroad company and the town, the judgment of reversal was equivalent to a refusal by the County Judge to make the original order, and invalidated the bonds.

There is no pretense of any fraud in the inception of the bonds in question in this case. It is not denied that they were issued in good faith and for a valuable consideration. The question, then, is: was the irregularity in the conduct of the election such an illegality as throws on the plaintiff the burden to show that he paid value for the coupons? We are clearly of opinion that it is not.

It will appear, from an examination of the cases above cited, in which the defense was illegality in the inception of the instrument, that the illegality which shifts the burden of proof on the holder to prove that he paid value, must be something which relates to the consideration of the paper sued on. It must appear that the consideration arose out of a transaction contrary to law, or against public policy. Thus, in the case of *Sistermans* v. *Field*, 9 Gray, 333, the illegality which the court held threw the burden on the plaintiff of proving that he gave value for the notes sued on, was the fact alleged by the defendant that they were given in payment for intoxicating liquors sold by the payees of the notes to the defendant in violation of law. Precisely the same illegality was held in the case of *Cottle* v. *Cleaves*, 70 Me., 256, to throw upon the plaintiff, who was indorsee, the burden of showing that he paid value for the note.

[544] So in *Fuller* v. *Hutchings*, 10 Cal., 526, the paper sued on was given for losses at a public banking game called "faro." Gaming was prohibited by statute. It was declared by the laws of California to be a felony in the keeper of the game, and a misdemeanor in the player. In this case, the court held that the illegal consideration being admitted, it devolved upon the plaintiff to show that he took the paper without notice and for value.

In the case of *Bailey* v. *Bidwell*, 13 Mees. & W., 73, it was alleged, as matter of defense, that the consideration for the note sued on was an agreement that the payee should not oppose a petition in bankruptcy filed by the defendant, the maker of the note, and that the note was indorsed to the plaintiff without value. The court, by *Baron* Parke, held the rule to be that if the note was proven to have been obtained by fraud or affected by illegality, that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and place it in the hands of another person to sue on it, and that such proof casts upon the plaintiff the burden of showing that he was a *bona fide* indorsee for value.

In *Fitch* v. *Jones*, 5 El. & Bl., 238, the note which was sued on by an indorsee was given for a wager on the hop duty. This, the court said, was not within the Statute of Anne or any other statutes which prohibit wagers. There was no penalty imposed for such a wager and, therefore, as between the maker and payee, there was no illegality or violation of law, but it was a mere *nudum pactum*. And the court held that the defendant was bound to prove his plea by showing that the plaintiff did not give value for the note.

The authorities illustrate the rule and show that it does not apply to this case. There was no illegality whatever in the consideration of the bonds in question in this suit. The mere irregularity in the conduct of the election was not such an illegality as is contemplated by the rule, and does not deprive the holder of the coupons of the presumption that he acquired them for value.

The next contention of the plaintiff in error is, that the decree of the Circuit Court of Christian County, Illinois, by which the bonds in question were declared void, is binding on the plaintiffs in this case, and is a bar to the action [545] upon the coupons sued on.

The plaintiffs in this case are citizens of the State of Maine. It is sought to bind them by a decree rendered in a proceeding purely *in personam* in a case in which they were not named as parties, when there was no personal service upon or appearance by them, and when the only pretense of notice to them of the pendency of the suit was a publication addressed to the "Unknown holders and owners of bonds issued by the Town of Pana."

It is contended that, under the Statutes of Illinois, parties may be thus brought in and a valid personal decree rendered against them. Whatever may be the effect of such a decree upon citizens of the State of Illinois, this court has held that, as to non-residents, it is absolutely void. *Cooper* v. *Reynolds*, 10 Wall., 308 [77 U. S., XIX., 931]; *Pennoyer* v. *Neff*, 95 U. S., 714 [XXIV., 565]; *Brooklyn* v. *Ins. Co.*, 99 U. S., 370 [XXV., 418]; *Empire* v. *Darlington*, 101 U. S., 92 [XXV., 879].

In a case decided at the present Term it was declared by this court, speaking by *Mr. Justice* Field, that "The Courts of the United States only regard judgments of the state courts establishing personal demands as having validity or importing verity when they have been rendered upon personal citation of the party or upon his voluntary appearance." *St. Clair* v. *Cox* [*ante*, 222].

These authorities settle the rule which is conclusive of this question. It would be a reproach to jurisprudence, if the rights of citizens of Maine to recover the contents of a chose in action, held and owned by them, could be cut off by a suit in Illinois to which they were not made parties by name, and in which there was no personal service or appearance.

It is insisted by counsel for plaintiff in error that the decree of the appellate court recites the fact that the persons made defendants under the designation of "The unknown holders and owners of bonds and coupons of the Town of Pana," which includes the defendants in error, appeared in that court, and that they are, therefore, concluded by the decree in the case.

There is no pretense that there was any appearance in fact of the parties referred to. It is [546] sought to conclude them by a loose expression

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in the decree, which, in our opinion, was clearly not intended to recite their appearance, and is not fairly open to such a construction.

Lastly, it is assigned for error that, in computing the amount due upon the coupons described in the declaration, the court allowed seven per cent interest, the legal rate in New York, where the coupons were payable, instead of six per cent, the legal rate in Illinois, where they were made. There was no error in this. The coupons, after their maturity, bore interest at the rate fixed by the law of the place where they were payable. *Gelpcke* v. *Dubuque*, 1 Wall., 175 [68 U. S., XVII., 520]. *What we have said covers all the assignments of error. We find no error in the record. The judgment of the Circuit must, therefore, be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 94.

INHABITANTS OF THE TOWNSHIP OF MONTCLAIR, In the COUNTY OF ESSEX, N. J., *Plffs. in Err.*,
v.
THOMAS RAMSDELL.

(See S. C., 17 Otto, 147-161.)

Town bonds—New Jersey Constitution—statute, constitutionality of—holder in good faith.

*1. The authority of Montclair Township, Essex County, New Jersey, to issue bonds to be exchanged for bonds of the Montclair Railway Company, sustained.

2. The Constitution of New Jersey provides: "To avoid improper influences which may result from intermixing in one and the same Act such things as have no propef relation to each other, every law shall embrace but one object, and that shall be expressed in the title;" held, that this provision does not require that the title of an Act shall embody a detailed statement, nor be an index or abstract, of its contents; nor does it prevent the uniting in the same Act of any number of provisions having one general object fairly indicated by its title; and that the powers, however varied and extended, which a new township may exercise, constitute but one object which is fairly expressed by a title showing nothing more than the legislative purpose to establish such township. The objections should be grave, and the conflict between the statute and the Constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or if but one object, that it is not sufficiently expressed by the title.

3. The holder of a negotiable security is presumed to have acquired it in good faith and for value. But if, in a suit upon it, the defense be such as to require plaintiff to show that value was paid, it is not, in every case, essential to prove that *he* paid value; for if any intermediate holder between him and the defendant gave value, such intervening consideration will sustain his title.

[No. 147.]

Argued Jan. 9, 10, 1883. Decided Mar. 5, 1883.

IN ERROR to the Circuit Court of the United States for the District of New Jersey.

This action was brought in the court below, by the defendant in error, to recover the amount alleged to be due on certain bonds and interest coupons issued by the Township of Montclair in aid of a certain railroad company.

The trial resulted in a verdict and judgment in favor of the plaintiff for $21,506.49, where-

*Head notes by *Mr. Justice* HARLAN.

NOTE.—*When a verdict may be directed by the court.* See *note* to Grand Chute v. Winegar, 82 U. S. XXI., 174.

upon the defendant sued out this writ of error.

The facts appear in the

Statement of the case by *Mr. Justice* **Harlan:**

The judgment below was in accordance with the verdict in an action brought by the defendant in error on certain bonds, payable to Samuel Holmes or bearer, and coupons thereof payable to the holder, all dated March 17, 1870, and alleged to have been issued by the Township of Montclair, Essex County, New Jersey. They are negotiable in form and purport to have been executed in pursuance of an Act approved April 9, 1868, entitled "An Act to Authorize Certain Townships, Towns and Cities to Issue Bonds, and to Take the Bonds of the Montclair Railway Company," a corporation created with authority to construct a railway from the Village of Montclair to the Hudson River at Pavonia or Hoboken ferries, or between those points. On the margin of each bond is the certificate of the county clerk of Essex County that it is registered in his office.

The 1st section of the foregoing Act, which was declared to be a public Act to take effect immediately upon its passage, provides:

"Sec. 1. That, on the application in writing of twelve or more freeholders, residents of any township, town or city along the route of the Montclair Railway Company, or at the terminus thereof, *except the Township of Bloomfield*, in the County of Essex, *which township is hereby excepted from the operation of all the provisions of this Act*, it shall be the duty of the Judge of the Circuit Court of the county wherein such freeholders shall reside, within ten days after receiving such application, to appoint under his hand and seal not more than three freeholders, residents of such township, town or city, to be commissioners thereof, to carry into effect the purposes and provisions of this Act; said commissioners shall hold their offices respectively for the term of five years, and until others shall have been appointed."

The 2d and 3d sections are as follows: [149]

"Sec. 2. That it shall be lawful for said commissioners to borrow, on the faith and credit of their respective townships, towns or cities, such sums of money, not exceeding twenty per centum of the valuation of the real estate and landed property of such township, town or city, to be ascertained by the assessment rolls thereof, respectively, for the year 1867, for a term not exceeding twenty-five years, at the rate of interest not exceeding seven per centum per annum, payable semi-annually, and to execute bonds therefor, under their hands and seals respectively. The bonds so to be executed may be in such sums, and payable at such times and places, as the said commissioners and their successors, may deem expedient; but no such debt shall be contracted of bonds issued by said commissioners of or for either of said townships, towns or cities, until the written consent of the persons owning or representing as agent or president at least two thirds of the real estate and landed property of such township, town or city, borne on the last assessment roll thereof, at the valuation thereon appearing, shall have been obtained.

Such consent shall state the amount of money authorized to be raised in such township, town or city, and that the same is to be invested in the

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bonds of said railway company, and the signatures shall be proved by one or more of said commissioners. The fact that the persons signing such consent own or represent, as aforesaid, at least two thirds of the taxable real and landed property of such township, town or city shall be proved by the affidavit of the assessor of such township, town or city, indorsed upon or annexed to such written consent, and the assessor of such township, town or city is hereby required to perform such service. Such consent and affidavit shall be filed in the office of the clerk of the county in which such township, town or city is situated, and a certified copy thereof in the office of the clerk of such township, town or city, and the same, or a certified copy thereof, shall be evidence of the facts therein contained, and shall be received as evidence in any court of this State and before any judge or justice thereof.

Sec. 3. *And be it enacted*, That the said commissioners authorized by this Act may, in their discretion, dispose of such bonds or any part thereof, to such persons or corporations and upon such terms as they shall deem most advantageous for their said townships, towns or cities, but not for less than par, and the money that shall be raised by any loan or sale of bonds shall be invested in the bonds of the said railway company for the purpose of building the railway thereof, and said money shall be applied and used in the construction of said railway, its buildings, equipments and necessary appurtenances, and for no other purpose. The commissioners respectively, in the corporate name of each of their said townships, towns or cities, shall subscribe for and purchase bonds of said railway company to the amount that they severally may have borrowed as aforesaid."

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After providing that the commissioners shall execute their official bonds, with security to be approved by the judge, all of which was done in this case, and that they shall be a board to act for their respective townships, towns and cities, with power, by a majority to do any business authorized by the Act, the 12th and 14th sections declare:

"Sec. 12. That all bonds issued in accordance with the provisions of this Act shall be registered in the office of the county in which the township, town or city so issuing is situated, and the words 'registered in the county clerk's office' shall be printed or written across the face of each bond, attested by the signature of the county clerk when so registered, and no bonds shall be valid unless so registered."

"Sec. 14. That, in case any new township, town or city *shall have been created*, or the boundaries of any township, town or city shall have been enlarged on the routes of the said railway, or at the *termini* thereof, so that there is no assessment roll for the year 1867 for such township, town or city so created or enlarged, the said commissioners for such *new* or enlarged township, town or city shall cause to be prepared an assessment roll for the purposes of this Act, by extracting from any assessment roll or rolls for said year all that relates to any assessment of persons or property in the territory embraced in the said *new township*, town or city so enlarged or created, or in said enlargement."

On the 15th day of April, 1868, the Legislature of New Jersey passed another Act, the provisions of which are important. It is entitled "An Act *to Set Off from the Township of Bloomfield*, in the County of Essex, *a New Township*, to be Called the Township of Montclair." The 1st section defines the boundary of the New Township, and the 2d constitutes its inhabitants a body politic and corporate in law by the name of "*The Inhabitants of the Township of Montclair*," with all the rights, powers, privileges and advantages, and subject to all the regulations, government and liabilities to which the inhabitants of the other townships in said County of Essex are or may be entitled or subject by the laws of the State.

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The 3d section, after prescribing the time and place at which the first town meeting of Montclair should be held, and that the voting thereat should be by ballot until otherwise determined by law, declares:

"That all the provisions and restrictions of an Act entitled 'An Act to Authorize the Inhabitants of the Several Townships of This State to Vote by Ballot at their Town Meetings,' approved March 22, 1860, and of the supplements thereto, shall apply to the inhabitants of the said Township of Montclair, and all Acts and parts of Acts in force in the said Township of Bloomfield at the time of the passage of this Act are hereby extended to and shall be in force in the said Township of Montclair, *but the provisions of any Act or Acts from the operation of which the Township of Bloomfield has by any proviso or exception contained therein, been specially excepted, shall apply to and be in force in said Township of Montclair from and after the time this Act shall go into effect, the same as if the Township of Bloomfield had not been specially excepted therein.*"

Messrs. **Thomas N. McCarter, Wm. M. Evarts** and *John L. Blake*, for plaintiffs in error.

Messrs. **John F. Dillon** and *Rastus S. Ransom*, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

In behalf of the Township of Montclair it is contended that the bonds and coupons in suit were executed and issued without legislative authority, and, consequently, are not enforceable. This proposition being fundamental in the case will be first considered.

It has been observed that the 1st section of the Act of April 9, 1868, the one referred to in the bonds, expressly excepts from its operation the Township of Bloomfield. The circuit court was of opinion and so ruled, that Montclair, upon being set off from Bloomfield Township and made a separate municipal corporation, with all the rights, powers and privileges of other townships in the same county, was no longer embraced in the exception of Bloomfield Township made by the Act of April 9, 1868, but, as a distinct, independent body politic and corporate, became entitled, in virtue of the 14th section of that Act and without reference to the proviso in the 3d section of the Act of April 15, 1868, to take advantage of all the provisions of the original or bonding Act. Some of the members of this court prefer not to rest the determination of the question of legislative authority upon that interpretation of the original Act. But we are of opinion that the proviso of the

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3d section of the Act creating the Township of Montclair, declaring in force, as to that Township, "The provisions of any Act or Acts from the operation of which the Township of Bloomfield has by any proviso or exception contained therein, been specially excepted," must be construed as taking Montclair out of the exception in the 1st section of the Act of April 9, 1868, and adding it to the class of townships which, by that Act were authorized to raise money upon bonds, to be invested in bonds of the railway company. Thenceforward, the Township of Bloomfield, within the meaning of the Act of April 9, 1868, embraced only such territory and inhabitants as remained after Montclair Township was set off as an independent municipality. The recital in the bonds that they were issued in pursuance of that Act, must, therefore, be taken as referring to it, as enlarged or extended by the Act of April 15, 1868.

It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the Legislature was ignorant of the meaning of the language it employed. We should assume that the Legislature was aware, when the Act of April 15, 1868, was passed, that a previous statute had expressly excepted Bloomfield Township from all of its provisions. When, therefore, they declared that the new Township should come under the operation of *any* Act from which Bloomfield had been specially excepted by any proviso thereof, the established canons of statutory construction require us to presume that the Legislature understood the full legal effect of such a declaration. [153] The purpose, manifestly, was to relieve the new Township from the disabilities imposed by the Bonding Act upon the Township of Bloomfield as then established.

This would close the discussion of the question of legislative authority, but for another proposition which counsel have pressed with great earnestness. They insist that this construction of the Act of April 15, 1868, brings it, or so much thereof as constitutes its 3d section, in conflict with section 7 of article 4 of the New Jersey Constitution, which declares that "To avoid improper influences which may result from intermixing in one and the same Act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title." The argument is not simply that the authority given by the Act of April 9, 1868, to issue township bonds in aid of the Montclair Railway Company, which authority we have seen is imported into the Act of April 15, 1868, is an object, distinct and separate from others embraced by the Montclair Township Act, but that such object is not expressed in the title of the latter Act.

The purpose of this constitutional provision was declared by the Supreme Court of New Jersey, in *State* v. *Town of Union*, 33 N. J. L., 351, to be "To prevent surprise upon legislators by the passage of bills, the object of which is not indicated by their titles, and also to prevent the combination of two or more distinct and unconnected matters in the same bill." Further, said the court: "It is not intended to prohibit the uniting in one bill of any number of provisions having one general object fairly indicated by its title. The unity of the object must be sought in the end which the legislative Act proposes to accomplish. The degree of particularity which must be used in the title of an Act rests in legislative discretion, and is not defined by the Constitution. There are many cases where the object might with great propriety be more specifically stated, yet the generality of the title will not be fatal to the Act, if by fair intendment it can be connected with it." The case in which these remarks occurred involved the constitutionality of an Act entitled "An Act to *Amend* an Act to Incorporate the Town of Union, in the Township of Union, in the County of Hudson, approved March 29, 1864." The body of the Act declared valid a certain ordinance [154] passed by the Town of Union without the formalities required by its charter, but under which a sewer had been constructed. In response to the objection that the object of the Act, the construction of sewers, was not expressed in its title, the court said: "The validity of Acts with general titles has been so long recognized by our courts, that it cannot be questioned that under the title, 'An Act to *Incorporate* the Town of Union,' a government for the town could be established, including taxation for its support, courts for the trial of offenders, authority for laying out streets, building sewers, and making assessments. Under any other rule it would be impossible to organize a city government without a large number of distinct Acts. If, under that general title, the formalities for building a sewer and making assessments may be prescribed, there is no reason why a dispensation from the use of the required forms may not be granted by an Act entitled 'An Act to *Amend* an Act to Incorporate the Town of Union.'" "If this objection," continued the court, "was sustained, it would annul a large portion of the legislation of this State." The doctrines of that case were approved in *Doyle* v. *Newark*, 34 N. J. L., 236. In the earlier case of *Gifford* v. *R. R. Co.*, 2 Stock., 172, an Act supplemental to a former Act was sustained upon the ground that the objects of both Acts "Were parts of the same enterprise, and cannot be said to have any improper relation to each other."

Our attention is called by counsel for the defendant to *Rader* v. *Township of Union*, 39 N. J. L., 509, and *R. R. Co.* v. *R. Co.*, 23 N. J. Eq., 457. But these do not, in the slightest degree, impinge upon the doctrines of the other cases. Referring, in the *Rader Case*, to the constitutional provision under examination, *Chief Justice* Beasley observed that its purpose is plainly twofold: "First, to secure a separate consideration for every subject presented for legislative action; second, to insure a conspicuous declaration of such purpose. By the former of these requirements, every subject is made to stand on its own merits, unaffected by 'improper influences,' which might result from connecting it with other measures having no proper relation to it; and, by the latter, a notice is provided, so that the public, or such part of it as may be inter- [155] ested, may receive a reasonable intimation of the matters under legislative consideration." In the same case he said that the Constitution required "substantial unity in the statutable object." We do not understand these remarks of the court as announcing any different rule from that established in the cases in 33d and 34th N. J. L.

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What was said in 23 N. J. Eq., is clearly in line with other cases. And the doctrines of the New Jersey Court are in harmony with decisions of the highest courts of other States when construing similar provisions in the Constitutions of their respective States. *See authorities cited in* Cooley, Const. Lim., 146, *n.* 1.

Upon the authority of these decisions and upon the soundest principles of constitutional construction, we are of opinion that the objection taken to the Act of April 15, 1868, as being (when construed as we have indicated) in conflict with the Constitution of New Jersey, cannot be sustained. The powers which the Township of Montclair is authorized to exert, however varied or extended, constitute, within the meaning of the Constitution, one object, which is fairly expressed in a title showing the legislative purpose to establish a new or independent township. It is not intended by the Constitution of New Jersey, that the title to an Act should embody a detailed statement, nor be an index or abstract, of its contents. The one general object, the creation of an independent municipality, being expressed in the title, the Act in question properly embraced all the means or instrumentalities to be employed in accomplishing that object. As the State Constitution has not indicated the degree of particularity necessary to express in its title the one object of an Act, the courts should not embarrass legislation by technical interpretations based upon mere form or phraseology. The objections should be grave, and the conflict, between the statute and the Constitution palpable, before the judiciary should disregard a legislative enactment, upon the sole ground that it embraced more than one object, or if but one object, that it was not sufficiently expressed by the title.

The assignments of error, unusually large in number, raise other questions. Such of them as we deem necessary to examine relate to the rejection, as well of evidence offered as of instructions asked in behalf of the township.

[156] The main provisions of the bonding Act will be found in the statement which precedes this opinion. As preliminary to an issue of township, town or city bonds, by such commissioners as might be appointed on the petition of freeholders, the statute requires the written consent of persons owning, or representing as agent or president, at least two thirds of the real estate of the municipality; the bonds so issued not, however, to exceed twenty per cent of the value of its landed property, and the consent so obtained stating the amount to be raised and that it is to be invested in the bonds of the railway company. The statute further provided, as we have seen, that the signatures of consenting freeholders should be proved by one or more of the commissioners; that the fact that the consenting freeholders owned or represented the requisite amount of landed property should be proved by the assessor, who was required to perform such service; and that the consent and affidavit should be filed in the office of the clerk of the county in which the municipality is situated, and a certified copy thereof in the office of the clerk of the township, town or city; the originals or a certified copy thereof to be received as evidence of the facts therein contained in any court of the State or before any judge or justice thereof.

The declaration in each count, whether on bond or coupon, expressly avers that in pursuance of the statute such consents were obtained; also that the commissioner, duly appointed and sworn, as directed by the statute, issued the bonds in suit; that thereafter, and before they respectively matured, a certain named bank became, for a valuable consideration, in public market paid, the holder and bearer thereof; and that thereafter, and before the commencement of suit, the plaintiff became for a valuable consideration by him paid to said bank, and still is, the holder and bearer thereof.

The only plea in behalf of the Township to the special counts on the bonds and coupons is *non est factum;* to the common count for interest, *nil debet.*

At the trial, the plaintiff introduced evidence tending to show that the commissioners were duly appointed in the mode prescribed by statute. If their due appointment was put in issue by the general plea of *non est factum*, it is sufficient to say that the question was properly [157] submitted to the jury.

The plaintiff also produced at the trial, from the county clerk's office, the original consents with the affidavits connected therewith, and also certified copies from the office of the township clerk. They show that the freeholders consented to an issue of bonds, to an amount not exceeding $200,000, under the Act of April 9, 1868, to "be exchanged for or their proceeds invested in the income bonds" of the railway company. Upon each is indorsed the affidavit of Van Giesen, assessor, showing that the consenting freeholders owned or represented at least two thirds of the landed property of the Tow r ship. These papers in form met all the requirements of the statute.

Numerous offers to introduce evidence in behalf of the Township were denied. They were made in every form which the ingenuity of able counsel could suggest. Without incumbering this opinion with a detailed statement of them, it is enough to say that the Township was denied the privilege of proving that the consents did not, in fact, represent the required amount of landed property; that Van Giesen, the assessor, made his affidavit without having extracted from any assessment roll the taxable value of the real estate to enable him to determine whether the consents represented sufficient real estate; and that the commissioners acted on that affidavit before Van Giesen had taken the oath of office. Upon the occasion of these offers, or of some of them, counsel for defendants, in response to inquiries by the court, disclaimed any ability to bring home to plaintiff knowledge of these departures from the requirements of the statute. Upon the same view of the law, as we suppose, counsel asked the court to give, but the court refused, the following instructions to the jury:

"If the evidence satisfies the jury that there were circumstances of fraud or illegality in the inception of the bonds, or in the circumstances under which they were issued and disposed of by the commissioners, then the plaintiff cannot recover on the bonds without some proof that he purchased them for value, or gave some consideration for them."

* * * * * * * * *

"That, by the issue presented by the plead- [158]

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ings in the case, the burden of showing that he was a purchaser for value, or claims title through such a purchaser, was on the plaintiff."

As to the last of these instructions, there is no ground whatever upon which it could stand. The pleadings did not, of themselves, impose upon plaintiff the necessity of showing either that he, or any prior holder of the bonds, was a purchaser for value. As holder he is presumed to have acquired them in good faith and for value. *Goodman* v. *Simonds*, 20 How., 366 [61 U. S., XV., 941]; *Murray* v. *Lardner*, 2 Wall., 121 [69 U. S., XVII., 859]; *Shaw* v. *R. R. Co.*, 101 U. S., 564 [XXV., 894]; *Swift* v. *Smith*, 102 Id., 444 [XXVI., 194]. The plea of *non est factum* did not put in issue the fact that he was the holder. Legislative authority for an issue of bonds being established by reference to the statute, and the bonds reciting that they were issued in pursuance of the statute, the utmost which plaintiff was bound to show to entitle him, *prima facie*, to judgment, was the due appointment of the commissioners and the execution by them, in fact, of the bonds. It was not necessary that he should, in the first instance, prove either that he paid value, or that the conditions preliminary to the exercise by the commissioners of the authority conferred by statute were, in fact, performed before the bonds were issued. The one was presumed from the possession of the bonds; and the other was established by the statute authorizing an issue of bonds, and by proof of the due appointment of the commissioners, and their execution of the bonds, with recitals of compliance with the statute. So we have often ruled in numerous cases with which the profession are familiar and which need not be cited.

But the contention of counsel is that it was competent, under the plea of *non est factum*, to prove either fraud or illegality in the inception of the bonds, in order to remove the presumption of *bona fide* ownership for value which arises from the mere possession of the bonds, and thus compel plaintiff to show that *he* paid value for them. Consequently, it is argued, the first of the foregoing instructions should have been given.

It is not necessary to extend this opinion by a review of the adjudications in the American and English courts to which our attention has been called, or to deduce therefrom a general [159] rule to govern every case in which it may be claimed that the proof upon the part of a defendant in a suit upon a negotiable security, requires the holder, before he can recover, to show that he paid value. Without entering upon a critical examination of the authorities upon this important question of commercial law, and assuming, for the purposes of this case merely, that the proof, of the exclusion of which the Township complains, was competent evidence for some purposes under the plea of *non est factum*, we are of opinion that the instruction in question ought to have been refused. Its rejection was proper for the reason, if there were no other, that it required the jury, if they believed either fraud or illegality in the inception of the bonds to have been established, to find for the Township, unless the plaintiff proved that *he* purchased for value or gave some consideration for them. Such is not the law; for, if any previous holder of the bonds in suit was a *bona fide* holder for value, the plaintiff, without showing that he had himself paid value, could avail himself of the position of such previous holder. In Byles on Bills, 119, 124, it is correctly said that "If any intermediate holder between the defendant and the plaintiff gave value for the bill, that intervening consideration will sustain the plaintiff's title." In *Hunter* v. *Wilson*, 19 L. J. (N. S.), 8, the plea was that the bill of exchange was drawn by a named person, at the request and for the accommodation of the defendant, without any consideration or value whatever, and that it was indorsed by that person without any consideration or value given by the *plaintiff* for such indorsement either to the defendant or to said person, or to any other person whatsoever. It was held that the plea ought to have contained a statement equivalent to an allegation that none of the previous parties to the bill had given value for the indorsement. One of the Judges remarked that "Some party to the bill may have given value for it, so as to vest a valid title in the plaintiff. We cannot tell through how many hands it may have passed." It is not necessary in this case to hold that the plea in such a case should aver that no previous holder of a negotiable security paid value. But the case last cited is authority for the proposition that the present plaintiff may be protected by showing that some previous holder paid value.

This question was directly adjudged in *Comrs.* [160] v. *Bolles*, 94 U. S., 109 [XXIV., 47]. One of the issues there, was, whether the plaintiffs were *bona fide* holders of certain municipal bonds. After stating that the legal presumption was that they were, the court, speaking by *Mr. Justice* Strong, said: "But the plaintiffs are not forced to rest upon mere presumption to support their claim to be considered as having the rights of purchasers without notice of any defense. They can call to their aid the fact that their predecessors in ownership were such purchasers. To the rights of those predecessors they have succeeded. Certainly the railroad company paid for the bonds and coupons by paying an equal amount of their stock, which the county now holds; and nothing in the special facts found show that the company knew of any irregularity or fraud in their issue." The court proceeded: "And still more; the contractor for building the railroad received the bonds from the county in payment for his work, either in whole or in part, after his work had been completed. There is no pretense that he had notice of anything that should have made him doubt their validity. Why was he not a *bona fide* purchaser for value? The law is undoubted, that every person succeeding him in the ownership of the bonds is entitled to stand upon his rights."

When the instruction in question was asked, the proof was that the bonds had been issued by the commissioners, and exchanged with the railroad company for a like amount of the company's income bonds. That exchange was a substantial compliance with the statute. It was made under a contemporaneous agreement between the commissioners, the railway company and certain trustees, mutually selected, whereby the bonds passed, upon the exchange, under the control of those trustees and were deposited in the Union Trust Company, to be surrendered,

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$10,000 at a time, only as the work of constructing the railroad progressed, to the company or the contractor on their order. The receipt of the trust company shows that it agreed to deliver them to the contractor or his agents or assigns, on the joint order of the trustees or any two of them. And it was proven that the bonds were delivered to the contractor or upon his order between May 10, 1870, and August 4, 1871. The road was constructed as contem-
[161] plated and the income bonds of the company remained in the hands of the commissioners or of some of them. Whether those bonds ultimately proved to be of any value, is of no consequence as between the Township and the plaintiff.

It thus appears that, when the court was asked to give an instruction upon the basis that plaintiff could not recover unless it was proven that he paid value for the bonds, it was established beyond question that the bonds had previously passed into the hands or become pledged for the benefit of the contractor who built the road. He acquired an interest or a lien on the bonds, to secure payment of the amount due him for his work and labor. He, therefore, became a holder for value in the sense that he paid real in contradistinction from apparent value, without notice of any fraud or illegality affecting the bonds. Story, Notes, sec. 195; *R. R. Co.* v. *Bank*, 102 U. S., 14 [XXVI., 61]; Byles, Bills, 117. No evidence was introduced or offered which in any degree impeached his good faith, or proved knowledge on his part that the preliminary conditions prescribed by statute had not been fully performed. The character of the bonds as negotiable securities, free from defenses which might have been available as between the original parties, was established by their being pledged for the benefit of the contractor. So that, even if there was fraud or illegality in the inception of the bonds apart from such illegality as would have made the bonds absolutely void by whomsoever held, a defense upon that ground would not have been good against the contractor and, consequently, is not available against the plaintiff. The latter, in virtue of the new and independent title derived from or traced to a prior *bona fide* holder for value, could stand upon the rights of such holder.

In any view of the case no error was committed to the prejudice of the Township, in excluding any of the evidence offered, or in refusing any of the instructions asked in its behalf.

Other questions in the case we pass by, as not necessary to be examined. We have considered all that seemed to affect the substantial rights of the parties.

The judgment is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 352; 111 U. S., 16; 113 U. S., 142.

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[162] INHABITANTS OF THE TOWNSHIP OF MONTCLAIR, In the COUNTY OF ESSEX, N. J., *Plffs. in Err.*,

v.

CHARLES DANA.

(See S. C., 17 Otto, 162, 163.)

Instruction to a jury.

*The jury may be controlled in their determination of a question, by a peremptory instruction, if the testimony is of such a conclusive character as would compel the court, in the exercise of a sound legal discretion, to set aside a verdict if one were returned in opposition to such testimony.

[No. 146.]

Argued Jan. 9, 10, 1883. Decided Mar. 5, 1883.

IN ERROR to the Circuit Court of the United States for the District of New Jersey.

This action was brought in the court below, by the defendant in error, to recover the amount alleged to be due on certain bonds and interest coupons issued by the Township of Montclair in aid of a certain railroad company.

The trial resulted in a verdict and judgment in favor of the plaintiff for $41,588.65, whereupon the defendant sued out this writ of error.

For the history of the issue of the bonds in question see the preceding case of *Montclair* v. *Ramsdell*, *ante*, 431.

Messrs. **Thomas N. McCarter, William M. Evarts** and *John L. Blake*, for plaintiffs in error.

Mr. **Barker Gummere**, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The bonds in suit are of the same issue as those involved in *Montclair* v. *Ramsdell* [*ante*, 431], just decided.

The cases do not materially differ, except in the circumstances under which the respective plaintiffs became the holders of the township bonds. In this, as in the other case, the Township was denied the opportunity to establish certain facts which, it claimed, tended to show fraud or illegality in the inception of the bonds, apart from any question of legislative authority. If it be conceded that the evidence offered and excluded was admissible under the plea of *non est factum*, which was the only plea to the special counts on the bonds and coupons; and, also, that such evidence tended to show fraud or illegality in their inception, still there was no error in the ruling of the court. For if, as counsel contend, proof of such fraud or illegality would shift the burden of proof upon plaintiff, to show how and upon what consideration he came by the bonds, that exigency was met by proof that plaintiff was, in every sense, a *bona fide* holder for value. That he purchased the bonds for value and without notice of any fraud or illegality upon the part of the commissioners in the exercise of the power conferred by the statute, was so clearly shown that the court below was justified in saying to the jury (as, in effect, it did) that the evidence left no room to dispute the fact. The action of the court, in that respect, was consistent with the rule fre-
quently announced, that the jury may be con- [163]
trolled in their determination of a question, by a peremptory instruction, if the testimony is of such a conclusive character as would compel the court, in the exercise of a sound legal discretion, to set aside a verdict if one were returned in opposition to such testimony. *Ins. Co.* v. *Doster* [*ante*, 65], October Term, 1882; *Hendrick* v. *Lindsay*, 93 U. S., 146 [XXIII., 856].

All other questions raised by the assignments of error, and which are deemed of any moment, are concluded by the decision in the *Ramsdell Case*.

The judgment is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

*Head note by *Mr. Justice* HARLAN.

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PETER F. KENDALL, *Appt.*,

v.

UNITED STATES.

(See S. C., 17 Otto, 123-126.)

Statute of Limitations—demurrer—effect of rebellion.

1. Where it appears by the petition in the Court of Claims, that a claim is barred by the Statute of Limitations, the objection may be taken by demurrer.

2. That the claimant was, prior to the amnesty Proclamation of 1868, unable by reason of his connection with the rebellion to comply with the terms upon which the Government had consented to be sued in the Court of Claims, is his misfortune and cannot have the effect of enlarging the time fixed by the Statute of Limitations.

[No. 168.]

Submitted Jan. 30, 31, 1883. Decided Mar. 5, 1883.

APPEAL from the Court of Claims.

The history and facts of the case appear in the opinion of the court.

Messrs. **T. W. Bartley** and *M. I. Southard*, for appellant.

Mr. **S. F. Phillips**, *Solicitor-Gen.*, for appellee.

[124] *Mr. Justice* **Harlan** delivered the opinion of court:

It is provided by the Act of March 3, 1863, amending that of February 24, 1855 [10 Stat. at L., 612], establishing the Court of Claims "That every claim against the United States, cognizable by the Court of Claims (that is, such as the Government permits to be asserted against it by suit in that tribunal) shall be forever barred, unless the petition, setting forth a statement of the claim, be filed in the court, or transmitted to it under the provisions of this (that) Act, within six years after the claim first accrues." After providing that claims which had accrued six years before the passage of that Act shall not be barred if the petition be filed in or transmitted to the court within three years after the passage of that Act, and after declaring that the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in court or transmitted within three years after the disability has ceased, the Statute proceeds: "But no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively." 12 Stat. at L., 767, sec. 10.

The same Statute also provides that, in order to authorize a judgment in favor of any citizen of the United States, it shall be set forth in the petition that the claimant, and the original and every prior owner thereof, where the claim has been assigned, has at all times borne true allegiance to the Government of the United States and, whether a citizen or not, that he has not in any way voluntarily aided, abetted or given encouragement to the rebellion against the Government, which allegation may be traversed by the Government; and if on the trial such issue shall be decided against the claimant, his petition shall be dismissed. *Id.*, 767.

Appellant's claim arose on or about the last day of December, 1865. His petition was not filed within six years from that date, and not until November 22, 1872. The Government pleaded limitation, and the petition was dismissed upon the ground that the claim was barred.

Claimant was engaged in the service of the insurgent Government, but he insists that in virtue of the amnesty Proclamation of December 25, 1868, his disabilities were removed, and his rights, privileges and immunities, under the Constitution, restored. His specific contention is, that within the true meaning of the Statute, his claim was not cognizable by the Court of Claims, and did not accrue, until he was in such position that he could invoke its jurisdiction. That, it is asserted, was impossible before the promulgation of the amnesty Proclamation of December 25, 1868 [15 Stat. at L., 711]. [125]

We said in *McElrath* v. *U. S.*, 102 U. S., 440 [XXVI., 192], that the Government could not be sued except with its consent, and that it may restrict the jurisdiction of the Court of Claims to certain classes of demands. The Acts in question do contain restrictions which that court may not disregard. For instance, where it appears in the case that the claim is not one for which, consistently with the Statute, a judgment can be given against the United States, it is the duty of the court to raise the question whether it is done by plea or not. To that class may be referred claims which are declared barred if not asserted within the time limited by the Statute. What claims are thus barred? The express words of the Statute leave no room for contention. *Every* claim, except those specially enumerated, is forever barred unless asserted within six years from the time it first accrued. And that there might be no misapprehension as to the intention of Congress, the Statute, after enumerating the cases to which the limitation of six years should not apply, declares that "No other disability than those enumerated shall prevent any claim from being disbarred." The court cannot superadd to those enumerated, a disability arising from the claimant's inability to truthfully take the required oath. It has no more authority to engraft that disability upon the Statute than a disability arising from sickness, surprise or inevitable accident, which might prevent a claimant from suing within the time prescribed. Appellant's claim, if any he has or had, accrued, within the meaning of the Statute, when the Government came under a legal obligation to pay the amount thereof. In other words, it accrued against the Government, when, had the transaction recited in the petition occurred with a citizen, it would have accrued against that citizen. That the claimant was, at that time, or any time prior to December 25, 1868, unable by reason of his connection with the rebellion, a circumstance for which the United States was in nowise responsible, to comply with the terms upon which the Government had consented to be sued in the Court of Claims, is his misfortune and cannot have the effect of enlarging the time fixed by the Statute of Limitations. His remedy, if the claim be a valid one, is to apply to the Legislative Department of the Government. The courts cannot, in view of the language of the Statute, exclude from computation, on the issue of limitation, the time intervening between the accruing of [126]

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the claim in 1865 and the promulgation of the amnesty Proclamation.

The judgment must be affirmed. It is so ordered.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[192] ATLANTIC WORKS, *Appt.*,

v.

EDWIN L. BRADY.

EDWIN L. BRADY, *Appt.*,

v.

ATLANTIC WORKS.

(See S. C., 17 Otto, 192-205.)

Letters patent—design and object of patent laws—priority of patents—appropriation of another's invention.

*1. Letters patent granted to Edwin L. Brady, December 17, 1867, for an improved dredge-boat for excavating rivers, declared to be invalid for want of novelty and invention.

2. The design of the patent laws is, to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. It was never their object to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures.

3. Although a patent is not set up by way of defense in an answer, yet if the invention patented thereby is afterwards put into actual use, the date of the patent will be evidence of the date of the invention on a question of priority between different parties.

4. One person receiving from another a full and accurate description of a useful improvement, cannot appropriate it to himself; and a patent obtained by him therefor will be void.

[Nos. 101, 102.]

Argued Jan. 17, 1883. Decided Mar. 5, 1883.

APPEALS from the Circuit Court of the United States for the District of Massachusetts.

The history and facts of the case appear in the opinion of the court.

Mr. **Wm. A. Maury,** *Asst. Atty-Gen.*, for the Atlantic Works.

Messrs. **William A. Abbott,** *Albert A. Abbott* and *John S. Abbott*, for Brady.

Mr. Justice **Bradley** delivered the opinion of the court:

This case arises upon a bill in equity filed by Edwin L. Brady against The Atlantic Works, a Corporation of Massachusetts, having workshops and a place of business in Boston, praying for an account of profits for building a dredge-boat in violation of certain letters patent granted to the complainant bearing date December 17, 1867, and for an injunction to restrain the defendants from making, using or selling any dredge-boat in violation of said letters patent. The bill was filed on the 9th of April, 1868, and had annexed thereto a copy of the patent alleged to be infringed. The following are the material parts of the specification:

"The excavator consists of a strong boat, propelled by one or two propellers placed in the stern of the boat. I prefer two propellers, as affording greater power and rendering the [193] boat more manageable in steering in crooked channels. This propeller is driven in the ordinary manner by steam-engines of ordinary construction. Near the bow of the boat I place another steam-engine, driving what I call the 'mud fan,' which projects from and in front of the bow of the boat. This is formed by a set of revolving blades shown at A, turned like the propellers, by a shaft passing through a stuffing box, D. The blades are shaped somewhat like those of a propeller, but they are sharper on their fronts and less inclined on their faces. These blades should extend, say, two feet below the bottom of the boat, and their object is by their rapid revolution to displace the sand and mud on the bottom, and stirring them up, to mix them with the water so that they may be carried off by the current.

The motion of the 'mud fan' tends to draw forward the boat, assisting the propellers.

All the engines may be driven by one set of boilers, F, placed amidships. In order that the 'mud fan' may be brought in contact with the bottom, I construct the boat with a series of water-tight compartments, E, placed in the bow and stern, and on each side of the center, amidships, into which the water may be permitted to flow through pipes so as to sink the vessel to the required depth; the compartments being so placed and proportioned that the vessel shall sink with an even keel, by which the effective action of the 'mud fan,' the propellers and the steering apparatus is preserved, the boat being manageable at any depth. A large pump, B, driven by the engine, is connected by pipes with all the compartments, so that the water may be pumped out when necessary to raise the boat.

I am aware that boats have been constructed with compartments to be filled with water, to sink the dredging mechanism to the bottom, by loading the end of the boat in which such mechanism is placed; but this construction is subject to the disadvantage of requiring more complicated machinery for dredging, in order that it may be accommodated to the inclination of the boat, and to the further disadvantage that the boats thus inclined are comparatively unmanageable.

What I claim as my invention, and desire to secure by letters patent, is:

1. A dredging-boat, constructed with a series of water-tight compartments, so proportioned and arranged that, as they are filled with water, the boat shall preserve an even keel, and the dredging mechanism be brought into action [194] without any adjusting devices, substantially as set forth.

2. The combination of the 'mud fan' attached to a rigid shaft, and a boat containing a series of water-tight compartments, E, so adjusted as to cause the boat to settle on an even keel as the compartments are filled with water, and a pump, B, for exhausting the water from all the compartments, substantially as set forth."

The defendants, in their answer, denied the validity of the patent, and denied infringement of any valid patent of the complainant. They then stated the circumstances under which they came to construct the dredge-boat complained of, namely: that in October, 1867, the Govern-

*Head notes by *Mr. Justice* BRADLEY.

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ment of the United States advertised for proposals for building a dredge-boat for the mouth of the Mississippi River, according to certain plans and specifications; that the defendants, being manufacturers and builders of marine engines and steamboats, examined the plans and specifications, and made proposals for building the boat according to the same; which were accepted; and they at once began the construction of the boat and completed it under the inspection and supervision of a United States officer, in conformity with the stipulations; and the boat went in charge of said officer to the mouth of the Mississippi River; that the said plans and specifications were made and furnished by General McAlester, of the engineer corps of the United States, for the use of the government and were the result of his own study, observations and experience, and that so far as they were original he was the author of them. They further alleged by their answer, as amended, as follows: "That the plans and specifications by which the said dredge-boat was constructed were not, and the said dredge-boat itself was not a new invention, or novel and original; but the same, and the principle of said dredge-boat, had been substantially known and publicly used before, to wit: at New Orleans, on the mouth of the Mississippi River, in the year 1859, in the steam dredge-boat Enoch Train, by Charles H. Hyde, by Thomas G. Mackie, and William A. Hyde, copartners, under the firm of Hyde & Mackie, and by Henry Wright; and had also been used and applied in the construction of light-draft monitors, so-called, built by the United States Government during the late rebellion, [195] and long prior to the alleged patent or invention of the said Brady and the dates of his patent or *caveat*, and one of which said light-draft monitors was built at the works of these defendants."

The answer further stated that in 1866 and 1867, prior to the date of Brady's alleged invention, he was acting as agent for one Tyler, in carrying out a contract with the government for the improvement of the mouth of the Mississippi River; that General McAlester was then stationed at New Orleans to supervise and inspect, on behalf of the United States, the execution of the contract; that Brady was fitting and preparing a steamboat for the purpose on a plan entirely different from that of his alleged invention; that McAlester then detailed and described to him a plan for a dredge-boat identical with that of the boat constructed by the defendants; which plan McAlester communicated to the board of engineers of the army before the date of the alleged invention by Brady; that Brady's boat was a failure, and the contract was annulled; that then Brady made drawings for a boat on the plan described to him by McAlester, and afterwards claimed to be the inventor of it, and made application for his patent, and obtained the same after the defendants had commenced work on the boat complained of.

Evidence was taken, and on a hearing before *Mr. Justice* Clifford, in September, 1876, a decree was made sustaining the patent, declaring that the defendants had infringed the same, and referring it to a master to take an account of the profits received by the defendants from the infringement. The master reported the sum of $6,604.82. Both parties excepted, but their exceptions were overruled, and a final decree, in accordance with the report, was rendered October 9, 1878, with costs. Both parties have appealed.

The most important question, and first to be considered, is the validity of the patent.

It is obvious from reading the specification that the alleged invention consists mainly in attaching a screw, which the patentee calls a mud fan, to the forward end of a propeller dredge-boat, provided with tanks for settling her in the water. It is operated by sinking the boat until the screw comes in contact with the mud or sand which, by the revolution of the screw, is thrown up and mingled with the cur- [196] rent. The use of a series of tanks for the purpose of keeping the vessel level while she settles is an old contrivance long used in dry-docks, and is shown, by the evidence, to have been used in many light-draft monitors during the late war. The defendants themselves built one of these vessels, The Casco. Mr. Edwards, the president of The Atlantic Works, in his testimony says: "The Casco was built double, leaving a water space on each side nearly the entire length of the vessel, with an arrangement of valves for flooding the compartments at pleasure, for the purpose of sinking the vessel to the desired draft of water, and with powerful steam pumps to pump the water out for the purpose of raising it in the water. The compartment on the side was divided into several, and one or all of them could be filled as desired. The object was to enable them to put her on an even keel, or to raise or depress one end at pleasure." The employment of their screws by propeller ships, driven stern foremost, for the removal of sand and mud accumulated at the mouths of the Mississippi, had frequently occurred years before the patentee's invention is alleged to have been made. Several French steamers, one of which was named The Francis Arago, had used this method there prior to the year 1859. In that year The Enoch Train, a double propeller, that is, having two screws at her stern, was used in the same way by certain contractors, under the government, for dredging the mouth of the Mississippi. Mr. Hyde, one of the contractors and owners, in his testimony describes her construction and operation as follows:

"She was a propeller of burden between three and four hundred tons, with two propeller screws at her stern, about nine feet in diameter each; the cylinders were thirty-six inches in diameter and thirty-four inches stroke; she had one doctor engine; was fitted also with a large wrecking pump, with two low-pressure boilers; engines were also low-pressure engines. Her draft of water, in ordinary trim, with three hundred barrels of coal on board, was about thirteen feet aft, and a little less at the bows. By ordinary trim, I mean the usual sailing trim. The propeller screws were one on each quarter, or each side of the stern post. Before going to dredging on the bar, I fitted her up with a water-tight apartment or tank, at the stern, by [197] a bulkhead running athwart ships; say about twenty or twenty-five feet from the stern. That space was divided by a fore and aft bulkhead, making two water-tight compartments.

The mode of filling the compartments was

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by stop-cocks in the sides of the vessel opening into the water-tight compartment; the draft of water could be increased from her natural draft of water, say thirteen feet to eighteen feet, according to the quantity of water let into the tanks. The mode of operating was by running the vessel up and down over the bar, and thus stirring up the mud with the propeller screws. When the water was too shoal for her to pass over, the stern of the vessel was turned to the bar, and she was run stern on, the engines being reversed. Whenever we got done working on the bar there was a valve in the water-tight compartments for letting the water into the hold of the vessel, from which the water was pumped out of the vessel by the steam-pumps, and the vessel would then be left at her ordinary draft.

Int. 13. Please to state how you happened to employ this mode of dredging by The Enoch Train.

Ans. Well, I thought it would be an effectual way of removing the mud from the bar; that by the screws, coming in contact with the mud and deposit, and the revolutions of the screws about sixty times a minute, would create a current of water by which the sediment would be washed away."

The evidence of Henry Wright, the master of The Enoch Train, under whose charge her operations were conducted, is to the same purport. He says:

"We used to work our propellers in cutting up the mud. The operation consisted in cutting through the mud with our propellers. Sometimes we went at the mud, stern foremost, sometimes sideways and sometimes bows on. When I went to the bar at first, there was about fifteen feet of water on it, and when I quit operating there were eighteen feet on it in most places. Where the water was shallow, we invariably went at the mud, stern foremost. The stern was always loaded down to eighteen feet when dredging, but the bows were not loaded down. In dredging, the stern was always several feet lower down than the bows, say three or four feet."

[198] The boat built by the defendants, which was called The Essayons, was operated in precisely the same way. Being built expressly for dredging, her dredging screw was placed at her stem, it is true; but her mode of operation was the same as that of The Enoch Train. Her master, Putnam, describes it as follows:

"The method we use is to go outside the bar into deep water; then we sink the dredging end of the vessel by filling up the tanks at that end with water to any depth required. Then we start the propelling screw at the other end of the vessel, and go in with that until the vessel grounds; then we stop the propelling screw and start the dredging screw; and as that screw revolves, it cuts up the mud at the bottom and drags the vessel after it at the same time; after going as far as we wish we stop the dredging screw, lower the rake at the dredging end, and back out into deep water, using either or both of the screws to go back with, thus dragging the mud after us that the dredging screw has cut up from the bottom, and carrying it out into deep water; or rather, the operation is, that the dredging screw agitates the mud and throws it up into the surface current, and the current takes it out to a large extent, while the rake takes fresh hold of the bottom and also carries out whatever is broken up by the screw and settles from the current. After backing out into deep water, we hoist the rake and go back again and repeat the operation. When we first arrived at the bar, we made several experiments as to the best mode of dredging, but the mode above described we found to be the correct one, and have ever since used."

Nearly all the witnesses examined on the subject declare that there is no difference in principle between the mode of operation of The Enoch Train and that of The Essayons. The scraping or raking apparatus is not mentioned in the plaintiff's patent at all. This, as will be hereafter seen, is part of the original design of General McAlester, the government officer who had charge of the improvement of the mouth of the Mississippi.

It is further noticeable, that The Essayons, as is abundantly established by the evidence, always worked with her stern sunk and depressed, [199] and never with an even keel, upon which special emphasis is placed by the patent in suit.

It may well be asked, at this point, where was there any invention in the device described in the patent? Was it invention to place a screw for dredging at the stem of the boat? Nothing more than this was in reality suggested by the patentee. And that was substantially what was done with the French steamers prior to 1859, and with The Enoch Train in that year. They were turned end for end, and the stern was used as the stem, and the screws went forward, working in the bottom deposit in advance of the vessels. When The Enoch Train was procured for the service which she performed, she was ready made, and the contractors, to save time and expense, simply supplied her with a tank, in order to settle her to the proper depth, and they found her very serviceable. Had she been built for a dredge-boat, with the design of using screws for dredging as she did use them, can it be doubted that her dredging screw would have been placed forward instead of turning her stern forward? Would not this have been suggested by ordinary mechanical skill? The plan and mode of operation would have been precisely the same. When, after this, the government proceeded to build a boat expressly for dredging the mouths of the Mississippi, we should naturally expect to find it built as The Essayons was built, with her dredging screws at the stem instead of the stern. The making of them with longer blades than those of the propelling screw, and sharpened at the points, would be a matter of course. No invention would be requisite for any of these arrangements. It seems to us that the whole principle of The Essayons' construction and furnishment, as well as that of the patent in question, was anticipated by The Enoch Train, if not by the French steamers, and that a patent for that principle, though qualified by the natural incidents and adjuncts of its application, ought not to be sustained.

The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper cut-

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growth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant to a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle and injurious in its consequences. [200]

The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith.

But The Enoch Train did not exhibit all that was done in the matter of dredge-boats anterior to the alleged invention of Brady. If the application of dredging screws to the stem of a boat, driven by a propeller or otherwise, was not formally exhibited in The Enoch Train, it was certainly exhibited in the invention of one Ephraim B. Bishop, which was patented in April, 1858, and was applied by Brady himself to a dredge-boat called The Wiggins Ferry, fitted up and operated by him at the mouth of the Mississippi in 1866. This boat was propelled by an ordinary center paddle wheel, and to the bow were fixed two revolving conical shaped screws, which, on being let down to the river bottom, cut and stirred up the mud and sand and caused it to float away in the current. Each screw was driven by a separate steam-engine. Bishop was examined as a witness, and testified that the idea occurred to him from seeing a stern wheel boat on the Arkansas River make a channel for herself by turning stern foremost and removing the sediment by the revolution of her propeller. He says: [201]

"About 1852 or 1858, I was then keeping store at Van Buren, Arkansas. The difficulty of getting goods up the Arkansas River, in consequence of sand bars, was very great—so great that we had a cargo of goods, nearly a whole boat load, that was detained in consequence of sand bars for at least eight months before she could reach Van Buren from Pine Bluff, Arkansas. Seeing this necessity of removing these obstructions, and knowing all about the usual machines up to that date that had been invented, and their capacity, and knowing of the very great amount of sediment that must be removed to do any good, it appeared to me absolutely necessary that machinery of greater capacity and strength should be invented, and thinking upon this subject, I thought of and planned out one or more spirally-flanched screws, to be rotated by machinery on deck of a boat or in her hull, with the large ends of the spiral screws down, with sharp cutting corners or points, the screws to revolve right and left powerfully, intended to elevate the sediment up the inclination of the drum by reason of the powerful motion of those drums; the water being comparatively still, would necessarily force the sediment up the inclination of the screws, and throw the sediment off to the right and left into the water, which would carry it to harmless localities. This was the first plan that was afterwards developed into my patent."

In the fall of 1866 Brady and several other persons associated with him, Bishop himself being interested, made a contract with the government to dredge the southwest pass of the Mississippi, and procured for the purpose The Wiggins Ferry, and fitted up her bow with Bishop's apparatus. Brady had the superintendence of her fitting up, and of operating her after she was ready for work. They commenced upon her in November, 1866, but did not get her started until the 19th of March, 1867. After working with her for several months, and finding that she was not strong enough for the work required in the southwest pass, and that the sediment would fill up again when she was taken off for repairs, although they often succeeded in deepening the channel three or four feet, the contract was abandoned. For a common river bottom she would have answered well enough. Mr. Roy, one of the parties interested in her and who was on her for several days at the commencement of her operations, says that in the pass, before trying the bar, she worked very successfully. If her machinery was not strong enough for accomplishing the hard work to be done on the bar, she was, nevertheless, well fitted for lighter dredging, and exemplified in her construction the use of screws at her stem. [202]

It is true that Bishop's patent was not set up by way of defense in the answer; but there is no dispute as to the time it was issued, and that fact, together with Bishop's testimony, makes it clear that his invention, which was exemplified in The Wiggins Ferry, was made as far back as 1858, anticipating Brady according to his own showing for at least seven or eight years.

It is clear, then, that Brady did not invent the furnishing of vessels with water tanks, so arranged as to sink them on an even keel; for these had been used long before in the light-draft monitors; he did not invent the use of revolving screws on a dredging-boat, for cutting and stirring up the mud and sediment; for these had been used for that purpose on the French steamers, and on The Enoch Train, in and prior to 1859; he did not invent the use of water tanks in a dredging-boat for sinking the screws down to the bottom or bar to be dredged, for this plan had been adopted in The Enoch Train; he did not invent the application of screws to the forward end of a dredge-boat, so as to work in advance of the boat, for this had been virtually done on The Enoch Train, and was formally done on The Wiggins Ferry, the plan of which had been invented by Bishop in 1858. What, then, did he invent? Did he make a selection and combination of these elements that would

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not have occurred to any ordinary skilled engineer called upon, with all this previous knowledge and experience before him, to devise the construction of a strong dredge-boat for use at the mouth of the Mississippi? We think not. We think that there is no reasonable ground for any such pretension.

[203] But if a different conclusion could be reached, to our minds it is as certain as any fact depending on conflicting testimony can be, that Brady derived the ideas embraced in his patent from General McAlester, the government officer who in 1866 and 1867 had charge of the improvements at the mouth of the Mississippi River, and that he never conceived these ideas till they were communicated and explained to him by General McAlester during the fitting up of The Wiggins Ferry at New Orleans and during the progress of her operations at the Southwest Pass. It is proved by overwhelming evidence that during the whole period of her fitting up, and until it was developed by her working on the bar, that she was incapable of performing the work required of her at that place, that Brady regarded and spoke of Bishop's plan as the best possible plan that could be devised, and that although deeply interested in the success of the operations, he never alluded to or hinted at any plan of his own devising different from it. His whole conduct for months, as well as his total silence on the subject of any prior invention made by himself, in all his intercourse with his associates in the contract, with the government officers in charge, and with the superintendents and owners of the foundry where The Wiggins Ferry was fitted up, is the strongest possible proof that no such invention as he claims had been projected by him. The witnesses who speak of his conversations and sketches in December, 1865, and early in 1866, as communicated to them with the utmost freedom, with no apparent object so far as they were concerned, must either be mistaken as to the time, or as to the devices described. Interested as he is in the result of the suit, his own testimony cannot be allowed to prevail against a course of conduct so utterly at variance with it. It may be true; but we cannot give it effect against what he himself did, and did not do, without disregarding the ordinary laws that govern human conduct.

During the operations of The Wiggins Ferry on the bar, it is true, he did make divers plans and drawings for an improved dredge-boat. The first, made as Lieutenant Payne says, a week or ten days after the vessel arrived at the Southwest Pass, therefore the last of March or first of April, was merely a modification of Bishop's [204] plan, placing the cones parallel to each other instead of being pointed together in a salient angle, and providing the boat with water-tight compartments by which she could be raised or lowered. He worked at these drawings for some time, and Lieutenant Payne helped him to make tracings of them. In one corner of the drawings on the same sheet, two or three screws were exhibited, intended to be used in place of the cones if thought best or desired. It is stated in the bill that on the 17th of May, 1867, Brady filed a *caveat* in the Patent Office, describing his invention; but the patent was not obtained till the 17th of December following. No copy of the *caveat* appears in the record, so that we cannot tell what it contained.

Now, where was it that Brady, who had been so enthusiastic upon the superlative merits of Bishop's plan as applied to The Wiggins Ferry, obtained the new light which resulted in the filing of his *caveat* the 17th of May, and in the obtaining of his patent in December? The story is told by Lieutenant Payne, who appears to be, not only an intelligent, but an entirely disinterested witness. He says:

"In the latter part of February, 1867, at the engineer office, New Orleans, General McAlester told Brady that he had doubts of the successful working of The Wiggins, and in the case of her proving a failure, he should suggest to the engineer department a plan of his own for doing that work, which plan he then explained to Brady in my presence. He said he should recommend the building of a strong vessel provided with propellers at each end, and arranged with water-tight compartments, so that the vessel could be raised or lowered at pleasure. She was also to be provided with scrapers, which could be attached at either end, and raised or lowered at will by machinery. She was to have rudders at each end, and be able to move in either direction, either head or stern, equally well. He proposed to try the scrapers first, and if they were not found to work satisfactorily, to try any other devise which might be thought practicable. Brady seemed to be much pleased with the idea, but seemed confident of the success of The Wiggins."

It further appears that General McAlester, in pursuance of his idea, communicated his plans to the government board of engineers, and during the spring and summer of 1867, commencing as early as April, prepared the plans and [205] specifications according to which The Essayons was afterwards built. It is very strange that the copy of General McAlester's letters to the department, and several other important exhibits that were put in evidence, have not been inserted in the record used on this appeal. Where the fault lies, it is not for us to say. Sufficient appears, however, notwithstanding the evidence adduced to the contrary, consisting mostly of the testimony of the complainant himself, to convince us that Brady derived his whole idea from the suggestions of General McAlester; and that the plans for the construction of The Essayons originated entirely with that officer.

Our conclusion is, that the patent sued on cannot be sustained, and that the decree of the Circuit Court must be reversed, and the cause remanded, with instructions to dismiss the bill of complaint.

Decree reversed accordingly.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 654; 109 U. S., 102; 110 U. S., 494; 111 U. S., 608; 112 U. S., 248, 358; 114 U. S., 12, 156.

ESCANABA AND LAKE MICHIGAN TRANSPORTATION COMPANY, *Appt.*,

v.

CITY OF CHICAGO.

(See S. C. "*Escanaba Company* v. *Chicago*," 17 Otto, 678-691.)

Navigable waters—power of States over bridges—ordinance of 1787.

1. The Chicago River and its branches, although

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entirely within the State of Illinois, are navigable waters of the United States, over which Congress, under its commercial power, may exercise control to the extent necessary to protect, preserve and improve their free navigation.

2. Until Congress acts upon the subject, the power of the State over bridges across its navigable streams is plenary.

3. Whatever limitation was placed upon the powers of Illinois as a government, while in a territorial condition, either by the Ordinance of 1787 or the legislation of Congress, such limitation ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union.

[No. 1057.]

Submitted Jan. 19, 1883. Decided Mar. 5, 1883.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The bill in this case was filed in the court below, by the appellant, to enjoin the defendant from obstructing the free navigation of the Chicago River, as it is alleged to have done by certain regulations as to the opening and closing of the bridges over the same.

The court below having entered a decree dismissing the bill, the complainant appealed to this court.

The facts of the case are fully stated in the opinion of the court.

Messrs. **A. T. Britton, J. H. McGowan** and *Homer Cook*, for appellants.

Mr. **Frederick S. Winston, Jr.**, for appellee:

The Chicago River is not, under the Illinois decisions, a navigable stream.

Middleton v. *Pritchard*, 3 Scam., 510; *Ensminger* v. *People*, 47 Ill., 384; *Chicago* v. *McGinn*, 51 Ill., 266.

By the decisions of this court, however, it is a navigable water of the United States.

The Genesee Chief v. *Fitzhugh*, 12 How., 443; *Barney* v. *Keokuk*, 94 U. S., 338 (XXIV., 223); *The Daniel Ball*, 10 Wall., 557 (77 U. S., XIX., 999); *The Montello*, 11 Wall., 411 (78 U.S., XX., 191).

Navigable waters of the United States, lying within the bounds of a State, are, in the absence of express prohibition by Congress, entirely in the control of such State, and the State may delegate its power over such river.

Commonwealth v. *Breed*, 4 Pick., 460; *People* v. *R. R. Co.*, 15 Wend., 113; *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet., 245; *Gilman* v. *Philadelphia*, 3 Wall., 713 (70 U. S., XVIII., 96); *The Passaic Bridges*, 3 Wall., 782 (For full report see, Appendix to Book XVI., 799); *Flanagan* v. *Phila.*, 42 Pa., 219; *Pound* v. *Turck*, 95 U. S., 459 (XXIV., 525); *Transportation Co.* v. *Chicago*, 99 U. S. 643 (XXV., 338).

While the United States may regulate commerce on the Chicago River, the State of Illinois has concurrent jurisdiction, and the two jurisdictions do not conflict.

Crandall v. *Nevada*, 6 Wall., 35 (73 U. S., XVIII., 745); *The Lottawanna*, 21 Wall., 558 (88 U. S., XXII., 654); *Ex parte McNeil*, 13 Wall., 236 (80 U. S., XX., 624); *Case of the State Freight Tax*, 15 Wall., 232 (82 U.S., XXI., 146); *R.R. Co.* v. *Fuller*, 17 Wall., 560 (84 U. S., XXI., 710); *Osborne* v. *Mobile*, 16 Wall., 479 (83 U. S., XXI., 470); *Foster* v. *N. O.*, 94 U.S., 248 (XXIV., 123).

The State of Illinois has delegated its power over the river to the City of Chicago.

R. S. Ill., 1881, ch. 24, p. 218.

All the acts complained of are authorized by the State.

Aside from the State's control over the river, which has been delegated to the City of Chicago, the bridges are erected for a public purpose; produce a public benefit; are in a reasonable situation; do not, when open, materially abridge the natural channel and, therefore, are lawful structures.

R. R. Co. v. *Ward*, 2 Black, 485 (67 U. S., XVII., 311); *Williams* v. *Beardsley*, 2 Cart. (Ind.), 591.

The rights of crossing and of navigating a public stream are co-existent and correlative, and the ordinances are an equitable adjustment of these correlative rights.

Devoe v. *Penrose Fer. Bridge Co.*, 3 Am. L. R., 83; *Ill. Riv. Packet Co.* v. *Peoria Bridge Co.*, 38 Ill., 467; *Chicago* v. *McGinn*, 51 Ill., 266; *Packet Co.* v. *Board of Trustees*, 4 Mor. Tran., 811.

The *onus* of proof is on the party alleging a nuisance.

Dutton v. *Strong*, 1 Black, 23 (66 U.S., XVII., 29).

Mr. Justice **Field** delivered the opinion of the court:

[679] The Escanaba and Lake Michigan Transportation Company, a Corporation created under the laws of Michigan, is the owner of three steam vessels engaged in the carrying trade between ports and places in different States on Lake Michigan and the navigable waters connecting with it. The vessels are enrolled and licensed for the coasting trade, and are principally employed in carrying iron ore from the Port of Escanaba, in Michigan, to the docks of the Union Iron and Steel Company on the south fork of the south branch of the Chicago River in the City of Chicago. In their course up the river and its south branch and fork to the docks, they are required to pass through draws of several bridges constructed over the stream by the City of Chicago; and it is of obstructions caused by the closing of the draws, under an ordinance of the City, for a designated hour of the morning and evening during week days, and by a limitation of the time to ten minutes, during which a draw may be left open for the passage of a vessel, and by some of the piers in the south branch and fork, and the bridges resting on them, that the Corporation complains; and to enjoin the City from closing the draws for the morning and evening hours designated, and enforcing the ten minutes' limitation, and to compel the removal of the objectionable piers and bridges, the present bill is filed.

The river and its branches are entirely within the State of Illinois, and all of it and nearly all of both branches that is navigable are within the limits of the City of Chicago. The river, from the junction of its two branches to the lake, is about three fourths of a mile in length. The branches flow in opposite directions and meet at its head, nearly at right angles with it. Originally, the width of the river and its branches seldom exceeded one hundred fifty feet; of the branches and fork it was often less than one hundred feet; but it has been greatly

NOTE.—*Navigable waters; what are in the United States; streams and inland waters as highways.* See *note* to U. S. v. The Montello, 87 U. S., XXII., 391.

Bridges; different kinds; legislative power to grant right to erect; duty to repair. See *note* to Weightman v. Washington, 66 U. S., XVII., 82.

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enlarged by the City for the convenience of its commerce.

[680] The City fronts on Lake Michigan, and the mouth of the Chicago River is near its center. The river and its branches divide the City into three sections; one lying north of the main river and east of its north branch, which may be called its northern division; one lying between the north and south branches, which may be called its western division; and one lying south of the main river and east of the south branch, which may be called its southern division. Along the river and its branches, the City has grown up into magnificent proportions, having a population of 600,000 souls. Running back from them on both sides are avenues and streets lined with blocks of edifices, public and private, with stores and warehouses, and the immense variety of buildings suited for the residence and the business of this vast population. These avenues and streets are connected by a great number of bridges, over which there is a constant passage of foot passengers and of vehicles of all kinds. A slight impediment to the movement causes the stoppage of a crowd of passengers and a long line of vehicles.

The main business of the City where the principal stores, warehouses, offices and public buildings are situated, is in the southern division of the City; and a large number of the persons who do business there reside in the northern or the western division, or in the suburbs.

While this is the condition of business in the City on the land, the river and its branches are crowded with vessels of all kinds, sailing craft and steamers, boats, barges and tugs, moving backwards and forwards and loading and unloading. Along the banks there are docks, warehouses, elevators and all the appliances for shipping and reshipping goods. To these vessels, the unrestricted navigation of the river and its branches is of the utmost importance; while to those who are compelled to cross the river and its branches the bridges are a necessity. The object of wise legislation is to give facilities to both, with the least obstruction to either. This the City of Chicago has endeavored to do.

The State of Illinois, within which, as already mentioned, the river and its branches lie, has vested in the authorities of the City jurisdiction over bridges within its limits; their con-
[681] struction, repair and use; and empowered them to deepen, widen and change the channel of the stream, and to make regulations in regard to the times at which the bridges shall be kept open for the passage of vessels.

Acting upon the power thus conferred, the authorities have endeavored to meet the wants of commerce with other States, and the necessities of the population of the City residing or doing business in different sections. For this purpose they have prescribed as follows: that "Between the hours of six and seven o'clock in the morning, and half past five and half past six o'clock in the evening, Sundays excepted, it shall be unlawful to open any bridge within the City of Chicago;" and that "During the hours between seven o'clock in the morning and half past five o'clock in the evening, it shall be unlawful to keep open any bridge within the City of Chicago for the purpose of permitting vessels or other crafts to pass through the same, for a longer period at any one time than ten minutes, at the expiration of which period it shall be the duty of the bridge tender or other person in charge of the bridge to display the proper signal, and immediately close the same, and keep it closed for fully ten minutes for such persons, teams or vehicles as may be waiting to pass over, if so much time shall be required; when the said bridge shall again be opened, if necessary for vessels to pass, for a like period, and so on alternately, if necessary, during the hours last aforesaid; and in every instance where any such bridge shall be open for the passage of any vessel, vessels or other craft, and closed before the expiration of ten minutes from the time of opening, said bridge shall then, in every such case, remain closed for fully ten minutes, if necessary, in order to allow all persons, teams and vehicles in waiting to pass over said bridge."

The first of these requirements was called for to accommodate clerks, apprentices and laboring men seeking to cross the bridges, at the hours named, in going to and returning from their places of labor. Any unusual delay in the morning would derange their business for the day, and subject them to a corresponding loss of wages. At the hours specified, there is three times, so the record shows, the usual number of pedestrians going and returning that there is during other hours of the day.

The limitation of ten minutes for the passage [682]
of the draws, by vessels, seems to have been eminently wise and proper for the protection of the interests of all parties. Ten minutes is ample time for any vessel to pass the draw of a bridge, and the allowance of more time would subject foot-passengers, teams and other vehicles to great inconvenience and delays.

It is to this ten minutes' limitation and to the assignment of the morning and evening hour to pedestrians and vehicles, that the complainant principally objects. He insists that the navigation of the river and its branches should not be thus delayed; that the rights of commerce by vessels are paramount to the rights of commerce by any other way.

But in this view the complainant is in error. The rights of each class are to be enjoyed without invasion of the equal rights of others. Some concession must be made on every side for the convenience and the harmonious pursuit of different occupations. Independently of any constitutional restrictions, nothing would seem more just and reasonable, or better designed to meet the wants of the population of an immense city, consistently with the interests of commerce, than the ten minutes' rule, and the assignment of the morning and evening hours which the city ordinance has prescribed.

The power vested in the General Government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, so far as it may be necessary to insure their free navigation, when by themselves or their connection with other waters they form a continuous channel for commerce among the States or with foreign countries. *The Daniel Ball*, 10 Wall., 557 [77 U. S., XIX., 999]. Such is the case with the Chicago River and its branches. The common law test of the navigability of waters, that they are subject to the ebb and flow of the tide, grew out of the fact that in England there are

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no waters navigable in fact, or to any great extent, which are not also affected by the tide. That test has long since been discarded in this country. Vessels larger than any which existed in England, when that test was established, now navigate rivers and inland lakes for more than a thousand miles beyond the reach of any tide. That test only becomes important when considering the rights of riparian owners to the [683] bed of the stream, as in some States it governs in that matter.

The Chicago River and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve and improve their free navigation.

But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people. This power embraces the construction of roads, canals and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the City of Chicago, for the convenience and comfort of its inhabitants and the growth of its commerce. And nowhere could the power to control the bridges in that City, their construction, form and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the City upon whom it has devolved that duty. When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the State and that of the Federal Government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the land. But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary. This doctrine has been recognized from the earliest period, and approved in repeated cases, the most notable of which are *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet., 245, which was decided in 1829, and *Gilman* v. *Philadelphia*, 3 Wall., 713 [70 U. S., XVIII., 96], which was decided in 1865. In the first of these cases, an Act of Delaware incorporated the [684] Blackbird Creek Company, and authorized it to construct a dam over one of the small navigable rivers of the State, which obstructed the navigation of the stream. A sloop, licensed and inrolled according to the navigation laws of the United States, broke and injured the dam, and thereupon an action was brought for damages by the company. The owners of the sloop set up that the river was a public and common navigable creek "in the nature of a highway," in which the tides had always flowed and reflowed, and in which there was, and of right ought to be, a common and public way, for all the citizens of the State of Delaware and of the United States, with sloops and other vessels to navigate at all times of the year at their free will and pleasure; that the company had wrongfully erected the dam across the navigable creek and thereby obstructed the same; and that they had broken the dam in order to pass along the creek with their sloop. To this plea, the company demurred and the demurrer was sustained by the Court of Appeals of Delaware and by this court. The decision here was based entirely upon the absence of any legislation of Congress upon the subject. Said *Chief Justice* Marshall, speaking for the court: "The measure authorized by this Act (of Delaware) stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the Government of Delaware and its citizens, of which this court can take no cognizance. The counsel for the complainants in error insist that it comes in conflict with the power of the United States to regulate commerce with foreign Nations and among the several States. If Congress had passed any Act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks, into which the tide flows and which abound throughout the lower country and the Middle and Southern States, we should not feel much difficulty in saying that a state law, coming in contact with such Act, would be void. But Congress has passed no such Act. The repugnancy of the law of Delaware with the Constitution is placed entirely upon its repugnancy to the power of Congress to regulate commerce with foreign Nations and among the several States, a power which has not [685] been so exercised as to affect the question."

The second case mentioned, that of *Gilman* v. *Philadelphia*, is equally emphatic and decisive. The complaint there was by a citizen of New Hampshire, who owned valuable coal wharves on the Schuylkill River at Philadelphia, just above Chestnut Street in that city. In 1857 the Legislature of the State authorized the City of Philadelphia to erect a permanent bridge over the river at that street. The city being about to begin the structure, which was to be without a draw, Gilman filed a bill to prevent its erection, alleging that it would be an unlawful obstruction of the navigation of the river, and an illegal interference with his rights, and a public nuisance, producing to him special damage; and that it was not competent for the Legislature of Pennsylvania to sanction such a structure; and he claimed that he was entitled to be protected by an injunction to stay the progress of the work, and to a decree of abatement, if it should be proceeded with to com- [691] pletion. It appeared that the river was tidewater, and navigable to the wharves of the complainant for vessels drawing from eighteen to twenty feet of water, and that for many years commerce to them had been carried on in all kinds of vessels. The bridge, which was to be constructed below them, was to be only thirty feet high; hence would not permit the passage of vessels with masts. The city justified its proposed action by the Act of the Legislature, alleging that the bridge was a necessity for public convenience, a large population residing on

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both sides of the river. The circuit court dismissed the bill, and this court affirmed the decree, holding that as the river was wholly within her limits, the State had not exceeded the bounds of her authority and that, until the dormant power of the Constitution was awakened and made effective by appropriate legislation, the reserved power of the State was plenary, and its exercise in good faith could not be made the subject of review by the court. In its opinion, after observing "That it must not be forgotten that bridges, which are connecting parts of turnpikes, streets and railroads, are means of commercial transportation as well as navigable waters, and that the commerce which passed over a bridge may be much greater than would ever be transported on the water obstructed," [686] the court said, speaking by *Mr. Justice* Swayne: "It is for the municipal power to weigh the considerations which belong to the subject and to decide which shall be preferred, and how far either shall be made subservient to the other. The States have always exercised this power, and from the nature and objects of the two systems of government, they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the State shall be exerted within the sphere of the commercial power which belongs to the Nation." 3 Wall., 729 [70 U. S., XVIII., 100].

These decisions have been cited, approved and followed in many cases, notably in that of *Pound* v. *Turck*, decided in 1877, 95 U. S., 459 [XXIV., 525]. There, a Statute of Wisconsin authorized the erection of one or more dams across the Chippewa River, which was a small navigable stream lying wholly within the limits of the State, but emptying its waters into the Mississippi; and also the building and maintaining of booms on the river with sufficient piers to stop and hold floating logs. The dams and booms were to be so built as not to obstruct the running of lumber rafts on the river. Certain parties were damaged by delay in a lumber raft and from its breaking, caused by the obstructions in the river; and their assignees in bankruptcy brought an action against those who had placed the obstructions there and recovered. The case being brought here, this court was of opinion that the somewhat confused instructions of the circuit court must have led the jury to understand, that if the structures of the defendant were a material obstruction to the general navigation of the river, the statute of the State afforded no defense, although the structures were built in strict conformity with its provisions. The circuit court evidently acted upon the theory that the State possessed no power to pass the statute because of its supposed conflict with the commercial power of Congress. This court thus construing the instructions of that court, held that they were erroneous, that the case was within the decisions of *The Blackbird Creek Case* and *Gilman* v. *Philadelphia*, and that it was competent for the Legislature of the State to impose such regulations and limitations upon the erection of obstructions like dams and booms in navigable streams wholly within its limits, as might best [687] accommodate the interests of all concerned, until Congress should interfere and by appropriate legislation control the matter.

The doctrine declared in these several decisions is in accordance with the more general doctrine now firmly established, that the commercial power of Congress is exclusive of state authority only when the subjects upon which it is exercised are national in their character, and admit and require uniformity of regulation affecting alike all the States. Upon such subjects only that authority can act which can speak for the whole country. Its non-action is, therefore, a declaration that they shall remain free from all regulation. *Welton* v. *Mo.*, 91 U. S., 275 [XXIII., 347]; *Henderson* v. *Mayor of N. Y.*, 92 *Id.*, 259 [XXIII., 543]; *Mobile Co.* v. *Kimball*, 102 *Id.*, 691 [XXVI., 238].

On the other hand, where the subjects on which the power may be exercised are local in their nature or operation, or constitute mere aids to commerce, the authority of the State may be exerted for their regulation and management until Congress interferes and supersedes it. As said in *County of Mobile* v. *Kimball*: "The uniformity of commercial regulations, which the grant to Congress was designed to secure against conflicting state provisions, was necessarily intended only for cases where such uniformity is practicable. Where from the nature of the subject or the sphere of its operation, the case is local and limited, special regulations, adapted to the immediate locality, could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts, the state authority is superseded. Inaction of Congress upon these subjects of a local nature, or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done in respect to them, but is rather to be deemed a declaration that for the time being and until it sees fit to act they may be regulated by State authority." 102 U. S., 699 [XXVI., 240].

Bridges over navigable streams, which are entirely within the limits of a State, are of the latter class. The local authority can better appreciate their necessity, and can better direct the manner in which they shall be used and regulated than a government at a distance. It [688] is, therefore, a matter of good sense and practical wisdom to leave their control and management with the States, Congress having the power at all times to interfere and supersede their authority whenever they act arbitrarily and to the injury of commerce.

It is, however, contended here that Congress has interfered, and by its legislation expressed its opinion as to the navigation of Chicago River and its branches; that it has done so by Acts recognizing the Ordinance of 1787, and by appropriations for the improvement of the harbor of Chicago.

The Ordinance of 1787, for the government of the Territory of the United States northwest of the Ohio River, contained in its 4th article a clause declaring that, "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between them, shall be common highways and forever free, as well to the inhabitants of the said Territory as to the citizens of the United States and those of any other States that may be admitted into the

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Confederacy, without any tax, impost or duty therefor."

The Ordinance was passed July 13, 1787, one year and nearly eight months before the Constitution took effect; and, although it appears to have been treated afterwards as in force in the Territory except as modified by Congress; and by the Act of May 7, 1800 [2 Stat at L., 58], creating the Territory of Indiana, and by the Act of February 3, 1809 [2 Stat. at L., 514], creating the Territory of Illinois, the rights and privileges granted by the Ordinance are expressly secured to the inhabitants of those Territories; and although the Act of April 18, 1818 [3 Stat. at L., 428], enabling the people of Illinois Territory to form a Constitution and State Government, and the Act of August 26 following, admitting the State into the Union, refer to the principles of the Ordinance according to which the Constitution was to be formed, its provisions could not control the authority and powers of the State after her admission. Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her after she became a State of the Union. On her admission, she at once became entitled to and [689] possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted and could be admitted only on the same footing with them. The language of the Act of admission is "on an equal footing with the original States *in all respects whatever*." 3 Stat. at L., 536. Equality of constitutional right and power is the condition of all the States of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Blackbird Creek, and Pennsylvania over the Schuylkill River. *Pollard* v. *Hagan*, 3 How., 212; *Permoli* v. *First Municipality*, 3 How., 589; *Strader* v. *Graham*, 10 How., 82.

But, aside from these considerations, we do not see that the clause of the Ordinance upon which reliance is placed materially affects the question before us. That clause contains two provisions; one, that the navigable waters leading into the Mississippi and the St. Lawrence shall be common highways to the inhabitants, and the other, that they shall be forever free to them without any tax, impost or duty therefor. The navigation of the Illinois River is free, so far as we are informed, from any tax, impost or duty, and its character as a common highway is not affected by the fact that it is crossed by bridges. All highways, whether by land or water, are subject to such crossings as the public necessities and convenience may require; and their character as such is not changed, if the crossings are allowed under reasonable conditions, and not so as to needlessly obstruct the use of the highways. In the sense in which the terms are used by publicists and statesmen, free navigation is consistent with ferries and bridges across a river for the transit of persons and merchandise as the necessities and convenience of the community may require. In *Palmer* v. *Comrs. of Cuyahoga Co.*, we have a case in point. Their application was made to the Circuit Court of the United States in Ohio for an injunction to restrain the erection of a drawbridge over a river in that State, on the ground that it would obstruct the navigation of the stream and injure the property of the plaintiff. The application was founded on the provision of the 4th article of the Ordinance mentioned. The court, which was presided over by *Mr. Justice* McLean, then having a seat on this bench, refused the injunc- [690] tion, observing that, "This provision does not prevent a State from improving the navigableness of these waters, by removing obstructions, or by dams and locks, so increasing the depth of the water as to extend the line of navigation. Nor does the Ordinance prohibit the construction of any work on the river which the State may consider important to commercial intercourse. A dam may be thrown over the river, provided a lock is so constructed as to permit boats to pass with little or no delay, and without charge. A temporary delay, such as passing a lock, could not be considered as an obstruction prohibited by the Ordinance." And again; "A drawbridge across a navigable water is not an obstruction. As this would not be a work connected with the navigation of the river, no toll, it is supposed, could be charged for the passage of boats. But the obstruction would be only momentary, to raise the draw; and as such a work may be very important in a general intercourse of a community, no doubt is entertained as to the power of the State to make the bridge." 3 McLean, 226. The same observations may be made of the subsequent legislation of Congress declaring that navigable rivers within the Territories of the United States shall be deemed public highways. 1 Stat. at L., 468, sec. 9; 2 Stat. at L., 279, sec. 6.

As to the appropriations by Congress; no money has been expended on the improvement of the Chicago River above the first bridge from the lake, known as Rush Street Bridge. No bridge, therefore, interferes with the navigation of any portion of the river which has been thus improved. But, if it were otherwise, it is not perceived how the improvement of the navigability of the stream can affect the ordinary means of crossing it by ferries and bridges. The free navigation of a stream does not require an abandonment of those means. To render the action of the State invalid in constructing or authorizing the construction of bridges over one of its navigable streams, the General Government must directly interfere so as to supersede its authority and annul what it has done in the matter.

It appears from the testimony in the record that the money appropriated by Congress has been expended almost exclusively upon what is [691] known as the outer harbor of Chicago, a part of the lake surrounded by breakwaters. The fact that formerly a light-house was erected where now Rush Street Bridge stands, in no respect affects the question. A ferry was then used there; and before the construction of the bridge the site as a light-house was abandoned. The existing light-house is below all the bridges. The improvements on the river above the first bridge do not represent any expenditure of the government.

From any view of this case, we see no error in

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the action of the court below and its decree must, accordingly, be affirmed and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 705; 109 U. S., 398; 113 U. S., 208, 210, 212.

STATE OF LOUISIANA, *ex rel.* JOHN ELLIOTT, NICHOLAS GWYNN and HENRY S. WALKER, *Plff. in Err.*,

v.

ALLEN JUMEL, Auditor of the STATE OF LOUISIANA; E. A. BURKE, Treasurer of the STATE OF LOUISIANA; AND the BOARD OF LIQUIDATION OF THE STATE OF LOUISIANA.

JOHN ELLIOTT, NICHOLAS GWYNN, AND HENRY S. WALKER, *Appts.*,

v.

LOUIS A. WILTZ, Governor; SAMUEL D. McENERY, Lieutenant Governor; ROBERT N. OGDEN, Speaker of the House of Representatives; W. A. STRONG, Secretary of State; ALLEN JUMEL, Auditor; E. A. BURKE, Treasurer; AND STATE NATIONAL BANK OF NEW ORLEANS, Fiscal Agent of the STATE OF LOUISIANA, MEMBERS OF THE BOARD OF LIQUIDATION OF LOUISIANA.

(See S. C., 17 Otto, 711-769.)

Authority to enjoin state officers—mandamus—*collection of taxes—authority of courts over action of State.*

1. The Treasurer of a State is not a trustee of moneys in the State Treasury; he holds them only as the agent of the State. If there is any trust, the State is the trustee, and unless it can be sued the trustee cannot be enjoined.

2. A single holder, or a committee of holders of state bonds cannot, by the judicial writ of *mandamus*, compel the executive officers of the State to perform generally their several duties under a state law.

3. A court cannot assume the executive authority of a State, so far as it relates to the enforcement of a law, and supervise the conduct of persons charged with official duty in respect to the levy, collection and disbursement of a tax to pay state bonds, in a proceeding in which the State, as a State, is not and cannot be made a party.

4. Courts cannot, when a State cannot be sued, set up jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State.

[Nos. 520, 529.]

Argued Apr. 18, 19, 20, 1882. Leave granted to file printed oral arguments Oct. 10, 1882. Decided Mar. 5, 1883.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The first of these cases, No. 520, arose upon a petition filed in the Third District Court, Parish of Orleans, Louisiana, Jan. 26, 1880, by the plaintiffs in error, as relators, against the defendants in error, holding various state offices and constituting the Board of Liquidation, for a *mandamus* requiring them to appropriate certain funds on hand, amounting to some $300,000, to the payment of the interest due and payable upon the consolidated bonds of the State of Louisiana, and to collect certain taxes and apply the proceeds on the interest and principal of said bonds.

The cause was subsequently removed into the court below on a petition of the relators.

Upon the final hearing, the court below found for the defendants and entered a judgment dismissing the petition; whereupon, the relators sued out this writ of error.

In the second case, No. 529, the bill was filed in the court below Jan. 16, 1880, by the said relators, against the same defendants, for an injunction to prevent the diversion of said funds from the payment of the interest on said bonds.

Upon the final hearing, the court below found for the defendants, and entered a decree dismissing the bill; whereupon, the complainants appealed to this court.

The history and facts of the case fully appear in the opinion of the court.

These cases were argued with the cases of *N. H.* v. *La.* and *N. Y.* v. *La.* See the report of those cases *post*, for a further statement of the facts involved and an abstract of portions of the elaborate argument of counsel.

Messrs. **Wheeler H. Peckham** and **George S. Lacey**, for plaintiffs in error and appellants.

Messrs. **John A. Campbell** and *J. C. Egan, Atty-Gen. of Louisiana*, for defendants in error and appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The Legislature of Louisiana, at its session of 1874, by an Act known as Act No. 3 of 1874, provided for an issue of bonds, to be designated as consolidated bonds of the State, for the purpose of consolidating and reducing the floating and bonded debt. The bonds were to be payable to the bearer forty years from Jan. 1, 1874, and bear interest at the rate of seven per cent per annum, payable on the first day of July and the first day of January in each year. The amount was not to exceed in the aggregate $15,000,000. The Governor, Lieutenant-Governor, Auditor, Treasurer, Secretary of State, Speaker of the House of Representatives, and a person to be elected by these officers as a fiscal agent of the State, were created a Board of Liquidation, with power to issue the bonds and exchange them for all valid outstanding bonds and certain valid warrants on the Treasury, at the rate of sixty cents in the new bonds for one dollar of old bonds and warrants. The bonds were to be signed by the Governor, Auditor and Secretary of State, and the coupons by the Auditor and Treasurer. [713

Section 7 of the Act is as follows:

"That a tax of five and a half mills on the dollar of the assessed value of all real and personal property in the State is hereby annually levied and shall be collected for the purpose of paying the interest and principal of the consolidated bonds herein authorized, and the revenue derived therefrom is hereby set apart and appropriated to that purpose, and no other. And that

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it shall be deemed a felony for the fiscal agent or any officer of the State or Board of Liquidators to divert the said fund from its legitimate channel as provided, and upon conviction the said party shall be liable to imprisonment for not more than ten years nor less than two, at the discretion of the court. If there shall, during any year, be a surplus arising from said tax after paying all interest falling due in that year, such surplus shall be used for the purchase and retirement of bonds authorized by this Act, said purchases to be made by the said Board of Liquidation, from the lowest offers, after due notice; *Provided*, That the total tax for interest and all other state purposes, except the support of public schools, shall never hereafter exceed twelve and a half mills on the dollar. The interest tax aforesaid shall be a continuing annual tax until the said consolidated bonds shall be paid or redeemed, principal and interest; and the said appropriation shall be a continuing annual appropriation during the same period; and this levy and appropriation shall authorize and make it the duty of the Auditor and Treasurer, and the said Board, respectively, to collect said tax annually, and pay said interest and redeem said bonds until the same shall be fully discharged."

[714] By other sections it was provided that any judge, tax collector, or any other officer of the State obstructing the execution of the Act or any part of it, or failing to perform his official duty, shall be deemed guilty of a misdemeanor, and on conviction thereof punished; that each provision of the Act should be, and was declared to be, a contract between the State of Louisiana and each and every holder of such consolidated bonds; that the tax collectors should not pay over any moneys collected by them to any other person than the State Treasurer, and that no court, or judge thereof, should have power to enjoin the payment of principal or interest of any of the bonds, or the collection of the special tax therefor.

Immediately after the passage of this Act the State adopted an amendment to its Constitution, as follows:

"The issue of consolidated bonds authorized by the General Assembly of the State, at its regular session in the year 1874, is hereby declared to create a valid contract betwen the State and each and every holder of said bonds, which the State shall by no means and in nowise impair. The said bonds shall be a valid obligation of the State in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof or the levy and collection of the tax therefor; to secure such levy, collection and payment, the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds shall be assessed and collected, each and every year, until the bonds shall be paid, principal and interest, and the proceeds shall be paid by the Treasurer of the State to the holders of said bonds, as the principal and interest of the same shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection, and for such payment from the Treasury."

Under this authority, consolidated bonds to the amount of about $12,000,000 were issued. John Elliott, Nicholas Gwynn and Henry S. Walker are the holders and bearers of these bonds to the amount of $20,000, and of unpaid coupons due January 1, 1880, to the amount of $78,900. The bonds, in accordance with the requirements of the Act under which they were issued are signed by the Governor, Auditor and Secretary of State, and the coupons by the Au- [715] ditor and Treasurer.

On the first day of January, 1880, a new Constitution of Louisiana went into effect. A portion of that Constitution, called the "Debt Ordinance," is in these words:

"*State Debt.*

Art. 1. *Be it ordained, by the people of the State of Louisiana, in convention assembled*, That the interest to be paid on the consolidated bonds of the State of Louisiana be and is hereby fixed at two per cent per annum for five years from the first day of January, 1880; three per cent per annum for fifteen years; and four per cent per annum thereafter, payable semi-annually; and there shall be levied an annual tax sufficient for the full payment of said interest, not exceeding three mills, the limit of all State tax being hereby fixed at six mills; *Provided*, The holders of consolidated bonds may, at their option, demand in exchange for the bonds held by them, bonds of the denomination of $5, $100, $500, $1,000, to be issued at the rate of seventy-five cents on the dollar, of bonds held and to be surrendered by such holders; the said new issue to bear interest at the rate of four per cent per annum, payable semi-annually.

Art. 2. The holders of consolidated bonds may at any time present their bonds to the Treasurer of the State or to an agent to be appointed by the Governor, one in the City of New York and the other in the City of London, and the said Treasurer or agent, as the case may be, shall indorse or stamp thereon the words, interest reduced to two per cent per annum for five years from January 1, 1880, three per cent per annum for fifteen years, and four per cent per annum thereafter; *Provided*, The holder or holders of said bonds may apply to the Treasurer for an exchange of bonds, as provided in the preceding article.

Art. 3. *Be it further ordained*, That the coupon of said consolidated bonds falling due the first day of January, 1880, be and the same is hereby remitted, and any interest taxes collected to meet said coupon are hereby transferred to defray the expenses of the State Government."

Article 209 of the same Constitution provides that "The state tax on all property for all purposes whatever, including expenses of government, schools, levees and interest, shall not exceed in any one year six mills on the dollar of its assessed valuation."

Elliott, Gwynn and Walker demanded of the [716] proper state officers payment of their coupons which fell due January 1, 1880; but such payment was refused, the Auditor and Treasurer stating "That they could not comply with the request made of them, owing to the prohibition contained in article 3, state debt ordinance of the Constitution of the State of Louisiana, adopted 23d July, 1879, and recently promulgated."

All the taxes allowed by the new Constitution have been levied for the year 1880, but no proceedings have been taken to levy and collect the five and a half mill tax under the Act of 1874. About $300,000 is in the Treasury of the

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State, collected under the levy imposed by the Act of 1874 to meet the coupons falling due January, 1880; but the Treasurer refuses to apply it to the payment of the coupons, and claims to hold it only for the purposes to which it was to be appropriated by the terms of the new Constitution. There are also taxes levied for former years under the Act of 1874, which remain uncollected, and which are subject to future collection and payment into the Treasury under the operation of the collection laws.

In this condition of things, the appellants, Elliott, Gwynn and Walker, on the 16th of January, 1880, commenced a suit in equity in the Circuit Court of the United States for the Eastern District of Louisiana, against the several officers of the State composing the Board of Liquidation, and the prayer of the bill is that it may be ordered, adjudged and decreed that the Act No. 3, of 1874, "So far as your orator's interests herein above declared are concerned, was all the time from its passage, has been and, at the time of the rendition of the decree herein prayed for, is a valid and subsisting law of the State of Louisiana; that the Act aforesaid, the constitutional amendment of 1874, and the several bonds and coupons of interest, held and owned by your orators as aforesaid, separately and together, constituted, were and are, good, valid, subsisting and binding contracts between the State aforesaid and the bearers and holders of the consolidated bonds and coupons, the obligation of which contract cannot be lawfully or constitutionally impaired; and that, under and by virtue of such contract, your orators were and are entitled to take and enjoy all the rights, privileges, taxes and moneys, particularly set forth and mentioned in Act No. 3, and the constitu- [717] tional amendment of 1874, aforesaid; that so much of the aforesaid Constitution of 1879 as alters, varies, modifies or changes, or assumes, purports or attempts to alter, vary, modify or change the provisions of the said Act of 1874 and the constitutional amendment of that year, especially article 208 of the Constitution of the year 1879, and that portion of such Constitution known and distinguished as the Ordinance on 'state debt,' do impair the obligation of the contract herein above referred to; that the said parts and portions of such Constitution are, therefore, violative of the Constitution of the United States, and are absolutely null and void and without the slightest force or effect whatever against complainants; and afford and offer no authority or warrant for the defendants, or any one or more of them, to make such disposition or application of any part or portion of the aforesaid taxes, and the proceeds thereof, collected and to be collected, as to enable the State, therewith, to defray the expenses of the State Government, or to accomplish any purpose or purposes other than those prescribed in the aforesaid Funding Act and constitutional amendment of 1874; that the defendants, and each of them, may be adjudged and decreed to replace and re-instate to the credit of said interest fund any moneys or funds that may have been diverted therefrom; * * * and that said defendants and each and every one of them may be peremptorily enjoined and restrained from recognizing as valid, against your orators, article 208 of the Constitution of Louisiana," and the "Debt Ordinance," and "from ignoring the Funding Act and constitutional amendment of 1874, and from doing and causing to be done any act or thing whatsoever, obstructing, preventing or impeding, or tending, directly or indirectly, to obstruct, prevent or impede, in the slightest degree, the prompt, full and complete execution and enforcement of the Act and constitutional amendment aforesaid; and, finally, that the said defendants and each and every one of them may be enjoined and restrained to such other and further extent, and in such additional way and manner, as the court may deem right and proper."

On the 26th of January, 1880, the same parties as relators filed a petition in a State Court of Louisiana against the Auditor and Treasurer of State and the several members of the Board of Liquidation, being Louis A. Wiltz, the Gov- [718] ernor; Samuel McEnery, Lieutenant-Governor; Allen Jumel, Auditor; Edward A. Burke, Treasurer; William A. Strong, Secretary of State; Robert N. Ogden, Speaker of the House of Representatives, and the State National Bank of New Orleans, fiscal agent, for a *mandamus* requiring them "To apply and pay to the extinguishment of the interest now due and payable upon the consolidated bonds of the State of Louisiana, or becoming due and payable upon said bonds, and to the redemption and retirement of such consolidated bonds, as are provided for and required by the aforesaid Act No. 3 of the year 1874, any and all moneys and proceeds of the tax levied or fixed by said Act now in the hands or subject to the control of the said defendants or either one of them, or which have been in the hands or subject to the control of the said defendants or either one of them, or which may come into their hands or become subject to the control of either of them, not already applied to the payment of interest upon the aforesaid bonds, or to the redemption and retirement of the bonds themselves, as provided for and required in and by said Act No. 3;" and that they "May furthermore be commanded and required to proceed, without delay, to collect the tax fixed or levied in and by the aforesaid Act No. 3 of the year 1874, in the manner and to the extent contemplated by that statute, and to apply and pay all moneys realized from such tax to the discharge of the interest and redemption of the bonds issued under and by virtue of the aforesaid Funding Act No. 3 * * * until the principal and interest of such bonds be fully extinguished and discharged; and, finally, that the said defendants may severally be commanded and required to enforce the Act herein above last referred to, and particularly to carry out, perform and discharge each and every one and all the ministerial acts, things and duties respectively required of them by the aforesaid Act No. 3, according to the full and true intent and purport of that Act."

This suit was afterwards removed into the Circuit Court of the United States for the Eastern District of Louisiana.

Upon final hearing, the Circuit Court denied the relief prayed for in each of the suits because, as stated in the conclusions of law which were filed in connection with the find- [719] ings of fact, it appeared that the respondents were constitutional officers of the State, and had no relation to the funds collected, or to be collected, except as such officers; that they were

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clothed with no authority and charged with no duty to pay over or collect said funds to or in behalf of the relators and complainants, but, on the contrary, by the organic law of the State under which their offices were created and exist, the provisions of which constitute their sole mandate, are prohibited from so doing. For these reasons it was concluded that the State was the party which, by its action in its original capacity through the people, had rendered the execution of its contract with the relators impossible through the instrumentality of its officers or functionaries, and that the question presented was political rather than judicial, and could not be adjudicated without calling the State to the bar of the court and subverting its entire financial basis, no matter how unjustly adopted and ordained.

From a judgment and decree to that effect a writ of error and appeal were taken to this court.

The two suits may properly be considered together here, as they were below, because they present substantially the same questions.

We have no doubt it was the intention of the State of Louisiana to enter into a formal contract with each and every holder of bonds issued under the Act of 1874, to levy and collect an annual tax of five and one half mills on the dollar of the assessed value of all the real and personal property in the State and to apply the revenue, derived therefrom, to the payment of the principal and interest of the bonds and to no other purpose. By the obligation so entered into, it was also agreed that the tax levied by the Act and confirmed by the Constitution should be a continuing annual tax until the bonds, principal and interest, were paid in full; that the appropriation of the revenue derived therefrom should be a continuing annual appropriation, and that no further authority than that contained in the Act should be required to enable the taxing officers to levy and collect the tax, or the disbursing officers to pay out the money as collected in discharge of the obligation of the bonds. Whatever may be, ordinarily, the effect of a promise or a pledge of faith by a State, the language employed in this [720] instance shows unmistakably a design to make these promises and these pledges so far contracts that their obligations would be protected by the Constitution of the United States against impairment.

It is equally manifest that the object of the State in adopting the "Debt Ordinance" in 1879 was to stop the further levy of the promised tax, and to prevent the disbursing officers from using the revenue from previous levies to pay the interest falling due in January, 1880, as well as the principal and interest maturing thereafter.

The bonds and coupons which the parties to these suits hold have not been reduced to judgment, and there is no way in which the State, in its capacity as an organized political community, can be brought before any court of the State, or of the United States, to answer a suit in the name of these holders to obtain such a judgment. It was expressly decided by the Supreme Court of the State in *State, ex rel. Hart*, v. *Burke*, 33 La. Ann., 498, that such a suit could not be brought in the state courts, and under the 11th Amendment of the Constitution no State can be sued in the courts of the United States by a citizen of another State. Neither was there, when the bonds were issued, nor is there now, any statute or judicial decision giving the bondholders a remedy in the state courts or elsewhere, either by *mandamus* or injunction, against the State in its political capacity, to compel it to do what it has agreed should be done but which it refuses to do.

These, then, are suits by creditors at large, of the class provided for in the Act of 1874, to compel the officers of the State, by judicial process, to enforce the provisions of the Act, when the State, by an amendment to its Constitution, has undertaken to prohibit them from doing so, and when the court, if it requires an officer to proceed, cannot protect him with a judgment to which the State is a party. The persons sued are the executive officers of the State, and they are proceeded against in their official capacity. The money in the Treasury is the property of the State, and not in any legal sense the property of the bond or coupon holders. If it be lost or destroyed, the loss will fall alone on the State or its agents, and the bondholders will be entitled to payment in full from other sources. True, the money was raised to pay this particular class of debts, and he agreement was it should not be [721] used for any other purpose; but, notwithstanding this, the State has undertaken to appropriate it to defray the expenses of the government. In this way the State has violated its contract and, if it could be sued, might, perhaps, be made to set aside its wrongful appropriation of the money already in hand, and raise more by taxation, if necessary.

That the Constitution of 1879 on its face takes away the power of the executive officers to comply with the terms of the Act of 1874 cannot be denied. As against everything but the outstanding bonds and coupons, this Constitution is the fundamental law of the State, and it is only invalid so far as it impairs the obligation of the contract on the faith of which the bonds and coupons were taken by their respective holders. The question, then, is, whether the contract can be enforced, notwithstanding the Constitution, by coercing the agents and instrumentalities of the State, whose authority has been withdrawn in violation of the contract, without having the State itself in its political capacity a party to the proceedings.

The relief asked will require the officers, against whom the process goes, to act contrary to the positive orders of the supreme political power of the State, whose creatures they are and to which they are ultimately responsible in law for what they do. They must use the public money in the Treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation when the same power has declared it shall not be done.

The parties prosecuting the suits do not, in direct terms, ask for the payment of the bonds and coupons they hold. In fact, this seems to have been purposely avoided, for in the suit for *mandamus* the petition was amended before the hearing by striking out all that would have the effect of confining the command of the writ to such a payment, and left the prayer for an order requiring the use of the money raised under the

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Act of 1874 for the redemption and retirement generally of all the bonds and coupons of the issue. In the suit in equity, while it was asked that the "Debt Ordinance" of 1879 might be declared invalid as against the complainants, [722] payment of the amount due was only sought through the general administration of the finances in accordance with the provisions of the Act of 1874. In neither of the suits, was any inquiry to be instituted in respect to the particular bonds and coupons held by the plaintiffs, or any special relief afforded as to them. All that is asked will inure as much to the benefit of the other holders of similar obligations as to the particular parties to these suits. So that the remedy sought implies power in the judiciary to compel the State to abide by and perform its contracts for the payment of money, not by rendering and enforcing a judgment in the ordinary form of judicial procedure, but by assuming the control of the administration of the fiscal affairs of the State to the extent that may be necessary to accomplish the end in view.

It is insisted, however, that the money in the Treasury, collected from the tax levied for the year 1879, constitutes a trust fund of which the individual defendants are *ex officio* trustees, and that they may be enjoined as such trustees from diverting it from the purposes to which it was pledged under the contract. The individual defendants are the several officers of the State, who, under the law, compose the Board of Liquidation. That Board is, in no sense, a custodian of this fund. Its duty was to negotiate the exchange of the new bonds for the old on the terms proposed. It had nothing to do with levying the tax, collecting the money or paying it out, further than by purchasing the bonds with any surplus there might be from time to time in the Treasury over what was required to meet the interest. The provision in the law, that it shall be the duty of the Auditor, Treasurer and the board, respectively, to collect the tax, pay the interest and redeem the bonds, evidently means no more than that the Auditor and Treasurer shall perform their respective duties under the general laws in the assessment and collection of the tax, and shall pay in the usual manner the interest and principal of the bonds as they respectively fall due, and that the Board shall purchase and retire the bonds whenever there is a surplus, that, under the law, is to be used for that purpose.

The Treasurer of State is the keeper of the Treasury, and in that way is the keeper of the money collected from this tax, just as he is the keeper of other public moneys. The taxes were collected by the tax collectors and paid over [723] to the state Treasurer, that is to say, into the state Treasury, just as other taxes were when collected. The Treasurur is no more a trustee of these moneys than he is of all other public moneys. He holds them, but only as the agent of the State. If there is any trust, the State is the trustee and, unless the State can be sued, the trustee cannot be enjoined. The officers owe duty to the State alone, and have no contract relations with the bondholders. They can only act as the State directs them to act, and hold as the State allows them to hold. It was never agreed that their relations with the bondholders should be any other than as officers of the State, or that they should have any control over this fund except to keep it like other funds in the Treasury and pay it out according to law. They can be moved through the State, but not the State through them.

In this connection there is much that is instructive in *Reg.* v. *Lords Commissioners of the Treasury*, Law Rep., 7 Q. B., 387. There money had been appropriated by Parliament for the payment of costs of a particular character, and an application was made for a *mandamus* to compel the Lords Commissioners of the Treasury to pay certain bills which had been properly taxed; but, although the court was emphatic in its declaration that payment ought to be made, the writ was refused because the Lords Commissioners held "The money as the servants of the Crown, and no duty was imposed upon them as between them and the persons to whom the money was payable." *Lord Chief Justice* Cockburn, in his opinion, said, p. 394: "Though I quite agree that according to the appropriation Act they (the Lords Commissioners) were bound to apply the money upon the vouchers being produced, and had no authority to retax these bills, still I cannot say that there is any duty which makes it incumbent upon them to do what I cannot hesitate to say they ought to have done, except as servants of the Crown; because in that character they have received the money, and in no other." And Blackburn, *J.*, p. 399: "It seems to me that the obligation, such as it is, is upon Her Majesty, to be discharged through her servants, and you cannot proceed therefor against the servants." So, here, the obligation is all on the State, to be discharged through its servants, and the money is held by [724] the officers proceeded against in their character as servants of the State, and no other.

There is nothing in any of the cases in this court that are relied on which, to our minds, authorizes any such relief as is asked. In *Osborn* v. *Bank*, 9 Wheat., 738, which is the leading case, and cited as authority in all the others, the object was to prevent money which had been unlawfully taken out of the bank by the officers of the State from getting into the Treasury. The money was, in legal effect, stopped while passing from the bank to the Treasury. The controlling facts are thus stated by *Chief Justice* Marshall in the opinion, p. 868: "But when we reflect that the defendants, Osborn and Harper, are incontestably liable for the full amount of the money taken out of the bank; that the defendant, Currie, is also responsible for the sum received by him, it having come to his hands with full knowledge of the unlawful means by which it was acquired; that the defendant, Sullivan, is also responsible for the sum specifically delivered to him, with notice that it was the property of the bank, unless the form of having made an entry on the books of the Treasury can countervail the fact that it was, in truth, kept untouched, in a trunk, by itself, as a deposit, to await the event of the pending suit respecting it; we may lay it down as a proposition, safely to be affirmed, that all the defendants in the case were liable in an action at law for the amount of this decree. If the original injunction was properly awarded, for the reasons stated in the preceding part of this opinion, the money, having reached the hands of all those to whom it afterwards came with

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notice of that injunction, might be pursued, so long as it remained a distinct deposit, neither mixed with the money of the Treasury, nor put into circulation. * * * The money of the bank had been taken, without authority, by some of the defendants, and was detained by the only person who was not an original wrong doer, in a specific form; so that detinue might have been maintained for it, had it been in the power of the bank to prove the facts which are necessary to establish the identity of the property sued for." Under this state of facts, the order for its return involved no question of power to interfere with what was actually in the Treasury. The officers stood in the place of a sher-
[725] iff who had levied an execution on goods and was sued to test his right to keep them, and the principle applied in the decision is thus stated in the head note of the report: "A court of equity will interpose by injunction to prevent the transfer of a specific thing which, if transferred, will be irretrievably lost to the owner, such as negotiable stocks and securities." Thus the money seized was kept out of the Treasury, because if it got in it would be irretrievably lost to the bank, since the State could not be sued to recover it back. No one pretended that if the money had been actually paid into the Treasury, and had become mixed with the other money there, it could have been got back from the State by a suit against the officers. They would have been individually liable for the unlawful seizure and conversion, but the recovery would be against them individually for the wrongs they had personally done, and could have no effect on the money which was held by the State. Certainly no one would ever suppose that by a proceeding against the officers alone, they could be held as trustees for the bank, and required to set apart from the moneys in the Treasury an amount equal to that which had been improperly put there, and hold it for the discharge of the liability which the State incurred by reason of the unlawful exaction.

In *Davis* v. *Gray*, 16 Wall., 203 [83 U. S., XXI., 447], the receiver of a land-grant railroad obtained an injunction against the Governor and Commissioner of the Land-Office of Texas to restrain them from incumbering, by patents to others, lands which had been contracted to the railroad company. The legal title was in the State, but the equitable title in the company. The specific tracts of land in dispute were, by the contract which had been made, segregated from the public domain and set apart for the company. The case rests on the same principle it would if patents had been actually issued to the company, and the State, through its officers, was attempting to place a cloud on the title by granting subsequent patents to others.

In *Board of Liquidation* v. *McComb*, 92 U. S., 531 [XXIII., 623], which arose under the same Act of 1874 that we are now considering, the board of liquidation was enjoined, at the instance of bondholders, from admitting to the privileges of the compromise proposed by the State, certain persons other than those originally
[726] provided for and on different terms. And this clearly because the board of liquidation was, by the very terms of the law, charged with the duty of exchanging the bonds specifically set apart by the contract for a particular purpose, and every *bona fide* bondholder, by accepting the compromise offered, became personally interested in securing the due administration of the trust which had thus been committed to the board. In fact the board held the new issue of bonds in trust, and everyone who gave up his old obligations and accepted the new in settlement became a beneficiary under the trust and might act accordingly.

In this case, however, there is no such trust. As has already been said, the Board is charged with no duty in respect to the taxes, except in connection with the purchase of bonds whenever there are funds which can be used in that way. The Auditor and Treasurer are required to audit and pay the coupons as they are presented; but that does not make them trustees for the bondholders of the money in the Treasury out of which the payment is to be made. They may draw on the fund raised to make the payment, but that is the extent of their official control over it. The law has never made it a part of their official duty to separate from the other moneys in the Treasury that which was realized from the taxes in question, and hold it in trust for the bondholders. The State has contracted not to use this money in any other way than to pay the debt; but, as against the State, the officers have no right to say they will keep it for that purpose only. It may be, without doubt, easily ascertained from the accounts how much of the money on hand is applicable to the payment of this class of debts: but the law nowhere requires the setting apart of this fund any more than others from the common stock. In the Treasury, all funds are mingled together and kept so until called for to meet specific demands.

In *The Arlington Case* [*U. S.* v. *Lee*, *ante*, 171], it was held that the officers of the United States, holding in their official capacity the possession of lands to which the United States had no title, could be required to surrender their possession to the rightful owner even though the United States were not a party to the judgment under which the eviction was to be had. Here, however, the money in question is lawfully the property of the State. It is in the manual pos- [727]
session of an officer of the State. The bondholders never owned it. The most they can claim is that the State ought to use it to pay their coupons, but until so used it is in no sense theirs.

Little need be said with special reference to the suit for *mandamus*. In this no trust is involved; but the simple question presented is, whether a single bondholder or a committee of bondholders can, by the judicial writ of *mandamus*, compel the executive officers of the State to perform generally their several duties under the law. The relators do not occupy the position of creditors of the State demanding payment from an executive officer charged with the ministerial duty of taking the money from the public Treasury and handing it over to them and, on his refusal, seeking to compel him to perform that specific duty. What they ask is that the Auditor of State, the Treasurer of State and the Board of Liquidation may be required to enforce the Act of 1874, and "Carry out, perform and discharge each and every one of the ministerial acts, things and duties respectively required of them * * * according to

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the full and true intent and purport of that Act." Certainly, no suit begun in the Circuit Court for such relief would be entertained, for that court can ordinarily grant a writ of *mandamus* only in aid of some existing jurisdiction. *Bath Co.* v. *Amy*, 13 Wall., 247 [80 U. S., XX., 540]; *Davenport* v. *Dodge Co.*, 105 U.S., 242 [XXVI., 1020]. Our attention has been called to no case in the state courts of Louisiana in which such general relief has been afforded; and the jurisdiction of the circuit court was, therefore, in no way enlarged through the operation of the removal Acts, even if this is a case which was properly removed, a question we do not deem it necessary now to decide. The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding to which the State, as a State, was not and could not be made a party. It needs no argument to show that the political [728] power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power.

The decree in the suit in equity and the judgment in that for mandamus *are affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Field**, dissenting:

I am not able to concur in the judgment in these cases, and I will briefly state my reasons.

I admit that the rule of the common law, that the Sovereign cannot be held amenable to process in his own courts without his consent, is applied in this country to the State, under which designation are included the people within its territorial limits, in whom resides whatever sovereignty the State possesses. But they act and speak in this country, at least in times of peace, only through the Constitution and laws. For their will we must look to these manifestations of it. If in that way they consent to suits, either directly against themselves by name or against any of their authorized agents, there can be no reasons of policy or of law against issuing process in proper cases to bring them or their agents before the court. And if in that way, that is, by their Constitution or laws, they direct their officers to do or omit certain things, in the doing or omission of which individuals are interested, and they provide appropriate remedies to compel or enjoin the performance of those things, there can be no reason why such remedies should not be resorted to when private rights are involved.

And such is the case with respect to the subjects of the present suits. The State of Louisi- [729] ana entered into certain engagements with her creditors; she embodied them in the most solemn form in a statute and in her organic law; she provided for the levying of a tax to pay those creditors; she prescribed certain duties for designated officers to perform in its collection and disbursement; she made it a felony for those officers to divert the fund thus raised to other purposes; she declared that no further legislation should be necessary for the collection of the tax or the appropriation of the proceeds, and that for the collection and payment of the tax the judicial power of the State should be exercised when necessary. The plaintiffs in these suits seek the enforcement of these engagements; and they are resisted merely because the engagements are repudiated by the State; and this court holds that it has no power to stay the repudiation.

That the character and object of these suits may more clearly appear, I will briefly give the history of the action of the State. Prior to 1874 Louisiana had contracted an indebtedness amounting to about $18,000,000. She asserted that a large portion of it had been fraudulently contracted; while the holders contended that their claims were valid and that she was legally and equitably bound therefor. Under these circumstances, and with a view to determine the conflicting claims of the parties, and to liquidate and settle her indebtedness, she proposed to issue new bonds for sixty per cent of the alleged indebtedness, upon the surrender of the claims; and to induce the surrender offered to make various enactments to secure the principal and interest of the new bonds. In 1874 she passed an Act, known as Act No. 8 of the laws of that year, entitled: "An Act to Provide for Funding Obligations of the State by Exchange for Bonds; to Provide for Principal and Interest of Said Bonds; to Establish a Board of Liquidation; to Authorize Certain Judicial Proceedings against it; to Define and Punish Violations of This Act; to Prohibit Certain Officers Diverting Funds, Except as Provided by Law, and to Punish Violations Therefor; to Levy a Continuing Tax and Provide a Continuing Appropriation for Said Bonds; to Make a Contract between the State and Holders of Said Bonds; to Prohibit Injunctions in Certain Cases; to Limit the Indebtedness of the State and to Lim- [730] it State Taxes; to Annul Certain Grants of State Aid; to Prohibit the Modification, Novation, or Extension of Any Contract Heretofore Made for State Aid; to Provide for the Receipt of Certain Warrants for Certain Taxes; and to Repeal All Conflicting Laws."

By this Act, the Governor, Lieutenant-Governor, Auditor, Treasurer, Secretary of State, and Speaker of the House of Representatives, and a seventh person to be selected by them, called a fiscal agent, were constituted a Board of Liquidation and were authorized to issue bonds of the State, to be called consolidation bonds, payable in forty years, with interest at seven per cent, and to exchange them for valid outstanding bonds and auditor's warrants at the rate of sixty cents on the dollar. The interest was to be payable semi-annually, on the first of

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January and July of each year; and for it coupons were to be annexed to the bonds.

The Act levied an annual tax of five and a half mills on the dollar of the assessed value of all real and personal property in the State, and declared that it should be collected for the purpose of paying the principal and interest of the consolidated bonds, and that the revenue derived therefrom was thereby "set apart and appropriated for that purpose, and no other," and that it should be a felony for the fiscal agent or any officer of the State or of the Board of Liquidation to divert the fund from its legitimate channel. It also declared that this tax, which is called an interest tax, "*Shall be a continual annual tax until the said consolidated bonds shall be paid or redeemed, principal and interest; and the said appropriation shall be a continual annual appropriation during the same period, and this levy and appropriation shall authorize and make it the duty of the Auditor and Treasurer, and the said Board respectively, to collect said tax annually, and pay said interest and redeem the said bonds until the same shall be fully discharged.*"

One section also provided "That any judge, tax collector, or any officer of the State obstructing the execution of this Act, or any part of it, or failing to perform his official duty thereunder, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment not exceeding five years and by fine not exceeding $2,000, at the discretion of the court."

[731] Another section enacted that each provision of the Act should be, and it was declared to be, "A contract between the State of Louisiana and every holder of the bonds issued under the Act."

But, as though this Act was not of itself a sufficient assurance of the unalterable purpose of the State to fulfill the promise it contained, an amendment to her Constitution was proposed and adopted, of which the following is the 1st section:

"The issue of consolidated bonds, authorized by the General Assembly of the State, at its regular session in the year 1874, is hereby declared to *create a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in nowise impair.* The said bonds shall be a valid obligation of the State in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof, or the levy and collection of the tax therefor; to secure such levy, collection and payment, the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year, until the bonds shall be paid, principal and interest, and the proceeds shall be paid by the Treasurer of the State to the holders of said bonds, as the principal and interest of the same shall fall due, *and no further legislation or appropriation shall be requisite for the said assessment and collection, and for such payment from the Treasury.*"

It would puzzle the wit of man to find, anywhere in the legislation of the world, a more perfect assurance of the fixed purpose of a State to keep faith with her creditors, or of a pledge of a portion of her revenues for their payment, or of the submission of her officers to the compulsory process of the judicial tribunals, if necessary, to carry out her engagements. With the knowledge that the Federal Constitution ordains that no State shall pass *any* law impairing the obligations of contracts, Louisiana proclaims that each provision of the Act shall be and is thereby declared to be a contract between her and each and every holder of the bonds issued under the Act. And the constitutional amendment reiterates substantially the same thing by declaring that the issue of the consolidated bonds created a valid contract between [732] the State and each and every holder of said bonds, "*which the State shall by no means and in nowise impair.*"

Under this Act and the constitutional amendment, obligations of the State amounting to over $12,000,000 were surrendered, and bonds taken for sixty per cent of their amount, which are held all over the country. The complainants in the injunction suit, and the petitioners for the *mandamus*, hold for themselves and others, whom they represent, $900,000 of the bonds. The interest on them has not been paid, and yet a portion of the tax levied to meet such interest has been collected and is now in the hands of the Treasurer of the State, one of the Board of Liquidation. The amount is admitted to be about $300,000, and as collections were being made when this admission was given, there is now probably a much larger amount in his hands. In both suits it is alleged that the Treasurer and other officers of the State intend to use the funds thus collected for other purposes than the payment of the interest. In one of them, an injunction is asked against such a perversion of the funds. In the other, a *mandamus* is asked to compel the application of the funds to the payment of the interest, and also the collection of the taxes authorized by the Act of 1874, and the constitutional amendment of that year, to meet further interest as it shall become due.

Why should not both of these prayers be granted?

The only answer offered is, that in 1879 Louisiana adopted a new Constitution which reduced the interest on the consolidated bonds to two per cent per annum for five years; to three per cent for fifteen years afterwards, and to four per cent thereafter, with a proviso that the holders of the bonds might take new bonds for seventy-five per cent on the dollar drawing four per cent interest.

The new Constitution also directed that the coupon of the consolidated bonds falling due January 1, 1880, should be remitted, and that the interest taxes collected for its payment should be transferred to defray the expenses of the State Government. The change in the rate of interest and the remission of the coupon falling due January 1, 1880, were made without the consent of the bondholders, or any con- [733] sultation with them. Of course the new Constitution, in these provisions, is a repudiation of the engagements of the Act of 1874 and of the constitutional amendment of that year, and is a direct violation of the inhibition of the Federal Constitution against the impairment of the obligation of contracts.

Is this inhibition against the repudiation by the State of her engagements of any efficacy? The majority of the court answer, No. I answer, adhering to the doctrines taught by a

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long line of illustrious Judges preceding me, "Yes, it is;" and though now denied, I feel confident that at no distant day its power will be re-asserted and maintained. In that faith, I dissent from the judgment of my associates, and I shall continue to do so on all proper cases, until the prohibition inserted in the Constitution as a barrier against the agrarian and despoiling spirit, which both precedes and follows a breach of public faith, is re-established in its original vigor.

The question whether the court will restrain the diversion of the funds in the hands of the Treasurer, a member of the Board of Liquidation, is to be considered precisely as though the new Constitution had never been adopted. The inhibition of the Federal Constitution is upon the State and not merely upon her Legislature. All the authority which her people can confer, whether by constitutional enactment or legislative provision, is subject to the inhibition. Her people are at all times under the Constitution of the United States, subject to its restrictions as they are entitled to its privileges. They cannot lawfully insert in any constitution or organic law, provisions contravening that instrument. They cannot authorize their Legislature to pass a bill of attainder, or an *ex post facto* law, or a law impairing the obligation of contracts; nor can they embody in their Constitution clauses amounting to or operating as such enactments. Any such authority or clauses would be treated as nugatory and futile by all tribunals holding that the Constitution of the United States is, what on its face it is declared to be, the supreme law of the land. Therefore, the new Constitution of Louisiana stands before us, with respect to her past contracts, with no greater weight than would a legislative enactment containing similar provisions; and [734] what the State authorizes to be done by her judicial tribunals against her officers, in the collection of the tax and the application of the moneys raised for the payment of the interest on the bonds, can be done by the judicial tribunals of the Federal Government when a case is transferred to them from a state court.

If the new Constitution had never been adopted, there could be no question as to the power of the state courts to require that the moneys collected be applied to the payment of the interest. It would not only have been the duty of the Board of Liquidation to thus apply them, but it would have been a felony to refuse to do so. Now, whatever enactment, constitutional or legislative, impairs the obligation of the contract with the bondholders, that is, abrogates or lessens the means of its enforcement, is void. Therefore, the new Constitution, as to that contract, is to be treated as though it never existed. As said by this court, without a dissenting voice, only two years ago, in *Wolff* v. *N. O.*: "Legislation producing this latter result (impairment of the obligation of contracts), not indirectly as a consequence of legitimate measures, as will sometimes happen, but directly by operating upon those measures, is prohibited by the Constitution, and must be disregarded, treated as though never enacted, by all courts recognizing the Constitution as the paramount law of the land." 103 U. S., 365 [XXVI., 398.]

And again, in the same case: "The prohibition of the Constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the State and to those of its agents acting under its authority, as well as to contracts between individuals. And that obligation is impaired, in the sense of the Constitution, when the means by which a contract at the time of its execution could be enforced, that is, by which the parties could be *obliged* to perform it, are rendered less efficacious by legislation operating directly upon those means." *Id.*, 367 [399].

No reason in law, therefore, any more than in morals, can be given why the mandates of the Act of 1874 and the constitutional amendment of that year should not be carried out. There is nothing in the fact that the defendants are officers of the State. The books are [735] full of cases where executive and administrative officers of a State have been required by the judiciary to do certain acts or been enjoined from doing them. And it has not been deemed an answer to the proceeding that the State was interested in the controversy.

In *Osborn* v. *Bank*, decided in 1824, an injunction was sustained against the Treasurer and Auditor of Ohio to prevent the seizure of moneys belonging to the bank, in payment of taxes levied under an unconstitutional law of the State. It was urged with much zeal that the State of Ohio, though not nominally a defendant, was the real party in interest, and that the suit was in fact against the State, which it was conceded could not be sued directly. But the court said, *Chief Justice* Marshall delivering the opinion: "If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is, that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party, and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true when it is in the power of the plaintiff to make them parties, but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be enjoined in the suit." 9 Wheat., 738, 842.

These views, as was said in the opinion in the *Arlington Case* [*U. S.* v. *Lee*, *ante*, 171], lately before us, have never been overruled, and the case is cited with approval in *Davis* v. *Gray*, decided in 1872, as establishing, among other propositions, that "Where the State is concerned, the State should be made a party, if it can be done. That it cannot be done is a sufficient reason for the omission, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record. In deciding who are parties to the suit, the court will not look beyond the record. [736] Making a state officer a party does not make the State a party, although her law may have prompted his action, and the State may stand

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behind him as the real party in interest." 16 Wall., 220 [83 U. S., XXI., 458].

In *Davis* v. *Gray*, the Governor of Texas was enjoined from executing patents of certain lands, the sale of which her Constitution had authorized, upon the supposition that the title of a corporation to them had been lost. In considering the right of a private party to maintain suit against the executive officer of the State, inasmuch as a suit could not be brought directly against the State, the court re-asserted the doctrine announced in *Osborn* v. *Bank*.

The objection suggested was also considered and disposed of in *Board of Liquidation* v. *McComb*, a case against these very officers, decided in 1875. There the Board undertook to liquidate a debt contracted in reconstructing and keeping in repair levees on the Mississippi River, with consolidated bonds issued under the Act of 1874, pursuant to the authority of a subsequent statute of the Legislature. A citizen of Delaware, holding some of the consolidated bonds, contended that the levee debt was not one of the debts to fund which these bonds had been issued, and that the use of them for that purpose would defeat one of the benefits of the funding scheme. He, therefore, applied to the Circuit Court of the United States for an injunction to restrain the Board from funding the levee debt with those bonds, and obtained it. On final decree, the injunction was made perpetual, and this court affirmed the decree. "In our judgment, therefore," said this court, speaking by *Mr. Justice* Bradley, "the court below was right in granting the injunction as to the consolidated bonds, if the defendants, occupying the official position they do, are amenable to such process. On this branch of the subject, the numerous, but well considered cases heretofore decided by this court, leave little to be said. The objection to proceeding against state officers by *mandamus* or injunction are, first, that it is in effect proceeding against the State itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. The State [737] cannot be sued without its consent by an individual, and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that when a plain, public duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain a personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of *mandamus* and injunction are simply correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or the violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as entirely void." 92 U. S., 541 [XXIII., 628].

Nor is there any force in the objection that the funds which the complainants and petitioners seek to reach are in the Treasury of the State. They are appropriated by the law of 1874, and by the constitutional amendment of that year, to the payment of the interest on the consolidated bonds. The statute declares that the revenue derived from the taxes levied to pay the interest and principal of the bonds is "Set apart and appropriated to that purpose, and no other;" that "the said appropriation shall be a continuing annual appropriation" until the bonds are paid or redeemed, principal and interest; and that "it shall be deemed a felony for the fiscal agent, or any officer of the State or Board of Liquidation to divert the fund from this channel." The constitutional amendment declares that no further legislation than that specified therein shall be requisite for the appropriation of the proceeds of the taxes levied.

Nothing more could be expressed to render the appropriation of the fund for the interest and principal of the bonds absolutely complete. The fund could not afterwards be diverted to any other purpose. The ministerial duty alone remained with the officer of the State having charge of the fund, wherever it might be, to apply it.

There would seem to be an impression that [738] to constitute a valid appropriation there must be some segregation of the amount appropriated from the general mass of money in the Treasury, by which it is placed in packages, bags or boxes, separate from the rest and set one side. But nothing of the kind is done, nor is it required to take the amount appropriated from the control of the fiscal officers of the State for other purposes. The appropriation is the legalization of the use of a designated amount in the Treasury for a specific object, and an inhibition of its use in any other way. That is all. Henceforth, to meet the appropriation, the fiscal officers must retain the designated amount in the Treasury, but not necessarily separated in packages, bags or boxes, from other funds. Their duty is purely ministerial, to hold it and pay it when called for. Were this not so, there could be no appropriations of moneys before their collection, which it is the constant practice of legislative bodies to make in view of anticipated revenue. When the moneys are collected and passed into the Treasury, the appropriation is complete. They are, in the eye of the law, dedicated to a specific purpose, and the party in whose behalf the appropriation is made can compel its payment by *mandamus*, as in the case of appropriations for the salaries of judges, heads of departments, and others. That writ is the common and appropriate remedy to enforce such payment.

Nor is there any weight in the objection that the officers of the State are called upon to enforce the collection of the tax. They are simply called upon to obey the mandates of the law and Constitution of the State. Both levy the tax, and designate its amount and the officers to collect it. The statute declares that the tax shall be a continuing annual tax, until the bonds are paid or redeemed. The constitutional amendment declares that "The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year until the bonds shall be paid, principal and interest, and the proceeds shall be paid by the Treasurer of the State to the holders of said bonds, as the principal and interest of the same shall fall due,

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and *no further legislation or appropriation shall be requisite for the said assessment and collection and for such payment from the Treasury.*"

[739] Here are provisions for levying, collecting and appropriating, sufficient for these purposes, or language is incapable of expressing them. Whatever doubts might be entertained as to the authority of the Legislature to make a levy and an appropriation to take effect in subsequent years, to meet the interest then accruing, they are removed by the constitutional amendment. There is nothing in the reason of the thing why the levy of taxes and the appropriations for all purposes should be made annually. They may be made for years in advance, if the Constitution of the State so permits, in order to provide for a sinking fund or to meet an expenditure for a work which may take years for its completion, or to meet, as in this case, future interest on its indebtedness. In some of the States the sessions of the Legislature are biennial. The interval between the sessions might be increased and there would be quite as much objection, so far as power is concerned, to the levy of taxes and the appropriations for those periods as for one year.

The tax provided and the appropriation of its proceeds were made for many years by the amendment to the Constitution, which expressed, at the time, the will of the people of the State. Nothing is to be done by the court and nothing is asked of it but to require that this will be obeyed.

There is another reason suggested against the maintenance of the suits, not, as appears to me very potential, but which affects the judgment of some able men: that the obligations of States are purely honorary and cannot, therefore, be the subject of judicial cognizance. What is meant by honorary, so far as I can understand it, is that the obligations may or may not be fulfilled, as the States will; in other words, that they are matters of convenience and not of duty, to be performed if the caprice of the hour approve, to be disregarded if the caprice of a subsequent hour disapprove. Or, to use other terms of explanation, as there is no mode of compelling a State by suit directly against her, to observe her obligations, they must be deemed honorary; that is, just so far as they may be dishonored without redress to those who trusted to [740] her good faith, they are to be deemed honorary obligations.

Whatever merit this suggestion may possess, it can have no place for consideration here. Where a State enters into the markets of the world as a borrower she, for the time, lays aside her sovereignty and becomes responsible as a civil corporation. And although suits against her even then may not be allowed, her officers can be compelled to do what she then contracts that they shall do. And as to these consolidated bonds, Louisiana has declared in her organic law that they created a valid contract between her and each and every holder, which she "Shall by no means and in nowise impair," and that no court "shall enjoin the payment of the principal or interest thereof, or the levying and collection of the tax therefor," but that, for the fulfillment of the promises, her judicial power shall be exercised when necessary. These engagements are not imperfect obligations, mere honorary promises, which she can keep or break without accountability.

If a State can successfully repudiate her solemn obligations, can obtain the surrender of a large portion of the demands of her creditors upon pledges for the more prompt payment of the remainder, and then set aside as worthless the pledges given with no possibility of redress to the creditors, either by enforcement of the pledges, or by a return of the surrendered demands, what confidence can be reposed anywhere? Public faith will be the synonym of public dishonesty; and, as I stated on a former occasion: "If the government will not keep its faith, little better can be expected from the citizen. If contracts are not observed, no property will in the end be respected, and all history shows that rights of persons are unsafe when property is insecure. Protection to one goes with protection to the other, and there can be neither prosperity nor progress where this foundation of all just government is unsettled." *Sinking Fund Cases*, 99 U. S., 767 [XXV., 518].

On the argument, much weight was placed upon the decision of the Supreme Court of Louisiana in *State* v. *Burke* [33 La. Ann., 498], and *Hart* v. *Burke*; and they are cited as authority to the point that no remedy by *mandamus* exists in the courts of the State to compel her officers to carry out her engagements; stated, however, in the opinion as deciding that there is no [741] remedy by *mandamus* or injunction against the State in its political capacity, a proposition which no one controverts. The cases were similar in their character and objects to those now under consideration. And it was there held, that the courts of Louisiana have no jurisdiction to entertain any judicial proceeding, the object of which is to enforce the performance of a contract or obligation of the State against her will; that they have no authority to declare that a provision of her Constitution does not express her will; and that they cannot annul a provision of that Constitution on the ground that it impairs the obligation of a contract with the State, because such a contract can never become the subject of judicial enforcement against her will. In these conclusions the court gave no force to the constitutional inhibition as against the State. It would seem as though it was of opinion that, in all matters of contract, the inhibition applies only to legislative action. It says: "We have been referred to authorities to the effect that where an officer pleads the authority of an unconstitutional law as a justification for the nonperformance or violation of his duty, this will not prevent the issue of the writ. [*Osborn* v. *U. S. Bk.*;] 9 Wheat., 859; [*Davis* v. *Gray*] 16 Wall., 220 [83 U. S., XXI., 458]. This may be so when the authority invoked is a statute under the State Constitution; but it is different when the authority is an article in the Constitution itself." And the court proceeds to lay down the doctrine that clauses of the State Constitution, though violative of the Constitution of the United States, express the will of the State, and as such must be respected by her courts. In thus holding, the court would seem to have lost sight of two provisions of the Federal Constitution: one, which declares that "The Constitution and the laws of the United States which shall be made in pursuance thereof——

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shall be the supreme law of the land"; and the other, which declares, that "The judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." These provisions, which govern in Louisiana as well as in other States, being overlooked, and the inhibition against the impairment of the obligation of contracts being limited to legislative action only on the part of the State, so far as concerns her own contracts, [742] it is not surprising that the court held that the ordinance of repudiation and shame embodied in the new Constitution was to be obeyed; that its conflict with the Federal Constitution was to be disregarded, and that what the State was prohibited from doing should be deemed the legal expression of her will, and enforced as such. The decision rests upon the theory, that a proceeding against the officers of the State to compel them to do their duty is a suit against the State; and that her consent to suit against them has been withdrawn by clauses of the new Constitution. But if those clauses never lawfully became a part of the new Constitution, because the State under the Federal Constitution was incapable of enacting them, then her consent remains, and the present suits are simply attempts to compel her officers to do her lawful bidding. The State cannot speak through an enactment which contravenes the Federal Constitution.

There can be no doubt that, but for the Debt Ordinance in the Constitution of 1879, a *mandamus* or other compulsory process could have been issued by the courts of Louisiana to compel officers of the State, and of the Board of Liquidation, to execute the provisions of the Act of 1874 and of the constitutional amendment of that year. The Code of Procedure of the State declares that the object of the writ "Is, to prevent a denial of justice or the consequence of defective police, and should, therefore, be issued in all cases where the law has assigned no relief by ordinary means, and where justice and reason require that some mode should exist of redressing a wrong or an abuse of any nature whatever," sec. 830; and that "it may be directed to public officers to compel them to fulfill any of the duties attached to their office, or which may be legally required of them." Sec. 834. These provisions are sufficiently comprehensive to embrace the present cases, and authorize compulsory process against the defendants to enforce the performance of the duties with which they are charged under the Act and constitutional amendment of 1874.

But independently of them, the constitutional amendment of 1874 of itself invests the courts of the State with jurisdiction to issue such compulsory process, by the clause which declares that to secure the levy, collection and payment stipulated, "the judicial power shall be exer- [743] cised when necessary," and that means such power as properly belongs to judicial tribunals, to enforce the performance by public officers of duties imposed upon them by law.

In *Marbury* v. *Madison*, 1 Cranch, 137, the conditions under which the writ will be issued are stated as clearly and happily as anywhere in the reports; and though the case is familiar to all, some of the observations of the great *Chief Justice*, who there spoke for the court, may properly be repeated. The relator there, as is well known, had been appointed a justice of the peace for the District of Columbia; his commission was signed by the President and sealed by the Secretary of the State, but its delivery to the relator was refused by a new Secretary succeeding to the one who had signed the commission. The court held that the relator was entitled to his commission, and to withhold it was an act not warranted by law, but in violation of a vested right, and then proceeded to consider whether the laws of the country gave him a legal remedy. "The very essence of civil liberty," said *Chief Justice* Marshall, "certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain, the King himself is sued in the respectful form of a petition, and *he never fails to comply with the judgment of his court.*" And, again: "The Government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right. If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case." He then shows that there was nothing in the character of the case or the nature of the transaction which exempted it from legal investigation or prevented the injured party from having redress; and, among other instances, he referred to the Act of Congress of 1794 [1 Stat. at L., 392], concerning invalids, as one where the performance of duties imposed upon the heads of departments might be enforced. "By the Act concerning invalids, passed in June, 1794," he said, "the Secretary of War is ordered to place on the pension list all persons whose names are contained in a report previously made [744] by him to Congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that when the law in precise terms directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country? Whatever the practice on particular occasions may be, *the theory of this principle will certainly never be maintained.* No Act of the Legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law." And, again: "If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How, then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process? *It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a* mandamus *is to be determined.*"

If the act be one which involves discretion, the officer only conforms to the law in exercising

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Bank v. *Sharp*, 6 Id., 301; *Walker* v. *Whitehead*, 16 Wall., 314 [83 U. S., XXI., 357]; *Edwards* v. *Kearzey*, 96 U. S., 595 [XXIV., 793]; *La.* v. *New Orleans*, 102 Id., 203 [XXVI., 132].

The State has no more right by law to impair the obligation of its contracts than it has, by law, to impair the obligation of contracts between individuals. In *N. J.* v. *Wilson*, the language of the court, speaking by *Chief Justice* Marshall, is: "In the case of *Fletcher* v. *Peck* it was decided in this court, on solemn argument and with much deliberation, that this provision of the Constitution (the contract clause) extends to contracts to which a State is a party, as well as to contracts between individuals." 7 Cranch, 164, 166. It is the settled doctrine of this court that contracts with States are as fully protected by the Constitution against impairment by state legislation as contracts between individuals. *Green* v. *Biddle*, 8 Wheat., 1; *Bank* v. *Billings*, 4 Pet., 514; *Woodruff* v. *Trapnall*, 10 How., 190; *Wolff* v. *New Orleans*, 103 U. S., 358 [XXVI., 395].

3. If the Debt Ordinance of Louisiana is in violation of the Constitution of the United States and, therefore, a nullity as against the holders of consolidated bonds, if the latter are entitled by the terms of their contract to be paid out of the moneys collected for their benefit and to have further collections made, is there any mode, known to the law, by which their rights can be protected? My brethren of the majority answer this question in the negative when they adjudge that no relief whatever can be given in either of these suits. One is a suit in equity commenced in the Circuit Court of the United States by holders of consolidated bonds to prevent, by injunction, officers of the State from using the proceeds of taxes already raised under the Statute and Constitution of 1874, for any purpose other than that for which they were collected and paid to the state Treasurer. In the other suit, the plaintiffs, holders of consolidated bonds, and citizens of New York, ask a *mandamus* against the state officers compelling the application of the moneys so collected to the payment of their coupons, and also the collection of taxes to meet future interest as it becomes due. [751]

Some comment is made upon the extended nature of the relief asked by plaintiffs. It is sufficient to remark that the court is never bound to give relief to the full extent demanded; and all relief is not to be denied because more is asked than the court will grant under any circumstances or in the particular case. And there is no ground, I submit, for the suggestion that granting relief would require the administration, by the court of the general finances of the State. What should be done, if properly it may be, is, by necessary orders to prevent the officers of the State from depriving creditors of moneys which by express contract have been set apart and appropriated exclusively to the payment of their claims. There is no obstacle to the payment out of that fund, except the prohibition in the void Debt Ordinance of 1879. It is distinctly admitted to be easily ascertainable from the accounts how much of the money in the Treasury is applicable to this class of debts. Indeed, it appears from the opinion in *Newman* v. *Burke*, hereafter referred to, that the Treasurer and fiscal agent of Louisiana held within their control, when these suits were commenced, all the moneys raised under the Statute and Constitution of 1874 to meet the interest falling due Jan. 1, 1880. They have, in their hands, more than enough to pay the coupons of Jan. 1, 1880, held by the parties now before the court. Further, a fact most significant in view of the suggestion that these moneys are mingled with other moneys in the state Treasury, the interest fund created to pay coupons maturing Jan. 1, 1880, were by an Act of the General Assembly of Louisiana, approved Jan. 4, 1882, directed to be invested in United States bonds. Acts, La., 1881, p. 50. And it is not pretended that payment from that fund will produce the slightest confusion in the Treasurer's accounts, or involve the use of moneys raised for other and distinct purposes. If any confusion ensues from such an application of these moneys, it would be only of that kind which arises when the law prevents a repudiating debtor from misappropriating funds, in his hands, that have been dedicated to a specific purpose. [752]

It is apparently urged, as an obstacle in the way of relief, that plaintiffs do not seek to have the proceeds of these taxes applied specially to the payment of their claims, but ask such orders as will enable all holders of consolidated bonds to participate in the distribution of the moneys raised under the Statute and Constitution of 1874. Had the suit for a *mandamus* sought the application of the moneys solely to the payment of coupons held by the plaintiffs, it might, perhaps, have been urged as ground for its refusal, that each bondholder had an interest in the fund so created. *State, ex rel. Boyer*, v. *State Treasurer*, 32 La. Ann., 177. If the relief asked cannot be given for the benefit of all holders of consolidated bonds, there would seem to be no difficulty in restricting payments to such as are actually before the court in person or by representation. It is, however, proper to say that, notwithstanding the criticisms made by the court upon the nature and extent of the relief asked, I do not feel authorized to infer from its opinion that relief would be given to the parties before it, had they asked payment only of their coupons. The opinion seems to proceed upon the broad ground that, as Louisiana is not directly suable in its corporate capacity, the courts of the Union cannot reach its agents employed, under its orders, in the work of destroying the contract rights of the plaintiffs.

4. Are these suits forbidden by the 11th Amendment of the Federal Constitution, which declares that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State? I understand the court, in effect, if not in terms, to hold that they cannot be maintained without violating that Amendment.

The first authority cited in support of that view is *Reg.* v. *Lords Commissioners of the Treasury*, Law Rep., 7 Q. B., 387. It appears that, by an Act of Parliament, a round sum was appropriated to the Crown to be used in paying costs incurred in prosecutions at assizes and quarter sessions in England, formerly paid out of county rates. Bills of costs having been passed by local officers, certain items were disallowed and others reduced by the Lords of the [753]

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Treasury. Subsequently a rule went against the latter to show cause why a writ of *mandamus* should not issue compelling them to pay these bills out of the funds appropriated to the Crown for such purposes. The Judges, although of opinion that the defendant should be governed by the taxation of the local officers, declined to grant the writ. Cockburn, *C. J.*, said: "The question comes to be, whether the Lords Commissioners of the Treasury, when this money gets into their hands, are bound to apply it as servants of the Crown, or as the servants of Parliament who vote the money." Blackburn, *J.*, said: "The question remains, whether there is any statutable obligation cast upon the Lords of the Treasury to do what we are asked to compel them to do by *mandamus*, namely: to issue a minute to pay that money; because it seems to me clear that we have a right to grant a *mandamus* if there is such a statutory obligation, particularly when the application is made on behalf of persons who have a direct interest in the matter." Similar declarations were made by the other Judges. They all concurred in denying the writ upon the ground that the money was voted, not to named officers to be by them applied to a designated purpose, but as "a supply to the Crown;" that the officers who distributed it for the purposes named acted as servants of the Crown, not as servants of Parliament; that a suit against those officers was, therefore, one against the Sovereign, whom, said *Chief Justice* Cockburn, the Court of Queen's Bench had no power, even in appearance, to command.

It seems to me that case furnishes no support for the suggestion that these are suits against the State, simply because they are brought against its officers. It does not conflict with the proposition that the state Treasurer can be compelled to apply the proceeds of these taxes as stipulated in the Statute and Constitution of 1874, which were his sole authority to receive them. Here there *is a statutable* obligation upon [754] him to pay the coupons as they matured. And to that is added the obligation imposed by that Constitution, which, in terms, declares that the proceeds of taxes collected under the Act of that year "Shall be paid by the Treasurer of the State to the holders of said bonds, as the principal and interest of the same shall fall due," without further legislative authority. These obligations remain upon that officer, unless it be that the Debt Ordinance, although unconstitutional and void, has discharged them. Had Parliament, instead of the Act involved in the case cited, passed one directly imposing upon the defendants the duty of paying out of moneys appropriated for that purpose a certain class of claims, it is manifest that the court of Queen's Bench would have compelled them, by *mandamus* or other process, to perform that duty. In the case supposed, there would have been a statutable obligation which the court would not have permitted the defendants to evade on the pretext that they were officers of the Crown.

This distinction is well illustrated in *Grenville-Murray* v. *Earl of Clarendon*, Law Rep., 9 Eq., 11. There the plaintiff sought a decree for the value of diplomatic services alleged to have been rendered by him. He claimed that he was entitled to be paid out of certain money voted by Parliament to the Foreign Office. *Lord* Romilly, M. R., said: "It (the money so voted) is not paid in trust for any particular person. The case that was cited was to this effect: that if Parliament votes a sum of £1,000 to *John Smith*, and the Treasury devote in their books the payment of that sum to other purposes, then a *mandamus* will lie to the Treasury in order to pay that £1,000 to *John Smith*. But there is nothing of the sort here. Parliament has merely voted certain sums to Her Majesty, and of these sums £600,000 are to be applied to the Foreign Office. The distribution of that amount is left to the officers of the Foreign Office to apply in such a manner as is most subservient to Her Majesty's service and to the due support of the Foreign Office, and there is nothing whatever to connect the plaintiff with a penny of this money in any aspect. It is impossible for me, therefore, in that state of things, to say that there is any trust for him."

I refer also to *Rex* v. *Lords Commissioners of the Treasury*, 4 Ad. & El., 286. That was an ap- [755] plication for a *mandamus* against the defendants, who had authority by statute to grant a certain "superannuation allowance." *Sir* J. Campbell, Attorney-General, contended that it was against principle that the court should order a *mandamus* in the name of the King, directing the King to pay money. But the *mandamus* was granted. *Lord* Denman, *C. J.*, said: "If, then, this is only the case of public officers having the control of a sum of money for this particular purpose, there is no reason that a *mandamus* should not issue. They are officers under the Crown; but the Crown has no more to do with them for this purpose than any other officers. They are merely parties who have received a sum of money as trustees for an individual under the provisions of an Act of Parliament. * * * Here it only appears that a sum of money has been voted as an allowance to an individual, which sum they have and refuse to pay."

There is another consideration which strengthens this position, that is, the supremacy of the Constitution of the United States over State Constitutions and state laws. To the duty imposed by the Statute and Constitution of 1874 upon its officers, there is superadded the duty imposed by the fundamental law of the land, not to regard as binding any state enactment which impairs the obligation of contracts.

If the case cited from the Queen's Bench were susceptible of the construction put upon it by this court, it should not have controlling influence. Here, no such relations exist between the executive and judicial departments as exist in England between the Crown and the courts. This was shown in the elaborate opinion of *Mr. Justice* Miller, speaking for the court in *United States* v. *Lee* [*ante*, 171]. That was ejectment to recover real estate, in the actual possession of officers who claimed it, not in any personal right, but for the United States; property used and occupied as a cemetery for dead soldiers of the Union. It was contended that a suit against the officers, having for its object to disturb their possession, was a suit against the government. In support of that position, numerous cases were cited from the English courts, which held that a suit could not be maintained against officers of the Crown. But we held that upon such a question but little weight should be given to [756]

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those adjudications; that there is a vast difference in the essential character of the two governments in reference to the source and depositaries of power; that while in England the Crown, the fountain of honor, cannot be disturbed in its possession of property by process directed against its officers or agents, under our system, the people, who are there subjects, are sovereign; that "Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of the monarch;" that "The citizen here knows no person, however near to those in power or however powerful in himself, to whom he need yield the rights which the law secures to him when it is well administered;" that "When he, in one of the courts of competent jurisdiction, has established his right of property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right." Said the court further, in that case: "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."

In that case the court re-affirms the doctrines of *Osborn* v. *Bank*, 9 Wheat., 738. The latter was a suit to recover moneys, which officers of the State of Ohio, in conformity with its statutes, had illegally taken from a bank of the United States. The suit being against the officers of the State, the objection was taken that it could not be sustained without the State itself being a party; that the State could not be sued; consequently, it was argued, the relief prayed (the restoration of the money) could not be granted. But to that objection the court, speaking by *Chief Justice* Marshall, and this language is quoted approvingly in *United States* v. *Lee*, [757] said: "If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him could his principal be joined in the suit."

The decision in that case has not been heretofore questioned in this court. It seems to establish, upon grounds which cannot well be shaken, that a suit against state officers, to prevent a threatened wrong to the injury of the citizen, is not necessarily a suit against the State within the meaning of the 11th Amendment of the Constitution; for, said *Chief Justice* Marshall, "The 11th Amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is, of necessity, limited to those suits in which a State is a party to the record." Here, the State is not a party to the record. Here, officers of Louisiana only are parties defendants; and the relief asked is that they be required to perform purely ministerial duties imposed upon them by the Statute and Constitution of 1874, whose provisions, as respects the matters now in issue, are still in force and obligatory, because never affected, modified or repealed, otherwise than by a Debt Ordinance, subsequently adopted, conceded to be in conflict with the Constitution and, therefore, absolutely void.

There are other decisions of this court still more directly in point. The leading one is *Davis* v. *Gray*, 16 Wall., 203 [83 U. S., XXI., 447]. In that case it appears that the State of Texas made a grant of lands to a railroad [758] company, upon the basis of which bonds were issued known as land-grant mortgage bonds. They were sold in large numbers in this country and Europe. Subsequently the State, by provisions of its statutes and Constitution, attempted to repudiate and nullify its contract; and, in pursuance thereof, its officers proposed to issue patents to others for a part of the lands embraced in this grant. Thereupon a suit in equity was instituted in the Circuit Court of the United States against the Governor and the Commissioner of the General Land-Office of Texas, to prevent them from issuing patents for the lands or any part of them. The State was, of course, not made a party on the record. The bill was demurred to upon the ground that she could not be sued, and that the suit, being against her officers, was one, within the meaning of the Constitution, against her. The demurrer was overruled, and the relief asked was given.

Touching the question of jurisdiction, the court, speaking by *Mr. Justice* Swayne, stated these principles as having been announced in *Osborn* v. *Bank*. 1. A Circuit Court of the United States, in a proper case in equity, may enjoin a state officer from executing a state law in conflict with the Constitution, or a statute of the United States, when such execution will violate the rights of the complainant. 2. Where the State is concerned, the State should be made a party, if it can be done. That it cannot be done, is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record. 3. In deciding who are parties to the suit, the court will not look beyond the record. Making a state officer a party does not make the State a party, although her laws prompt his action and the State stands behind him as the real party in interest. P. 220 [453]. It was in conformity with those doctrines that the relief asked was given. See, also, *Vattier* v. *Hinde*, 7 Pet., 252; *R. R. Co.* v. *Letson*, 2 How., 497; 2 Story, Const., sec. 1685; 1 Kent, Com., 351.

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In part upon the authority of *Davis* v. *Gray*, and *Osborn* v. *Bank*, this court, in *Board of Liquidation* v. *McComb*, 92 U. S., 531, 541, [XXIII., 623, 628], maintained the right of a holder of consolidated bonds to a decree against the [759] officers of the State of Louisiana, who are here defendants, constituting the Board of Liquidation, preventing the use of such bonds for the payment of a debt due from the State to a levee company. The proposed action of the Board was based upon a statute passed March 2, 1875. So that the suit had for its object to prevent state officers, charged with the execution of the latter Act, from carrying out its provisions. It never occurred to this court that the suit was, for that reason, one against the State within the meaning of the Constitution. Upon the general question, whether the defendants, being officers of the State, were amenable to process from a Federal Court, *Mr. Justice* Bradley, speaking for this court, observed: "On this branch of the subject, the numerous and well considered cases heretofore decided by this court leave little to be said. The objections to proceeding against state officers by *mandamus* or injunction, are: first, that it is, in effect, proceeding against the State itself; and secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such case, the writs of *mandamus* and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void." Upon these grounds, the decree of the Circuit Court was affirmed, so far as it prohibited the debt due the levee company from being funded in consolidated bonds. Such use [760] of them was deemed an impairment of the contract rights of those who were entitled to receive them.

It seems to be impossible, in view of our decision in that case, apart from previous decisions upon which it was founded, to hold that these suits are forbidden by the 11th Amendment of the Federal Constitution. We have adjudged that there is power in the courts of the Union, in a suit by an individual against state officers, to prevent them, in execution of an unconstitutional statute, from using these consolidated bonds for purposes inconsistent with the contract under which they were issued. In these cases, it is determined that those courts are powerless, in suits against such officers, to prevent the misapplication of moneys collected for the purpose of meeting the interest on those bonds; and this, in part, upon the ground that the relief asked will require the officers, who have charge of those moneys, to disregard the confessedly void orders of the supreme political power of the State.

It may be asked: when before has this court found the unconstitutional mandate of a State to be an obstacle in the way of compelling her officers to respect rights of contract, the obligation of which is protected against impairment by any law of the State? Of what value is the contract clause of the Federal Constitution if it cannot be enforced against hostile provisions of a State Constitution? This court said, in *Dodge* v. *Woolsey*, 18 How., 331, 360 [59 U. S., XV., 401, 412], that "A change of constitution cannot release a State from contracts made under a constitution which permits them to be made;" in *Bank* v. *Skelly*, 1 Black, 436, 448 [66 U. S., XVII., 173, 179], that a contract between Ohio and a bank in that State was entitled to the protection of the Constitution of the United States against any law of Ohio impairing its obligation; in *R. R. Co.* v. *McClure*, 10 Wall., 511, 515 [77 U. S., XIX., 997, 998], that "The Constitution of a State is undoubtedly a law," within the meaning of the contract clause of the Constitution, and that "A State can no more do what is thus forbidden by one than by the other,—there is the same impediment in the way of both;" in *White* v. *Hart*, 13 Id., 646, 652 [80 U. S., XX., 685, 687], that "It is well settled by the adjudications of this court that a State can no more impair the obligation of a contract by adopting a constitution than by passing a law; in the eye of the constitutional inhibition they are substantially the same thing;" and in *Gunn* v. [761] *Barry*, 15 Wall., 610, 623 [82 U. S., XXI., 212, 215], that the Constitution of the United States "Is above and beyond the power of Congress and the States, and is alike obligatory upon both; a State can no more impair an existing contract by a constitutional provision than by a legislative Act; both are within the prohibition of the National Constitution." Why should these established doctrines of the court be overruled, as, for all practical purposes, they are, by the judgment this day rendered? The Constitution declares that it shall be the supreme law of the land, "Anything in the Constitution or laws of any State to the contrary notwithstanding." Its mandate, in that respect, is addressed alike to the Judges of the Federal and State Courts, for it declares that the Judges in every State shall be bound thereby. And, as is said in *Dodge* v. *Woolsey*, to make its supremacy more complete, impressive and practical, that there should be no escape from its operation, and that its binding force upon the States and the members of Congress should be unmistakable, it is declared that "The Senators and Representatives, before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution."

Nor, if the relief here asked be granted, can I agree that the officers of the State cannot be protected against her subsequent action. If proceeded against because of their compliance with the judgments of the courts of the Union, the suit can ultimately be brought here for review,

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where no one will be permitted to suffer because of his obedience to the supreme law of the land.

Upon the general question of the power of the circuit court to grant a *mandamus* against state officers, there are some propositions announced by the court which should be examined. The fact is mentioned that the coupons held by plaintiffs have not been reduced to judgment, and it is said that the circuit court, in exercising its original jurisdiction, can ordinarily grant a writ of *mandamus* only in aid of some existing jurisdiction. As the State cannot be sued as a party defendant, to say that a judgment for the amount of the coupons is a condition precedent to a *mandamus* is only another form of saying [762] that there is no remedy whatever to prevent the misapplication of the moneys raised under the contract and by virtue of the Statute and Constitution of 1874. The demands of the plaintiffs are not disputed, except upon the ground that the Debt Ordinance has assumed, without the consent of the State's creditors, to remit the interest falling due Jan. 1, 1880, and to divert the funds raised to meet it. The genuineness of the bonds and coupons is not questioned. The case, therefore, comes within the rule, explicitly laid down in *McComb's* and other cases, that *mandamus* will lie to compel the performance by a public officer of a plain ministerial duty, requiring no exercise of discretion. Such a remedy is absolutely essential for the protection of the rights here claimed.

Upon this question, reference is made by the court to *Bath Co.* v. *Amy*, 13 Wall., 244 [80 U. S., XX., 539], and *Davenport* v. *Dodge Co.*, 105 U. S., 237 [XXVI., 1018]. In the first of those cases it was decided that the circuit court had no power, under the Act of 1789, to issue a writ of *mandamus* except where necessary or ancillary to the exercise of its jurisdiction. And that doctrine was re-affirmed in *Davenport* v. *Dodge Co.*, upon the authority of *Bath Co.* v. *Amy*, but without any question being raised in the former case as to the power of the circuit court to issue writs of *mandamus* since the passage of the Act of March 3, 1875, ch. 137 [18 Stat. at L., 470]. It will be found that the decision in *Bath Co.* v. *Amy* was based upon *McIntire* v. *Wood*, 7 Cranch, 504; *McClung* v. *Silliman* 6 Wheat., 598; and *Kendall* v. *U. S.*, 12 Pet., 524.

In *McIntire* v. *Wood*, the circuit court was held to have authority to issue such writs only when necessary to the exercise of its jurisdiction. But it was said: "Had the 11th section of the Judiciary Act (the one declaring what suits shall be within the original cognizance of circuit courts) covered the whole ground of the Constitution, there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right arising under the laws of the United States, and the 14th section of the same Act would sanction the issuing of the writ for such a purpose. But although the judicial [763] power of the United States extends to cases arising under the laws of the United States, the Legislature has not thought proper to delegate the exercise of that power to its Circuit Courts except in certain specified cases."

In *Kendall* v. *U. S.*, the previous cases were held to decide that the writ was appropriate to compel the performance of a ministerial act, necessary to the completion of an individual right arising under the laws of the United States. In all the cases prior to *Bath Co.* v. *Amy*, the want of power in the circuit court to issue the writ, in the first instance, and in advance of a judgment, establishing the rights of the parties, was put distinctly upon the ground that the whole judicial power of the United States had not been delegated to the circuit courts. In *Kendall's Case*, however, the power of the Circuit Court in the District of Columbia, to compel the Postmaster-General by *mandamus* to perform a duty enjoined by an Act of Congress, was sustained because, differently from the circuit courts in the several States, its jurisdiction then extended to all cases in law or equity arising under the laws of the United States. Now, it is apparent that the Act of March 3, 1875, ch. 137, supplies what in *McIntire* v. *Wood*, and *McClung* v. *Silliman* was said to be wanting. It substantially covers the whole ground of the Constitution. It invests the circuit courts with original jurisdiction, and with jurisdiction by removal from the state courts, of all suits at law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, arising under the Constitution or laws of the United States, or treaties made or which shall be made, under their authority; or in which the United States are plaintiffs or petitioners; or in which there is a controversy between citizens of different States; or a controversy between citizens of a State and foreign States, citizens or subjects; or a controversy between citizens of the same State claiming lands under grants of different States.

It seems to me entirely clear that since the Act of March 3, 1875, ch. 137, enlarged the jurisdiction of the circuit courts, they have power, in the first instance, and in advance of a judgment to issue a *mandamus*, to compel the performance of purely ministerial acts, which require no exercise of discretion and are necessary to the protection or completion of an indi- [764] vidual right arising under the Constitution or the laws of the United States. Unless the circuit court can, by injunction, prevent the state officers from doing what they propose to do and, by *mandamus*, compel them to perform the ministerial acts enjoined by the statute and Constitution of 1874, then its new and enlarged jurisdiction is of no practical value in any case where a State determines to repudiate its contracts and to enforce ordinances impairing their obligation. The power has always existed in those courts to issue such writs, not specifically provided by statute, as "may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." 1 Stat., 81, 334; R. S., sec. 716. Jurisdiction to hear and determine a suit arising under the Constitution and laws of the United States carries with it the power to issue either a *mandamus* or an injunction, or both, when essential to the protection and enforcement of the rights involved. In such cases, the writ is in every legal sense, not simply necessary but vital to the exercise of the jurisdiction granted.

It must also be observed that the *mandamus* suit was commenced in an inferior court of the State, and thence removed into the Circuit Court of the United States. If the power of the latter depended upon the question whether the state court could, by *mandamus*, compel a state officer

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to perform plain official duties imposed by law, the writ should be awarded. This court, I submit with great confidence, is in error if it means to say that *State, ex rel. Hart*, v. *Burke*, 33 La. Ann., 498, decides, or that the Supreme Court of Louisiana has ever decided, that the courts of that State cannot, under any circumstances, compel her officers, by *mandamus*, to perform plain official duties requiring no discretion. The State Code of Procedure expressly declares that the writ "may be directed to public officers to compel them to fulfill any of the duties attached to their office, or which may be legally required of them." Sec. 834. It is, I think, clear that but for the Debt Ordinance the court would have sustained the writ in that case, and compelled the officers to obey the Statute and Constitution of 1874. What the court adjudged [765] was that while an officer could not plead the authority of an unconstitutional statute as a justification for the non-performance or the violation of his duty, it was different where the authority is an article in the State Constitution. Upon that ground alone the writ was refused.

That I do not misinterpret that case, is clear from *Newman* v. *Burke*, determined in April, 1882. Newman, holding warrants on the general fund of the State for 1880 and 1881, claimed that by virtue of the Debt Ordinance he was entitled to be paid out of moneys in the hands of state officers, collected under the Statute and Constitution of 1874, and by that Ordinance directed to be transferred to the general fund. He obtained by the judgment of the Supreme Court of the State an order for a *mandamus* against the state Treasurer and fiscal agent, directing them to conform their books to the requirements of the Debt Ordinance, subject, however, to the right and duty of those officers "To retain *in statu quo* so much of the fund in controversy as may be necessary to satisfy the pending claims of S. J. Hart and John Elliott *et al.*, * * * in case judgment should be rendered in their favor in the judicial proceedings instituted by them, and now pending in the Supreme Court of the United States." Thus, it seems that those officers, with the approval of the Supreme Court of Louisiana, only await the final determination of these suits to ascertain whether they will be permitted to execute a state ordinance in conflict with the Federal Constitution.

The state court, affirming the doctrines of *State, ex rel. Hart*, v. *Burke*, said: "Inasmuch as no court can ever acquire jurisdiction over a State, or to enforce a contract of a State against her will, it follows that no court can ever have power to decree the invalidity of any provision of the State Constitution on the ground that it impairs the obligation of such a contract. But unless the court may decree the nullity of such a provision, on such a ground, it follows that it cannot compel the officers of the State to do anything in violation thereof, because the Constitution of the State is their exclusive mandate and absolutely binding on them."

This language needs no interpretation. While the Federal Constitution declares that it shall be the supreme law of the land, anything in [66] the Constitution of any State to the contrary notwithstanding, the Supreme Court of Louisiana holds that, in the matter of state contracts, her Constitution is the exclusive mandate to her officers, and absolutely binding upon them, anything in the Constitution of the United States to the contrary notwithstanding. And I take leave to say, with all respect for my brethren, that the decision this day rendered can be sustained upon no other ground than that taken by the state court. But in vain has this court repeatedly adjudged that a suit against the officers of a State to enforce the performance of plain official duties is not, necessarily, one against the State within the meaning of that Constitution; in vain has it often decided that contracts with States are as fully protected by that Constitution as are those between individuals, and that a State can no more impair an existing contract by constitutional provision than by legislative Act; in vain have the Circuit Courts of the United States been invested with jurisdiction of all suits arising under the Constitution and laws of the United States; in vain does that Constitution declare that it shall be the supreme law of the land, binding upon the judges in every State, if it be true, as determined by the Supreme Court of Louisiana, that no court can ever have power either to decree a provision of a State Constitution invalid on the ground that it impairs the obligation of contracts with that State, or to compel state officers to disregard such invalid provision.

As further evidence that the state court recognizes the right to a *mandamus* compelling state officers to discharge ministerial duties, imposed by provisions of the Debt Ordinance, I refer to *State, ex rel. Ecuyer*, v. *Burke*, 33 La. Ann., 969. Ecuyer was the owner of certain consolidated bonds, issued under the Act of 1874. He concluded to accept the provisions of the Debt Ordinance of 1879 and, in conformity therewith, applied to the state Treasurer to have his bonds stamped, so as to show that he acceded to the reduction of interest made by that Ordinance. That officer declining to comply with this request, an application was made to an inferior state court to compel him to stamp them. His refusal to comply with the relator's demands was based in part upon the statute passed in 1880, after the Debt Ordinance went into operation, which declares that no bond [767] shall be stamped until the coupon of January, 1880, is surrendered. That the relator did not do. A *mandamus* was refused; but the Supreme Court, after deciding that the Act of 1880 was inoperative, because in conflict with the Debt Ordinance, said: "In his answer, defendant alleges that the service required of him by relator is not a ministerial duty, and that the judiciary has no control over the executive and co-ordinate branches of the government, except as regards purely ministerial duties of executive officers. As regards the first proposition, we decide that the service required in this case is the performance of a purely ministerial duty, and this is too plain to require argument. As to the second proposition, it is elementary; but while fully recognizing the independence and all the rights of the co-ordinate branches of the government, it is only necessary to say that it is the province and duty of the judiciary, whenever the question is properly brought before it

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in judicial proceedings, to decide whether duties sought to be enforced at the hands of officers are or are not ministerial, and that it is of the essence of the judiciary to adjudge such questions, as otherwise those officers would themselves, by their own decision, be judges of their legal and constitutional powers." The judgment of the lower court was reversed, and the *mandamus* ordered to be issued, at the costs of the state Treasurer in both courts.

Thus it is shown that the same court which determined *State, ex rel. Hart*, v. *Burke*, has decided that the courts of Louisiana have power, by *mandamus*, to compel an officer of the State to discharge ministerial duties, requiring in their performance no discretion upon his part; especially when necessary to enforce a provision in the State Constitution in conflict with the Constitution of the United States.

It would seem, then, that holders of the consolidated bonds of Louisiana are in this anomalous condition: while her courts, because of the Debt Ordinance in the new Constitution, will not, by *mandamus*, compel her officers to perform the purely ministerial duties imposed by the Statute and Constitution of 1874, but will, by using that writ, require those officers to execute the provisions of that Ordinance, although it is confessedly in conflict with the Federal Constitution, the courts of the United States, though now invested with jurisdiction [768] of all suits arising under the Constitution and the laws of the United States, are, according to the present decision, without power to compel those officers to respect the inhibition in the supreme law of the land against state laws impairing the obligation of contracts. Such are the results which follow from the action of the "supreme political power" of a State whose officers, sworn to support the Constitution of the United States, are required by the state court, and now permitted by this court, to regard the State Constitution as their "exclusive mandate and absolutely binding on them."

My own conclusions are:

That the officers of Louisiana cannot rightfully execute provisions of its Constitution which conflict with the supreme law of the land, and the courts of the Union should not permit them to do so;

That but for the adoption of the unconstitutional Debt Ordinance of 1879, and whether the suits were in a state court or in the Circuit Court of the United States, these state officers would have been restrained by injunction from diverting the funds collected to meet the interest on the consolidated bonds, and would have been compelled, by *mandamus*, to perform the purely ministerial duties enjoined by the Statute and Constitution of 1874;

That if, by existing laws, the Circuit Court of the United States has no power to issue such writs, still, upon the removal of the *mandamus* suit from the state court, the former had power to do what the state court could legally have done had there been no removal, *viz.*: make peremptory the alternative *mandamus* granted at the beginning of the suit by the inferior state court;

That the Debt Ordinance being void because in conflict with the Constitution of the United States, furnishes no reason whatever, least of all in the courts of the Union, why the relief asked should not be granted by any court of proper jurisdiction as to parties;

That to refuse relief because of the command of a State to its officers to do that which is forbidden, and refrain from doing that which is enjoined, by the supreme law of the land; or to give effect, for any purpose, in the courts of the [769] Union, to the orders of the supreme political power of a State, made in defiance of the Constitution of the United States, is, practically, to announce that, so far as judicial action is concerned, a State may, by nullifying provisions in its fundamental law, destroy rights of contract, the obligation of which the Constitution declares shall not be impaired by any state law. To such a doctrine, I can never give my assent.

I am, therefore, unable to concur in the opinion and judgment of the court.

Cited—107 U. S., 783; 108 U. S., 78; 109 U. S., 455, 466; 114 U. S., 293.

ANDREW ANTONI, *Plff. in Err.*,

v.

SAMUEL C. GREENHOW, Treasurer of the CITY OF RICHMOND.

(See S. C., 17 Otto, 769-812.)

Coupons receivable for taxes—Act impairing contract—when adequate remedy is left—enforcement—mandamus.

1. When a State issued its bonds, with interest coupons attached, "receivable at and after maturity for all taxes, debts, dues and demands due the State," it entered into a valid contract with all persons taking the coupons to receive them in payment of taxes and state dues, and a subsequent Act of the State, which forbids the receipt of the coupons for a tax, conflicts with this contract and is void.

2. The question, whether a change of remedy impairs a substantial right, is one of reasonableness, and of that the Legislature is primarily the judge. This court should never overrule the decision of the Legislative Department of the Government on that subject, unless a palpable error has been committed.

3. Where, at the time the coupon was issued, there was a remedy by *mandamus* from the Supreme Court of Appeals to compel the tax collector to take the coupon and cancel the tax, but a suit was necessary to enforce the right, and the mere pendency of the suit would not prevent the collector from proceeding with the collection of the tax, a subsequent law requiring payment of the taxes in advance, and changing the place and manner of trial, does not impair the obligation of the contract on the part of the State to furnish an adequate and efficacious remedy to compel a tax collector to receive the coupons in payment of taxes.

4. A remedy which is ample for the enforcement of the payment of the coupons, is ample for all the purposes of the contract.

[No. 845.]

Motion to advance submitted Oct. 16, 1882. Granted Oct. 23, 1882. Argued Jan. 8, 9, 1883. Decided Mar. 5, 1883. Leave to file additional brief granted Jan. 9, 1883.

IN ERROR to the Supreme Court of Appeals of the State of Virginia.

This case arose upon a petition filed in the court below, March 28, 1882, by the plaintiff in error, for a *mandamus* to compel the defendant in error, as Treasurer of the City of Rich-

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mond, to receive a certain coupon in payment of his taxes.

The petition having been denied, the court below being equally divided in opinion, the petitioner sued out this writ of error.

The history and facts of the case more fully appear in the opinion of the court.

Mr. **Wm. L. Royall,** for plaintiff in error:

The same rules of law are to be applied in construing the contract of a State, as are applied in construing the contract of an individual.

Murray v. *Charleston*, 96 U. S., 445 (XXIV., 768); *Davis* v. *Gray*, 16 Wall., 282 (83 U. S., XXI., 457); *Hall* v. *Wis.*, 103 U. S., 11 (XXVI., 305).

Under the constitutional inhibition, a contract is not to be impaired at all. It will not do to say that the contract is only slightly impaired. The Constitution allows of no deviations whatever.

Green v. *Biddle*, 8 Wheat., 84; *Bank* v. *Sharp*, 6 How., 327; *Von Hoffman* v. *Quincy*, 4 Wall., 552, 553 (71 U. S., XVIII., 409); *Walker* v. *Whitehead*, 16 Wall., 318 (83 U. S., XXI., 358); *Farrington* v. *Tenn.*, 95 U. S., 683 (XXIV., 559); *Edwards* v. *Kearzey*, 96 U. S., 601 (XXIV., 796).

Contracting parties are supposed to contract with reference to the laws at that time in existence, and all those laws enter into and form part of the contract. This is true of the laws then in existence providing remedies to enforce performance of the contract, as well as of any other laws.

Walker v. *Whitehead* (*supra*); *Edwards* v. *Kearzey* (*supra*); *McCracken* v. *Hayward*, 2 How., 612; *Gunn* v. *Barry*, 15 Wall., 623 (82 U. S., XXI., 215); *Butz* v. *Muscatine*, 8 Wall., 575 (75 U. S., XIX., 490).

It has been repeatedly affirmed by the court, that one means of proving that legislation has impaired the obligation of a contract, is the fact that it has diminished its value.

Bank v. *Sharp*, 6 How., 327; *Von Hoffman* v. *Quincy* (*supra*); *Edwards* v. *Kearzey* (*supra*).

The contract being that the State will receive the coupons for taxes, it is an express repudiation of the contract to refuse so to do.

Woodruff v. *Trapnall*, 10 How., 190; *Furman* v. *Nichol*, 8 Wall., 44 (75 U. S., XIX., 370); *Hartman* v. *Greenhow*, 102 U. S., 672 (XXVI., 271); *Keith* v. *Clark*, 97 U. S., 454 (XXIV., 1071).

Messrs. Dillon and *Swayne*, representing the holders of a large amount of the securities affected by the decision in this case, filed a brief by leave of the court, of which the following is an abstract:

The case of *Hartman* v. *Greenhow* (*supra*) settles finally the validity of the contract here in question as originally made. The only question that can arise, is as to the remedy which was a part of that contract, and to which the plaintiff in error would then have been entitled, in the event of default on the part of the State.

Von Hoffman v. *Quincy* (*supra*); *Wolff* v. *New Orleans*, 103 U. S., 358 (XXVI., 395); *La.* v. *Pilsbury*, 105 U. S., 278 (XXVI., 1090).

The remedy is as much within the protection of the Constitution as any other part of the contract, and is entitled to the same inviolable sanctity whenever the question of impairment arises. It is not denied that the remedy may be modified by subsequent state laws, provided the alteration does not impair the obligation of the contract.

Bronson v. *Kinzie*, 1 How., 316; *McCracken* v. *Hayward*, 2 How., 612; *Von Hoffman* v. *Quincy*, 4 Wall., 535 (71 U. S., XVIII., 403); see, also, 1 Kent, Com., 456, and Sedg. Const. and Stat. Const., 652; *Edwards* v. *Kearzey* (*supra*).

The idea that the Act is a remedy, strikes strongly though painfully, one's sense of the ludicrous. If the Act be valid, we cannot doubt that these bonds (like those of Mississippi, repudiated more than fifty years ago) will, as it were, be stricken out of existence, become worthless to the holders and finally disappear from the market. Such was the intent and purpose of the Act. The constitutional guaranty will be less comprehensive and efficient than has been supposed.

This is not a remedy, real or pretended, for the enforcement of the receivability clause, but the annihilation of that clause, and the arbitrary and revolutionary substitution of a wholly distinct and different thing.

That there is gross impairment of the substantial contract rights of the plaintiff in error by the Acts of Jan. 14, 1882, and of April 7, 1882, is in our view too clear to admit of doubt or require discussion.

Messrs. **F. S. Blair,** *Atty-Gen. of Virginia*, and *J. Ambler Smith*, for defendant in error:

We think it well settled that the Legislature may change the remedies, even though the new remedies be less convenient than the old, and less prompt and speedy. A right to a particular remedy is not a vested right; but every State has control of the remedies it offers its suitors, and may withdraw them entirely.

Cooley Const. Lim., 361 (marg.), and *note* 3; 287, *notes* 1, 2 of 4th ed.; Potter, Dwar., Stat., 471-3; *Morse* v. *Gould*, 11 N. Y., 287, 291.

Mr. Chief Justice **Waite,** delivered the opinion of the court: [770]

On the 30th of March, 1871, the General Assembly of Virginia passed an Act to provide for the funding and payment of the public debt, by which two thirds of the amount due on old bonds might be funded in new bonds, with interest coupons attached "Receivable at and after maturity for all taxes, debts, dues and demands due the State." Under this Act many bonds were put out with coupons which expressed on their face that they were receivable for taxes. On the 7th of March, 1872, however, the General Assembly passed another Act prohibiting the officers charged by law with the collection of taxes from receiving in payment anything else than gold and silver coin, United States treasury notes, and notes of the national banks, and repealing all other Acts inconsistent therewith.

The Supreme Court of Appeals of Virginia decided, at its November Term, 1872, in the case of *Antoni* v. *Wright*, 22 Gratt., 833, that in issuing these bonds the State entered into a valid contract with all persons taking the coupons to receive them in payment of taxes and State dues, and that the Act of 1872, so far as it conflicted with this contract, was void. The authority of this case was recognized in *Wise* v. *Rogers*, 24

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Gratt, 169; and in *Clarke* v. *Tyler*, 30 Gratt, 137, decided in 1878, it was said: "This decision [771] of *Antoni* v. *Wright*, * * * must be held to be the settled law of this State." The same questions were decided in the same way here at the October Term, 1880, in *Hartman* v. *Greenhow*, 102 U. S., 672 [XXVI., 271], and are no longer open in this court. Any Act of the State which forbids the receipt of these coupons for taxes, is a violation of the contract and void as against couponholders.

At the time the Act of 1871 was passed, and when the bonds and coupons were issued, the Supreme Court of Appeals of the State had jurisdiction to grant writs of *mandamus* in all cases where *mandamus* would lie, according to the principles of the common law, if necessary to prevent a failure of justice; and in *Antoni* v. *Wright, ubi supra*, it was decided that the writ of *mandamus* was the proper remedy to compel a collector to accept the coupons in question when offered in payment of taxes. The case of *Wise* v. *Rogers* presented the same question, and we understand it to have been the settled practice of that court to entertain suits for similar relief.

The form and mode of proceeding were regulated by statute which provided (Code, Virginia, 1873, p. 1023, ch. 151, sec. 1), that when the return was made to a writ of *mandamus* it should state plainly and concisely the matter of law or fact relied on in opposition to the complaint; that the complainant might thereupon demur to the return, or plead thereto, or both, and that the defendant might reply, take issue on, or demur to the pleas of the complainant. The case was to be tried at the place where writs of error to the court were to be tried (Code, p. 1051), and after a verdict was found, or judgment rendered on demurrer or otherwise for the person suing out the writ, he could recover his costs, with such damages as the jury might assess, and have forthwith a peremptory writ.

On the 14th of January, 1882, the General Assembly passed another Act of which the following is a copy:

"Chap. 7. *An Act to Prevent Frauds upon the Commonwealth and the Holders of her Securities in the Collection and Disbursement of Revenues.*

Whereas, bonds purporting to be the bonds of this Commonwealth, issued by authority of the Act of March thirtieth, eighteen hundred and seventy-one, entitled An Act to Provide for the Funding and Payment of the Public Debt, and under the Act of March twenty-eight, eighteen hundred and seventy-nine, entitled an [772] Act to provide a plan of settlement of the public debt, are in existence without authority of law;

And whereas, other such bonds are in existence which are spurious, stolen or forged, which bonds bear coupons in the similitude of genuine coupons, receivable for all taxes, debts, and demands due the Commonwealth;

And whereas, the coupons from such spurious, stolen, or forged bonds are received in payment of taxes, debts and demands;

And whereas, genuine coupons from genuine bonds, after having been received in payment of taxes, debts and demands, are fraudulently re-issued, and received more than once in such payments;

And whereas, such frauds on the rights of the holders of the aforesaid bonds impair the contract made by the Commonwealth with them, that the coupons thereon should be received in payment of all taxes, debts and demands due the said Commonwealth, and at the same time defraud her out of her revenues;

Therefore, for the purpose of protecting the rights of said bondholders and of enforcing the said contract between them and the Commonwealth, preventing frauds in the revenue of the same,

1. *Be it enacted by the General Assembly of Virginia*, That whenever any taxpayer or his agent shall tender to any person whose duty it is to collect or receive taxes, debts or demands due the Commonwealth, any papers or instruments in print, writing or engraving, purporting to be coupons detached from bonds of the Commonwealth issued under the Act of eighteen hundred and seventy-one, entitled an Act to fund the public debt, in payment of any such taxes, debts and demands, the person to whom such papers are tendered shall receive the same, giving the party tendering a receipt stating that he has received the same for the purpose of identification and verification.

2. He shall at the same time require such taxpayer to pay his taxes in coin, legal tender notes, or national bank-bills, and upon payment give him a receipt for the same. In case of refusal to pay, the taxes due shall be collected as all other delinquent taxes are collected.

3. He shall mark each paper as coupons so received, with the initials of the taxpayer from whom received, and the date of receipt, and shall deliver the same, securely sealed up, to the judge of the county court of the county or hustings court of the city in which such taxes, debts or demands are payable. The taxpayer shall thereupon be at liberty to file his petition in said county court against the Commonwealth; a summons to answer which petition shall be served on the Commonwealth's attorney, who shall appear and defend the same. The petition shall allege that he has tendered certain [773] coupons in payment of his taxes, debts and demands, and pray that a jury be impaneled to try whether they are genuine, legal coupons, which are legally receivable for taxes, debts and demands. Upon this petition, an issue shall be made in behalf of the Commonwealth which shall be tried by a jury, and either party shall have a right to exceptions on the trial and of appeal to the Circuit Court and Court of Appeals. If it be finally decided in favor of the petitioner that the coupons tendered by him are genuine, legal coupons, which are legally receivable for taxes, and so forth, then the judgment of the court shall be certified to the treasurer, who, upon the receipt thereof, shall receive said coupons for taxes and shall refund the money before then paid for his taxes by the taxpayer out of the first money in the Treasury in preference to all other claims.

4. Whenever any taxpayer shall apply to any court in this Commonwealth for a *mandamus* to compel any person authorized to receive or collect taxes, debts or demands due the Commonwealth to receive coupons for taxes, it shall be the duty of such person to make returns to said *mandamus*, that he is ready to receive

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said coupons in payment of such taxes, debts and demands as soon as they have been legally ascertained to be genuine, and the coupons which by law are actually receivable. Upon such return, the court before whom the application is made shall require the petitioner to pay his taxes to the tax collector of his county or city, or to the treasurer of the Commonwealth, and upon filing the receipt for such taxes in such court the said court shall direct the petitioner to file his coupons in such court, which shall then forward the same to the county court of the county or hustings court of the city where such taxes are payable, and direct such court to frame an issue between the petitioner as plaintiff and the Commonwealth as defendant as to whether the coupons so tendered are genuine coupons, legally receivable for taxes. On the trial of the cause, the attorney for the Commonwealth in the lower courts, and the Attorney-general in the Supreme Court of Appeals, shall appear for the Commonwealth and require proof of the genuineness and legality of the coupons in issue. Either party shall be entitled to exceptions, and an appeal to the Circuit Court and Supreme Court of Appeals on the trial of this issue. If the decision be finally in favor of the petitioner, the *mandamus* shall issue requiring the coupons to be received for said taxes, and so forth; and they shall be so received; and on the certificate of such judgment the treasurer of the Commonwealth shall forthwith refund to the taxpayer the amount of currency or money be- [774] fore then paid by him out of the first money in the treasury, in preference to all other claims.

5. This Act shall be in force from its passage."

On the 20th of March, 1882, Andrew Antoni, who owed the state taxes to the amount of three dollars and fifteen cents, tendered the treasurer of the City of Richmond, the lawful tax collector, a coupon of the issue of 1871, for three dollars and fifteen cents lawful money, in payment. This tender was refused, and Antoni, on the 28th of March, petitioned the Supreme Court of Appeals for a *mandamus* to require its acceptance. The treasurer, on the 30th of March, for a return to an order to show cause, said he was ready to receive the coupon as soon as it had been legally ascertained to be genuine, and such as by law was actually receivable. To this return a demurrer was filed. Upon the hearing of the demurrer, the court being equally divided in opinion on the questions involved, "in pursuance of an Act of Assembly in such case made and provided," denied the writ. From a judgment to that effect, this writ of error was brought.

The question we are now to consider is not whether, if the coupon tendered is in fact genuine and such as ought, under the contract, to be received, and the tender is kept good, the treasurer can proceed to collect the tax by distraint or such other process as the law allows, without making himself personally responsible for any trespass he may commit, but whether the Act of 1882 violates any implied obligation of the State in respect to the remedies that may be employed for the enforcement of its contract, if the collector refuses to take them.

It cannot be denied that, as a general rule, laws applicable to the case which are in force at the time and place of making a contract enter into and form part of the contract itself, and "that this embraces alike those laws which affect its validity, construction, discharge and enforcement." *Walker* v. *Whitehead*, 16 Wall., 317 [83 U. S., XXI., 357]. But it is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract, if an adequate and efficacious remedy is left. This limitation upon the prohibitory clause of the Constitution in respect to the legislative power [775] of the States over the obligation of contracts, was suggested by *Chief Justice* Marshall in *Sturges* v. *Crowninshield*, 4 Wheat, 200, 207, and has been uniformly acted on since. *Mason* v. *Haile*, 12 Wheat., 378; *Bronson* v. *Kinzie*, 1 How., 316; *Von Hoffman* v. *City of Quincy*, 4 Wall., 553 [71 U. S., XVIII., 410]; *Drehman* v. *Stifle*, 8 Id., 602 [75 U. S., XIX., 510]; *Gunn* v. *Barry*, 15 Id., 623 [82 U. S., XXI., 215] *Walker* v. *Whitehead* [*supra*]; *Terry* v. *Anderson*, 95 U. S., 633 [XXIV., 366]; *Tennessee* v. *Sneed*, 96 Id., 69 [XXIV., 610]; *Louisiana* v. *Pilsbury*, 105 Id., 301 [XXVI., 1098]. As was very properly said by *Mr. Justice* Swayne in *Von Hoffman* v. *City of Quincy*, *ubi supra*, "It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the Act is within the prohibition of the Constitution and, to that extent, void." In all such cases the question becomes, therefore, one of reasonableness, and of that the Legislature is primarily the judge. *Jackson* v. *Lamphire*, 3 Pet., 290; *Terry* v. *Anderson*, *ubi supra*. We ought never to overrule the decision of the Legislative Department of the Government, unless a palpable error has been committed. If a state of facts could exist that would justify the change in a remedy which has been made, we must presume it did exist, and that the law was passed on that account. *Munn* v. *Illinois*, 94 U. S., 132 [XXIV., 86]. We have nothing to do with the motives of the Legislature, if what they do is within the scope of their powers under the Constitution.

The right of the coupon holder is to have his coupon received for taxes when offered. The question here is not as to that right, but as to the remedy the holder has for its enforcement when denied. At the time the coupon was issued, there was a remedy by *mandamus* from the Supreme Court of Appeals to compel the tax collector to take the coupon and cancel the tax. This implied a suit, with process, pleadings, issues, trial and judgment. No restrictions were placed on the defenses the collector could make. He might raise such issues as he chose. Without the aid of some restraining power, the mere [776] pendency of the suit would not prevent the collector from proceeding according to law with the collection of the tax. He might, if he went on, subject himself to liability for damages, if the tender was one he ought to have accepted; but there was nothing to prevent his going on if he chose to take this risk.

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Under this law, the trial must be had in the Supreme Court of Appeals and at the time and place where that court was to be held for other purposes. There was nothing in the law to give these cases preference over others for trial. So far as we are informed, they stood as other cases before the court, and subject to such orders as should seem to be reasonable. The tax collector could not be compelled to accept the coupon and discharge the tax until final judgment. If the final judgment was in favor of the holder, he recovered his costs and such damages as the jury might give him.

Under section 4 of the Act of 1882, when a *mandamus* is asked for, the collector is required by law to return to the alternative writ or rule "That he is ready to receive said coupons in payment of such taxes, * * * as soon as they have been legally ascertained to be genuine, and the coupons which by law are actually receivable." Upon such return the court must require the petitioner to pay his taxes, which being done, the coupons are taken and forwarded to the county court of the county or the hustings court of the city where the taxes are payable, with directions to that court to frame an issue between the petitioner as plaintiff and the Commonwealth as defendant, as to whether the coupons so tendered are genuine coupons legally receivable for taxes. Upon this issue proof of the genuineness and legality of the coupons must be made. Either party may take exceptions and carry the case, on appeal, to the Circuit Court and Supreme Court of Appeals. If the decision is in favor of the petitioner, a *mandamus* is to issue and the money be paid returned to him out of the first money in the treasury, in preference to all other claims.

The following changes are thus made in the old remedy: 1. The taxes actually due must be paid in money before the court can proceed, after the collector has signified in the proper way his willingness to receive the coupons, if they [777] are genuine and in law receivable; 2. The coupons must be filed in the Court of Appeals; and, 3. They must be sent to the local court to have the fact of their genuineness and receivability determined, subject to an appeal to the Circuit Court and the Supreme Court of Appeals. As the suit is for a *mandamus*, all the provisions of the general law regulating the practice not inconsistent with the new law remain; and if the petitioner succeeds in getting his peremptory writ, he will recover his costs. No issues are required that it would not have been in the power of the collector to raise before the change was made, and there is no additional burden of proof imposed to meet the issues; so that the simple question is, whether the requirement of the advance of the taxes, and the change of the place and manner of trial, impair the obligation of the contract on the part of the State to furnish an adequate and efficacious remedy to compel a tax collector to receive the coupons in payment of taxes, in case he will not do it without compulsion.

1. As to the payment of the taxes in advance: In this connection it must be borné in mind that the legislation, the validity of which is involved, relates alone to the collection of taxes levied under the authority of the State for the purposes of revenue. Promptness in the payment of taxes by the citizen is as important as promptness by the State in the discharge of its own obligations. In fact, ordinarily the last cannot be done without the first. Hence, under the revenue system of the United States, the collection of the revenue in the manner prescribed by law cannot be restrained by judicial proceedings. The only remedy for an illegal exaction is payment under protest and suit to recover back the money paid. The reason is, that as it is necessary the government should be able to calculate with certainty on its revenues, it is better that the individual should be required to pay what is demanded under the forms of law, and sue to recover back what he pays, than that the government should be embarrassed in its operations by a stay of collection.

It is to be noticed, also, that the law which authorized the issue of the bonds and coupons did not in express terms provide that the coupon-holder should have the remedy of *mandamus* to compel the tax collector to take his coupons. His claim to relief in that way rests alone on the fact, that when his coupon was issued *mandamus* was an existing form of action in the State, which the courts have decided was applicable to such a case. What the Legislature has done is only to say, that before this remedy can be resorted to, the amount due for taxes shall be deposited in the treasury. That being done, the suit may go on. If in the suit it shall be determined that the coupons tendered are genuine and in law receivable, the collector will be required to accept them, and the money will be restored. If, however, the judgment is against the coupon-holder, the taxes will be paid, and the State will have suffered no inconvenience for want of its just revenues. Looking at the case, therefore, as one affecting the collection of the public revenue, we cannot see that the requirement of the advance of the taxes as a condition to the employment of the remedy is such an impairment of the contract as makes the requirement invalid. [778]

2. As to the change in the place and mode of trial:

We cannot think this, of itself, invalidates the law. So far as the change of place is concerned, it simply takes from the Supreme Court of Appeals jurisdiction for the trial of the questions of fact, and confers precisely the same jurisdiction upon another court, with ample provision for appeal, so that in the end the authority of the Court of Appeals may be invoked on all matters of law. The courts on which the new jurisdiction is conferred are required by law to hold frequent terms, and the trial is to be had in the county where the taxes are to be paid. It is difficult to see how this impairs, in any manner, either the adequacy or the efficiency of the original remedy.

Then, as to the manner of the trial: The deposit of the coupons with the Court of Appeals, if the suit is to go on, cannot be considered unreasonable. If the trial had been conducted under the old law, the coupons would have to be at some time surrendered, and the precise stage of the case in which this is to be done is by no means important, so far as the present question is concerned. Neither does the positive requirement of an issue as to the genuineness and receivability of the coupons, and a trial by jury, affect the validity of the law. Under the old law, this same issue might have

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been raised, and the same trial by jury required. It certainly is not an impairment of an old remedy to make that imperative which before was discretionary.

[779]

Without pursuing the subject further, we say that, in our opinion, the 4th section of the Act of 1882 does not impair the obligation of any contract which the State has made with the holders of its interest coupons.

After this suit was begun, but before it was tried, the General Assembly of Virginia amended the section of the Code conferring jurisdiction on the Supreme Court of Appeals in suits for *mandamus*, so that it now reads as follows:

"Chap. 19. *An Act to Amend and Re-enact Section Four, Chapter one hundred and fifty-six, of the Code of eighteen hundred and seventy-three, in Relation to* Mandamus, *Prohibition, etc.*

1. *Be it enacted by the General Assembly of Virginia*, That chapter one hundred and fifty-six, section four, of the Code of Virginia, of eighteen hundred and seventy-three, be amended and re-enacted, so as to read as follows:

Sec. 4. The said Supreme Court, besides having jurisdiction of all such matters as are now pending therein, shall have jurisdiction to issue writs of *mandamus* and prohibition to the circuit and corporation courts, and to the hustings court and the chancery court of the City of Richmond, and in all other cases in which it may be necessary to prevent a failure of justice, in which a *mandamus* may issue according to the principles of the common law, provided that no writ of *mandamus*, prohibition, or any other summary process whatever, shall issue in any case of the collection or attempt to collect revenue, or compel the collecting officers to receive anything in payment of taxes other than as provided in chapter forty-one, Acts of Assembly, approved January twenty-six, eighteen hundred and eighty-two, or in any case arising out of the collection of revenue in which the applicant for the writ of process has any other remedy adequate for the protection and enforcement of his individual right, claim and demand, if just.

The practice and proceedings upon such writs shall be governed and regulated, in all cases, by the principles and practice now prevailing in respect to writs of *mandamus* and prohibition respectively.

2. This Act shall be in force from its passage."

[780]

This, it is claimed, repealed section 4 of the Act of January, 1882, and took away entirely the remedy by *mandamus*. Without deciding that question, we proceed to consider the remedy provided in sections 1, 2 and 3, of the Act of 1882, which, it is conceded, will remain in force even if section 4 is repealed. These sections provide, in substance, that if coupons are tendered in payment of taxes, the collector shall take and receipt for them for the purposes of identification and verification. He shall then require payment of the taxes in money, and after marking the coupons with the initials of the name of the owner, deliver them to the judge of the county court of the county or hustings court of the city where the taxes are payable. The taxpayer may then file his petition in the county or hustings court against the Commonwealth to have a jury impaneled to try whether the coupons "are genuine, legal coupons, which are legally receivable for taxes, debts and demands." The Commonwealth may be brought into court by service of a summons on the Commonwealth's attorney. Upon this petition, an issue and trial by jury is to be had, with ample privileges to all parties of exception and appeal. If the suit is finally decided in favor of the taxpayer, he is to have the amount paid by him for the taxes refunded out of the first money in the Treasury, in preference to all other claims.

It is somewhat difficult to see any substantial difference between the remedy given by these sections and that by section 4. There the form of the suit is *mandamus* begun while the coupons are in the hands of the taxpayer. After the suit has been begun, the court requires a delivery of the coupons into its own possession, and the payment of the amount of the taxes into the Treasury. This being done, the court sends the coupons to the appropriate tribunal for adjudication, and the proceedings thereafter are in all material respects like those provided for in the other sections. The judgment is also the same, except as to the merest matters of form. In both proceedings the object is to require the collector to accept the coupons as payment of the tax, and deliver back the money that has been deposited for the same purpose in case the coupons are not in law receivable The petition for *mandamus*, filed in the Court of Appeals, under section 4, is the exact equivalent of the petition to be filed in the other courts under sections 1, 2 and 3, to have the genuineness and receivability of the coupons determined, and in both, the real matter submitted for determination is, whether the taxpayer is entitled to have back the money he has deposited to pay his taxes in case his coupons ought to have been received.

[781]

Mandamus, in this class of cases, is in the nature of a suit to obtain a specific performance of a contract. But in the present case, the performance sought is the payment of money, and the remedy substituted is equivalent to a suit at law for its recovery, with ample provision for the satisfaction of any judgment that may be obtained; for it is made the ministerial duty of the treasurer to pay the amount of the recovery out of the first money in the Treasury, and in preference to all other claims, as soon as the judgment is properly certified. The language of the Act is, "shall refund the money before then paid for his taxes by the taxpayer, out of the first money in the Treasury, in preference to all other claims." Clearly this is an appropriation by law of money in the Treasury, within the meaning of art. X., sec. 10, of the Constitution of Virginia, and the treasurer would be authorized to make the payment without further legislative action. It will be time enough to consider the effect of a repeal of this branch of the remedy when that shall be attempted.

The primary obligation of the State is for the payment of the coupons. All else is simply as a means to that end. It matters not whether the coupons have been refused for the taxes, if full payment of the amount they call for is actually made in money. A remedy, therefore, which is ample for the enforcement of the payment of the money, is ample for all the purposes of the contract That, we think, is given by the Act of 1882 in both forms of proceeding.

Some objection is made to the 1st, 2d, and 3d sections, because there is no provision for the recovery of costs. Without determining whether, in point of fact, costs can be recovered,

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it is sufficient to say that costs, *eo nomine*, were not recoverable at common law, and are usually regulated by statute. Certainly it would not be claimed that the change of an ordinary statute, which provided a remedy for the en-
[782] forcement of contracts, so as to prevent the recovery of costs when they had been given before, would impair the obligation of contracts between individuals that were affected by what was done, and we see no reason why one rule, in this particular, should be applied to individuals and another to the State.

In conclusion, we repeat that the question presented by this record is not whether the tax collector is bound in law to receive the coupon, notwithstanding the legislation which, on its face, prohibits him from doing so, nor whether, if he refuses to take the coupon and proceeds with the collection of the tax by force, he can be made personally responsible in damages for what he does, but whether the obligation of the contract has been impaired by the changes which have been made in the remedies for its enforcement in case he refuses to accept the coupons. We decide only the question which is actually before us. It is no doubt true that the commercial value of the bonds and coupons has been impaired by the hostile legislation of the State; but this impairment, in our opinion, comes not from the change of the remedies, but from the refusal to accept the coupons without suit. What we are called upon to consider in this case is not the refusal to take the coupons, but the remedy after refusal.

We might have satisfied ourselves by a reference to the case of *Tennessee* v. *Sneed*, *ubi supra*, where the same general question was before us; but as we were asked to reconsider that case, we have done so with the same result, and, as we think, without in any manner departing from the long line of cases in which the principle involved has been recognized and applied.

Inasmuch as we are satisfied that a remedy is given by the Act of 1882, substantially equivalent to that in force when the coupons were issued, we have not deemed it necessary to consider what would be the effect of a statute taking away all remedies.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Matthews** said:

I concur in the judgment of the court, but prefer to rest the decision upon a ground different from that on which it is placed in its opinion.

[783] I agree that the State of Virginia, by the Act of 1871, entered into a valid contract with the holders of its bonds to receive their coupons in payment of taxes; and that any subsequent statute which denies this right is a breach of its contract and a violation of the Constitution of the United States.

But for a breach of its contract by a State no remedy is provided by the Constitution of the United States against the State itself; and a suit to compel the officers of a State to do the acts which constitute a performance of its contract by the State is a suit against the State itself.

If the State furnishes a remedy by process against itself or its officers, that process may be pursued because it has consented to submit itself to that extent to the jurisdiction of the courts; but if it chooses to withdraw its consent by a repeal of all remedies, it is restored to the immunity from suit, which belongs to it as a political community, responsible in that particular to no superior.

I adopt as decisive of the present case the language of the *Chief Justice*, in expressing the opinion of the court in the cases of the *State of Louisiana* v. *Jumel*, and *Elliott* v. *Wilt*, [*ante*, 448]: "When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has, by its act of submission, allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State."

I do not, therefore, consider it necessary to enter upon the inquiry, whether the remedy provided by the State of Virginia, by the Act of 1882, is effective and substantial compared with that which existed in 1871, when the bonds were issued. It is sufficient to say that it is the one which the State has chosen to give, and the only one, therefore, which the courts of the United States are authorized to administer.

Mr. Justice **Bradley**, *Mr. Justice* **Woods**, [784]
and *Mr. Justice* **Gray** concurred in the judgment upon both grounds: that stated in the opinion of the court as delivered by the *Chief Justice*, and that stated in the opinion of *Mr. Justice* Matthews.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Field**, dissenting:

I am not able to agree with the majority of the court in the judgment in this case, nor in the reasoning on which it is founded. The legislation of Virginia, which is sustained, appears to me to be in flagrant violation of the contract with her creditors under the Act of March 30, 1871, commonly known as the Funding Act; and the doctrines advanced by the court, though not so intended, do, in fact, license any disregard of her obligations which the ill-advised policy of her legislators may suggest.

The plaintiff in error, the petitioner in the court below, is a citizen of Virginia and a resident of the City of Richmond. He owns property there, and on the 20th of March, 1882, was indebted to the State for taxes to the amount of $3.15. At that time he was also the lawful holder of an overdue interest coupon for $3.00, which had been cut from a bond of the State, issued under the provisions of the Funding Act. This coupon is in the following words:

"The Commonwealth of Virginia will pay the bearer three dollars, interest due first January, 1882, on bond 6,498.

George Rye,
Treasurer of the Commonwealth of Virginia.
Coupon No. 21."

And on its face it thus declares:

"Receivable at and after maturity for all taxes, debts and demands due the State."

The receivability of such coupons for state

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taxes, debts and demands was, as will hereafter be shown, the principal consideration for the surrender of former bonds of the State and the acceptance of a less number in their place.

[785] The petitioner, in payment of his taxes, tendered the coupon he held and fifteen cents in money to the Treasurer of Richmond, who was charged by law with the duty of collecting taxes due to the State in that city, but he refused to receive them. Application was then made to the Supreme Court of Appeals to compel their receipt. The treasurer set up in his answer that he was ready to receive the coupon in payment of the taxes as soon as it was ascertained to be genuine and legally receivable. This answer was founded upon the provisions of the Act of January 14, 1882, entitled "An Act to Punish Frauds upon the Commonwealth and the Holders of Her Securities in the Collection and Disbursement of Revenues." Upon the validity of its provisions, the Judges of the Court of Appeals equally divided, and the application failed. The preamble of the Act recites that bonds purporting to be those of the Commonwealth, issued under the Act of March 30, 1871, are in existence without authority of law; that other bonds are in existence, which are spurious, stolen or forged, bearing coupons in the similitude of those which are genuine and receivable for taxes, debts and demands of the State; that coupons from such spurious, stolen and forged bonds are received in payment of such taxes, debts and demands; that coupons from genuine bonds, after having been thus received, are frequently re-issued and received more than once in such payment; and that such frauds on the rights of the holders of the bonds impair the contract made by the Commonwealth with them and, therefore, for the alleged purpose of protecting the rights of the bondholders, and of enforcing the contract between them and the State, the Act declares that whenever any taxpayer or his agent shall tender to a collector any papers or instruments in print purporting to be coupons detached from bonds of the Commonwealth, issued under the Act of 1871, to fund the public debt, the collector shall receive the same, and give the party tendering a receipt, stating that he has received them for the purpose of identification and verification; that he shall, at the same time, require such taxpayer to pay his taxes in coin, legal tender notes, or national bank bills, and if payment be refused, the taxes shall be collected as other delinquent taxes; that the collector shall mark each coupon thus received with the initials of the taxpayer, and deliver them sealed up to the judge of the county court of the county or hustings court of the city, in which the taxes are payable. It then provides that the taxpayer shall be at liberty to file his petition in said county court against the Commonwealth; that a summons to answer the same shall be served on the Commonwealth's attorney, who is to appear and defend the same; that, in his petition, the taxpayer must allege that he has tendered the coupons in payment of his taxes, and pray that a jury be impaneled "to try whether they are genuine legal coupons, which are legally receivable for taxes, debts and demands." Upon this petition an issue is to be made on behalf of the Commonwealth, which is to be tried by a jury, and either party is to have a right to exceptions on the trial and to an appeal to the circuit court and ultimately to the Court of Appeals. If it be finally decided in favor of the petitioner that the coupons are "genuine legal coupons, receivable for taxes, and so forth," then the judgment of the court is to be certified to the Treasurer of the Commonwealth, who, upon receipt thereof, shall receive the coupons for taxes and refund to the taxpayer the amount before paid by him out of the first money in the treasury, in preference to other claims.

[786]

The Act also provides that whenever any taxpayer applies to a court for a *mandamus* to compel a collector of taxes to receive coupons for them, it shall be the duty of the collector to return that he is ready to receive, in payment of the taxes, the coupons as soon as they have been legally ascertained to be genuine, and by law actually receivable; and that, upon such return being made, the court shall require the petitioner to pay his taxes to the collector of the city or county, or to the Treasurer of the Commonwealth; and upon filing the receipt for the same, that the court shall direct the petitioner to file his coupons in court, which shall then forward the same to the county court of the county or hustings court of the city, where the taxes are payable, and direct that court to frame an issue between the petitioner and the Commonwealth as to whether the coupons thus tendered are genuine and legally receivable for taxes. On the trial, either party is to be entitled to exceptions and to an appeal to the circuit court and to the Supreme Court of Appeals. If the decision be finally in favor of the petitioner, he is to be entitled to a *mandamus* that the coupon be received for taxes; but, inasmuch as those taxes have already been paid, they are to be refunded by the Treasurer of the Commonwealth out of the first money in the Treasury, in preference to all other claims. A subsequent Act, passed on the 7th of April, 1882, amending a section of the Code of Virginia of 1873, prohibits the Supreme Court of Appeals from issuing the writ of *mandamus* or any other summary process to compel the collecting officers of the State to receive anything in payment of taxes other than gold or silver, treasury notes of the United States, or bills of the national banks.

[787]

The question for decision here is as to the constitutionality of the Act of January 14, 1882, which destroys the receivability of the coupon for taxes, allows a suit for the recovery of its amount only after they have been paid, and authorizes a recovery only when the jury have found that it is genuine and legally receivable for them, and of the Act of April 7, 1882, which withdraws from the Supreme Court of Appeals the power to compel the receivability of the coupon for taxes. In other words: do these Acts impair the obligation of the contract upon which the coupons were originally issued?

A brief reference to the history of the Funding Act of 1871 will serve to place this subject in a clear light. Prior to the late war, Virginia constructed various public works, and to enable her to do so she borrowed large sums of money, for which she issued her bonds, exceeding in amount $30,000,000. The interest on them was regularly paid up to the breaking out of the war. Afterwards its payment ceased and until 1871, with the exception of some small sums re-

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mitted to London for foreign bondholders or paid in Virginia in confederate money and a small amount in 1866 and 1867, no part of the interest or principal was ever paid. In 1871, the principal of her debt, with its unpaid and overdue interest, amounted to over $45,000,000.

During the war, the people of a portion of her territory separated from her, and formed a new State, by the name of West Virginia, which was admitted by Congress into the Union. Nearly one third of the territory of Virginia and one [788] third of her people were thus withdrawn from her original limits and jurisdiction. Her then indebtedness was justly chargeable against her and the new State in some ratable proportion. The money raised by her bonds had been expended in improvements throughout the entire territory. All portions of it had participated in the benefits conferred by the expenditure of the moneys. It was but just, therefore, that the new State should assume and pay an equitable proportion of the debt. It is a well settled doctrine of public law, that, upon a division of a State into two or more States, her debts shall be ratably apportioned among them. See authorities upon his subject in *Hartman* v. *Greenhow*, 102 U. S., 677 [XXVI., 274].

In conformity with this doctrine, West Virginia, in her first Constitution, adopted in 1863, recognized her liability in this respect and declared that "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January in the year 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years." Constitution of 1863, art. 8, sec. 8. She, however, did nothing, up to 1871, to give effect to this unequivocal and solemn recognition of her liability or to her positive injunction that the Legislature should, as soon as practicable, ascertain the same and provide for its liquidation; and she has done nothing since.

The Commonwealth of Virginia, nevertheless, undertook in that year to effect a settlement with her creditors, taking as a basis that, inasmuch as one third of her former territory and population was embraced in the new State, the latter should assume one third of the debt and the Commonwealth should settle for the remainder. Accordingly, her Legislature on the 30th of March, 1871, passed the Funding Act. It is entitled "An Act to Provide for the Funding and Payment of the Public Debt." Its preamble recites that, in the Ordinance authorizing the creation of the State of West Virginia, it was provided that she should take upon herself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, and that this provision has not [789] been fulfilled, although repeated and earnest efforts in that behalf have been made by Virginia, and that the people of the Commonwealth are anxious for the prompt liquidation of her proportion of the debt, estimated at two thirds of the same; and then declares that, to enable the State of West Virginia to settle her proportion of said debt with the holders thereof, and to prevent any complications or difficulties which may be interposed to any other manner of settlement, and for the purpose of promptly restoring the credit of Virginia by providing for the prompt and certain payment of the interest upon the just proportion of her debt as the same should become due, the Legislature enacts that the owners of the bonds, stocks or interest certificates of the State, with some exceptions, may fund two thirds of the amount of the same, together with two thirds of the interest due or to become due thereon, up to July 1, 1871, in six per cent coupon or registered bonds of the State having thirty-four years to run, but redeemable at the pleasure of the State after ten years, the bonds to be made payable to order or bearer, and the coupons to bearer. The Act declares that the coupons shall be payable semi-annually, and "be receivable at and after maturity for all taxes, dues and demands due the State," which shall be so expressed on their face, and that the bonds shall bear on their face a declaration to the effect that their redemption is secured by a sinking fund, provided for by the law under which they were issued. For the remaining one third of the amount of the bonds thus funded the Act provides that certificates shall be issued to the creditors, setting forth the amount with the interest thereon, and that their payment shall be provided for in accordance with such settlement as may subsequently be made between the two States, and that Virginia will hold the bonds surrendered, so far as they are not funded in trust for the holder or his assignees.

This Act induced a large number of creditors to surrender their bonds, and take new bonds, with interest coupons annexed, for two thirds of their amount and certificates for the balance. The number of bonds surrendered amounted to about $30,000,000, for which new bonds to the amount of $20,000,000 were issued. A contract was thus executed between the State and the [790] holders of the new coupons which the State could not afterwards impair. As this court, with only one dissenting member, said in *Hartman* v. *Greenhow* with respect to this contract: "She thus bound herself, not only to pay the bonds when they became due, but to receive the interest coupons from the bearer at and after their maturity, to their full amount, for any taxes or dues by him to the State. This receivability of the coupons for such taxes and dues was written on their face, and accompanied them into whatever hands they passed. It constituted their chief value, and was the main consideration offered to the holders of the old bonds to surrender them and accept new bonds for two thirds of their amount." 102 U. S., 679. [XXVI., 274].

The Supreme Court of Appeals of Virginia had previously spoken, with respect to this contract, with equal clearness. Notwithstanding the language of the Act of March 30, 1871, declaring that the interest coupons of the new bonds shall be "Receivable at and after maturity for all taxes, debts, dues and demands due the State," and this is expressed upon their face, the Legislature of Virginia, within less than a year afterwards, on March 7, 1872, passed an Act declaring that it shall not be lawful for any officers charged with the collection of taxes or other demands of the State then due, or to become due, "To receive in payment thereof anything else than gold or silver coin, United States Treasury notes, or notes of the national banks." As this Act was in direct conflict with that of

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March 30, 1871, its validity was assailed, and came before the Court of Appeals, in *Antoni* v. *Wright*, at the November Term, 1872. 22 Gratt., 833. In an opinion of great ability and learning, the character and effect of the Funding Act were elaborately considered; and it was held that its provisions constituted a contract founded upon valuable considerations and binding upon the State. By the decision of the state court in that case, and of this court in *Hartman* v. *Greenhow*, the receivability of the coupons for taxes and demands of the State was held to be an essential part of the contract on which the bonds were received, and to constitute the chief value of the coupon and the principal inducement offered for the surrender of the old bonds and the acceptance of two thirds of their amount. When the Legislature [791] subsequently attempted to annul this receivability, and required coin or currency to be received for taxes, the Court of Appeals held that such interference with the receivability of the coupons impaired the obligation of the contract and was void. When again the Legislature attempted to impair that receivability, by requiring the tax on the bond to which it originally belonged to be first deducted from the amount of the coupon before it could be received for other taxes, this court held that the legislation impaired the obligation of the contract. But now, strange to say, a law is sustained, as not impairing the obligation of the contract, although it prohibits the receivability of the coupons for state taxes, dues and demands, and requires the holder to pay them in coin, treasury notes, or bills of the national banks and, in return, gives him the privilege only, upon surrendering it, to test its genuineness and its receivability for taxes by instituting a suit, in which a jury is to be summoned, and any decision obtained may be taken to the circuit court and to the Court of Appeals. If final judgment shall be obtained that the coupon is genuine and legally receivable for taxes, the court is required to certify it to the Treasurer of the Commonwealth, who shall then receive the coupon for taxes, that is to say, long after they are paid, and refund its amount out of the first money in the Treasury, in preference to other claims. If there be no money in the Treasury, not otherwise appropriated, he may have to wait an indefinite period until the Treasury is replenished. Not only does this Act entail prolonged delay and expense in every case, but, in a majority of cases, the expense would exceed the amount of the coupon. Where only a few hundred dollars in bonds are held, the amount of the coupons would not justify the expenditure. Coupons for small amounts are thus rendered practically of no value. Their receivability for taxes, dues and demands of the State is effectually destroyed.

Under the Act of January 14, 1882, there is no equivalent given to the creditor for the receivability of the coupon for taxes. The right to enforce on demand payment of a particular claim essentially differs, both in availability and value, from a right to reduce the claim to judgment after protracted litigation, and particularly when, even after judgment, a further delay [792] is necessary to wait until there are funds in the Treasury of the State to pay it.

It would excite surprise in any commercial community if a bank, whose bills purport on their face to be payable on demand, should declare that, inasmuch as there were some forged notes upon it in circulation, therefore it would pay only such as the holder should judicially establish to be genuine. It has been decided that any unnecessary delay by a bank, in examining its bills to determine their genuineness, is equivalent to a refusal to redeem them. A bank resorting to such a flimsy pretext to evade payment would at once be pronounced insolvent, and be put into the hands of a receiver.

No weight is to be given to the recitals in the preamble of the Act of January 14, 1882, as to outstanding forged bonds and coupons. In the first place, the State, by reciting that various frauds have been committed with respect to some of her securities, cannot legislate to impair the obligation of her contracts. In the second place, we are justified in considering that these recitals are without foundation in fact. According to the established doctrine of this country, the most which can be attributed to a recital of facts in the preamble of an Act is, that it was represented to the Legislature that they existed. It is not the province of the Legislature to find facts which shall affect the rights of others: that is the province of the judiciary. Says Cooley: "A recital of facts in the preamble of a statute may, perhaps, be evidence when it relates to matters of a public nature, as that riots or disorders exist in a certain part of the country; but when the facts concern the rights of individuals, the Legislature cannot adjudicate upon them." Const. Lim., 96.

Says the Court of Appeals of Kentucky: "The Legislature, in all its enquiring forms by committees, makes no issue, and in their discretion may or may not coerce the attendance of witnesses or the production of records, and are frequently not bound by those rules of evidence applicable to an issue properly formed, the trial of which is an exercise of judicial power. Once adopt the principle that such facts are conclusive or even *prima facie* evidence against private rights, and many individual controversies may be prejudged, and drawn from the functions of the judiciary into the vortex of legislative usurpation. The appropriate func- [793] tions of the Legislature are to make laws to operate on future incidents, and not a decision of or forestalling rights accrued or vested under previous laws." *Elmondorf* v. *Carmichael*, 8 Litt., 480. In the case from which this citation is made, two Acts were under consideration, the recital in the preamble of one was that a certain person was a naturalized citizen; the recital in the preamble of the other was of a letter of attorney and a conveyance by a third party; and the court said: "Such a preamble is evidence that the facts were so represented to the Legislature, and not that they are really true." Although the language cited was used with reference to the preamble of a private statute, Sedgwick, in his treatise on the Interpretation and Construction of Statutory and Constitutional Law, after quoting it says: "This reasoning applies with as much force to public as to private statutes; and the Supreme Court of New York has well said that the Legislature has no jurisdiction to determine facts touching the rights of individuals."

The weight usually accorded to a recital of

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matters of fact in the preamble of an Act, that the facts were so represented to the Legislature, cannot be allowed here; for the journals of the Legislature of Virginia show that it had information when the Act was passed, that the very opposite of the recitals was true; that there were no forged or counterfeit bonds or coupons in existence, as therein stated. The journals may be referred to in order to show what was brought to the attention of the Legislature, and those journals show that in 1880 the House of Delegates of Virginia appointed a committee to examine the office of the second auditor, who is the custodian of all papers relating to the debt of the State, to ascertain whether there were any forged or counterfeit bonds or coupons among them; and the committee reported that they were unable to find a single forged or counterfeit bond or coupon; and of the millions of dollars in coupons which had been paid into the Treasury since 1871, all were accounted for except coupons to the amount of $28,197. As it was the duty of the officer on receiving the coupons to cancel them, it must be presumed that these were properly canceled by him at the time.

[794] Again; in answer to a resolution of the House of Delegates, dated January 9, 1882, the second auditor reported that no counterfeit or forged obligations, bonds, coupons or certificates of the State had in any way come to his knowledge. And in answer to a resolution of the Senate of the 16th of January, 1882, the same auditor replied that he had no knowledge of any spurious or forged bonds or coupons issued or purporting to be issued under the Funding Act of March 30, 1871; and in an examination had into the matter, a clerk in the second auditor's office testified that he was familiar with the coupons issued under the Act of March 30, 1871, and had handled about seven millions of them, and had never seen or heard of a counterfeit coupon. Another witness connected with the treasurer's office stated that he was familiar with the conduct and management of both the second auditor's office and of the treasurer's office, and that he had never heard of a duplicate or forged coupon.

In the third place, assuming that the $28,197 in coupons, which could not be found in the auditor's office or accounted for, had not been canceled, but had been mislaid, lost or stolen, the holders of other coupons ought not to be deprived of their use because the officers of the auditor's department had been neglectful of their duties. Assuming, also, against the fact, that there were forged and spurious coupons of the State, their existence did not warrant a rejection of such as are genuine. Although no officer questions their genuineness when tendered, the holder of them must make up an issue with the State to try the fact before a jury. The Act was evidently designed to accomplish much more than the protection of the holders of genuine coupons. As justly said by one of the judges of the Court of Appeals: "Whilst its professed object in its title is to prevent frauds upon the Commonwealth and the holders of its securities, it greatly depreciates the value of those securities, and thereby impairs the obligation of contracts, under the vain pretext that it is necessary to protect the Commonwealth against frauds. It not only destroys or renders almost valueless the coupon, but also the coupon bonds, amounting to millions of dollars, issued by the State by authority of the Act of March 30, 1871, and whose value depends upon the prompt payment of interest, of which assurance was given by the State to the holders of those bonds by the stipulation in the contract that the coupons at and after maturity should be receivable for all taxes, debts, etc., due the State. This statute prohibits revenue officers to receive any coupons, though unquestionably genuine, when tendered for and in discharge of taxes, etc., due the State, and requires the bearer of the coupon so tendered to pay his taxes in coin or other currency, which I think is plainly a repudiation or annulment of the State's contract." [795]

The clause of the Constitution, which declares that no State shall pass any law impairing the obligation of contracts, prohibits legislation thus affecting contracts between the State and individuals equally as it does contracts between individuals. Indeed, the greater number of cases, in which the protection of the constitutional provision has been invoked against subsequent legislative impairment of contracts, has been of those in which the State was one of the contracting parties. Where a State enters the markets of the world and becomes a borrower, she lays aside her sovereignty and takes upon herself the position of an ordinary civil corporation, or of an individual, and is bound accordingly. *Davis* v. *Gray*, 16 Wall., 232 [83 U. S., XXI., 457]; *Murray* v. *Charleston*, 96 U. S., 445 [XXIV., 763]; *Hall* v. *Wisconsin*, 103 U. S., 11 [XXVI., 305].

What, then, was the obligation of the contract entered into between Virginia and her creditors under the Funding Act of 1871, so far as the interest coupons are concerned? The contract is that she will pay the amount of the coupon and that it shall, at and after maturity, be receivable for taxes, dues and demands of the State. And by its receivability is meant that it is to be taken by officers whom the State may authorize to receive money for its dues whenever tendered for them. By the obligation of a contract, is meant the means which the law affords for its execution; the means by which it could, at the time it was made, be enforced. As said by the court, in *McCracken* v. *Hayward*, "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts and form a part of them as the measure of the obligation to perform them by the one party and the right acquired by the other." 2 How., 612.

To the same purport and still more emphatic is the language of the court in *Walker* v. *Whitehead*, 16 Wall., 317 [83 U. S., XXI., 357]. [796] "The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge and enforcement. Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment."

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In other words, to quote the language of Professor Pomeroy in his work on Constitutional Law: "A party may demand that substantially the same remedial right, appropriate to his contract when it was entered into, shall be accorded to him when it is broken." "Under our system of jurisprudence," says the same writer, "two forms of remedial right may result to the injured party upon the breach of a contract; the one form applying to a small number only of agreements, the other being appropriate to all. The first is the right to have done exactly what the defaulting party promised to do, the remedial right to a specific performance. The other is compensatory, or the right to be paid such an amount of pecuniary damages as shall be a compensation for the injury caused by the failure of the defaulting party to do exactly what he promised to do. Both of these species of remedial rights must be pursued by the aid of the courts. In both, the existence of the contract and of the breach must be established. These facts having been sufficiently ascertained, a decree or judicial order must be rendered, in the first case, that the defaulting party do exactly what he undertook to do; and in the second case, that the defaulting party pay the sum of money fixed as a compensation for his delict." Secs. 611, 612.

The receivability of the coupon, under the Funding Act of 1871, for taxes, dues and demands, gave to it, as already said, its principal value. At that time there was provided in the system of procedure of the State a remedy for the specific execution of the contract, by which this receivability could be enforced. The legislation of January 14 and April 7, 1882, deprives the holder of the coupon of this remedy, and in lieu of it gives him the barren privilege, after paying the taxes, of suing in a local court [797] to test before a jury the genuineness of the coupon and its legal receivability for them, and in case he establishes these facts, of having a judgment to that effect certified to the Treasurer of the Commonwealth, and the amount paid refunded out of money in the Treasury, if there be any. To recover this judgment, he must pay the costs of the proceeding, including the fees of witnesses and jurors, and of the clerk, sheriff and other officers of the court. This is a most palpable and flagrant impairment of the obligation of the contract. No legislation more destructive of all value to the contract is conceivable, unless it should absolutely and in terms repudiate the coupon as a contract at all. It is practical repudiation.

In *Bronson* v. *Kinzie* this court, speaking by *Chief Justice* Taney, said: "It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of a contract, and the rights of a party under it, may in effect be destroyed by denying a remedy altogether, or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law, declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it." 1 How., 317.

In *Bank* v. *Sharp* this court said: "One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force." 6 How., 327.

In *Murray* v. *Charleston* the court cited with approval the language of a previous decision to the effect that a law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, impairs its obligation; and added, speaking by *Mr. Justice* Strong, who recently occupied a seat on this bench, that "It is one of the highest duties of this court to take care the prohibition (against [798] the impairment of contracts) shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit." 96 U. S., 448 [XXIV., 764].

In *Edwards* v. *Kearzey* this court said, speaking by *Mr. Justice* Swayne, so lately one of our number: "The remedy subsisting in a State, when and where a contract is made and is to be performed, is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the Constitution, and is, therefore, void." 96 U. S., 607 [XXIV., 798]. *Mr. Justice* Clifford, also lately sitting with us, in a concurring opinion in the same case, said: "When an appropriate remedy exists for the enforcement of the contract at the time it was made, the State Legislature cannot deprive the party of such a remedy, nor can the Legislature append to the right such restrictions or conditions as to render its exercise ineffectual or unavailing." *Id.*, 608 [799].

And only two terms ago in the case of *La.* v. *New Orleans*, this court said, without a dissenting voice, that "The obligation of a contract, in a constitutional sense, is the means provided by law by which it can be enforced, by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened." 102 U. S., 206 [XXVI., 138].

How can it be maintained, in the face of these decisions, that the legislation of January 14, and April 7, 1882, does not impair the obligation of the contract under the Funding Act? It annuls the present receivability of the coupon; it substitutes for the specific execution of the contract, a protracted litigation; and when the genuineness of the coupon and its legal receivability for taxes are judicially established, its payment is made dependent upon the existence of money in the Treasury of the State. If the language of the Act, declaring that when the genuineness of the coupon and its receivability for taxes are established, the taxes paid by its holder shall be refunded out of the first money in the Treasury in preference to other claims, be deemed a sufficient appropriation to authorize the treasurer to pay out the money, contrary [799] to what has just been decided with respect to

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language much more expressive in the legislation of Louisiana, of what avail can it be to the owner of the coupon if the treasurer refuse to refund the amount? There is no mode, according to the opinion of the majority, of coercing his action. No *mandamus* can issue; for that remedy and all compulsory process have been abolished.

Besides all this, as the coupons are mostly for small amounts, the costs of the suits to test their genuineness and receivability for taxes would be more than their value. Practically, the law destroys the coupons, and it was evidently intended to have that effect.

There is nothing at all similar to this, as seems to be intimated by the opinion of the majority, in the revenue system of the United States which forbids judicial proceedings to restrain the collection of a tax for its alleged invalidity, and only authorizes suit to recover back the money if paid under protest. Here the validity of the tax of Virginia is not assailed. The only question is: shall the officer of the State be required to receive in payment of the tax what she by her contract declared he should receive?

The case of *Tenn.* v. *Sneed*, 96 U. S., 69 [XXIV., 610], is cited as giving support to the decision in this case. I do not think that it gives it any support whatever. It does not sustain the doctrine that a State may abolish the right of *mandamus* to which a creditor at the time of the contract was entitled, as a mode of specifically enforcing it. The facts of the case are these: in 1838 the Legislature of Tennessee passed a law, with respect to the bills and notes of the Bank of Tennessee, declaring that "The bills and notes of the said corporation, originally made payable or which shall have become payable on demand in gold or silver coin, shall be receivable at the Treasury, and by all tax collectors and other public officers, in all payments for taxes or other moneys due the State."

The Supreme Court of the State decided that a proceeding by *mandamus* against an officer of the State to enforce the receipt of these bills for taxes was virtually a suit against the State, and could not be maintained prior to 1855, when an Act was passed allowing suits to be brought against the State under the same rules [800] and regulations that govern actions between private parties. In 1865 this Act was repealed. The creditor, when the contract was made acquired, therefore, no right to the writ of *mandamus*, for it was not then an existing remedy, and so *Mr. Justice* Hunt, in delivering the opinion of the court, said: "The question discussed by *Mr. Justice* Swayne in *Walker* v. *Whitehead*, 16 Wall., 314 [83 U. S., XXI., 357], of the preservation of the laws in existence at the time of the making of the contract, is not before us. The claim is of a subsequent injury to the contract." And the court, after referring to the numerous cases of a change of remedies, says: "The rule seems to be that in modes of proceeding and of forms to enforce the contract, the Legislature has the control and may enlarge, limit or alter them, provided that it does not deny a remedy, or so embarrass it with restrictions and conditions as seriously to impair the value of the right."

Here the original remedy possessed by the coupon holder is abolished, and that which is given as a substitute is so embarrassed with conditions as to destroy the value of the contract.

In the case of *La.* v. *Pilsbury*, which was before us at the last Term, the Legislature of that State had passed a law prohibiting its courts from issuing a *mandamus* to compel the levy of a tax for the payment of bonds other than those issued under what was known as the premium bond plan, thus cutting off the means of enforcing certain bonds held by the relator, and this court unanimously held that "The inhibition upon the courts of the State to issue a *mandamus* for the levy of a tax for the payment of interest or principal of any bonds, except those issued under the premium bond plan, was a clear impairment of the means for the enforcement of the contract with the holders of the consolidated bonds." "When the contract was made," said the court, "the writ was the usual and the only effective means to compel the city authorities to do their duty in the premises in case of their failure to provide in other ways the required funds. There was no other complete and adequate remedy. The only ground on which a change of remedy, existing when a contract was made, is permissible without impairment of the contract, is that a new and adequate and efficacious remedy be substituted for that which is superseded."

That there is any adequate and efficacious [801] remedy substituted for the one in existence when the Funding Act was adopted, cannot, it seems to me, be seriously affirmed. The remedy originally existing was effective. No officer could refuse to receive the coupon without subjecting himself to personal liability. After a tender, no valid sale could be made for the taxes. And the creditor could invoke the compulsory process of the courts to secure a specific performance. Now all is changed. A law which practically destroys the value of the coupons is sustained. The officer is not bound to receive it, in the sense that he cannot be compelled to take it. He can enforce the payment of taxes in money; he can sell property, if necessary, to collect them; he can wholly ignore the coupon unless the holder should foolishly consent to incur double the amount in costs to establish by a jury trial its genuineness and legal receivability for taxes.

I find myself bewildered by the opinion of the majority of the court. I confess that I cannot comprehend it, so foreign does it appear to be from what I have heretofore supposed to be established and settled law. And I fear that it will be appealed to as an excuse, if not justification, for legislation amounting practically to the repudiation of the obligations of States; and of their subordinate municipalities, their cities and counties. It will only be necessary to insert in their statutes a false recital of the existence of forged and spurious bonds and coupons, as a plausible pretext for such legislation, and their schemes of plunder will be accomplished. No greater calamity could, in my judgment, befall the country than the general adoption of the doctrine that it is not a constitutional impairment of the obligation of contracts, to embarrass their enforcement with onerous and destructive conditions, and thus to evade the performance of them.

I am of opinion that the judgment of the Court of Appeals of Virginia should be reversed,

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and the cause remanded with instructions to award the *mandamus* prayed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Harlan:**

I understand my brethren of the majority, in the opinion read by the *Chief Justice*, to declare:

That the bonds and coupons issued by Virginia, under the Funding Act of March 30, 1871, [802] constitute contracts within the meaning of that clause of the Federal Constitution which forbids a State from passing any law impairing the obligation of contracts;

That the holder of a coupon, so issued, against whom state taxes are assessed, is entitled under his contract to have it applied in payment of them, when it is offered for that purpose;

That the Act of Jan. 14, 1882, in so far as it prevents the tax collector from receiving it, when so offered for any purposes except that of identification and verification, is in conflict with the Federal Constitution and, therefore, void;

That, as a general rule, the laws applicable to the case, in force at the time and place of making a contract, including those which affect its validity, construction, discharge and *enforcement* enter into and form a part of the contract itself; and that while the State may alter or change existing remedies, it may not make such alterations and changes in the forms of action or the modes of proceeding as will impair substantial rights, or leave the party without an adequate and efficacious remedy for their enforcement;

I understand them, also, to re-affirm *Bronson* v. *Kinzie*, 1 How., 311, where, among other things, this court, speaking by *Chief Justice* Taney, said: "It is difficult, perhaps, to draw a line that would be applicable in all cases, between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference, between a retrospective law declaring a particular contract or class of contracts to be abrogated and void and one which took away all remedy to enforce them, or incumbered it with conditions that rendered it useless or impracticable to pursue it." P. 317.

I do not understand the court to throw any doubt upon, or in any degree to qualify the de- [803] cision in *N. J.* v. *Wilson*, 7 Cranch, 164, 166, where it is declared that the contract clause of the Constitution "Extends to contracts to which a State is a party, as well as to contracts between individuals;" or in *Bank* v. *Billings*, 4 Pet., 514, 560, where this court, speaking by *Chief Justice* Marshall, said that it had been "Settled that a contract entered into between a State and an individual is as fully protected by the 10th section of the 1st article of the Constitution, as a contract between two individuals;" or in *Green* v. *Biddle*, 8 Wheat., 1, 92, where it was said, through *Mr. Justice* Washington, "That the Constitution of the United States embraces all contracts, executed or executory, whether between individuals or between a State and individuals; and that a State has no more power to impair an obligation into which she herself has entered than she can the contracts of individuals;" or in *Woodruff* v. *Trapnall*, 10 How., 190, 207, where, speaking by *Mr. Justice* McLean, the court declared that "A State can no more impair, by legislation, the obligation of its own contracts, than it can impair the obligation of the contracts of individuals;" or in *Wolff* v. *New Orleans*, 103 U. S., 358, 367 [XXVI., 395, 399], where, speaking by *Mr. Justice* Field, this court unanimously held "That the prohibition of the Constitution, against the passage of laws impairing the obligation of contracts, applies to the contracts of States and to those of its agents under its authority, as well as to contracts between individuals."

These propositions meet my hearty approval, as well because they rest upon a sound interpretation of the Constitution, as because they have been long established by the decisions of this court. But the difficulty I have, is to reconcile the judgment in this case with these admitted propositions and, therefore, I am, with my brother Field, constrained to dissent from so much of the opinion as maintains that the remedy provided by the Act of Jan. 14, 1882, is adequate and efficacious for the protection and enforcement of the rights of the holders of the bonds and coupons, and substantially equivalent to that given when they were issued. On the contrary, the Act, especially as subsequently modified, is, I take leave to say, a palpable and flagrant impairment of the obligation of the contract of Virginia and, consequently, is unconstitutional and void. If it be upheld in its application to the bonds and coupons issued un- [804] der the Funding Act, it is difficult to perceive that the contract clause of the Constitution is of the slightest practical value for the preservation of the rights of parties dealing with a State. Indeed, the Act, in its necessary operation, as directly and effectually impairs the commercial value of the bonds and the taxpaying power of the coupons thereunto annexed, as would a statute which, in terms, repudiated them and forbade the receipt of the coupons, under any circumstances, for taxes or demands due to the Commonwealth.

What were the rights of the bondholder under the Funding Act, and other laws of Virginia in force when it was passed? This inquiry is fundamental, since those rights are entitled to judicial protection, either by the remedies existing when they accrued or by such, if any, subsequently given, as may be adequate and efficacious to that end. Under the contract, Antoni was entitled, as all agree, to have his coupon received, when offered, in payment of his taxes. If, when so offered, it was refused, those laws provided him with the remedy of a *mandamus* from the Supreme Court of Appeals to compel the collector to accept it and cancel the taxes. This is conceded by my brethren of the majority, and no one claims that there was then any other remedy for the direct enforcement of the contract. And that remedy, it cannot be denied, was of value, since the taxes, until paid, constituted an incumbrance upon the taxpayer's property which he could not prudently overlook, and which he was entitled to have removed. It should be observed, in this connection, that section 2 of article 4 of the Con-

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stitution of Virginia, adopted in 1870, gave, in express terms, original jurisdiction to that court in cases of *mandamus*. Such were his contract rights under the Act of 1871, and such was the remedy then given for their enforcement.

I proceed to inquire whether those rights have been impaired by the Act of Jan. 14, 1882. The 1st section declares that the officer to whom coupons, issued under the Act of 1871, are tendered in payment of taxes, debts or demands due the State, "shall receive the same for the purpose of identification and verification." The 2d section provides that he shall, at the same time, require the taxpayer to pay his taxes in coin, legal tender notes or national bank-bills and, upon [805] such payment, give him a receipt for the same; and, in case of a refusal so to pay, the officer is directed to collect the taxes as all other delinquent taxes are collected, that is, by levy and distraint.

It may be observed here that when the taxpayer elects to stand upon the terms of his contract, and refuses to pay his taxes in coin, legal tender notes, or bank-bills, the Act, curiously enough, does not direct the officer to return the coupons so tendered, but requires him to deliver them to the judge of the county court of the county or the hustings court of the city in which such taxes, debts or demands are payable. Thereupon the taxpayer is at liberty to file his petition in said county court against the Commonwealth, and have a jury impaneled to try whether the coupons are "genuine, legal coupons, which are legally receivable for taxes, debts and demands," with right of appeal by either party to the Circuit Court and the Court of Appeals. "If it be finally decided in favor of the petitioner that the coupons tendered by him are genuine, legal coupons, which are legally receivable for taxes, and so forth, then the judgment of the court shall be certified to the treasurer, who, upon the receipt thereof, shall receive said coupons for taxes, and shall refund the money, before then paid for his taxes by the taxpayer, out of the first money in the treasury, in preference to all other claims."

The alteration made by the Act of Jan. 14, 1882, of the remedy by *mandamus* is this: if a *mandamus* is applied for to any court of the Commonwealth, the collector shall make return "That he is ready to receive said coupons in payment of such taxes, debts and demands as soon as they have been legally ascertained to be genuine, and the coupons which, by law, are actually receivable." Upon such return, the court shall require the taxpayer to pay his taxes to the proper officer, which being done, the taxpayer must file his coupons in court, which is directed to forward them to the county court of the county or the hustings court of the city where the taxes are payable, when an issue is framed, upon the trial of which the officer representing the State must require proof of the genuineness and legality of the coupons tend- [806] ered. A right of appeal is given to the Circuit Court and the Supreme Court of Appeals. If the petitioner finally succeeds, then the court is required to issue a *mandamus* for the receipt of the coupons for the taxes assessed. Thereupon the Treasurer of the Commonwealth must refund to the taxpayer the amount theretofore paid by him out of any money in the Treasury, in preference to all other claims. The Act of April 7, 1882, provides that no writ of *mandamus* shall issue from the Supreme Court of Appeals "In any case of the collection or attempt to collect revenue or compel the collecting officers to receive anything in payment of taxes other than as provided in chapter 41, Acts of Assembly, approved January 26, 1882, or in any case arising out of the collection of revenue in which the applicant for the writ of process has any other remedy adequate for the protection and enforcement of his individual right, claim and demand, if just."

This court waives any determination of the question whether the Act of April 7, 1882, repeals so much of that of Jan. 14, 1882, as relates to *mandamus*. But, referring to the remedy given by the 1st, 2d and 3d sections of the latter Act, it holds that there is no substantial difference between the remedy given by those sections and the remedy given by *mandamus* in the same Act; further, which is vital in this case, that the obligation of the contract is not impaired by the changes made, by the Act of Jan. 14, 1882, in the remedies for its enforcement, in case the collector refuses to accept, in payment of taxes, coupons, when offered for that purpose.

Here is the radical difference between the majority of my brethren and myself. To my mind, I say it with all respect for them, it is so entirely clear that the change in the remedies has impaired both the obligation and the value of the contract, that I almost despair of making it clearer by argument or illustration.

It is conceded that, under the contract, the taxpayer is entitled to have his coupon received for his taxes when tendered, while under the Act of Jan. 14, 1882, the collector is forbidden to so receive it; and the taxpayer, in order to protect his property against levy or distraint and relieve it from the incumbrance created by the assessment of taxes, must pay them in money, [807] and then, if he wishes to get it back, prove to the satisfaction of twelve jurymen the genuineness and legal receivability of his coupons.

Under the contract and the laws in force when it was made, the taxpayer is entitled, in the first instance, to enforce the receipt of his coupons for taxes by *mandamus*, the sole remedy then given to effect that result; while under the subsequent legislation he is denied the right to that writ until he first pays his taxes in money and then proves to the satisfaction of twelve jurymen that they are genuine coupons and legally receivable for taxes.

Under the contract and the laws in force when it was made, the collector was not bound to resist an application for a *mandamus*, and it is not to be presumed that he would do so unless he doubted the genuineness of the coupon tendered in payment of taxes. If, however, he did so, he became liable to pay costs when the taxpayer succeeded; while, under the Act of Jan. 14, 1882, all discretion is taken from the collector and, without liability to pay costs in any contingency, he is required, although he may know the coupon to be genuine and legally receivable for taxes, to decline receiving it until the taxpayer, having first paid his taxes in money, shall, to the satisfaction of twelve jurymen, prove it to be genuine.

Let me further illustrate some of these propositions: suppose the taxpayer holds a bond for

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$100 issued under the Act of 1871. It has thirty-four years to run, and the interest, payable semi-annually for the whole period at the rate of six per cent per annum, is evidenced by sixty-eight coupons of three dollars each. Under the laws in force when the contract was made (a *mandamus* to compel the receipt of the first coupon, having established its genuineness and its receivability for taxes), the collector and the Commonwealth would be estopped from raising any such question as to the remaining coupons attached to the same bond. But under the Act of Jan. 14, 1882, the collector is required, as to all coupons presented, although known to be genuine, to collect money for the taxes for which they are tendered; and that money is paid into the Treasury of the Commonwealth, not to be returned unless the taxpayer, upon every presentation of coupons for taxes, goes [808] through the jury trial prescribed by that Act, obtains a verdict establishing their genuineness and legal receivability for taxes and, in the event of an appeal, secures an affirmance of the judgment in his favor. The verdict and judgment as to one coupon do not, under that Act, establish the genuineness of other coupons of the same bond. Thus it is demonstrably clear that the taxpayer, before he can enforce the receipt of the entire sixty-eight coupons of one bond for $100, may be required to have at least as many jury trials, covering precisely the same issues, as there may be occasions to use coupons in payment of taxes. Certainly, the taxpayer, if not an attorney, cannot safely go before the jury without an attorney to represent him. It is, therefore, almost absolutely certain that his attorney's fee and the cost for each jury trial will be several times greater than the amount of the coupons involved. The result, then, is that he will lose more by presenting his coupons in payment of his taxes than by making an absolute gift of them to the Commonwealth.

And the remedy thus given by the statutes, passed after the contract was made, for the enforcement of the taxpayer's admitted right to have his coupon received for taxes, when offered, is pronounced to be adequate and efficacious, and not an impairment of the substantial rights given by the contract. My brethren, distinctly admitting that the legislation of 1882 is in hostility to the State's creditors and has impaired the commercial value both of the bonds and their coupons, in effect and by a refinement of reasoning which I am unable to comprehend, hold that such legislation does not burden the proceedings for the enforcement of the contract with any new conditions or restrictions inconsistent with or impairing its obligation. I cannot assent to such conclusion, believing, as I do, not only that it is in direct conflict with every adjudged case cited, either by the court or by my brother Field, but that the new remedy is adequate and efficacious, not for the preservation and enforcement, but for the destruction, of the contract. The holders of the bonds and coupons are placed by the legislation of 1882 in a position where it is useless and impracticable to pursue the remedies thereby given. To my mind this is so perfectly apparent that I should have deemed it impossible that [809] any different view could be entertained. It should be remembered that the court places its decision upon the ground that the change in the remedy has not, in legal effect, impaired the obligation of the contract, and not upon the ground that this suit is, within the meaning of the Federal Constitution, a suit against the State. Nor could it be placed upon the latter ground without overturning the settled doctrines of this court. *Davis* v. *Gray*, 16 Wall., 203 [83 U.S., XXI., 447]; *Osborn* v. *Bank*, 9 Wheat., 738; *Board of Liquidation* v. *McComb*, 92 U. S., 531 [XXIII., 623]. It is a case in which a plain official duty, requiring no exercise of discretion, is to be performed, and where performance in the mode stipulated by the contract is refused. In such cases, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance. *Board of Liquidation* v. *McComb*, *supra*. The Acts of 1882, in their application to the bonds issued under that of 1871, are unconstitutional and void, because they impair the obligation of the contract between the parties. The way is, therefore, clear for the court to apply the remedy allowed by the statute when the contract was made. That remedy is, in law, unaffected by subsequent unconstitutional legislation. The defendant cannot plead such legislation as an excuse for the non-performance of a plain official duty, requiring no exercise of discretion, because, as held in *Board of Liquidation* v. *McComb*, *supra*, in accordance with settled principles, an unconstitutional law will be treated by the courts as null and void; and if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, that will not prevent a *mandamus* from being issued, or an injunction being granted when that is necessary to prevent threatened injury.

One word in this connection about *Tennessee* v. *Sneed*, 96 U. S., 69 [XXIV., 610], to which the court refers as authority for the present decision. In the brief of the Attorney-General of Virginia the names of the Justices who participated in that decision are given, and mine is placed among the number. This is an error into which counsel naturally fell by reason of the fact that there are cases in the same volume preceding *Tennessee* v. *Sneed*, and cases in the previous volume of our reports, in the decision of which I participated. In fact, however, that case was determined, and the decision therein [810] announced, before I became a member of this court.

Touching *Tennessee* v. *Sneed*, I may say that it does not militate against the views I have expressed. Upon the face of that decision it appears that this court, accepting as authority a decision of the Supreme Court of Tennessee, held that when the contract there in question was made, no remedy by *mandamus* was given against an officer of the State, charged with the collection of the revenue. And to show that the court did not have before it and did not decide any case of the impairment of the obligation of a contract through the withdrawal of existing remedies by subsequent legislation, I quote this language from the opinion of *Mr. Justice* Hunt, speaking for the court: "The question discussed by *Mr. Justice* Swayne, in *Walker* v. *Whitehead*, 16 Wall., 314 [83 U. S., XXI., 357], of the preservation of the laws in existence at the time of the making of the contract, is not before us. The claim is of a subsequent injury to the contract."

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Without further elaboration, and referring to the authorities cited in the dissenting opinion of my brother Field, I content myself with saying that the principles of law applicable to the present cases are stated in *McCracken* v. *Hayward*, 2 How., 608, 612, 613, where this court, speaking by *Mr. Justice* Baldwin, said: "The obligation of a contract consists in its binding force on the party who makes it. This depends upon the laws in existence when it is made. These are necessarily referred to in all contracts and form a part of them, as the measure of the obligations to perform them by the one party and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other; hence, any law which in its operation amounts to a denial or an obstruction of the rights accruing by a contract, [811] though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution. * * * The obligation of the contract between the parties in this case was to perform the promises and undertakings contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit and obtain judgment, to take out and prosecute an execution against the defendant till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws giving these rights were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions."

Mr. Justice Story, in his Commentaries on the Constitution, Vol. II. p. 245, says that any deviation from the terms of a contract, by postponing or accelerating the performance it prescribes, or imposing conditions not expressed in the contract, or dispensing with the performance of those which are a part of the contract, impairs its obligation. And *Judge* Cooley, in his treatise on Constitutional Limitations, summarizes, as I think correctly, the doctrines of numerous adjudged cases in this and other courts, when he says that "Where a statute does not leave a party a substantial remedy, according to the course of justice as it existed at the time the contract was made, but shows upon its face an intention to clog, hamper or embarrass the proceedings to enforce the remedy so as to destroy it entirely, and thus impair the contract, so far as it is in the power of the Legislature to do it, such statute cannot be regarded as a mere regulation of the remedy, and is void" (p. 289); language strikingly applicable to the legislation of Virginia.

By an Act passed by the Legislature of Virginia on the 7th of March, 1872, collectors of taxes were required to accept, in payment of taxes, nothing but gold and silver coin, United States treasury notes and notes of national banks. But the Supreme Court of Appeals of that Commonwealth pronounced it to be unconstitutional as applied to the holders of bonds and coupons issued under the Funding Act of 1871. 22 Gratt., 833; 24 Id. 169; 30 Id. 137. Other statutes were subsequently passed plainly having for their object the destruction of the contracts made under and in pursuance of the Funding Act of 1871. The constitutional validity of that legislation was involved in *Hartman* v. *Greenhow*, [812] 102 U. S., 672 [XXVI., 271]. This court there, with only one dissenting voice, sustained the right of taxpayers, holding coupons issued under the Act of 1871 to have them received in payment of taxes. Finally came the enactments of 1882, which have so changed the remedies existing when bonds were issued under the Act of 1871 that taxpayers holding coupons of such bonds cannot use them in payment of taxes without expending more money to enforce a compliance with their contract than the coupons are worth.

I cannot agree that the courts of the Union are powerless against state legislation which is so manifestly designed to destroy contract rights protected by the Constitution of the United States.

Without stopping to speculate upon the disastrous consequences which would result both to the business interests and to the honor of the country if all the States should enact statutes similar to those passed by Virginia, I sum up what has been so imperfectly said by me: if, as is conceded, Antoni is entitled by the contract, to have his coupon received in payment of taxes, when offered for that purpose; and if, as is also conceded in the opinion of the majority, he was entitled, by the laws in force when the contract was made, to the remedy of *mandamus* to compel the tax collector to receive his coupons and discharge *pro tanto* his taxes, it is clear that the subsequent statute does impair the obligation of the contract, by imposing new and burdensome conditions, which not only prohibit the collector from receiving coupons in payment of taxes when offered, but require the taxpayer to pay his taxes in money, not to be returned to him unless, upon the occasion of each tender of coupons, he submits, without the possibility of recovering his costs of suit, to a jury trial and proves to the satisfaction of twelve jurymen that the coupons tendered are genuine and legally receivable for taxes.

Upon the grounds stated, I dissent from the judgment.

Cited—114 U. S., 278, 280, 298 299, 340.

NEW YORK GUARANTY AND INDEMNITY COMPANY ET AL., *Appts.*, *v.* MEMPHIS WATER COMPANY, TAXING DISTRICT OF SHELBY COUNTY, TENNESSEE, Substituted for the CITY OF MEMPHIS, ET AL.

(See S. C., 17 Otto, 205-215.)

Assignee of chose in action—action by equity—suit at law.

*1. The rule that an assignee of a chose in action, or any other *cestui que trust*, cannot, merely because

*Head notes by *Mr. Justice* BRADLEY.

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his interest is an equitable one, proceed in a court of equity for the recovery of the demand, enforced, and the decision in *Hayward* v. *Andrews*, affirmed.

2. Certain bondholders, whose bonds with others were secured by a common mortgage given by a corporation, filed a bill to recover certain moneys alleged to be due on a contract made by the City of Memphis with the mortgagor, which contract was assigned in the mortgage as part of the security for the bonds; held, that as the demand against the City was cognizable at law in the name of the mortgagor, and no special circumstances being shown for a resort to equity, the bill should be dismissed.

3. The United States Courts especially, in view of the Act of Congress declaring that suits in equity shall not be sustained where plain, adequate and complete remedy may be had at law, should enforce the rule above stated.

[No. 160.]

Submitted Jan. 24, 1883. Decided Mar. 12, 1883.

APPEAL from the Circuit Court of the United States for the Western District of Tennessee.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **Wm. M. Randolph** and *Fillmore Beall*, for appellants.

Messrs. **J. B. Heiskell** and *C. W. Heiskell* for the Taxing District, appellee.

[206] *Mr. Justice* **Bradley** delivered the opinion of the court:

This case was commenced by a bill in equity filed by the New York Guaranty and Indemnity Company and others, holders of bonds, of the Memphis Water Company, against said Water Company, the City of Memphis, the trustees of a mortgage given to secure said bonds, and certain others of the bondholders and persons interested. The principal object of the bill was to have declared valid a certain contract made between the city and the Water Company, and to compel the city to comply with its terms, in order that the moneys alleged to be due thereon from the city might be applied to the payment of the bonds held by the complainants and others, the said contract being included in the mortgage. There was also a prayer for a sale of all the property and privileges of the Water Company under the mortgage, and an alternative prayer that the said contract might be canceled if the court should hold it to be void, and that then the city might be compelled to pay up a subscription it had made to the stock of the Water Company, or else that the stock might be canceled. The circumstances of the case on which the bill was founded may be briefly stated as follows:

The charter of the City of Memphis, amongst other things, conferred upon its corporate authorities the power of supplying the city with water for all purposes. But, on the 28th of February, 1870, an Act was passed chartering the Memphis Water Company, and giving to it the exclusive privilege of laying down water pipes and extending aqueducts and conductors through all or any of the streets, lanes and alleys of the city and of supplying to the inhabitants water, by public works. Under this charter, the Company commenced operations for laying pipes and erecting works without the acquiescence of the city authorities. The city undertook to carry out a counter scheme, which had been under consideration for several years. A litigation ensued, which resulted in June, 1871, in a judgment of the Supreme Court of Tennessee, confirming the Water Company's exclusive right, and enjoining the city from interfering therewith, the court holding in substance that the exclusive right given to the Water Company suspended that of the city for the period named in the former's charter. Thereupon, on the 18th of January, 1872, the city and the Water Com- [207] pany entered into a contract whereby, amongst other things, the Water Company agreed to erect waterworks in the city, including a certain number of street hydrants, of a peculiar construction, which the city agreed to hire for the purpose of extinguishing fires, and to pay therefor a certain annual rent; and it was mutually agreed that the city should receive one half of the Company's capital stock, amounting to $100,000.

Immediately after this contract was executed, the Water Company took measures to raise money by an issue of bonds to the amount of $600,000. For this purpose they executed a deed of trust in the nature of a mortgage to F. S. Davis, T. R. Farnsworth of Memphis, and J. L. Worth of New York, whereby they conveyed all their franchises, lands, wells, pumps, machinery, pipes and other property then held and thereafter to be acquired, and all the income which they might thereafter "Receive, acquire or become entitled to, including all sums of money which the party of the first part may become entitled to receive from the City of Memphis under and by virtue of a contract made and entered into between the said City of Memphis and the said party of the first part hereto on the 18th day of January, A. D. 1872." This deed was declared to be given for the purpose of securing the payment of six hundred bonds of $1,000 each, payable to bearer, with interest at seven per cent per annum semi-annually. In case default should be made in payment of principal or interest, power was given to the trustees to take possession of the property and books of the Company, and to collect all moneys due to it, including all sums due or coming due from the City of Memphis under the said contract, and to apply the same to the payment of unpaid interest on the bonds; and, if two successive installments of interest should be unpaid the principal to become due, and at the request of a majority in interest of the bondholders, the trustees should take possession, give notice and sell the entire property for cash and apply the same to the payment of principal and interest on the bonds.

The bonds provided for by this mortgage were duly issued and disposed of, and the complainants represent themselves as holding near- [208] ly all of them; those supposed to hold the remainder being made defendants.

It is alleged and not denied, that, on or prior to the first of April, 1873, the waterworks were completed and in operation, and the hydrants stipulated for in the contract of January, 1872, were used by the city. But the city refusing to pay the rent therefor, a suit was brought by the Water Company against the city to recover the first installment of rent due. After the pleadings were filed, the writ and declaration were amended by consent so as to be in the name of the Water Company, to the use of Davis, Farnsworth and Worth, trustees of the mortgage. The cause was tried in April, 1874, and a verdict was given and judgment rendered for the plaintiffs. The Supreme Court of Tennessee, on writ of error, reversed this judgment in De-

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cember, 1876, and awarded a new trial, the court holding that the contract between the city and the Water Company was *ultra vires* of the city and absolutely void.

In the meantime, in May, 1875, whilst the writ of error was pending, at the request of the requisite number of bondholders, the trustees of the mortgage took possession of the property of the Water Company, and proceeded to advertise the same for sale. Thereupon one T. W. Yardley, a holder of some of the bonds, filed a bill in equity in the Chancery Court of Shelby County, Tennessee, alleging that the New York Guaranty and Indemnity Company had obtained the bonds held by it for an usurious and corrupt consideration, which made it inequitable for that Company to hold the said bonds, or at least for the full amount thereof; and that said Company was urging the trustees to make said sale, which would at that time be at a sacrifice of the property; and he prayed for an injunction to prevent the sale, and for an investigation of the true amount due, if anything, to said New York Guaranty and Indemnity Company. All the bondholders as well as the Water Company itself, were made parties to the suit. A temporary injunction was granted. On the 25th of May, 1875, a decree was made by consent of all parties, that the property should be exposed for sale by the trustees on sixty days' notice, whenever the court in its discretion should so order, on the demand of the requisite number of bondholders, and that the mutual rights of the parties to a distribution of [209] the proceeds should be ascertained by the further litigation in the cause; the trustees in the meantime to keep possession of the property and account for all receipts and expenditures. An amendment to the bill was afterwards filed, which prayed an account to be taken of the amount justly due to all parties, and for a foreclosure and sale of the mortgaged premises. Answers and cross-bills were filed, nearly all the bondholders appearing, to assert their respective interests. In January, 1876, the cause was removed to the Circuit Court of the United States, and further proceedings took place in that court. On the 15th of May, 1876, the trustees, at their own request and with the assent of all parties, were by decree discharged from the custody of the waterworks, and the president and secretary of the Water Company were placed in charge; but it was stated in the decree that the property was not thereby restored to the Company itself, but to be operated in the interest of the bondholders, and at all times subject to the supervision and control of the court. In March, 1877, a few days after the filing of the bill in the present case, a decree was made dismissing Yardley's bill and the several cross-bills. An appeal was taken to this court, but was dismissed for want of prosecution. On the 2d of June, 1879, after the final decree was made in the present case, the circuit court, on the application of the New York Guaranty and Indemnity Company and others holding a majority of the bonds, made a decree in the Yardley suit, in pursuance of the consent decrees of May 28, 1875, and May 15, 1876, ordering a sale, by a commissioner appointed for that purpose, of all the franchises, rights, privileges, and property conveyed by the deed of mortgage, and authorizing the commissioner to receive the bonds and coupons secured by the mortgage, as cash in payment of the property, and foreclosing the equity of redemption. In answer to an application of the appellants here, it is now shown by the appellees that the said decree for sale was carried into effect in 1880, and the purchase money paid, and that in June of that year, pending this appeal, the circuit court made a decree confirming said sale.

In the present case, the principal defense set up by the City of Memphis, by answer and demurrer, was the alleged illegality of the contract, as adjudged by the Supreme Court of [210] Tennessee. It was also insisted that there was a complete and adequate remedy at law; that if there was any cause of action or complaint, it was vested in the Water Company and the trustees of the mortgage, all of whom reside in Tennessee; and that the complainants, if they have any claim, acquired it through the assignment of the Water Company, which, itself, could not maintain a suit in the United States Court. The circuit court concurred in the view taken by the Supreme Court of the State, and held that the contract on the part of the city was *ultra vires* and void, and dismissed the bill by a final decree rendered May 27, 1879. From this decree, the present appeal was taken.

The main object of the bill was to enforce the performance of the contract made between the City of Memphis and the Water Company; to have it declared binding, and to compel the city to pay the rents due under it, in order that they might be applied in satisfaction of the bonds held by the complainants and others. There was added, it is true, a prayer for the foreclosure and sale of the mortgaged property, and the application of the proceeds to the payment of the debts received. But this latter relief was already provided for by the consent decrees entered in the Yardley suit, which, as we are now informed, have been carried into effect at the instance of the appellants themselves pending this appeal. The important question to be considered is, whether the principal relief prayed for can be granted in this suit.

The contract sought to be enforced was not made with the complainants; nor has it ever been assigned to them. It was made with the Water Company, and its interest therein was assigned to the trustees of the mortgage, as part of the security for the payment of the bonds held by the complainants. Whatever interest the complainants have therein they derive as beneficiaries under the mortgage through the assignment which it contained. They stand in no better plight for the maintenance of the suit than the trustees would if they had brought it. There seems to be no reason, indeed, why the suit was not brought by the trustees. No allegation is made that they were even unwilling to bring it. The legal interest of the mortgage was in them, and they were the proper repre- [211] sentatives of all the bondholders, and the most proper persons to protect the trust in their hands. Indeed, they did bring a suit to enforce the contract. The action at law brought in the name of the Water Company against the city for the recovery of the first installment of rent was prosecuted for the use of the trustees; and this was really the proper mode of proceeding. Had the judgment in that case been a final one, the questions raised in this cause would have

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been *res judicata;* but a new trial being ordered it failed to have this effect. Thereupon, shortly after the decision of the Supreme Court was rendered, the principal bondholders, without, so far as appears, making any effort to have that suit further prosecuted, brought this suit in the Federal Court in their own names as complainants, and seek in this indirect way to accomplish the same purpose which was attempted to be obtained by the direct proceeding in the state court. It is a manifest attempt to evade the decision of the case by that court, which had full and adequate jurisdiction of the subject.

It was objected *in limine*, by the demurrer to the bill, that, as the complainants claim under the assignment of the contract made to the trustees, the circuit court had no jurisdiction, because the Water Company, with which the contract was made, and which made the assignment, is a citizen of Tennessee. This objection is insisted on here and would seem to be conclusive, if the citizenship of the parties were the only ground of jurisdiction of the circuit court. The Act of March 3, 1875 [18 Stat. at L., 470], declares that no circuit or district court shall have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made. This suit is founded on the contract between the city and the Water Company; the whole claim of the bondholders to any benefit therefrom depends upon the assignment thereof contained in the mortgage deed; and although the trustees of the mortgage are the real assignees, the bondholders as *cestuis que trust*, claim under them and stand on no higher plane, as regards the right to sue, than the trustees themselves. The complainants, however, insist that this suit is cognizable by the circuit court by reason of that [212] court's having judicial possession and control of the mortgaged property in the Yardley suit. The bill and cross-bills in that suit, it has been seen, were dismissed; but the parties regarded the consent decrees entered therein as giving the court authority to keep the property under its control, and to cause it to be sold. Therefore, so far as relates to the waterworks themselves, and all the property comprised in the mortgage which is susceptible of actual possession, the position of the appellants may be correct. But the claim against the city does not lie in possession, but in contract alone. The contract itself may be subject to sale as part of the mortgage assets; but the proceeds of the contract, the money alleged to be due from the city to the Water Company under it, has never been reduced to possession, and the City of Memphis denies its liability to pay it. In order to reduce to possession the money claimed to be due, and subject it to the control of the court, the ordinary mode of enforcing the contract must be resorted to. It may be that the circuit court had the power to direct such a proceeding to be had as ancillary to its administration of the mortgage fund; but it must be a proper proceeding, adapted to the nature of the demand. If a promissory note were included in the mortgage fund, and the parties liable upon it should refuse to pay it, the circuit court might probably order the trustees of the mortgage to bring an action on the note; but a bill in equity would hardly be considered a proper proceeding for enforcing its collection. The view we have taken with regard to the propriety of the proceeding in this case, for enforcing the contract against the city, renders it unnecessary to determine the question raised on the assignment of it by a citizen of Tennessee. Whether the contract is or is not a valid one and, if valid, what are the obligations of the city under it and the damages for the breach thereof, are pure questions of law, which the city cannot, under ordinary circumstances, be compelled to litigate with any other party than the Water Company or its legal assigns. If the parties having the legal interest refuse to sue, those having the beneficial interest will be authorized to use their names on giving them proper indemnity against costs. The city has a right to be confronted with those who have the legal interest in the contract, unless they ab- [213] solutely refuse the use of their names, or special circumstances exist which would prevent or greatly embarrass the prosecution of the suit. It does not lose its right to a trial at law by any pledges or assignments which the Water Company may make of its interest in the contract. Such pledges or assignments may create equitable rights in regard to that interest, as between the Water Company and the assignees; but the contract, so far as the city is concerned, remains a matter of legal cognizance. If a merchant should pledge his bills receivable as security for a loan, any equitable rights which arise between him and his pledgees may be adjudged in equity; but the makers and acceptors of the bills must be sued thereon at law. And so here: whilst the equities between the Water Company as mortgagor and the mortgagees, or those claiming under them, such as the right of redemption, etc., may be determined by a court of equity, the legal demand against the city on the contract is cognizable at law, and should be prosecuted in the ordinary courts of law, as was done in the action brought in the name of the Water Company against the city. Every question arising on the contract in this suit is determinable in an action at law, and was determined in the action referred to.

Recurring for a moment to the leading facts; how does the case really stand? The trustees of the mortgage, on default of the Water Company in payment of interest, took possession of its works, and carried them on. In performing this duty they found or supposed they had found that certain rents had accrued and were accruing from the city for the use of the hydrants, under the contract in question, which rents the city refused to pay. To establish the contract and recover these rents, their remedy was clear and adequate by an action at law in the name of the Water Company. They brought such an action and failed by the adverse decision of the Supreme Court of Tennessee. Then the bondholders, dissatisfied with this result, brought this suit in equity in the Federal Court for the purpose of raising the same questions anew. It is difficult to see how they acquired any right to transfer the controversy from a court of law to a court of equity. The fact that they have only a beneficial interest is not of itself sufficient. [214] Whether the legal interest in the contract remained in the Water Company or became vested in the trustees, an action at law could have been brought in the name of the party having it.

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There is no allegation in the bill that either of these parties were applied to, or that they refused to allow such an action to be brought in their names.

We have lately decided, after full consideration of the authorities, in the case of *Hayward* v. *Andrews*, 5 Morrison, Trans., 629 [*ante*, 271], that an assignee of a chose in action on which a complete and adequate remedy exists at law, cannot, merely because as such assignee his interest is an equitable one, bring a suit in equity for the recovery of the demand. He must bring an action at law in the name of the assignor to his own use. This is true of all legal demands standing in the name of a trustee, and held for the benefit of *cestuis que trust*. Besides the authorities cited in *Hayward* v. *Andrews*, reference may be made to Mitf. Pl., 123, 125; Willis, Eq. Pl., 435, *n. g; Adair* v. *Winchester*, 7 Gill & J., 114; *Moseley* v. *Bousb*, 4 Rand., 392; *Doggett* v. *Hart*, 5 Fla., 215; *Smiley* v. *Bell*, Mart. & Y. (Tenn.), 378; and the English and American *Notes* to *Ryall* v. *Rowles*, 2 White & Tudor, L. Cas., 1567, 1670, ed. 1877.

In view of the early enactment by Congress in the 16th section of the Judiciary Act, R. S., sec. 723, declaring "That suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law," the rule laid down in *Hayward* v. *Andrews* is entitled to special consideration from the courts of the United States. This enactment certainly means something; and if only declaratory of what was always the law, it must, at least, have been intended to emphasize the rule, and to impress it upon the attention of the courts.

We think that the present case clearly falls within the rule. The bill alleges no special circumstances which can properly take it out of its operation. The fact that there are many beneficiaries entitled to a distribution of the fund, is not sufficient for that purpose. All the property covered by the mortgage deed constitutes one [215] fund, and is to be brought together and administered as such by first discharging the expenses of the trust, and distributing the residue amongst the bondholders *pro rata*. There is no such division and separation of interests into distinct parcels as existed in the case of *Field* v. *Mayor of N. Y.*, reported in 6 N. Y., 179. The whole beneficiary interest is a unit, and is represented by the trustees of the mortgage; and the case presents no difficulty or embarrassment in the way of an action at law.

We think, therefore, that the bill could have been properly dismissed on this ground alone; and this renders it unnecessary for us to consider the other questions in the case.

The decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNION TRUST COMPANY of New York,
Appt.,
v.
E. E. SOUTHER & BROTHER.

(See S. C., 17 Otto, 591-595.)

Power of court to authorize receiver of railroad to pay debts—cases followed.

1. When a court of chancery is asked, by railroad mortgagees, to appoint a receiver of railroad property, pending proceedings for foreclosure, the court may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership, of outstanding debts for labor, supplies, equipment or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable.

2. The right to impose terms does not depend alone on whether current earnings have been used to pay the mortgage debt, principal or interest, instead of current expenses.

3. Fosdick v. Schall, XXV., and Miltenberger v. R. Co., *ante*, followed.

[No. 1152.]

Submitted Jan. 19, 1883. Decided Mar. 12, 1883.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

The history and facts of the case appear in the opinion of the court.

Messrs. **S. Corning Judd** and **W. F. Whitehouse**, for appellant.

Mr. **T. C. Mather**, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This appeal was taken because of a difference of opinion between the Circuit Judge and the District Judge holding the circuit court as to a matter decided, and the facts on which the questions certified depend may be stated as follows:

On the 7th of October, 1871, the Cairo and St. Louis Railroad Company mortgaged its property, franchises, tolls, incomes and profits to the Union Trust Company of New York, to secure an issue of bonds amounting in the aggregate to $2,500,000. Default was made in the [592] payment of interest falling due October 1, 1873, and semi-annually thereafter. On the 6th of December, 1877, the Trust Company filed its bill in the Circuit Court of the United States for the Southern District of Illinois to foreclose the mortgage. In the bill it is, among other things, averred that the Company is insolvent; "That many and large claims exist against said railroad company of the character known as floating debt; and that unless a receiver is appointed * * * great, irreparable damage to said bondholders will ensue, and the property will be liable to be greatly depreciated, and to be involved in useless litigation; and your orator and its bondholders will lose the benefit thereof as a security for the payment of said bonds." Upon this allegation, it was prayed that the "Court will appoint a receiver according to the course and practice of this court, with the usual powers of receivers in like cases."

As soon as the bill was filed, a receiver was appointed and, in making the appointment, the court, of its own motion, entered the following order:

"And said receiver, after paying the expenses of operating, maintaining and repairing said railroad and property, and after making such other payments herein authorized as are or may be necessary for the conduct of such receivership, shall pay and discharge all amounts due and owing by said railroad company for labor or supplies, that may have accrued in the operation and maintenance of such railroad property within six months immediately preceding the rendition of this decree."

In 1876 the railroad company paid $3,000 to the beneficiaries under the mortgage on account

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of their expenses, to a much larger amount, in keeping an agency in the United States, and in connection with the forbearance which they had given the company in respect to overdue interest. Previous to the appointment of the receiver, none of the current income of the company, except this single amount, had been paid to the bondholders.

When the order in respect to debts for labor and supplies was entered, the court instituted no special inquiries in respect to the use which had been made of the income prior to that time.

[593] The receiver thus appointed took possession of the property and operated the road until the end of the year 1881, and after a sale had been perfected under a decree of foreclosure. During the receivership, the net earnings of the road, after paying all operating expenses, exceeded $200,000. The whole amount was, however, under the orders of the court, with the consent of the Trust Company, from time to time, expended "In purchasing additional grounds, rolling stock, etc., and in making permanent repairs and improvements upon said railroad property, instead of discharging therewith the claims of (against) the railroad company for labor, materials and supplies" during the six months immediately preceding the appointment of the receiver, and when the property was finally sold, over $65,000 of these debts remained unpaid. Among them was one to E. E. Souther & Brother amounting to $532.14 for supplies. On the 9th of May, 1878, after the receiver got into possession of the road, Souther & Brother filed in the suit for foreclosure an intervening petition praying for the allowance of their claim and its payment. On the 16th of May, the claim was allowed and the receiver directed to pay it out of the net earnings "and before any improvements or ameliorations are made upon the property in his hands as receiver." On the 5th of June, both the Trust Company and the receiver filed motions to set aside this order. These motions remaining undisposed of, the road was sold under a decree of foreclosure in 1881, and brought only $4,000,000, when the amount due under the mortgage was $4,300,000 and some more. After the report of the sale was made and a deficiency appeared, the court, on the 8th of September, 1882, set aside the order for the payment of the debt to the interveners and allowed the Trust Company to answer. An answer was filed and proof taken which disclosed the foregoing facts. Upon the facts so established one of the questions which arose was, whether, under the circumstances, the court had the right to make an order directing the payment of the claim. The Circuit Judge was of the opinion that it had, and a decree was entered accordingly. From that decree this appeal was taken.

[594] It seems to us that the question certified is fully disposed of by the case of *Foedick* v. *Schall*, 99 U. S., 251 [XXV., 342], where it was said: "We have no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income, during the receivership, of outstanding debts for labor, supplies, equipment or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable." To this we adhere and, in our opinion, the right to impose terms does not depend alone on whether current earnings have been used to pay the mortgage debt, principal or interest, instead of current expenses. *Miltenberger* v. *R. Co.* [*ante*, 117], decided at the present Term. Many other circumstances may make such an order reasonable, and this case furnishes a striking example. The first default in the payment of interest under the mortgage occurred in October, 1873. The bondholders did not see fit to take possession, as they had the right to do, when the default had continued for six months. On the contrary, notwithstanding no payments of interest were made, they allowed the company to operate the road and incur obligations therefor until December, 1877. This was evidently in the hope that their condition would be improved by the delay; for to effect the forbearance they established an agency and incurred expenses to an amount much larger than the $3,000 re-imbursed by the company. Prior to the appointment of the receiver, the gross earnings do not appear to have been enough to pay expenses, but afterwards they yielded a very considerable surplus. There cannot be a doubt that it was for the interest of the bondholders that the road should be kept in operation, and as they did not see fit to take possession while it could only be operated at a loss, it was certainly not an abuse of judicial discretion for the court to order, as a condition of granting their application for a receiver, that debts incurred by the company in thus protecting the security should be paid from the income of the receivership, if, in consequence of an increase of revenue, it could be [595] done.

The income of the receivership, instead of being applied in accordance with the order to pay the debts for the supplies and labor, was used, with the consent and, it may fairly be inferred, at the request of the bondholders, to buy additional grounds, rolling stock, etc., and to make permanent improvements, thus adding to the value of the property; which was afterwards sold. There is nothing whatever to indicate that in thus using the income it was the intention of the court to revoke the original order. It seems to have been found, in the administration of the cause, that by using the income to add to the value of the fixed property the interests of all parties would be promoted, and so the fund, which in equity belonged to the labor and supply creditors, was for the time being diverted from them and put into improvements and additions, the proceeds of which are now in court. It is not to be presumed that this diversion would have been authorized if the value of the property added to and improved was not to be correspondingly increased. Clearly, therefore, on the face of the transaction, the fund in court represents in equity the income which belongs to the labor and supply creditors as well as the mortgage security, and there was no impropriety in appropriating it as far as necessary to pay the creditors specially provided for when the receiver was appointed. Such a practice, under proper circumstances, was approved in *Foedick* v. *Schall*, *ubi supra*, and seems to us eminently just.

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There were other questions certified in the case, but as we answer the one which has been particularly stated, in the affirmative, and nothing more is needed to sustain the decree, the others will not be considered further than has already been done incidentally.

The decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 596.

THE UNION TRUST COMPANY OF NEW YORK, *Appt.*, *v.* EDWARD FITZGERALD, No. 1151.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The facts and questions certified in this case are in all material respects like those in *Union Trust Co.* v. *Souther* [*ante*, 488], just decided. Without, therefore, answering the questions further than by reference to what has been said in that case, *we affirm the decree.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[596] UNION TRUST COMPANY of New York, *Appt.*,

v.

JOHN WALKER.

(See S. C., 17 Otto, 596.)

Assignee, rights of.

An assignee of a claim which the receiver of a railroad, pending the foreclosure, is ordered to pay, has the same right to payment as the original holder; the right passes with an assignment of the claim.

[No. 1150.]

Submitted Jan. 19, 1882. Decided Mar. 12, 1883.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

For the history and facts of the case, see the opinion of the court and the case of *Union Trust Co.* v. *Souther*, *ante*, 488.

Messrs. **S. Corning Judd** and **W. F. Whitehouse**, for appellant.

Mr. **Thomas C. Fletcher**, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This case differs from that of *Union Trust Co.* v. *Souther* [*ante*, 488], only in the fact that Walker, the present intervener and appellee, is the assignee by purchase from the original holders of the claims he seeks to have paid, and one of the questions certified is, whether, being an assignee and not an original holder, he is entitled to payment. We have no hesitation in answering this question in the affirmative. As was said in *Fosdick* v. *Schall*, 99 U. S., 253 [XXV., 342], these creditors are paid, not because they have in law a lien on the mortgaged property or the income, but because in equity the earnings of the Company constitute a fund for the payment of the expenses which their claims represent, before any income arises which ought to be applied to the discharge of the mortgage debt. Under such circumstances, it is a matter of no importance that the original creditor has parted with the claim. The right is one that attaches to the debt and not to the person of the original creditor. Consequently, the right passes with an assignment of the debt.

The decree is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 783.

THOMAS COCHRAN ET AL., Survivors, etc., *Plffs. in Errr.*, [61]

v.

AUGUSTUS SCHELL, Late Collector of Customs.

AUGUSTUS SCHELL, Late Collector of Customs, *Plff. in Errr.*,

v.

THOMAS COCHRAN AND WILLIAM BARBOUR, Survivors, etc.

(See S. C., "*Barber* v. *Schell*," 17 Otto, 617-624.)

Duty Act, construction of—meaning of words—collector's fee.

*1. By schedule D to the Act of July 30, 1846, 9 Stat. at L., 46, a duty of 25 per cent *ad valorem* was imposed on cotton laces, cotton insertings, and manufactures composed wholly of cotton, not otherwise provided for. By section 1 of the Act of March 3, 1857, 11 *Id.*, 192, the duties on the articles enumerated in schedules C and D of the Act of 1846 were fixed at 24 and 19 per cent, respectively, with such exceptions as are hereinafter made. By section 2 of the Act of 1857, "All manufactures composed wholly of cotton, which are bleached, printed, painted or dyed, and delaines," were transferred to schedule C; held, that laces and insertings composed wholly of cotton, and bleached or dyed, were dutiable at 24 per cent, under the Act of 1857.

2. The designations qualified by the word "cotton," in the Act of 1846, are designations of articles by special description, as contradistinguished from designations by a commercial name or a name of trade, and are designations of quality and material.

3. Under section 2 of the Act of March 2, 1799, 1 Stat. at L., 706, the following fees are not chargeable at the custom-house: a fee for putting on an invoice a stamp or certificate as to the presentation of the invoice; a fee for an oath to an entry or for a jurat to such oath; a fee for an order from the collector to the storekeeper to deliver examined packages.

[Nos. 1126, 1127.]

Motion to advance submitted Jan. 17, 1883. Granted Jan. 22, 1883. Argued Mar. 6, 7, 1883. Decided Mar. 19, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the opinion of the court.

Mr. **George Bliss**, for Cochrane *et al.*, plaintiffs.

Mr. **S. F. Phillips**, *Solicitor-Gen.*, for Schell, defendant.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit commenced in 1863, by the mem-

*Head notes by *Mr. Justice* BLATCHFORD.

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bers of the firm of S. Cochran & Co., against the Collector of the Port of New York. As tried in the circuit court it involved the recovery back of duties paid on cotton laces and cotton insertings imported from abroad in 1857, 1858, 1859, 1860 and 1861, and of fees paid at the custom-house. The laces and insertings were composed wholly of cotton, and were either bleached or dyed. The collector charged a duty on them of 24 per cent *ad valorem*, the importers claiming that the proper duty was 19 per cent *ad valorem*. At the trial the court instructed [618] the jury that the duty was correctly assessed and that the plaintiffs could not recover.

The question as to the fees involved four items. On the presentation of an invoice and an entry, the Collector, before he would receive them as Collector, impressed on each invoice, for the convenience and security of himself and the government, a stamp or certificate, certifying in the name of a deputy-collector that the invoice was presented on entry on such a day. On each entry, one of the plaintiffs' firm was required to make and subscribe before the Collector or his deputy the owner's or consignee's oath. For each of such stamps the Collector exacted twenty cents, and for each of such oaths twenty cents. He also exacted a fee of twenty cents for each permit to land the merchandise embraced in each entry on which the duties had been paid or secured, such permit being signed by the Collector and the naval officer. Said three fees of twenty cents were paid with the duties, and otherwise no permit for the landing and delivery of the goods could be obtained. The permit to land covered all the goods embraced in the entry, but at least one package of each invoice and one package in every ten packages of each invoice, were, by order of the Collector, designated on each invoice and each entry and also on the permit, to be sent, and were sent, to the public store for examination and appraisement; and, after they had been examined and appraised and reported on, an order was required by the plaintiffs' firm, signed by the Collector alone, to the storekeeper, to deliver such examined packages to the plaintiffs' firm. For every such order, without which the examined packages could not be obtained, the Collector exacted a fee of twenty cents. At the trial, the plaintiffs conceded that the fee for the permit was legal. The court directed a verdict for the plaintiffs for the amounts exacted for the other three fees, with interest, being $1,734.80, and after a judgment for the plaintiffs therefor, with costs, the plaintiffs sued out a writ of error based on their failure to recover the alleged excess of duty exacted on the laces and insertings, and the defendant sued out a writ of error based on the recovery for the three alleged illegal fees.

By schedule D of the Act of July 30, 1846, 9 Stat. at L., 46, a duty of twenty-five per cent *ad valorem* was imposed on cotton laces, cotton [619] insertings, cotton trimming laces, cotton laces and braids, and manufactures composed wholly of cotton, not otherwise provided for.

By section 1 of the Act of March 3, 1857, 11 Stat. at L., 192, it was enacted that after July 1, 1857, *ad valorem* duties should be imposed in lieu of those then imposed on imported goods, as follows: "Upon the articles enumerated in schedules A and B" of the tariff Act of 1846, a duty of thirty per centum, "And upon those enumerated in schedules C, D, E, F, G and H of said Act," the duties of twenty-four, nineteen, fifteen, twelve, eight and four per centum, respectively, "with such exceptions as are hereinafter made." The schedules above mentioned respectively imposed duties of one hundred, forty, thirty, twenty-five, twenty, fifteen, ten and five per centum.

Thus far cotton laces and cotton insertings, being in schedule D of the Act of 1846 at twenty-five per cent, were reduced by the Act of 1857, with the other articles in schedule D, to nineteen per cent. But section 2 of the Act of 1857 provided "That all manufactures composed wholly of cotton, which are bleached, printed, painted or dyed, and delaines, shall be transferred to schedule C." Under this provision, it would seem very plain that the goods in the present case were subject to a duty of twenty-four per cent, and not of nineteen per cent. If section 1 of the Act of 1857 had merely reduced from twenty-five per cent to nineteen per cent, the duty on the articles specially mentioned in schedule D of the Act of 1846, without exception, the duty on the goods in question would have been reduced to nineteen per cent. But the enactment was distinct that there should be excepted out of the reduction "all manufactures composed wholly of cotton, which are bleached, printed, painted or dyed, and delaines," and that they should go into schedule C, the twenty-four per cent schedule.

The contention for the plaintiffs is, that as cotton laces and cotton insertings were made dutiable by those names in the Act of 1846, they are not to be affected by the subsequent general provision as to manufactures composed wholly of cotton.

Schedule C of the Act of 1846 imposed a duty of thirty per cent on cotton cords, gimps and galloons, and on "manufactures of cotton * * * if embroidered or tamboured in the loom, or otherwise, by machinery, or with the needle, or other process." Schedule E imposed a duty [620] of twenty per cent on "Caps, gloves, leggins, mitts, socks, stockings, wove shirts and drawers, made on frames, composed wholly of cotton, worn by men, women and children," and on "velvet, in the piece, composed wholly of cotton." These provisions, and the one in schedule D as to cotton laces, etc., relate to goods made of cotton entirely. Those goods are all of them goods to which, as manufactures composed wholly of cotton, section 2 of the Act of 1857 applies, transferring them, when bleached, printed, painted or dyed, to the twenty-four per cent schedule, schedule C. The duty on them had been thirty, twenty-five and twenty per cent respectively. But for such transfer the new duty on those in schedules D and E would have been nineteen and fifteen. A new uniform rate of twenty-four was imposed, and while the thirty was reduced by six per cent, the twenty-five was reduced by only one, and the twenty was increased by four. This indicates an intention, in the Act of 1857, to impose, in general, on manufactures composed wholly of cotton, when bleached, printed, painted or dyed, a relatively higher duty as compared with other articles named in the Act of 1846.

The expression "manufactures composed wholly of cotton" is not found in the Act of

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1846. It is in that Act qualified by the words "not otherwise provided for." In the Act of 1857 the expression is "all manufactures composed wholly of cotton, which are bleached," etc. If the words "manufactures composed wholly of cotton," unqualified, and the words "cotton laces" and "cotton insertings," had all of them been found in the Act of 1846, as the general expression would not have embraced the specific terms in that Act, for dutiable purposes, though including them in general language, it would be reasonable to say that the general expression in a later Act would not include the specific terms, for dutiable purposes. But the fact that the general expression, as used in schedule D of the Act of 1846, is qualified by the words "not otherwise provided for," shows that there were manufactures composed wholly of cotton otherwise provided for; that is, in other items in that Act. Thus, besides the embroidered and tamboured manufactures of cotton provided for in schedule C of that Act there are cords, gimps, galloons, laces, insertings, trimming laces, laces and braids, each with the word "cotton" prefixed, indicating manufactures composed wholly of cotton; and there are also the articles composed wholly of cotton named in schedule E. The material "cotton" is the thing of special mark, as the sole material in the manufacture. In this view it cannot properly be said that these manufactured articles, manufactures of cotton composed wholly of cotton, designated in the Act of 1846 always by the epithet "cotton" applied to them, are not embraced, for dutiable purposes, in the terms "all manufactures composed wholly of cotton," in section 2 of the Act of 1857.

[621]

The designations qualified by the word "cotton," in the Act of 1846, are designations of articles by special description, as contradistinguished from designations by a commercial name or a name of trade. They are designations of quality and material. The articles referred to, named in schedules C, D and E of the Act of 1846, are all of them manufactures wholly of cotton; but under that Act they were not all subject to the same duty, and so that Act designates them substantially as manufactures wholly of cotton which are gimps at thirty per cent, manufactures wholly of cotton which are laces or insertings at twenty-five per cent, manufactures wholly of cotton which are stockings, made on frames and worn by human beings, at twenty per cent, and so on. But for the exceptions provided for by section 1 of the Act of 1857 the duties on those articles, if bleached, printed, painted or dyed, would have been reduced to twenty-four, nineteen and fifteen per cent respectively, but section 2 of that Act says, in substance, that manufactures wholly of cotton which are gimps or laces or insertings or stockings, and so on, shall, all of them, be subject to twenty-four per cent duty. This was the view applied by *Mr. Justice* Nelson, in *Reimer* v. *Schell*, 4 Blatchf., 328, in 1859, to colored cotton hosiery, under the provisions in question, and we think it a sound one. It was the view adopted by the circuit court in this case. There is no question of commercial designation. Hence, the cases cited and relied on by the importers, are not cases in their favor.

Homer v. *Collector*, 1 Wall., 486 [68 U. S., XVII., 688], in 1863, was a case in which *Mr. Justice* Nelson delivered the opinion of this court. It was a case under these same statutes. Almonds were dutiable, by that name, at forty per cent, in schedule B of the Act of 1846. Under the Act of 1857 the duty on the articles in said schedule B was reduced to and fixed at thirty per cent, and the collector exacted that duty on almonds. It was contended that as, by section 2 of the latter Act, "fruits, green, ripe or dried," were transferred to schedule G, and so made subject to only eight per cent duty, almonds were so transferred, as being "fruits, green, ripe or dried." An attempt was made, at the trial, to show that at the time the Act of 1857 was passed, almonds were fruit, green, ripe or dried, according to the commercial understanding of those terms in the markets of this country, and questions were certified to this court, on a division of opinion in the circuit court, as to the proper duty on almonds, and as to the admissibility of such evidence. It was contended, for the importer, that the term "dried fruits," in popular meaning, included almonds. The government claimed that the term "almonds" was a specific name and, therefore, commercial nomenclature had no application. This court held that inquiry as to whether, in a commercial sense, almonds were dried fruit, had nothing to do with the question, as a duty had been imposed on almonds, *eo nomine*, almost immemorially; and that, as almonds were charged specifically with a duty of forty per cent in the Act of 1846, and were not named as almonds in the changes in the Act of 1857, and full effect could be given to the term "fruit, dried," without including almonds in it, it followed that almonds were dutiable at thirty per cent. There is nothing in this decision that overrules that in *Reimer* v. *Schell*, or that aids the importers in the present case. The Act of 1846, in substance, mentions manufactures wholly of cotton which are laces or insertings, bleached or dyed, and section 2 of the Act of 1857 mentions them in naming manufactures composed wholly of cotton, bleached or dyed.

[622]

Nor does the case of *Reiche* v. *Smythe*, 13 Wall., 162 [80 U. S., XX., 566], as to birds, apply. That case was decided on the ground that the word "animals," in the Act of 1861 [12 Stat. at L., 193], did not include birds, and so could not include them in the Act of 1866 [14 Stat. at L., 48].

There is nothing in *Smythe* v. *Fiske*, 23 Wall., 374 [90 U. S., XXIII., 47], or in *Arthur* v. *Morrison*, 96 U. S., 108 [XXIV., 764], which applies to this case.

The case of *Movius* v. *Arthur*, 95 U. S., 144 [XXIV., 420], was decided on the same view as that of *Homer* v. *Collector*. Patent leather had been dutiable by that name in the Acts of 1861 and 1862. The Act of 1872 [17 Stat. at L., 230], imposed a less duty on skins dressed and finished, of all kinds. This court held that patent leather continued subject to the former duty, on the view that, although patent leather was a finished skin, something was done to it after it could be called a finished skin to make patent leather of it, and that it could not have been intended to include patent leather in the general designation of "finished skins."

[623]

In *Arthur* v. *Lahey*, 96 U. S., 112 [XXIV., 766], the subject of duty was laces, manufactures of silk, on which a duty of sixty per cent

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was exacted, under the Act of 1864 [13 Stat. at L., 210], as silk laces. It was contended that they were dutiable at thirty per cent as thread laces, under the Act of 1861 [12 Stat. at L., 190], as amended by the Act of 1862 [12 Stat. at L., 550]. The question being submitted to the jury whether they were commercially known as thread laces, although made of silk, it was found that they were, and the plaintiffs had a verdict. This court held that the question was one of commercial designation and that the prior specific designation of thread laces must prevail over the words silk laces, it appearing that there were thread laces of cotton and thread laces of silk, and articles commercially known as silk laces, the designation of "thread lace" depending on the mode of manufacture. The principle of that case, and of kindred cases, such as *Arthur* v. *Rheims*, 96 U. S., 143 [XXIV., 813], is, that the specific designation of an article by a commercial name will prevail over a general term in a later Act, and has no application to the present case, which is not, as to cotton laces and cotton insertings, one of designation by a commercial name.

The bill of exceptions in the present case states that previously to about 1879 there were no cotton laces printed or dyed, and that from 1850 to 1861 there were many goods composed wholly of cotton, and bleached, printed, painted, colored or dyed, such as calicoes (prints), lawns, handkerchiefs, velvets and velveteens, and cotton piece goods generally. If, when section 2 of the Act of 1857 [11 Stat. at L., 192], was enacted, the words "printed" and "painted" were not applicable to laces, it does not follow that the provision is to be limited to such cotton ar-
[624] ticles as were then printed or painted as well as bleached or dyed. It includes any article which, as then known, satisfied any one of the conditions.

We see no warrant for the view that the Act of 1857 applies only to piece goods.

It results from these views that the goods in question were subject to the duty imposed.

As to the three disputed fees, we are of opinion that they were none of them allowed by the law in force, section 2 of the Act of March 2, 1799, 1 Stat. at L., 706.

The stamp or certificate on the invoice was one for the convenience and security of the collector and the government, and was not an official certificate, in the sense of the statute. It was not an official document required by the merchant, nor was it given to him. It was a memorandum between officers in the custom-house, as a part of their system of checks and authentications.

The fee for the oath to the entry, as a fee for its administration, was not named in the statute. As a fee for the jurat to the oath, although the oath was required by the statute and its form was prescribed and it was to be taken before the collector, the jurat was not an official document required by the merchant or given to him.

The bill of exceptions states that the order to the storekeeper, to deliver examined packages, was an order required by the plaintiffs' firm from the Collector. But we do not think it was an official certificate or an official document required by the merchant, in the sense of the statute. The permit to land the goods having been issued and paid for, and the duties paid or secured, it was the duty of the officers of the customs to deliver the goods, when examined. The order to the storekeeper was a memorandum between officers. It was required by the merchant, in one sense, because, without it, according to the course of business, the storekeeper would not deliver the examined packages, but it was not an official document passing from the custom-house to the merchant.

The judgment of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

GEORGE W. HILL, *Plff. in Err.*, [631]

v.

GEORGE F. HARDING ET AL.

(See S. C., 17 Otto, 631-635.)

Action against bankrupt—effect of discharge.

*A state court, in which an action against a bankrupt upon a debt provable in bankruptcy is pending, must, on the bankrupt's application under section 5106 of the Revised Statutes, stay all proceedings to await the determination of the court in bankruptcy on the question of his discharge, unless unreasonable delay on his part in endeavoring to obtain his discharge is shown, or the court in bankruptcy gives leave to proceed to judgment for the purpose of ascertaining the amount due; even if an attachment has been made in the action more than four months before the commencement of the proceedings in bankruptcy, and has been dissolved by giving bond with sureties to pay the amount of the judgment to be recovered. And if the highest court of the State denies the application and renders final judgment for the plaintiff, the bankrupt, although he has since obtained his certificate of discharge, may sue out a writ of error from this court, and the assignee in bankruptcy may be heard here in support of the writ.

[No. 177.]

Submitted Mar. 7, 1883. Decided Mar. 19, 1883.

IN ERROR to the Supreme Court of the State of Illinois.

The history and facts of the case appear in the opinion of the court.

Mr. **George W. Brandt,** for plaintiff in error.

Messrs. **Adolph Moses,** *Wm. H. Barnum* and *C. E. Mayer*, for defendants in error.

Mr. Justice **Gray** delivered the opinion of the court:

The material facts, as appearing by the record of this case in the Supreme Court of Illinois, are as follows:

On the 16th of March, 1877, the original plaintiffs, in accordance with the statutes of Illinois, and upon the affidavit of one of them that the defendant was indebted to them in the sum of $8,264 for services as attorneys at law, and that he was a resident of Illinois, and was about fraudulently to conceal, assign or otherwise dispose of his property or effects so as to hinder or delay his creditors, sued out from the Circuit Court of Cook County a writ of attachment against him, upon which his real estate was attached. On the 28th of March, 1877, in accordance with those statutes, he dissolved the attachment by giving bond with sureties to pay to the plaintiffs, within ninety days after judgment,

*Head note by *Mr. Justice* GRAY.

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the amount of any judgment which might be rendered against him on a final trial in the suit. On the 12th of April, 1878, a verdict was returned for the plaintiffs in the sum of $3,500, and the defendant moved the court to set it aside and grant a new trial. On the 7th of May, [632] 1878, he filed in the cause a duly attested copy of an order, dated the first of May, 1878, adjudging him a bankrupt under the Bankrupt Act of the United States.

On the 11th of May, 1878, before judgment on the verdict, the defendant suggested the adjudication in bankruptcy, which was admitted, and applied to the state court, under section 5106 of the Revised Statutes, for a stay of proceedings to await the determination of the court in bankruptcy upon the question of his discharge. On the same day, the court denied this application, as well as the motion for a new trial, and rendered judgment against him on the verdict, and afterwards allowed a bill of exceptions, which stated the facts above recited. That judgment was affirmed by the Appellate Court for the First District of Illinois on the 19th of November, 1878, and by the Supreme Court of Illinois on the 18th of November, 1879. The opinion of the Supreme Court is reported in 93 Illinois, 77. On the 6th of January, 1880, the defendant sued out this writ of error.

At October Term 1880, of this court, the defendants in error moved to dismiss the writ of error, because at the time it was sued out the plaintiff in error had been discharged from the obligation of the debt to them; and the assignee in bankruptcy moved to substitute his name for that of the bankrupt as plaintiff in error. By the papers submitted with these motions, it appeared that the assignment in bankruptcy was made on the 17th of June, 1878, and a certificate of discharge granted to the bankrupt on the 15th of September, 1879. The court overruled both motions; but granted leave to the assignee to be heard by counsel at the argument on the merits, as to all matters affecting the estate of the bankrupt.

The record clearly shows that a privilege under section 5106 of the Revised Statutes was claimed by the original defendant, and was denied by the highest court of the State. There can, therefore, be no doubt of the authority of this court to revise the judgment.

The section in question is as follows: "No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall [633] have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge; *Provided*, There is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge; *and Provided, also*, That if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed."

The terms of this enactment are as broad and as peremptory as possible. "No creditor whose debt is provable shall be allowed to prosecute to final judgment" any suit thereon against the bankrupt; and such suit "shall, upon the application of the bankrupt, be stayed." This provision, like all laws of the United States made in pursuance of the Constitution, binds the courts of each State, as well as those of the Nation. Upon the application of the bankrupt to the court, state or national, in which the suit is pending, it is the duty of that court to stay the proceedings "to await the determination of the court in bankruptcy on the question of the discharge," unless there is unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, or unless, the amount of the debt being in dispute, the United States Court sitting in bankruptcy gives leave to proceed to judgment for the purpose of ascertaining that amount. If neither the bankrupt nor his assignee in bankruptcy applies for a stay of proceedings, the court may of course proceed to judgment. *Doe* v. *Childress*, 21 Wall., 642 [88 U. S., XXII., 549]; *Eyster* v. *Gaff*, 91 U. S., 521 [XXIII., 403]; *Norton* v. *Switzer*, 93 U. S., 355 [XXIII., 903].

The stay does not operate as a bar to the action, but only as a suspension of proceedings until the question of the bankrupt's discharge shall have been determined in the United States Court sitting in bankruptcy. After the determination of that question in that court, the court in which the suit is pending may proceed to such judgment as the circumstances of the case may require. If the discharge is refused, the plaintiff, upon establishing his claim, may obtain a general judgment. If the discharge is granted, the court in which the suit is pending may then determine whether the plaintiff is entitled to a special judgment for the purpose of enforcing an attachment made more than four months before the commencement of the proceedings in bankruptcy, or for the purpose of [634] charging sureties upon a bond given to dissolve such an attachment. But, so long as the question of the discharge in bankruptcy is undetermined, the suit cannot, against the objection of the bankrupt or of his assignee in bankruptcy, proceed for any purpose, except in one of two events, an unreasonable delay of the bankrupt in endeavoring to obtain his discharge, or an order of the court in bankruptcy granting leave to proceed for the single purpose of ascertaining the amount due.

The result required by the very words of the statute is confirmed by a consideration of the reasons upon which it rests. Its purpose is not merely to protect the bankrupt, in case he obtains a certificate of discharge, from having the original cause of action against him merged in a judgment, the right of action upon which might not be barred by the discharge; but to prevent him, so long as the question of his discharge is undetermined, from being harassed by suit upon any debt provable in bankruptcy, whether it would or would not be barred by a certificate of discharge, and whether the attachment or other security obtained in the suit would or would not be affected by the proceedings in bankruptcy; and also to afford to the assignee in bankruptcy, to whom all the property of the bankrupt has passed, opportunity to assume the defense of the suit, and to contest the existence and amount of the plaintiff's claim, and the validity of his attachment.

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This view, which is supported alike by the words and by the reason of the statute, is in accordance with the preponderance of decisions in the highest courts of the several States, and in the District Courts of the United States, as shown by the cases cited in argument.*

The plaintiffs' debt being provable in bankruptcy, no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge being shown, and the court in bankruptcy having granted no leave to proceed to [635] judgment for the purpose of ascertaining the amount due, the decision of the state court, denying the application, made by the bankrupt before judgment, for a stay of proceedings to await the determination of the question of his discharge, and rendering a general judgment against him, was erroneous, and he had the right to sue out and prosecute a writ of error to reverse it. The assignee in bankruptcy has also been permitted to be heard in support of the writ of error, because of his authority and duty to defend the estate of the bankrupt against claims and attachments which he believes to be invalid.

The result is that the judgment of the Supreme Court of Illinois must be reversed, and the case remanded to that court for further proceedings in conformity with this opinion.

The judgment of the state court being reversed for the reason that it denied the stay of proceedings to which the original defendant was entitled under the provision of the Bankrupt Act until the question of his discharge in bankruptcy should have been determined, there is no occasion to consider the question, which may perhaps depend upon the statutes or the practice of the State, whether it will be within the authority of the court in which the suit is pending, now that the defendant has obtained his discharge in bankruptcy, to render a special judgment in favor of the plaintiffs for the purpose of charging the sureties on the bond given to dissolve the attachment; or any other question which may hereafter arise upon the production, by the defendant, of his certificate of discharge, or upon the suggestion of the assignee in bankruptcy.

Judgment reversed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 596.

*Metcalf's Case, 2 Ben., 78; Rosenberg's Case, 3 Ben., 14; Penny v. Taylor, 10 Bk. Reg., 200; Whitney's Case, 18 Bk. Reg., 563; Ray v. Wight, 119 Mass., 426; Nat. Bk. v. Taylor, 120 Mass., 124; Towne v. Rice, 122 Mass., 67; Page v. Cole, 123 Mass., 98; Seavey v. Beckler, 128 Mass., 471; McKay v. Funk, 37 Iowa, 661; Bratton v. Anderson, 5 S. C., 504; Cohen v. Duncan, 64 Ga., 343.

E. S. JAFFRAY & COMPANY ET AL., *Appts.*,

v.

McGEHEE, SNOWDEN & VIOLETT, JAMES TORRANS, United States Marshal, ET AL.

(See S. C., 17 Otto, 361-365.)

Arkansas law—assignment.

1. The provisions of the Arkansas Statute respecting the sale of property assigned for the benefit of creditors, are mandatory and not directory.

2. An assignment which vests the assignee with a discretion contrary to the mandates of the statute and, in effect, authorises him to sell the property conveyed thereby, in a method not permitted by the statute, is void.

[No. 176.]

Submitted Mar. 7, 1883. Decided Mar. 19, 1883.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas. The history and facts appear in the

Statement of the case by *Mr. Justice* **Woods**:

The Statutes of Arkansas contain the following provisions:

"Section 385. In all cases in which any person shall make an assignment of any property, whether real, personal, or choses in action, for the payment of debts, before the assignee thereof shall be entitled to take possession, sell or in any way manage or control any property so assigned, he shall be required to file in the office of the clerk of the court exercising probate jurisdiction, a full and complete inventory and description of such property; and also make and execute a bond to the State of Arkansas in double the estimated value of the property in said assignment, with good and sufficient security, to be approved by the judge of said court, conditioned that such assignee shall execute the trust confided to him, sell the property to the best advantage, and pay the proceeds thereof to the creditors mentioned in said assignment, according to the terms thereof, and faithfully perform the duties according to law."

"Section 387. Said assignee shall be required to sell all the property assigned to him for the payment of debt, at public auction, within one hundred and twenty days after the execution of the bond required by this Act, and shall give at least thirty days' notice of the time and place of such sale. And any person damaged by the neglect, waste or improper conduct of such assignee, shall be entitled to bring his action on [362] the bond in the name of the State for the use and benefit of such person." Gantt, Digest, pp. 207, 208.

While these sections were in force, to wit: on December 19, 1878, James C. Moss and John S. Bell, partners under the name of Moss & Bell, doing business as merchants at Pine Bluff, Arkansas, conveyed by an assignment in writing, all their goods, wares and merchandise, and choses in action to the defendant, James M. Hudson, as trustee in trust for the payment of their debts. The deed of assignment preferred certain creditors who afterwards became the complainants in this suit, and required the trustee to pay them in full if the proceeds of the property assigned should be sufficient for that purpose, and if there should be any surplus, to pay it share and share alike to other creditors. The powers conferred on the trustee were as follows: "To sell and dispose of all of said property for cash as he should deem advisable and right, and to this end to use his own discretion, subject to the supervision of the creditors * * * and to conduct and transact all of the business as he may deem proper in the exercise of a sound discretion, and as he shall deem most advisable for the benefit of creditors and their trust; and he shall have power to ap-

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point such assistants, agents, and attorneys as in his judgment may be necessary to enable him to fulfil this trust," etc.

Hudson accepted the trust and, on December 21, 1878, gave bond according to law, and filed in the office of the clerk of the probate court, an inventory of the property conveyed to him by the deed of assignment.

On December 21, 1878, the defendants, McGehee, Snowden & Violett, recovered against Moss & Bell, in the United States Circuit Court for the Eastern District of Arkansas, a judgment for $10,992, on which execution was issued on January 12, 1879, and the same came into the hands of the marshal of the district on that day. The marshal levied the execution on the goods and chattels assigned by Bell & Moss to Hudson, and took them into his possession, and was about to advertise and sell the same to satisfy the execution, when the bill in this case was filed by the complainants, who were the preferred creditors named in the assignment. The bill recited the foregoing facts, and prayed an injunction against the marshal and McGehee, Snowden & Violett, forbidding them to interfere with the property assigned to Hudson, and that they might be decreed to return the same to him, etc.

[363] The defendants demurred to the bill for want of equity. The circuit court sustained the demurrer on the ground that the deed of assignment was void on its face, and dismissed the bill. The purpose of this appeal is to reverse that decree.

Messrs. **S. F. Clark** and **S. W. Williams**, for appellants.

Mr. **U. M. Rose**, for appellees.

Mr. Justice **Woods** delivered the opinion of the court:

The Statute of Arkansas provides that the property assigned for the benefit of creditors shall be sold at public auction within one hundred and twenty days after the execution of the bond required of the assignee.

The deed of assignment, in effect, authorized the assignee to sell at private sale, and at such time and in such manner as he should deem advisable and right. Under this power he could wait an indefinite time, and then sell the property at wholesale, or he could carry on the business of selling off the stock of goods in the ordinary way of retail merchants, and without any limit of time within which the sale should be completed. The powers conferred by the deed of assignment were, therefore, in direct opposition to the policy of the statute. It is true, the powers conferred on the trustee were subject to the supervision of the creditors. But this could only mean a majority of the creditors. The assignee was, therefore, authorized by the assignment to dispose of the property assigned in a manner different from that pointed out by the statute, and in disregard of the wishes and remonstrances of a minority of the creditors. The question presented is, therefore, this: is an assignment for the benefit of creditors, which authorizes the assignee to violate the provisions of the statute regulating such assignments, valid and binding on the creditors of the assignor?

The contention of the appellant is that the assignment is valid: (1) because the discretion given the assignee by the assignment leaves him at liberty to follow the law; and (2) because, even if the assignment required him to administer the trust in a manner different from that prescribed by the law, only such directions as conflicted with the law would be void, and the assignment itself would remain valid.

We think that, under the construction given [364] the assignment law by the Supreme Court of Arkansas, in the case of *Raleigh* v. *Griffith*, 37 Ark., 158, these positions cannot be maintained. The assignment in that case provided as follows: "The party of the second part," the assignee, "shall take possession of all and singular the property and effects hereby assigned, and sell and dispose of the same, either at public or private sale, to such person or persons for such prices and on such terms and conditions, either for cash or upon credit, as in his judgment, may appear best and most for the interest of the parties concerned, and convert the same into money."

It will be observed that the terms of the assignment did not prevent the assignee, in the administration of his trust, from following the directions of the statute in all particulars. He was at liberty to sell for cash at public auction, and within one hundred and twenty days after the filing of his bond. But the assignment vested him with a discretion to do otherwise. The court declared the assignment to be void. It said: "In providing for the sale of the property, the statute is disregarded in the deed of assignment; the assignee was authorized to sell at a private or public sale, and for cash or credit. Under such provision it was in the power and discretion of the assignee to prolong the execution and closing of the trust for an indefinite period. The Legislature deemed it expedient, as a matter of public policy, to require assignees, in general deeds of assignment for the benefit of creditors, to sell all property assigned to them, for the payment of debts, at public auction, within one hundred and twenty-five days after the execution of the bond, on thirty days' notice of the time and place of sale." And the court declared: "The Statute prescribes a mode of sale in this State, and dissenting creditors are not barred by a deed made in direct contravention of a plain provision of the statute."

The effect of this decision is that the provisions of the statute respecting the sale of property assigned for the benefit of creditors are mandatory and not directory; see, also, *French* v. *Edwards*, 13 Wall., 506 [80 U. S., XX., 702], and there are no conflicting decisions of the Supreme Court of Arkansas. This being the construction put upon the law by the Supreme Court of the State when the assignment in this [365] case was made, it is binding on the courts of the United States. *Brashear* v. *West*, 7 Pet., 608; *Sumner* v. *Hicks*, 2 Black, 532 [67 U. S., XVII., 355]; *Leffingwell* v. *Warren*, Id., 599 [67 U. S., XVII., 261]. It follows that the assignment, which vests the assignee with a discretion contrary to the mandates of the statute and, in effect, authorizes him to sell the property conveyed thereby, in a method not permitted by the statute, must be void, for contracts and conveyances in contravention of the terms or policy of a statute will not be sanctioned. *Peck* v. *Burr*, 10 N. Y., 294; *Macgregor* v. *S. E. R. Co.*, 18 Q. B.,

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618; *Jackson* v. *Davison*, 4 B. & Ald., 695; *Miller* v. *Post*, 1 Allen, 434; *Parton* v. *Hervey*, 1 Gray, 119; *Hathaway* v. *Moran*, 44 Me., 67.

The result of these views is that the decree of the Circuit Court, dismissing the bill, because the assignment in question was void on its face, was right and must be affirmed.

True copy. Test,
James H. McKenney, Clerk, Sup. Court, U. S.

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[512] CHARLES H. MARSHALL ET AL., *Appts.*,
v.
THE STEAMSHIP ADRIATIC, Her Engines, etc., THE OCEANIC STEAM NAVIGATION COMPANY (Limited) Claimant.

(See S. C., "*The Adriatic*," 17 Otto, 512-519.)

Findings in admiralty case—sailing rule—steamer meeting sail vessel.

1. In cases of admiralty and maritime jurisdiction, on the instance side of the court, under the Act of 1875, the findings of fact have the effect of a special verdict in an action at law.
2. There is no occasion in any case to except specially to a finding of fact, as its sufficiency, in connection with the pleadings to support the decree rendered, is always open to consideration on appeal.
3. When a steamer is nearing another vessel and there is danger of collision, from continuing the rate of speed at which she is going, it is the duty of her captain to slacken her speed and, if necessary, to reverse her engines and move her backwards.
4. A sailing vessel meeting a steamer must keep her course, while the steamer takes the necessary measures to avoid a collision; it must be a strong case which puts the sailing vessel in the wrong for obeying the rule.

[No. 169.]

Argued Jan. 31 and Feb. 1, 1883. Decided Mar. 19, 1883.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The libel in this case was filed in the District Court of the United States for the Southern District of New York, to recover for the loss of the ship, Harvest Queen, and cargo, resulting from a collision.

The district court entered a decree dismissing the libel with costs. This decree having been affirmed, on appeal, by the court below, the libelants appealed to this court.

The facts of the case are fully stated by the court.

Messrs. **Wm. Allen Butler, Thomas E. Stillman** and *Thomas H. Hubbard*, for appellants.

Messrs. **Everett P. Wheeler** and **Joseph H. Choate**, for appellee.

Mr. Justice **Field** delivered the opinion of the court:

This case comes before us on appeal from a decree of the circuit court, with a finding of facts upon which it was rendered. We are, therefore, relieved of much of the embarrassment experienced on the trial, both by that court and the district court, from the difficulty of determining from the evidence the exact position of the vessels immediately preceding the collision. Here we must take the facts as found and apply the law to them. In cases of admiralty and maritime jurisdiction, on the instance side of the court, under the Act of Congress of 1875, [18 Stat. at L., 315], the finding has the effect of a special verdict in an action at law.

There is, it is true, a bill of exceptions in the record, but it contains exceptions only to the finding, and to the refusal of the court to find otherwise. It presents no question for our consideration except such as arises upon the facts as found. There is no occasion in any case to except specially to a finding, as its sufficiency, in connection with the pleadings, to support the decree rendered, is always open to consideration on appeal.

On the evening of December 30, 1875, the [513] ship Harvest Queen, an American vessel, sailed from the harbor of Queenstown, Ireland, for the Port of Liverpool, England. She was 187 feet long, of 1626 tons burden and had, at the time, a cargo of grain on board. On the same day, the steamer Adriatic, a British vessel left Liverpool for New York, and proceeded down the Irish Channel. She was 450 feet long, and of over 3,000 tons burden. Her forward deck was roofed with what is termed a turtle back, so called from its shape. The spray of the sea dashed over this roof, and the lookouts of the steamer were, therefore, stationed on a house just abaft of it.

The wheel-house was on deck, and above and a little forward of it was the bridge on which the officer on watch usually took his position. Adjoining the wheel-house, and opening into it, was the chart room. At a quarter past two on the morning of December 31, the captain, who had been on duty all the time after leaving Liverpool, went into that room and lay down on a sofa, giving orders to be called at four, or sooner if any vessels came in sight. The first officer was then on watch, standing on the bridge, most of the time on the starboard side. Three seamen were on the lookout, one on each side of the house mentioned, and one on the port side of the bridge. At thirty-five minutes past two the first officer, looking through a night-glass, saw a green light about two points on his starboard bow. It could not be seen by the naked eye. It proved afterwards to be a light on The Harvest Queen. At this time the sky was clear, with scattering clouds; but on the water the night was dark; the wind was blowing a fresh breeze from the southwest and the sea was running high. The steamer was going about twelve knots an hour, having all her lights in their proper places and burning brightly. Soon afterwards the light on The Harvest Queen was seen by one of the lookouts, and two strokes were given to the bell on the turtle deck as a signal that a light was seen on the starboard bow.

Four minutes after that, at thirty-nine minutes past two, the green light of the ship, which had broadened to three and a half points, changed to red. Up to this time the steamer had not altered her course. The character of the approaching vessel was not known, nothing but [514] her light being seen. But whether she was propelled by wind or steam, the steamer pursued the proper course to prevent the danger of collision. Her green light must have been equally

NOTE.—*Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting.* See *note* to St. John v. Paine, 51 U. S. (10 How.), 557.

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visible from The Harvest Queen; and when two vessels keep the same colored lights in view of each other, collision is impossible, for they are then moving on parallel lines. The lights on vessels are required to be so placed as not to be seen across their bows. The red light coming in sight indicated that the ship had changed her course, and was no longer running on a parallel line, but in a direction which, if continued, would bring her across the bow of the steamer. The first officer, therefore, at once gave an order to port the helm, and signaled the engineer to stand by the engine, following this with a further order to slow the engine. Both these orders were promptly obeyed, and the steamer slowly swung to the right.

As already stated, the steamer was going at the rate of twelve knots an hour. The Harvest Queen, judging from the time she occupied in passing over the distance from Queenstown, must have been sailing at the rate of eight knots an hour; that is, the two vessels were approaching each other at a speed equal to about twenty miles an hour. The light on The Harvest Queen could not have been seen that night further than two miles and a half, and over this distance the steamer with her speed had passed four fifths of a mile, and The Harvest Queen a little more than one half of a mile. So that at this time, when the red light was seen, the vessels must have been about a mile and a quarter apart. At the rate they were moving, they would come together or pass each other in four minutes. The first officer of the steamer at once perceived the necessity of an immediate change in her course so as to bring her on a parallel line with the approaching ship. To accomplish this, it was necessary to port the helm of the steamer, which was at once done. The order to do this was, under the circumstances, the proper one to be given. The slowing of the speed of the steamer by reason of the proximity of the other vessel was also a proper proceeding. When a steamer is nearing another vessel, and there is danger of collision from continuing the rate of speed at which she is going, it is the duty of her captain [515] to slacken her speed and, if necessary, to reverse her engines and move her backwards. Such is the express language of Rule 21 adopted by Congress for the prevention of collisions on the water, which is as follows: "Every steam vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed or, if necessary, stop and reverse; and every steam vessel shall, when in a fog, go at a moderate speed." R. S., sec. 4233.

Had there been no other change in the course of The Harvest Queen, the new direction taken by the steamer would have carried her past that vessel without collision. But about a minute afterwards, or forty minutes past two, the red light of The Harvest Queen changed again to green. The steamer had then yielded to her helm, and gone off a point to the starboard and was swinging further in that direction. The first officer, seeing the re-appearance of the green light, at once gave an order to stop the engine and, as soon as it could be done, to back the steamer at full speed. This order was obeyed, and the engine was put in a reverse motion at about forty-one minutes past two.

The captain was then called and immediately came on deck. Looking ahead he saw a green light not far away, about two points off the starboard bow; then green and red lights appeared together and then the red alone. He noticed also that the helm was to the port side and that the engine was under reversed action. Thereupon he gave the order from the deck, "hard-a-starboard," which was obeyed. He then went on the bridge.

Had the steamer been then going astern, there could be no question as to the propriety of this order; it would have turned her to the right and she would have passed on the left side of The Harvest Queen, showing red light to red light, the two vessels in that event moving on parallel lines. The effect of a starboard helm, when a vessel is going astern, is directly the opposite of that produced when she is going ahead. But at the time the order was given, the forward motion of the steamer had not been entirely overcome, and she was still moving ahead slowly. It appears, however, that whilst thus moving with the reversed action of her engine, the steamer did not yield to her helm so as to materially change her forward direction. The [516] order could not, therefore, have contributed to the collision. But were it otherwise, we cannot say that the captain could be justly blamed. In considering his action, the question is not whether the order given was the best when viewed in the light of subsequent events; but whether, under the circumstances in which he was placed, it was that of a prudent and skillful commander. The nearness of the approaching ship and the frequent change of her lights, whilst calling for prompt action on his part, were well calculated to embarrass and confuse him. Delay in acting was full of danger; there was no time for deliberation and consultation with others; and seeing the reversed movement of the engine he would naturally conclude that the steamer had yielded or would soon yield to it and pass the approaching ship in safety.

Soon after he reached the bridge, The Harvest Queen appeared through the darkness under full sail and bore down directly on the steamer. Before anything could be done, her jib-boom ran over the turtle back of the steamer, and was broken in two, one part falling into the water. The engines of the steamer were then backing at full speed, and if she was not in fact going astern, she was, according to the finding of the circuit court, "not going ahead much, if any." She continued backing after the collision and, when the vessels separated, The Harvest Queen passed across the bow of The Adriatic from port to starboard. Her masts were standing and her sails were all set. The first officer of the steamer hailed her, but received no answer from anyone; no hail came from her. She gave no signs of serious injury, yet she was in some way injured so severely that soon afterwards she sank with all on board.

Immediately after the separation of the vessels, the captain of the steamer gave orders to clear away the boats; but The Harvest Queen keeping in sight, the orders were countermanded, and The Adriatic steamed slowly towards her until she became lost to view. It was about that time that cries for help were heard in the water, in the direction where the ship was last seen. The engines were stopped and an order to lower the boats was immediately given. Two boats under command of officers of the steamer [517]

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put out in search of the parties from whom the cries were heard. They were rowed in the direction whence the cries came; but after remaining out for half an hour to an hour they were recalled by a signal from the steamer. Nothing was ever afterwards heard of any of the ship's crew, and only a few fragments of the vessel were ever found. The vessel and cargo were a total loss.

The present libel was filed to recover their value in damages, alleged to be $225,000. The libelants charge that the collision was caused by the negligence and improper conduct of those on board the steamer:

1. In not having a good and sufficient lookout.
2. In running at too great a speed.
3. In not keeping out of the way of The Harvest Queen; and,
4. In not stopping and backing in time to avoid the collision.

From the narrative we have given, of the facts of the case, which is but a summary of the findings of the circuit court, stating the facts with much greater detail and particularity, it is evident that these allegations are not sustained in any essential particular.

Whilst the vessels were over two miles apart, the green light on The Harvest Queen was distinctly seen. A similar light on The Adriatic could easily have been seen and, if the lookouts were attending to their duty, probably was seen from the ship. Those lights being visible, it was only necessary for the vessels to keep in their course, and collision would have been impossible. The subsequent changes made by the steamer were caused by previous changes on the course of the ship, as indicated by the showing of her lights. Whilst it was the duty of the steamer to keep out of the way of the ship, being more under control, it was no less the duty of the ship to avoid anything tending to mislead and embarrass the steamer in the performance of this duty. That she did thus mislead and embarrass the steamer is plain from the statement already made. To one at a distance, her changing lights were confusing, indicating either doubt on the part of her officers as to the course to be taken or, what is more likely to have been the case, the absence [518] of a good and sufficient lookout on board of the ship to report the sight and approach of the steamer.

The continued appearance of the green light for the first four minutes after it was seen, answers the suggestion that the change of lights on The Harvest Queen was the result of the swinging of the vessel from the wind and sea, and not from an alteration in her course.

The general rule as to the conduct of a ship under circumstances like those presented in this case is much stronger against the course The Harvest Queen pursued than we have stated. That rule is for a sailing vessel meeting a steamer to keep her course while the steamer takes the necessary measures to avoid collision. In *Crockett* v. *The Isaac Newton* this court said, that "Though the rule should not be observed when circumstances are such that it is apparent its observance must occasion a collision, while a departure from it will prevent one, yet it must be a strong case which puts the sailing vessel in the wrong for obeying the rule;" 18 How., 583 [59 U. S., XV., 493]; and in *Steamship Co.* v. *Rumball* that "Under the rule that a steamer must keep out of the way, she must of necessity determine for herself and upon her own responsibility, independently of the sailing vessel, whether it is safer to go to the right or left or to stop; and in order that she may not be deprived of the means of determining the matter wisely, and that she may not be defeated or baffled in the attempt to perform her duty in the emergency, it is required, in the admiralty jurisprudence of the United States, that the sailing vessel shall keep her course, and allow the steamer to pass either on the right or left, or to adopt such measures of precaution as she may deem best suited to enable her to perform her duty and fulfil the requirement of the law to keep out of the way." 21 How., 384 [62 U. S., XVI:, 148].

Here, so far from observing this rule, the ship, by her frequent changes, embarrassed the action of the steamer, and prevented her from continuing in a course which would have avoided the disastrous result. If the ship had kept on the course she was sailing when first seen, or had adhered to the first new course afterwards taken, no collision would have happened.

It seems to us plain, upon the facts found by the Circuit Court, that whatever fault there was which caused the collision, it originated with the ship and not the steamer. The decree is, therefore, affirmed. [519]

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MADELAINE ROTH. *Plff. in Err.*, [319]
v.
FREDERICA EHMAN ET AL.

(See S. C., 17 Otto, 319.)

Jurisdiction over state judgment.

This court has no jurisdiction to review a decision of a state court, that a decree of a foreign court annulling a marriage is valid and that the plaintiff in error is, consequently, not entitled to dower.

[No. 1201.]

Submitted Mar. 6, 1883. Decided Mar. 19, 1883.

IN ERROR to the Supreme Court of the State of Illinois.

On motion to dismiss for want of jurisdiction.

The case is sufficiently stated by the court.

Messrs. **Julius Rosenthal** and **A. M. Pence**, for defendants in error, in support of motion.

Mr. **C. M. Harris**, for plaintiff in error, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

The only question in this case, controverted below, was whether Madelaine Roth, the plaintiff in error, was the widow of John George Roth, deceased, and that depended entirely on the validity of the decree of the Royal Matrimonial Court of Elwangen, in the Kingdom of Wurtemburg, annulling the marriage of the parties. The Supreme Court of Illinois decided in favor of the validity of the Wurtemburg decree and, consequently, that the plaintiff in

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error was not the widow of the decedent and not entitled to dower in his estate, or to inheritance under the laws of Illinois. This presents no question of which we can take cognizance under section 709 of the Revised Statutes. No right, title, privilege or immunity which could be claimed under the authority of the United States was involved, and the validity of no treaty or statute of or any authority exercised under the United States was drawn in question. Neither was there any statute or authority of the State relied on, which was in conflict with the Constitution, treaties or laws of the United States.

The motion to dismiss for want of jurisdiction is granted.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[602] MARTIN BASKET, *Appt.*,

v.

MILAS J. HASSELL, Admr. of HILLERY M. CHANEY, Deceased,

(See S. C., 17 Otto, 602-616.)

Necessary parties to appeal—donatio mortis causa—*executed transfer—certificate of deposit—restricted indorsement.*

1. Parties to an action who have no legal interest, either in maintaining or reversing the decree, are not necessary parties to the appeal therefrom.
2. A *donatio mortis causa* must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be devested by the happening of any of the conditions subsequent; that is, upon actual revocation by the donor, or by the donor's surviving the apprehended peril, or outliving the donee, or by the occurrence of a deficiency of assets necessary to pay the debts of the deceased donor.
3. If the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition, good only if made and proved as a will.
4. A certificate of deposit is a subsisting chose in action and represents the fund it describes, as in cases of notes, bonds and other securities, so that a delivery of it, as a gift, constitutes an equitable assignment of the money for which it calls.
5. A delivery of a certificate of deposit to the intended donee with an indorsement thereon which limits and restrains the authority of the donee in the collection of the money, so as to forbid its payment until the donor's death, is not valid as a *donatio mortis causa.*

[No. 170.]

Argued Feb. 1, 2, 1883. Decided Mar. 26, 1883.

APPEAL from the Circuit Court of the United States for the District of Indiana.

On motion to dismiss, for want of necessary parties.

The history and facts of the case appear in the opinion of the court.

For the opinion of this court on a petition for a rehearing, see, *post.*

Messrs. **P. Phillips, W. H. Phillips** and *Charles Denby*, for appellant:

How the last sickness has been treated by the courts as affecting the validity of a gift, is shown by the following citations:

Miller v. *Miller*, 3 P. Wms. 356; *Walter* v. *Hodge*, 2 Swanst., 100; *Nicholas* v. *Adams*, 2 Whart., 17; *Grymes* v. *Hone*, 49 N.Y., 17; *Gass* v. *Simpson*, 4 Cold., 288.

That Chaney intended, by the indorsement and delivery of the certificate, that his nephew should receive the money evidenced by it, is too plain to justify argument. The inquiry then is, whether the words used by him are to be construed by some rigorous rule of law so as to defeat his intention. It hath this extent; no more.

When the intent of the donor is proved under his own hand, as in this case, the courts have presumed delivery in support of the gift on slight evidence.

Brinkerhoff v. *Lawrence*, 2 Sandf. Ch., 406; *Grover* v. *Grover*, 24 Pick., 261; *Chase* v. *Redding*, 13 Gray, 418; *Sessions* v. *Mosely*, 4 Cush., 92; Story, Eq. Jur., sec. 607; see, also, *Camp's Appeal*, 36 Conn., 88; *Turpen* v. *Thompson*, 2 Met. (Ky.), 420; *Waring* v. *Edmonds*, 11 Md., 424; *Pierce* v. *Bank*, 129 Mass., 430; *Hill* v. *Stevenson*, 63 Me., 364; *Tillinghast* v. *Wheaton*, 8 R. I., 536; *Grymes* v. *Hone*, 49 N. Y., 17.

The unwillingness of the early decisions to sustain gifts *causa mortis* of choses in action, arose from the fact that no legal transfer could be made of them at all, because they only represented rights, but were not, of themselves, intrinsically valuable. Since the equitable doctrine has prevailed that they can be assigned by delivery, they are placed with all other chattels as subject to gift.

The certificate of deposit was, in all respects, the negotiable promissory note of the Bank.

Bank v. *Ringel*, 51 Ind., 393; *Miller* v. *Austen*, 13 How., 218.

NOTE.—*Gifts* causa mortis, *requisites of; what revokes.*

Donatio causa mortis cannot be made by parol; a delivery of the thing given is essential. Bradly v. Hunt, 5 Gill & J., 54; S. C., 23 Am. Rep., 597; Priester v. Priester, Richardson Eq. Cas., 26; S. C., 23 Am. Dec., 191; Tate v. Hilbert, 2 Ves. Jr., 120; Miller v. Miller, 3 P. Wms., 356; Hall v. Howard, Rice's Law, 310; S. C., 33 Am. Dec., 115; Borneman v. Sidlinger, 15 Me., 429; S. C., 33 Am. Rep., 626.

The delivery necessary in such cases is the same as in other cases of parol gifts. McDowell v. Murdock, 1 Nott. & McC., 237; S. C., 9 Am. Dec., 684.

In some cases a symbolical delivery is held sufficient. Toller's Law of Executors, 234; Bailey v. Ogden, 3 Johns., 420; S. C., 3 Am. Dec., 509; Wilkes v. Ferris, 5 Johns., 335; S. C., 4 Am. Dec., 364; Cooper v. Burr, 45 Barb., 9; Ward v. Turner, 2 Ves., 443; Miller v. Jeffress, 4 Gratt., 472.

To constitute a valid gift *causa mortis*, four things are necessary:

1. It must be made with a view to the donor's death. Duffield v. Elwes, 1 Sim. & Stu., 240; Champney v. Blanchard, 39 N. Y., 111; Grymes v. Hone, 49 N. Y., 17; S. C., 10 Am. Rep., 313; Edwards v. Jones, 1 Myl. & C., 233; Walter v. Hodge, 2 Swanst., 97.
2. The donor must die of that ailment. Irish v. Nutting, 47 Barb., 370, and cases last cited; Weston v. Wight, 17 Me., 287; S. C., 35 Am. Dec., 250.
3. There must be a delivery of the thing given. Brink v. Guild, 43 How. Pr., 289; Cooper v. Burr, 45 Barb., 9; Champney v. Blanchard, 39 N. Y., 111; Grymes v. Hone, 49 N. Y., 17; Taylor v. Staples, 8 R. I., 170; Case v. Dennison, 9 R.I., 88; S. C., 11 Am. Rep., 222; Jones v. Lock, 1 L. J. Ch., 25; Egerton v. Egerton, 17 N. J. Eq., 419; Singleton v. Cotton, 23 Ga., 261; Cutting v. Gilman, 41 N. H., 147.
4. There must be an acceptance by the donee. Brink v. Guild, 43 How. Pr., 289; Delmotte v. Taylor, 1 Redf., 417.

The title does not vest until death of the donor. The gift may be revoked during his life. Jones v. Brown, 34 N. H., 439; Sessions v. Moseley, 4 Cush., 92; Rhodes v. Childs, 64 Pa. St., 18; Johnson v. Spies, 5 Hun, 468; Doty v. Willson, 47 N. Y., 580; Bunn v. Markham, 7 Taunt., 224.

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On well settled decisions, its delivery, with or without an indorsement, will confer a good title.

Messrs. **Asa Iglehart** and **Jno. E. Iglehart**, for appellee:

Delivery is essential to a gift, and whether it be *inter vivos* or *causa mortis*, there must be an actual handing over, with the intent to transfer the right of property and possession.

Johnson v. *Stevens*, 22 La. Ann., 144; *Hanson* v. *Millett*, 55 Me., 184; *Carleton* v. *Lovejoy*, 54 Me., 445; *Edgerton* v. *Edgerton*, 2 C. E. Green, 419; *Dilts* v. *Stevenson*, 2 C. E. Green., 407; *Buschian* v. *Hughart*, 28 Ind., 449; *Peeler* v. *Guilcey*, 27 Tex., 355; *Curry* v. *Curry*, 30 Ga., 257; *Carswell* v. *Ware*, 30 Ga., 71; 1 L. Cas. in Eq., 1233, 4th Am. ed.

Again; "A gift, *mortis causa*, is as much within this rule as if it were absolute. There must be a present delivery passing the right of property and possession."

Irons v. *Smallpiece*, 2 B. & Ald., 551; 1 L. Cas. in Eq., 1244, 4th Am. ed.

Again; "Though subject to defeasance by the donors' restoration from danger, and in other ways, the property must pass at the time; and not be intended to pass at the giver's death."

Duncan v. *Duncans*, 5 Litt., 12, 13; *Walden* v. *Dixon*, 5 Mon., 170, 171; 1 L. Cas. in Eq., 1243, 4th Am. ed.

These authorities simply establish the principle that a *donatio causa mortis* is an executed gift *inter vivos*, upon an implied condition subsequent. And this proposition is well sustained in the States generally and particularly in the State of Tennessee, where the gift is alleged to have taken place.

Nicholas v. *Adams*, 2 Whart., 17; *Chase* v. *Redding*, 13 Gray, 422; *Parish* v. *Stone*, 14 Pick., 203; *Mitchell* v. *Smith*, 10 Law T. (N. S.), 520; *S. C.*, 10 L. T. (N. S.), 800.

A *donatio causa mortis* must pass such a title to the donee, in the lifetime of the donor, as will prevent any title from passing to the executor or administrator of the donor. In other words, that which is in legal effect a legacy cannot take effect as a gift *causa mortis*.

In the case at bar, the indorsement rebuts the inference of a present gift by postponing the payment until the death of the donor. The transfer cannot operate as a present gift of the money and cannot operate to transfer the title to the money at all, except it be executed and probated as a will. The language is a good conditional will and is, therefore, not a good *donatio causa mortis* of the money evidenced by the certificate. 1 Redf. Wills, 176-179, *notes*.

Mr. Justice **Matthews** delivered the opinion of the court:

This is a bill in equity, filed by the appellee, a citizen of Tennessee, to which, besides the appellant, a citizen of Kentucky, The Evansville National Bank of Evansville, Indiana, Samuel Bayard, its president, and Henry Reis, its cashier, and James W. Shackelford and Robert D. Richardson, attorneys for Basket, citizens of Indiana, were made parties defendant. The single question in the case was, whether a certain fund, represented by a certificate of deposit, issued by the bank to Chaney in his lifetime, belonged to Basket, who claimed it as a gift from Chaney, having possession of the certificate, or to the appellee, as Chaney's administrator. Basket asserted his title, not only by answer but by a cross-bill. The final decree ordered the certificate of deposit to be surrendered to the complainant, and that the bank pay to the complainant, as its holder, the amount due thereon. The money was then tendered by the bank, in open court, and the certificate was deposited with the clerk. It was, thereupon, ordered, Basket having prayed an appeal, that, until the expiration of the time allowed for filing a bond on appeal, the bank should hold the money as a deposit, at four per cent interest; but if a bond be given, that the same be paid to the clerk, and by him loaned to the bank on the same terms. Basket failed to give the bond required for a *supersedeas*, but afterwards prayed another appeal, which he perfected by giving bond for costs alone. To this appeal, Basket and the appellee are the parties respectively, the co-defendants not having appealed, or been cited after severance. And, on the ground that they are necessary parties, the appellee has moved to dismiss the appeal. [603]

It is apparent, however, that the sole controversy is between the present parties to the appeal. By the delivery of the certificate of deposit to the clerk, the attorneys of Basket are exonerated from all responsibility; and the payment of the money by the bank, to the appellee, equally relieves it and its officers; for, not being parties to the appeal, and the execution of the decree not having been superseded, the decree will always furnish them protection, whether affirmed or reversed; because, if re-

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A vague impression that death may occur is not sufficient. A soldier about to join his regiment cannot make a gift *causa mortis* to take effect in event of his death during the war. Smith v. Dorsey, 38 Ind., 451; S. C., 10 Am. Rep. 118; Dexheimer v. Gautier, 34 How. Pr., 472; S. C., 5 Rob., 216; Irish v. Nutting, 47 Barb., 370; Gourley v. Linsenbigler, 51 Pa. St., 345.

No particular form of words is necessary. Keniston v. Sceva, 54 N. H., 24.

A mere promise to give made by one on his death bed is void for want of consideration. Chevallier v. Wilson, 1 Tex., 161.

Merely marking packages with the name of the donee is not sufficient. Bunn v. Markham, 7 Taunt., 224; Hawkins v. Blewitt, 2 Esp., 663.

A gift *causa mortis* is subject to debts of deceased, if there is not other property sufficient to pay the claims. 2 Kent, 448; Chase v. Redding, 13 Gray, 418; Mitchell v. Pease, 7 Cush., 350; Marshall v. Berry, 13 Allen, 43; Michener v. Dale, 23 Pa. St., 59; Borneman v. Sidlinger, 15 Me., 429; S. C., 33 Am. Dec., 624; Drury v. Smith, 1 P. Wms., 406.

It may be revoked by the donor at any time before his death. Wigle v. Wigle, 6 Watts, 522; Merchant v. Merchant, 2 Bradf., 432; Bunn v. Markham, 7 Taunt., 224.

It is revoked by the death of the donee before the donor, or if the donor recover. Wells v. Tucker, 3 Binn., 366; Merchant v. Merchant, 2 Bradf., 432; Stainland v. Willott, 3 Mac. & G., 664; Parker v. Marston, 27 Me., 196.

It is revoked by the recovery of the donor from the illness from which he was suffering at the time he made the gift. Weston v. Hight, 17 Me., 267; S. C., 35 Am. Dec., 250.

The delivery of savings bank books has been held a sufficient delivery to make a gift *causa mortis* of the deposit. Sheedy v. Roach, 124 Mass., 472; S. C., 26 Am. Rep., 680; Camp's Appeal, 36 Conn., 88; S. C., 4 Am. Rep., 39; Tillinghast v. Wheaton, 8 R. I., 536; S. C., 5 Am. Rep., 621; Gardiner v. Merritt, 32 Md., 78; S. C., 3 Am. Rep., 115; Minor v. Rogers, 40 Conn., 512; S. C., 16 Am. Rep., 69; Hill v. Stevenson, 63 Me., 364; S. C., 18 Am. Rep., 231; Ray v. Simmons, 11 R. I., 266; S. C., 23 Am. Rep., 447.

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versed, it would only be so as between the parties to the appeal. So that the omitted parties have no legal interest, either in maintaining or reversing the decree and, consequently, are not necessary parties to the appeal. *Simpson* v. *Greeley*, 20 Wall., 152 [87 U. S., XXII., 338]; *Cox* v. *U. S.*, 6 Pet., 182; *Forgay* v. *Conrad*, 6 How., 203; *Germain* v. *Mason*, 12 Wall., 261 [79 U. S., XX., 392]. *The motion to dismiss the appeal is, accordingly, overruled.*

The fund, in respect to which the controversy has arisen, was represented by a certificate of deposit, of which the following is a copy:

"Evansville National Bank,
Evansville, Ind., Sept. 8, 1875.

H. M. Chaney has deposited in this bank twenty-three thousand five hundred and fourteen $\frac{70}{100}$ dollars, payable in current funds, to the order of himself, on surrender of this certificate properly endorsed, with interest at the rate of 6 per cent per annum, if left for six months.

$23,514.70. Henry Reis, *Cashier*."

Chaney, being in possession of this certificate at his home in the county of Sumner, State of Tennessee, during his last sickness and in apprehension of death, wrote on the back thereof the following indorsement:

"Pay to Martin Basket, of Henderson, Ky.; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself.

H. M. Chaney."

Chaney then delivered the certificate to Basket, and died, without recovering from that sickness, in January, 1876.

It is claimed on behalf of the appellant that this constitutes a valid *donatio mortis causa*, which entitles him to the fund; and whether it be so, is the sole question for our determination.

The general doctrine of the common law as to gifts of this character is fully recognized by the Supreme Court of Tennessee as part of the law of that State. *Richardson* v. *Adams*, 10 Yerg., 273; *Sims* v. *Walker*, 8 Humph., 503; *Gass* v. *Simpson*, 4 Cold., 288.

In the case last mentioned, that court had occasion to consider the nature of such a disposition of property and the several elements that enter into its proper definition.

Among other things, it said:

"A question seems to have arisen, at an early day, over which there was much contest, as to the real nature of gifts *causa mortis*. Were they gifts *inter vivos*, to take effect before the death of the donor? or were they in the nature [609] of a legacy, taking effect only at the death of the donor? At the termination of this contest, it seems to have been settled, that a gift *causa mortis* is ambulatory and incomplete during the donor's life and is, therefore, revocable by him and subject to his debts, upon a deficiency of assets; not because the gift is testamentary or in the nature of a legacy, but because such is the condition annexed to it and because it would otherwise be fraudulent as to creditors; for no man may give his property who is unable to pay his debts; and all now agree that it has no other property in common with a legacy. The property must pass at the time and not be intended to pass at the giver's death; yet, the party making the gift, does not part with the whole interest, save only in a certain event; and, until the event occurs which is to devest him, the title remains in the donor. The donee is vested with an inchoate title, and the intermediate ownership is in him; but his title is defeasable until the happening of the event necessary to render it absolute. It differs from a legacy in this, that it does not require probate, does not pass to the executor or administrator, but is taken against, not from him. Upon the happening of the event upon which the gift is dependent, the title of the donee becomes, by relation, complete and absolute from the time of the delivery, and that without any consent or other act on the part of the executor or administrator; consequently, the gift is *inter vivos*." In another part of the opinion (p. 297), it is said: "All the authorities agree that delivery is essential to the validity of the gift; and that, it is said, is a wise principle of our laws, because delivery strengthens the evidence of the gift; and is certainly a very powerful fact for the prevention of frauds and perjury."

In the first of these extracts there is an inaccuracy of expression, which seems to have introduced some confusion, if not an apparent contradiction, when, after having stated that "The property must pass at the time and not be intended to pass at the giver's death," it is added, that "until the event occurs which is to devest him, the title remains in the donor." But a view of the entire passage leaves no room to doubt its meaning; that a *donatio mortis causa* must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be devested by the happening of any of the conditions subsequent; that is, upon actual rev- [610]
ocation by the donor, or by the donor's surviving the apprehended peril, or outliving the donee, or by the occurrence of a deficiency of assets necessary to pay the debts of the deceased donor. These conditions are the only qualifications that distinguish gifts *mortis causa* and *inter vivos*. On the other hand, if the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition, good only if made and proved as a will.

This statement of the law, we think, to be correctly deduced from the judgments of the highest courts in England and in this country; although as might well have been expected, since the early introduction of the doctrine into the common law from the Roman civil law, it has developed, by new and successive applications, not without fluctuating and inconsistent decisions.

"As to the character of the thing given," says *Chief Justice* Shaw, in *Chase* v. *Redding*, 13 Gray, 418-420, "The law has undergone some changes. Originally it was limited, with some exactness, to chattels, to some object of value deliverable by the hand; then extended to securities transferable solely by delivery, as bank notes, lottery tickets, notes payable to bearer or to order, and indorsed in blank; subsequently it has been extended to bonds and other choses in action, in writing or represented by a certificate, when the entire equitable interest is assigned; and in the very latest cases on the subject in this Commonwealth, it has been held that a note not negotiable, or if negotiable, not actually indorsed, but delivered,

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passes, with a right to use the name of the administrator of the promisee, to collect it for the donee's own use," citing *Sessions* v. *Moseley*, 4 Cush., 87; *Bates* v. *Kempton*, 7 Gray, 382; *Parish* v. *Stone*, 14 Pick., 208.

In the case last mentioned, *Parish* v. *Stone*, the same distinguished Judge, speaking of the cases which had extended the doctrine of gifts *mortis causa* to include choses in action, delivered so as to operate only as a transfer by equitable assignment or a declaration of trust, says further, that "These cases all go on the assumption that a bond, note or other security [611] is a valid subsisting obligation for the payment of a sum of money, and the gift is, in effect, a gift of the money by a gift and delivery of the instrument that shows its existence and affords the means of reducing it to possession." He had, in a previous part of the same opinion, stated that "The necessity of an actual delivery has been uniformly insisted upon in the application of the rules of the English law to this species of gift." P. 204.

In *Camp's Appeal*, 36 Conn., 88, the Supreme Court of Errors of Connecticut held that a delivery to a donee of a savings bank book, containing entries of deposits to the credit of the donor, with the intention to give to the donee the deposits represented by the book, is a good delivery to constitute a complete gift of such deposits, on the general ground that a delivery of a chose in action that would be sufficient to vest an equitable title in a purchaser is a sufficient delivery to constitute a valid gift of such chose in action, without a transfer of the legal title. That was the case of a gift *inter vivos*. But the court say, referring to the case of *Brown* v. *Brown*, 18 Conn., 410, as having virtually determined the point: "It is true that was a donation *causa mortis*, but the principle involved is the same in both cases, as there is no difference in respect to the requisites of a delivery between the two classes of gifts." And so *Justice* Wilde, delivering the opinion of the court in *Grover* v. *Grover*, 24 Pick, 261-264, expressly declared that "A gift of a chose in action, provided no claims of creditors interfere to affect its validity, ought to stand on the same footing as a sale:" that the title passed and the gift became perfected, by delivery and acceptance; that there was, therefore, "No good reason why property thus acquired should not be protected as fully and effectually as property acquired by purchase;" and showed, by a reference to the cases, that there was no difference in this respect between gifts *inter vivos* and *mortis causa*.

In respect to the opinion in this case, it is to be observed, that it cites with approval the case of *Wright* v. *Wright*, 1 Cow., 598, in which it was decided that the promissory note, of which the donor himself was maker, might be the subject of a valid gift *mortis causa*, though the concurrence was not upon that point. That case, however, has never been followed. It was ex- [612] pressly disapproved and disregarded by the Supreme Court of Errors of Connecticut in *Raymond* v. *Sellick*, 10 Conn., 480, *Judge* Waite delivering the opinion of the court; had been expressly questioned and disapproved in *Parish* v. *Stone*, 14 Pick., 198-206, by *Chief Justice* Shaw, and was distinctly overruled by the Court of Appeals of New York, in *Harris* v. *Clark*, 3 N. Y., 93. In that case it was said: "Gifts, however, are valid without consideration or actual value paid in return. But there must be delivery of possession. The contract must have been executed. The thing given must be put into the hands of the donee, or placed within his power by delivery of the means of obtaining it. The gift of the maker's own note is the delivery of a promise only, and not of the thing promised, and the gift therefore fails. Without delivery, the transaction is not valid as an executed gift; and without consideration, it is not valid as a contract to be executed. The decision in *Wright* v. *Wright* was founded on a supposed distinction between a gift *inter vivos* and a *donatio mortis causa*. But there appears to be no such distinction. A delivery of possession is indispensable in either case."

The case from which this extract is taken was very thoroughly argued by Mr. John C. Spencer for the plaintiff, and Mr. Charles O'Conor for the defendant, and the judgment of the court states and reviews the doctrine on the subject with much learning and ability. It was held that a written order upon a third person, for the payment of money, made by the donor, was not the subject of a valid gift, either *inter vivos* or *mortis causa;* and the rule applicable in such cases, as conceded by Mr. O'Conor, was stated by him as follows:

"Delivery to the donee of such an instrument as will enable him, by force of the instrument itself, to reduce the fund into possession, will suffice, is the plaintiff's doctrine. This might safely be conceded. It might even be conceded that a delivery out of the donor's control of an instrument, without which *he* could not recover the fund from his debtor or agent, would also suffice."

The same view, in substance, was taken in deciding *Hewitt* v. *Kaye*, L. R., 6 Eq., 198, which was the case of a check on a banker, given by the drawer *mortis causa*, who died before it was possible to present it, and which was held not [613] to be valid. *Lord* Romilly, M. R., said: "When a man on his deathbed gives to another an instrument, such as a bond, or promissory note, or an I O U, he gives a *chose in action*, and the delivery of the instrument confers upon the donee all the rights to the *chose in action* arising out of the instrument. That is the principle upon which *Amis* v. *Witt*, 33 Beav., 619, was decided, where the donor gave the donee a document by which the bankers acknowledged that they held so much money belonging to the donor at his disposal, and it was held that the delivery of that document conferred upon the donee the right to receive the money. But a cheque is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is at a banker's or anywhere else. It is an order to deliver the money, and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing."

Accordingly the Vice-Chancellor, in *In re Beak's Estate*, L. R., 13 Eq., 489, refused to sustain as valid the gift of a check upon a banker, even although its delivery was accompanied by that of the donor's pass-book.

The same rule, as to an unpaid and unaccepted check, was followed in *Nat. Bk.* v. *Williams*, 13 Mich., 282. The principle is that a check

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upon a bank account is not of itself an equitable assignment of the fund, *Bank* v. *Millard*, 10 Wall., 152 [77 U. S., XIX., 897], but if the banker accepts the check, or otherwise subjects himself to liability as a trustee, prior to the death of the donor, the gift is complete and valid. *Bromley* v. *Brunton*, L. R., 6 Eq., 275.

Contrary decisions have been made in respect to donations *mortis causa* of savings bank books, some courts holding that the book itself is a document of title, the delivery of which, with that intent, is an equitable assignment of the fund. *Pierce* v. *Bank*, 129 Mass., 425; *Hill* v. *Stevenson*, 63 Me., 364; *Tillinghast* v. *Wheaton*, 8 R. I., 536. The contrary was held in *Ashbrook* v. *Ryon*, 2 Bush, 228, and in *McGonnell* v. *Murray*, Ir., Rep., 3 Eq., 460.

That a delivery of a certificate of deposit, such [614] as that described in the record in this case, might constitute a valid *donatio mortis causa*, does not admit of doubt. It was so decided in *Amis* v. *Witt* [*supra*]; in *Moore* v. *Moore*, L. R., 18 Eq., 474; *Hewitt* v *Kaye*, L. R., 6 Eq., 198; *Westerlo* v. *De Witt*, 36 N. Y., 340. A certificate of deposit is a subsisting chose in action and represents the fund it describes, as in cases of notes, bonds, and other securities, so that a delivery of it, as a gift, constitutes an equitable assignment of the money for which it calls.

The point, which is made clear by this review of the decisions on the subject, as to the nature and effect of a delivery of a chose in action, is, as we think, that the instrument or document must be the evidence of a subsisting obligation and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to devest the donor of all present control and dominion over it, absolutely and irrevocably, in case of a gift *inter vivos*, but upon the recognized conditions subsequent, in case of a gift *mortis causa*; and that a delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation, according to its terms, will not suffice. A delivery, in terms, which confers upon the donee power to control the fund only after the death of the donor, when by the instrument itself it is presently payable, is testamentary in character, and not good as a gift. Further illustrations and applications of the principle may be found in the following cases: *Powell* v. *Hellicar*, 26 Beav., 261; *Reddel* v. *Dobree*, 10 Sim., 244; *Farquharson* v. *Cave*, 2 Colly. Ch., 356; *Hatch* v. *Atkinson*, 56 Me., 324; *Bunn* v. *Markham*, 7 Taunt., 224; *Coleman* v. *Parker*, 114 Mass., 30; *Wing* v. *Merchant*, 57 Me., 383; *McWillie* v. *Van Vacter*, 35 Miss., 428; *Egerton* v. *Egerton*, 17 N. J. Eq., 420; *Michener* v. *Dale*, 23 Pa., 59.

The application of these principles to the circumstances of the present case require the conclusion that the appellant acquired no title to the fund in controversy, by the indorsement and delivery of the certificate of deposit. The certificate was payable on demand; and it is unquestionable that a delivery of it to the donee, with an indorsement in blank, or a special indorsement to the donee, or without indorsement, would have transferred the whole title and interest of the donor in the fund represented by it, [615] and might have been valid as a *donatio mortis causa*. That transaction would have enabled the donee to reduce the fund into actual possession, by enforcing payment according to the terms of the certificate. The donee might have forborne to do so, but that would not have affected his right. It cannot be said that obtaining payment in the lifetime of the donor would have been an unauthorized use of the instrument, inconsistent with the nature of the gift; for the gift is of the money, and of the certificate of deposit, merely as a means of obtaining it. And if the donee had drawn the money, upon the surrender of the certificate, and the gift had been subsequently revoked, either by the act of the donor or by operation of law, the donee would be only under the same obligation to return the money, that would have existed to return the certificate, if he had continued to hold it, uncollected.

But the actual transaction was entirely different. The indorsement, which accompanied the delivery, qualified it, and limited and restrained the authority of the donee in the collection of the money, so as to forbid its payment until the donor's death. The property in the fund did not presently pass, but remained in the donor, and the donee was excluded from its possession and control during the life of the donor. That qualification of the right, which would have belonged to him if he had become the present owner of the fund, establishes that there was no delivery of possession, according to the terms of the instrument, and that as the gift was to take effect only upon the death of the donor, it was not a present executed gift *mortis causa*, but a testamentary disposition. The right conferred upon the donee was that expressed in the indorsement; and that, instead of being a transfer of the donor's title and interest in the fund, as established by the terms of the certificate of deposit, was merely an order upon the bank to pay to the donee the money called for by the certificate, upon the death of the donor. It was, in substance, not an assignment of the fund on deposit, but a check upon the bank against a deposit, which, as is shown by all the authorities and upon the nature of the case, cannot be valid as a *donatio mortis causa*, even where it is payable *in præsenti*, unless paid or accepted while the donor is alive; how much less so, when, as [616] in the present case, it is made payable only upon his death.

The case is not distinguishable from *Mitchell* v. *Smith*, 4 De G., J. & S., 422, where the indorsement upon promissory notes, claimed as a gift, was, "I bequeath—pay the within contents to Simon Smith, or his order, at my death." *Lord Justice* Turner said: "In order to render the indorsement and delivery of a promissory note effectual they must be such as to enable the indorsee himself to indorse and negotiate the note. That the respondent, Simon Smith, could not have done here during the testator's life." It was, accordingly, held that the disposition of the notes was testamentary and invalid.

It cannot be said that the condition in the indorsement, which forbade payment until the donor's death, was merely the condition attached by the law to every such gift. Because the condition, which inheres in the gift *mortis causa*, is a subsequent condition, that the subject of the gift shall be returned if the gift fails by revocation; in the meantime, the gift is executed, the title has vested; the dominion and control of the donor has passed to the donee. While here, the

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condition annexed by the donor to his gift is a condition precedent, which must happen before it becomes a gift and, as the contingency contemplated is the donor's death, the gift cannot be executed in his lifetime and, consequently, can never take effect.

This view of the law was the one taken by the Circuit Court as the basis of its decree, in which we accordingly find no error. It is, accordingly, affirmed.

Mr. Justice **Miller** did not sit this cause, and took no part in its decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[320] UNITED STATES, *Plff. in Err.*,
v.
FRANK PHELPS ET AL.

(See S. C., 17 Otto, 320-328.)

Statute as to duties—reduction of duty.

1. Section 2928 of the Revised Statutes relates alone to merchandise taken from a wreck, and does not in any manner affect the proceedings under section 2927, to obtain an appraisement for an abatement of duties on account of damages to goods during the voyage of importation.

2. An application for allowance for such damages may be made after the goods have been entered at the custom-house at their full invoice value, and the estimated amount of duty thereon paid.

[No. 178.]

Argued Mar. 14, 1883. Decided Mar. 26, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

This action was brought in the District Court of the United States for the Southern District of New York, by the plaintiff in error, to recover from the defendants, Phelps Brothers & Co., certain duties alleged to have been illegally refunded to them by the Collector of the Port of New York.

The case is this: Aug. 7, 1876, the defendants imported, into the said port, 3,825 boxes of lemons, the value of which was $14,383 in gold, and the duty on which, at twenty per cent *ad valorem*, was $2,876.60 in gold.

Aug. 15, 1876, the defendants imported 2,986 boxes of lemons, of the value of $9,623 in gold, the duty on which, at twenty per cent *ad valorem*, was $1,924.60 in gold.

These duties were paid by the defendants; but after the delivery of the merchandise to them it was discovered that the same had sustained damage during the respective voyages of importation, and said damage having been duly appraised to defendants at $4,315 as to the importation of Aug. 7, 1876, and at $1,443 as to the importation of Aug. 15, 1876, the defendants applied in the one case, for an allowance for damage Aug. 14, 1876, and in the other, Aug. 22, 1876, and twenty per cent of the said amounts of $4,315 and $1,443 was refunded to them by the collector, to recover which, as illegally refunded, this action is brought.

On the trial, the Government proved the value of the merchandise by the custom-house entry, as originally liquidated, and the amount of duties due, after allowing credit for what had been paid, and rested.

The defendants then offered evidence of damage, and allowance for damage, as above stated, to the admissibility of which the plaintiff objected, on the ground that the damage allowance was not applied for and the amount of damage not ascertained before entry, as required by law.

But the evidence was admitted as to both importations, and the plaintiff excepted to the ruling.

The defendants then rested, and thereupon the plaintiff asked the court to instruct the jury:

"That, as the goods had been entered at the full invoice prices in the first instance, and the application for allowance, the examination and appraisement not made, nor the damage ascertained, nor the damage allowance made until after the entries of the goods, the damage allowance was unwarranted by law, and they could not give the defendants any abatement of duties on account of such damage allowance."

But the court refused to give the instructions, and thereupon the plaintiff excepted.

There was a verdict and judgment for the defendants.

This judgment having been affirmed on error to the court below, the plaintiff sued out this writ of error.

Mr. **William A. Maury**, *Asst. Atty-Gen.*, for plaintiff in error:

The first legislation providing for reduction of duties in consequence of damage to merchandise, sustained during the voyage of importation, is the 52d section of the Act of March 2, 1799, 1 Stat. at L., 666, re-enacted in section 2927 of the Revised Statutes.

The difficulty in the case grows out of the 21st section of the Act of March 1, 1823, 3 Stat. at L., 736, re-enacted in section 2928, Revised Statutes.

These provisions, as parts of two independent statutes, came before this court in 1866, in the case of *Shelton* v. *Collector*, 5 Wall., 113 (72 U. S., XVIII., 544) upon the contention by the Government that the Act of 1823, in requiring that the same proceedings shall be taken in case of reduction of duties on account of damage sustained during the voyage, rendered it imperative that the appraisal necessary in every such case should be made before entry, as in the case of importation of merchandise taken from a wreck; and this court sustained that view, holding that the Act of 1823 had wrought an implied repeal of the Act of 1799, in this particular.

Mr. Charles M. DaCosta, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court: [323]

Section 2928 of the Revised Statutes, a re-enactment of section 21 of the Act of March 1, 1823, ch. 21 [3 Stat. at L., 729] relates alone to merchandise taken from a wreck, and does not in any manner affect the proceedings under section 2927, a re-enactment of section 52 of the Act of March 2, 1799, ch. 22 [1 Stat. at L., 666] to obtain an appraisement for an abatement of duties on account of damages to goods during a voyage. What was said in *Shelton* v. *Collector*, 5 Wall., 118 [72 U. S., XVIII., 545], to the con-

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trary of this is disapproved. The subject is so fully and carefully considered in the opinion of the court below, that we deem it unnecessary to do more than to refer to the report of the case in the 17th of Blatchford's Reports, 312.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[221] CHARLES F. KRING, *Plff. in Err.*,
v.
STATE OF MISSOURI.

(See S. C., 17 Otto, 221-251.)

Ex post facto *law—what is—constitutional provision—substantial right of accused—alteration in.*

*The plaintiff in error stands convicted of murder in the first degree by the judgment of the Supreme Court of the State of Missouri. He had been previously sentenced to twenty-five years' imprisonment on his plea of, guilty of murder in the second degree, which sentence was, on his appeal, reversed and set aside.

By the law of Missouri in force when the homicide was committed, this conviction was an acquittal of the higher crime of murder in the first degree, but that law was changed before the plea of guilty, so that a judgment on that plea, set aside lawfully, should not be held to be an acquittal of the higher crime. Held:

1. That, as to this case, the new law was an *ex post facto* law, within the meaning of section 10, article 1 of the Constitution of the United States; and that plaintiff in error could not be again tried for murder in the first degree.

2. The history of the *ex post facto* clause of the Constitution reviewed in relation to its adoption as part of the Constitution, and its construction subsequently by the Federal and State Courts.

3. The distinction between retrospective laws, which affect the remedy or the mode of procedure, and those which operate directly on the offense, held to be unsound where, in the latter case, they affect to his serious disadvantage any substantial right which the party charged with crime had under the law as it stood when the offense was committed.

4. Any law is an *ex post facto* law, within the meaning of the Constitution, passed after the Commission of a crime charged against a defendant, which, in relation to that offense or its consequences, alters the situation of the party to his disadvantage; and no one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time.

[No. 1041.]

Motion to advance, filed Jan. 29, 1883. Granted Jan. 29. 1883.

Submitted Mar. 13, 1883. Decided Apr. 2, 1883.

IN ERROR to the Supreme Court of the State of Missouri.

The history and facts of the case fully appear in the opinion of the court, and in the dissenting opinion.

See, also, 64 Mo., 591; 71 Mo., 551; 74 Mo., 612.

Messrs. **L. D. Seward, Jeff. Chandler** and *Presly N. Jones*, for plaintiff in error.

Messrs. **S. F. Phillips** and *D. H. McIntyre, Atty-Gen. of Mo.*, for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of Missouri.

The plaintiff in error was indicted in the Criminal Court of St. Louis for murder in the first degree, charged to have been committed January 4, 1875, to which he pleaded: not guilty. He has been tried four times before a jury, and sentenced once on a plea of, guilty of murder in the second degree. His case has been three times before the Court of Appeals of that State, and three times before the Supreme Court of the State. In the last instance, the Supreme Court affirmed the judgment of the criminal court by which he was found guilty of murder in the first degree and sentenced to be hung, [222] and it is to this judgment that the present writ of error is directed.

It is to be premised that the Court of Appeals is an intermediate appellate tribunal between the Criminal Court of St. Louis and the Supreme Court of the State, to which all appeals of this character are first taken.

At the trial, immediately preceding the last one in the court of original jurisdiction, the prisoner was permitted to plead: guilty to murder in the second degree, which plea was accepted by the prosecuting attorney and the court, and on this plea he was sentenced to imprisonment in the penitentiary for twenty-five years.

He took an appeal from this judgment, on the ground that he had an understanding with the prosecuting attorney that, if he would plead as he did, his sentence should not exceed ten years' imprisonment, and the Supreme Court reversed that judgment and remanded the case to the St. Louis Criminal Court for further proceeding.

In that court, when the case was again called, the defendant refused to withdraw his plea of, guilty of murder in the second degree, and refused to renew his plea of, not guilty, which had been withdrawn when he pleaded, guilty, to murder in the second degree; and the court, against his remonstrance, made an order setting aside his plea of guilty of murder in the second degree, and ordered a general plea of, not guilty, to be entered. On this plea he was tried by a jury and found guilty and sentenced to death, as we have already said, which judgment was affirmed by the Supreme Court of the State.

By refusing to plead, not guilty, to murder in the first degree and to withdraw his plea of, guilty in the second degree, defendant raised the point that the proceedings under that plea, namely: its acceptance by the prosecuting attorney and the court, and his conviction and sentence under it, was an acquittal of the charge of murder in the first degree, and that he could not be tried again for that offense.

This point he insisted on in the circuit court, and relied on it for reversing the judgment in the Court of Appeals and in the Supreme Court.

Both these latter tribunals, in the opinions delivered by them and which are part of the record, conceded that such was the law of the State of Missouri at the time the homicide was committed. But they overruled the defense on the

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Note.—Former conviction or acquittal; effect of, in criminal cases. See *note* to U. S. v. Perez, 22 U. S. (9 Wheat.), 579.

When person is in jeopardy; when jury may be discharged without a verdict; former acquittal or conviction. See *note* to *Ex parte* Lange, 85 U. S., XXI., 872.

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ground that by section XXIII of article 2 of the [223] Constitution of Missouri, which took effect November 30, 1875, that law was abrogated, and for this reason defendant could be tried for murder in the first degree, notwithstanding his conviction and sentence for murder in the second degree.

As this new Constitution was adopted after the crime was committed for which Kring is indicted and, as construed by the Court of Appeals and the Supreme Court, changes the law as it then stood, to the disadvantage of the defendant, the jurisdiction of this court is invoked on the ground that, as to this case, and as so construed, it is an *ex post facto* law, within the meaning of section 10, article 1, of the Constitution of the United States.

That it may be clearly seen what the Supreme Court of Missouri decided on this subject and what consideration they gave it, we extract here all that is said in their opinion about it.

"There is nothing in the point," they say, "that, after an accepted plea of, guilty of murder of the second degree, the defendant could not be put upon trial for murder of the first degree. We shall, on that proposition, accept what is said by the Court of Appeals in its opinion in this cause."

What that court said on this subject is as follows:

"The theory of counsel for defendant, that a plea of guilty of murder in the second degree, regularly entered and received, precludes the State from afterwards prosecuting the defendant for murder in the first degree, is inconsistent with the ruling of the Supreme Court in *State* v. *Kring*, 71 Mo., 551, and in *State* v. *Stephens*, 71 Mo., 535. The declarations of defendant, that he would stand upon his plea already entered, were all accompanied with a condition that the court should sentence him for a term not to exceed ten years, in accordance with an alleged agreement with the prosecuting attorney, which the court would not recognize. The prisoner did not stand upon his plea of, guilty of murder in the second degree; he must, therefore, be taken to have withdrawn that plea and, as he refused to plead, the court properly directed the plea of, not guilty of murder in the first degree to be entered.

"Formerly it was held in Missouri, *State* v. *Ross*, 29 Mo., 32, that, when a conviction is had of murder in the second degree on an indictment charging murder in the first degree, if this be set aside, the defendant cannot again be [224] tried for murder in the first degree. A change introduced by section 23 of article 2 of the Constitution of 1875 has abrogated this rule. On the oral argument something was said by counsel for the defendant, to the effect that under the old rule defendant could not be put on his trial for murder in the first degree, and that he could not be affected by the change of the constitutional provision, the crime having been committed whilst the old Constitution was in force. There is, however, nothing in this; this change is a change not in crimes, but in criminal procedure, and such changes are not *ex post facto*. *Gut* v. *State*, 9 Wall., 35 [76 U. S., XIX., 573]; *Cummings* v. *Mo.*, 4 Wall., 326 [71 U. S., XVIII., 364].

We have here a distinct admission that, by the law of Missouri, as it stood at the time of the homicide, in consequence of this conviction of the defendant of the crime of murder in the second degree, though that conviction be set aside, he could not be again tried for murder of the first degree; and that, but for the change in the Constitution of the State, such would be the law applicable to his case. When the attention of the court is called to the proposition that if such effect is given to the change of the Constitution, it would, in this case, be liable to objection as an *ex post facto* law, the only answer is, that there is nothing in it, as the change is simply in a matter of procedure.

Whatever may be the essential nature of the change, it is one which, to the defendant, involves the difference between life and death, and the retroactive character of the change cannot be denied.

It is to be observed that the force of the argument for acquittal does not stand upon defendant's plea nor upon its acceptance by the State's attorney nor the consent of the court; but it stands upon the judgment and sentence of the court by which he is convicted of murder in the second degree, and sentence pronounced according to the law of that guilt, which was, by operation of the same law, an acquittal of the other and higher crime of murder charged in the same indictment.

It is sufficient for this case that the Supreme Court of Missouri, in the opinion we are examining, says it was so, and cites as authority for it the case of *State* v. *Ross*, 29 Mo., 32, in the same court; but counsel for plaintiff in error cites to the same effect the cases of the *State* v. [225] *Ball*, 27 Mo., 324; *State* v. *Smith*, 53 Mo., 139

Blackstone says (Commentaries, Book 4, marg. 336): "The plea of *autrefoits convict*, or a former conviction for the same identical crime, though no judgment was ever given or, perhaps, will be (being suspended by benefit of clergy or other causes), is a good plea in bar to an indictment. And this depends upon the same principle as the former (that is: *autrefoits acquit*), that no man ought to be twice brought in danger of his life for one and the same crime. Hereupon it has been held that a conviction of manslaughter, on an appeal or indictment, is a bar even in another appeal, and much more in an indictment for murder; for the fact prosecuted is the same in both, though the offenses differ in coloring and degree." See, *State* v. *Norvell*, 2 Yerg. (Tenn.), 81 [*Campbell* v. *State*], 9 Yerg., 337.

This law, in force at the date of the homicide for which Kring is now under sentence of death, was changed by the State of Missouri, between that time and his trial, so as to deprive him of its benefit, to which he would otherwise have been entitled, and we are called on to decide whether in this respect, and as applied by the court to this case, it is an *ex post facto* law within the meaning of the Constitution of the United States.

There is no question of the right of the State of Missouri, either by her fundamental law or by an ordinary Act of legislation, to abolish this rule, and that it is a valid law as to all offenses committed after its enactment. The question here is: does it deprive the defendant of any right of defense which the law gave him when the act was committed so that as to that offense it is *ex post facto*?

This term necessarily implies a fact or act

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done, *after* which the law in question is passed. Whether it is *ex post facto* or not relates, in criminal cases, to which alone the phrase applies, to the time at which the offense charged was committed. If the law complained of was passed before the commission of the act with which the prisoner is charged, it cannot, as to that offense, be an *ex post facto* law. If passed after the commission of the offense, it is as to that *ex post facto*, though whether of the class forbidden by the Constitution may depend on [226] other matters. But so far as this depends on the *time* of its enactment, it has reference solely to the date at which the offense was committed, to which the new law is sought to be applied. No other time or transaction but this has been in any adjudged case held to govern its *ex post facto* character.

In the case before us an argument is made founded on a change in this rule. It is said the new law in Missouri is not *ex post facto*, because it was in force when the plea and judgment were entered, of, guilty of murder in the second degree; thus making its character as an *ex post facto* law to depend, not upon the date of its passage as regards the commission of the offense, but as regards the time of pleading guilty; that, as the new law was in force when the conviction on that plea was had, its effect as to future trials in that case must be governed by that law. But this is begging the whole question, for if it was as to the offense charged an *ex post facto* law, within the true meaning of that phrase, it was *not* in force and could not be applied to the case, and the effect of that plea and conviction must be decided as though no such change in the law had been made.

Such, however, is not the ground on which the Supreme Court and the Court of Appeals placed their judgment.

"There is nothing," say they, "in this; the change is a change not in crimes but in criminal procedure, and such changes are not *ex post facto*."

Before proceeding to examine this proposition, it will be well to get some clear perception of the purpose of the Convention which framed the Constitution in declaring that no State shall pass any *ex post facto* law.

It was one of the objections most seriously urged against the new Constitution by those who opposed its ratification by the States, that it contained no formal Bill of Rights. Federalist, No. LXXXIV. And the State of Virginia accompanied her ratification by the recommendation of an Amendment embodying such a bill. 3 Elliot, Debates, 661.

The feeling on this subject led to the adoption of the first ten Amendments to that instrument at one time, shortly after the government was organized. These are all designed to operate as restraints on the General Government, and most of them for the protection of [227] private rights of persons and property. Notwithstanding this reproach, however, there are many provisions in the original instrument of this latter character, among which is the one now under consideration.

So much importance did the Convention attach to it, that it is found twice in the Constitution: first as a restraint upon the power of the General Government, and afterwards as a limitation upon the legislative power of the States. This latter is the 1st clause of section 10 of article 1, and its connection with other language in the same section may serve to illustrate its meaning. "No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility."

It will be observed that here are grouped contiguously a prohibition against three distinct classes of retrospective laws, namely: bills of attainder, *ex post facto* laws and laws impairing the obligation of contracts. As the clause was first adopted, the words concerning contracts were not in it, because it was supposed that the phrase *ex post facto* law included laws concerning contracts as well as others. But it was ascertained before the completion of the instrument that this was a phrase which, in English jurisprudence, had acquired a signification limited to the criminal law, and the words "or any law impairing the obligation of contracts" were added to give security to rights resting in contracts. 2 Bancroft, History of the Constitution, 213.

Sir Thomas Tomlin, in that magazine of learning, the English edition of 1835 of his Law Dictionary, says:

"*Ex post facto* is a term used in the law, signifying something done after, or arising from or to affect another thing that was committed before.

An *ex post facto* law is one which operates upon a subject not liable to it at the time the law was made."

The first case in which this court was called upon to construe this provision of the Constitution was that of *Calder* v. *Bull*, 3 Dall., 386, decided in 1798.

The opinion of the court was delivered by Chase, *Justice*, and its main purpose was to de- [228] cide that it had no application to acts concerning civil rights. The opinion, however, is important, as it discusses very fully the meaning of the provision in its application to criminal cases. It defines four distinct classes of laws embraced by the clause. "1. Every law that makes an action, done before the passing of the law and which was innocent when done, criminal, and punishes such action. 2. Every law that aggravates the crime or makes it greater than it was when committed. 3. Every law that changes the punishment and inflicts a greater punishment than was annexed to the crime when committed. 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender." Again he says: "But I do not consider any law *ex post facto*, within the prohibition, that modifies the rigor of the law; but only those that create or aggravate the crime or increase the punishment or change the rules of evidence for the purpose of conviction."

In the case before us, the Constitution of Missouri so changes the rule of evidence that what was conclusive evidence of innocence of the higher grade of murder when the crime was committed, namely: a judicial conviction for a

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lower grade of homicide, is not received as evidence at all, or if received, is given no weight in behalf of the offender. It also changes the punishment; for, whereas, the law as it stood when the homicide was committed was that, when convicted of murder in the second degree, he could never be tried or punished by death for murder in the first degree, the new law enacts that he may be so punished, notwithstanding the former conviction.

But it is not to be supposed that the opinion in that case undertook to define, by way of exclusion, all the cases to which the constitutional provision would be applicable.

Accordingly, in a subsequent case tried before *Mr. Justice* Washington, he said, in his charge to the jury, that "An *ex post facto* law is one which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, *or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage.*" *U. S.* v. *Hall*, 2 Wash. (C. C.), 366. [229]

He adds, by way of application to that case, which was for a violation of the embargo laws; "If the enforcing law applies to this case, there can be no doubt that, so far as it *takes away or impairs the defense* which the law had provided the defendant at the time when the condition of this bond became forfeited, it is *ex post facto* and inoperative."

This case was carried to the Supreme Court and the judgment affirmed. 6 Cranch, 171.

The new Constitution of Missouri does take away what, by the law of the State when the crime was committed, was a good defense to the charge of murder in the first degree.

In the subsequent cases of *Cummings* v. *Mo.*, and *Ex parte Garland*, 4 Wall., 277-333 [71 U. S., XVIII., 356-366], this court held that a law which excluded a minister of the gospel from the exercise of his clerical function, and a lawyer from practice in the courts, unless each would take an oath that they had not engaged in or encouraged armed hostilities against the Government of the United States, was an *ex post facto* law, because it punished, in a manner not before punished by law, offenses committed before its passage, and because it instituted a new rule of evidence in aid of conviction. Though this court was divided in that case, it was because the minority were of opinion that the Act in question was not a crimes Act, and that it inflicted no punishment, in the judicial sense, for any past crime, and they did not controvert the proposition that it was an *ex post facto* law, if it had that effect.

In these cases we have illustrations of the liberal construction which this court, and *Mr. Justice* Washington in the circuit court, have given to the words *ex post facto* law; a construction in manifest accord with the purpose of the constitutional Convention to protect the individual rights of life and liberty against hostile retrospective legislation.

Nearly all the States of the Union have similar provisions in their Constitutions, and whether they have or not, they all recognize the obligatory force of this clause of the Federal Constitution on their legislation.

A reference to some decisions of those courts [230] will show the same liberality of construction of the provision, many of them going much further than is necessary to go in this case to show the error of the Missouri courts.

In the Supreme Court of Massachusetts, in the case of *Commonwealth* v. *McDonough*, 13 Allen, 581, it was held that a law passed after the commission of the offense of which defendant stood charged, which mitigated the punishment, as regarded the fine and the maximum of imprisonment that might be inflicted, was an *ex post facto* law as to that case, because the minimum of imprisonment was made three months, whereas before there was no minimum limit to the court's discretion. This slight variance in the law was held to make it *ex post facto* and void as to that case, though the effect of the decision was to leave *no* law by which the defendant could be punished, and he was discharged, though found guilty of the offense.

In the case of *Hartung* v. *People*, 22 N.Y., 95, after she had been convicted of murder and sentenced to death, and while her case was pending on appeal, the Legislature of that State changed the law for the punishment of murder in general, so as to authorize the Governor to postpone indefinitely the execution of the sentence of death, and to keep the party confined in the penitentiary at hard labor until he should order the full execution of the sentence or should pardon or commute it.

The Court of Appeals held that, while this later law repealed all existing punishments for murder, it was *ex post facto* as to Mrs. Hartung's case, and could not be applied to it, and this was decided in face of the fact that it resulted in the discharge of a convicted murderess without any punishment at all.

Judge Denio, in delivering the opinion of the court, makes these excellent observations:

"It is highly probable that it was the intention of the Legislature to extend favor rather than increased severity towards the convict and others in her situation; and it is quite likely that, had they been consulted, they would have preferred the application of this law to their cases rather than that which existed when they committed the offenses of which they are convicted. But the case cannot be determined on such considerations. No one can be criminally punished in this country, *except according to a law prescribed for his government before the supposed offense was committed, and which existed as a law at that time.* It would be useless to speculate upon the question whether this would be so upon the reason of the thing, and according to the spirit of our legal institutions, because the rule exists in the form of an express written precept, the binding force of which no one disputes. No State shall pass any *ex post facto* law is the mandate of the Constitution of the United States." [231]

This is re-affirmed by the same court in the cases of *Shepherd* v. *People*, 25 N.Y., 406; *Green* v. *Shumway*, 39 N.Y., 418; and in *In re Petty*, 23 Kan., 477, the same thing is decided. In the case of *State* v. *Keith*, 63 N. C. [140], the Supreme Court of that State held that a law repealing a statute of general amnesty for offenses arising out of the rebellion, was *ex post facto* and void, though both statutes were passed after the acts were committed with which defendant was charged.

In the case of the *State* v. *Sneed*, 25 Tex., Supp., 66, the court held that in a criminal case

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barred by the statute of limitations, a subsequent statute which enlarged the time necessary to create a bar was, as to that case, an *ex post facto* law, and it could not be supposed to be intended to apply to it.

When, in answer to all this evidence of the tender regard for the rights of a person charged with crime under subsequent legislation affecting those rights, we are told that this very radical change in the law of Missouri to his disadvantage is not subject to the rule because it is a change, not in crimes but in criminal procedure, we are led to inquire what that court meant by criminal procedure.

The word *procedure*, as a law term, is not well understood, and is not found at all in Bouvier's Law Dictionary, the best work of the kind in this country. Fortunately a distinguished writer on criminal law in America has adopted it as the title to a work of two volumes. Bishop, Criminal Procedure. In his first chapter he undertakes to define what is meant by procedure. He says: "S. 2. The term procedure is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, pleading, evidence [232] and practice." And in defining practice, in this sense, he says: "The word means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in;" and evidence, he says, as part of procedure, "Signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted."

If this be a just idea of what is intended by the word procedure as applied to a criminal case, it is obvious that a law which is one of procedure may be obnoxious as an *ex post facto* law, both by the decision in *Calder* v. *Bull*, 3 Dall., 386, and in *Cummings* v. *Mo.*, 4 Wall., 277 [71 U. S., XVIII., 356], for in the former case this court held that "Any law which alters the legal rules of evidence, and receives less or different testimony than the law requires at the time of the commission of the offense, in order to convict the offender," is an *ex post facto* law; and in the latter, one of the reasons why the law was held to be *ex post facto* was that it changed the rule of evidence under which the party was punished.

But it cannot be sustained without destroying the value of the constitutional provision, that no law, however it may invade or modify the rights of a party charged with crime, is an *ex post facto* law within the constitutional provision, if it comes within either of these comprehensive branches of the law designated as pleading, practice and evidence.

Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed by state legislation after the offense committed, to the disadvantage of the prisoner, and not held to be *ex post facto* because it relates to procedure, as it does according to Mr. Bishop?

And can any substantial right which the law gave the defendant at the time to which his guilt relates, be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot.

Some light may be thrown upon this branch of the argument by a recurrence to a few of the numerous decisions of the highest courts construing the associated phrase in the same sentence of the Constitution which forbids the States to pass any law impairing the obligation [233] of contracts. It has been held that this prohibition also relates exclusively to laws passed after the contract is made, and its force has been often sought to be evaded by the argument that laws are not forbidden which affect only the *remedy*, if they do not change the nature of the contract or act directly upon it.

The analogy between this argument and the one concerning laws of procedure in relation to the contiguous words of the Constitution is obvious. But while it has been held that a change of remedy made after the contract may be valid, it is only so when there is substituted an adequate and sufficient remedy by which the contract may be enforced, or where such remedy existed and remained unaffected by the new law. *Tenn.* v. *Sneed*, 96 U. S., 69 [XXIV., 610]; *Antoni* v. *Greenhow*, present Term [*ante*, 468].

On this point it has been held that laws are void, enacted after the date of the contract:

1. Which give the debtor a longer stay of execution after judgment. *Blair* v. *Williams*, 4 Litt. (Ky.), 35; *McKenney* v. *Carroll*, 5 Mon. (Ky.), 98.

2. Which require on a sale of his property under execution an appraisement, and a bid of two thirds the value so ascertained. *Bronson* v. *Kinzie*, 1 How., 311; *McCracken* v. *Hayward*, 2 How., 608; 4 Litt., 35; *Sprott* v. *Reid*, 3 Greene (Ia.), 489.

3. Which allow a period of redemption after such sale. *Lapsley* v. *Brashear*, 4 Litt., 58; 7 Mon. (Ky.), 54; *Cargill* v. *Power*, 1 Mich., 369; *Robinson* v. *Howe*, 13 Wis., 341.

4. Which exempts from sale under judgment for the debt a larger amount of the debtor's property than was exempt when the debt was contracted. *Edwards* v. *Kearzey*, 96 U. S., 595 [XXIV., 793], and the cases there cited; Story Com., sec. 1385.

There are numerous similar decisions showing that a change of the law which hindered or delayed the creditor in the collection of his debt, though it related to the remedy or mode of procedure by which that debt was to be collected, impaired the obligation of the contract within the meaning of the Constitution.

Why are not the rights of life and liberty as sacred as the right of contract? Why should not the contiguous and associated words in the [234] Constitution, relating to retroactive laws, on these two subjects, be governed by the same rule of construction? And why should a law, equally injurious to the rights of the party concerned, be void in one case and not in the other, under the same circumstances?

But it is said that at the time the prisoner pleaded, guilty of the second degree of murder, and at the time he procured the reversal of the judgment of the criminal court on that plea, the new Constitution was in force, and he was bound to know the effect of the change in the law on his case.

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We do not controvert the principle that he was bound to know and take notice of the law. But as regards the effect of the plea and the judgment on it, the Constitution of Missouri made no change.

It still remained the law of Missouri, as it is the law of every State in the Union, that, so long as the judgment rendered on that plea remained in force or after it had been executed, the defendant was liable to no further prosecution for any charge found in that indictment.

Such was the law when the crime was committed; such was the law when he pleaded guilty; such is the law now, in Missouri and everywhere else. So that in pleading, guilty, under an agreement of ten years' imprisonment, both he and the prosecuting attorney and the court all knew that the result would be an acquittal of all other charges but that of murder in the second degree.

Did he waive or annul this acquittal by prosecuting his writ of error? Certainly not by that act; for if the judgment of the lower court sentencing him to twenty-five years' imprisonment had been affirmed, no one will assert that he could still have been tried for murder in the first degree. Nor was there anything else done by him to waive this acquittal. He refused to withdraw his plea of, guilty. It was stricken out by order of the court against his protest. He refused then to plead, not guilty, and the court in like manner, against his protest, ordered a general plea of, not guilty, to be filed. He refused to go to trial on that plea, and the court forced him to trial.

The case rests then upon the proposition that, [235] having an erroneous sentence rendered against him on the plea accepted by the court, he could only take the steps which the law allowed him, to reverse that sentence, at the hazard of subjecting himself to the punishment of death for another and a different offense of which he stood acquitted by the judgment of that court; that he prosecuted his legal right to a review of that sentence with a halter around his neck, when, if he succeeded in reversing it, the same court could tighten it to strangulation, and if he failed, it did him no good. And this is precisely what has occurred. His reward for proving the sentence of the court of twenty-five years' imprisonment (not its judgment on his guilt) to be erroneous, is, that he is now to be hanged instead of imprisoned in the penitentiary. No such result could follow a writ of error before, and as to this effect the new Constitution is clearly *ex post facto*. The whole error, which results in such a remarkable conclusion, arises from holding the provision of the new Constitution applicable to this case, when the law is *ex post facto* and inapplicable to it.

If Kring or his counsel were bound to know the law when they prosecuted the writ of error, they were bound to know it as we have expounded it. If they knew that, by the *words* of the new Constitution, such a judgment of acquittal as he had when he undertook to reverse it, would be no longer an acquittal after it was reversed, they also knew that, being as to his case an *ex post facto* law, it could have no such effect on that judgment.

We are of opinion that any law passed after the commission of an offense which, in the language of Washington, in *U. S.* v. *Hall*, "In relation to that offense, or its consequences, alters the situation of a party to his disadvantage," is an *ex post facto* law, and in the language of Denio, in *Hartung* v. *People*, "No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time."

Tested by these *criteria*, the provision of the Constitution of Missouri which denies to plaintiff in error the benefit which the previous law gave him of acquittal of the charge of murder in the first degree, on conviction of murder in the second degree, is, as to his case, an *ex post* [236] *facto* law within the meaning of the Constitution of the United States, and *for the error of the Supreme Court of Missouri, in holding otherwise, its judgment is reversed and the case is remanded to it, with direction to reverse the judgment of the Criminal Court of St. Louis, and for such further proceedings as are not inconsistent with this opinion.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Matthews** dissenting:

The *Chief Justice, Mr. Justice* **Bradley**, *Mr. Justice* **Gray**, and myself are unable to concur in the judgment and opinion of the court in this case, and the importance of the question determined constrains us to state the grounds of our dissent. The material facts are these: the plaintiff in error, at March Term, 1875, of the St. Louis Criminal Court, was indicted for murder in the first degree. On his arraignment he pleaded, not guilty. At the November Term of the same year, a trial was had, which resulted in a verdict of, guilty of murder in the first degree, and a sentence of death. That judgment was reversed on appeal, and twice subsequently there were mistrials. On November 12, 1879, the defendant, by consent of the circuit attorney and leave of the court, withdrew his plea of, not guilty, and entered a plea of, guilty of murder in the second degree. He was, thereupon, sentenced to imprisonment in the penitentiary for a term of twenty-five years. The prisoner then filed a motion to set aside this judgment and sentence, and to allow him to withdraw the plea of, guilty of murder in the second degree, and to permit him "To have his original plea of, not guilty, entered of record to the end that he may have a trial upon the merits of his case before a jury." In support of this motion, reasons were assigned, in substance: that he had withdrawn his original plea of, not guilty, and entered the plea of, guilty of murder in the second degree, upon the faith of an understanding previously had with the circuit attorney representing the prosecution that, if he would do so, the sentence should not exceed ten years in the penitentiary; which understanding was vi- [237] olated by the sentence complained of. The court overruled the motion, but on appeal the judgment was reversed on the ground alleged by the prisoner, that he had been misled, and the cause was remanded for further proceedings. On receipt of this mandate, the trial court, the prisoner refusing to withdraw his plea of, guilty of murder in the second degree, and to enter a plea of, not guilty, entertained the motion previously made by him, for refus-

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ing to grant which the judgment had thus been reversed, and granted it, setting aside the plea of, guilty and, the prisoner standing mute, ordered a plea of, not guilty to be entered. On this plea, a trial was had at October Term, 1881, when the prisoner was found guilty of murder in the first degree and again sentenced to death. An appeal was prosecuted from this judgment, which, however, was affirmed by the Supreme Court of Missouri, and is brought here for examination by the present writ of error, on the ground that it has been rendered in violation of a right secured to the plaintiff in error by the Constitution of the United States.

The right which it is alleged has been violated is supposed to arise in this way: at the time of the commission of the offense in 1875, it was well established as the law of Missouri, by the decisions of the Supreme Court of the State, that "When a person is indicted for murder in the first degree, and is put upon his trial and convicted of murder in the second degree and a new trial is ordered at his instance, he cannot legally be put upon his trial again for the charge of murder in the first degree; he can be put upon his trial only upon the charge of murder in the second degree." *State* v. *Ross*, 29 Mo., 32; *State* v. *Smith*, 53 Mo., 139. And it is not denied that a plea of, guilty of murder in the second degree, accepted by the State, would have been at that time equally an acquittal of the charge of murder in the first degree, having the same force as to future trials as a conviction of murder in the second degree, although the judgment should be reversed on the application of the prisoner.

On November 30, 1875, the State of Missouri adopted a new Constitution, which contained (section 23, article 2) the provision, that, "If judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall [238] prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law."

In the case of *State* v. *Simms*, 71 Mo., 538, it was decided that this provision overthrows the rule laid down in the case of *State* v. *Ross*, *ubi supra*, and was "Equivalent to declaring that when such judgment is reversed for error at law, the trial had is to be regarded as a mistrial; and that the cause, when remanded, is put on the same footing as a new trial, as if the cause had been submitted to a jury, resulting in a mistrial by the discharge of the jury in consequence of their inability to agree on a verdict."

The rule thus introduced by the Constitution of 1875 was the one applied in the trial of the prisoner, instead of that previously in force; and the contention is, that to apply it in a case such as the present, where the alleged offense was committed prior to the adoption of the new Constitution, is to give it operation as an *ex post facto* law, in violation of the prohibition of the Constitution of the United States.

In examining this proposition, it must constantly be borne in mind that the plea of, guilty of murder in the second degree, the legal effect of which, when admitted, is the precise subject of the question, was entered long after the new rule established by the Constitution of Missouri took effect; that the prisoner himself moved, to set it aside and for leave to renew his plea of, not guilty; on the ground that he had been misled into making his plea of, guilty, under circumstances that would make it operate as a fraud upon his rights, if it were permitted to stand; and that, because the court denied this motion, he made and prosecuted his appeal for a reversal of its judgment, in full view of the rule, then in force, of the application of which he now complains, which expressly declared what should be the effect of such a reversal.

The classification of *ex post facto* laws first made by *Mr. Justice* Chase, in *Calder* v. *Bull*, 3 Dall., 386-390, seems to have been generally accepted. It is as follows: "1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2. Every law that aggravates a crime or makes it greater than it was when committed. 3. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime [239] when committed. 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender." This definition was the basis of the opinion of the court in the cases of *Cummings* v. *Mo.*, 4 Wall., 277 [71 U. S., XVIII., 356], and *Ex parte Garland*, 4 Wall., 333 [71 U. S., XVIII., 366], and was expressly relied on in the opinion of the dissenting Judges, which says: "This exposition of the nature of *ex post facto* laws has never been denied, nor has any court or any commentator on the Constitution added to the classes of laws here set forth, as coming within that clause of the organic law." 4 Wall., 391 [71 U. S., XVIII., 374].

Now, under which of these heads does the controverted rule of the Missouri Constitution fall? It cannot be contended that it is embraced in either of the first three. If in any, it must be covered by the fourth. But what rule of evidence, existing at the time of the commission of the offense, is altered to the disadvantage of the prisoner? The answer made is this: that, at that time, an accepted plea of, guilty of murder in the second degree, was conclusive proof that the prisoner was not guilty of murder in the first degree, and that it was abrogated, so as to deprive the prisoner of the benefit of it. But while that rule was in force, the prisoner had no such evidence of which he could avail himself. How, then, has he been deprived of any benefit from it? He had not, during the period while the rule was in force, entered any plea of, guilty of murder in the second degree, and no such plea had been admitted by the State. All that can be said is, that if, while the rule was in force, he had entered such a plea with the consent of the State, its legal effect would have been as claimed, and by its change he has lost what advantage he would have had in such a contingency. But it does not follow that such a contingency would have happened. It was not within the power of the prisoner to bring it about, for it required the concurrence and consent of the State; and it cannot be assumed that under such a rule and in such a case, that consent would have been given. It is not enough to say that, under a ruling of the court, a party might have lost the benefit of certain evidence, if such evidence had existed. To predicate error in such a case, it must be shown that the [240] party had evidence of which, in fact, he has

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been illegally deprived. Such a case would have been presented here, if the plea of, guilty of murder in the second degree, had been entered and accepted, before the Constitution of 1875 took effect and while the old rule was in force. Then the law would have taken effect upon the transaction between the prisoner and the prosecution, in the acceptance of his plea; the *status* of the prisoner would have been fixed and declared; he would have stood acquitted of record of the charge of murder in the first degree; and the new rule would have been an *ex post facto* law if it had made him liable to conviction and punishment for an offense of which by law he had been declared to be innocent.

But, in the circumstances of the present case, the evidence, of which it is said the prisoner has been deprived, came into being after the law had been changed. It was evidence created by the law itself, for it consists simply in a technical inference; and the law in force when it was created necessarily determines its quality and effect. That law did not operate upon the offense to change its character; nor upon its punishment to aggravate it; nor upon the evidence which, according to the law in force at the time of its commission, was competent to prove or disprove it. It operated upon a transaction between the prisoner and the prosecution, which might or might not have taken place; which could not take place without mutual consent; and when it did take place, that consent must be supposed to have been given by both with reference to the law as it then existed, and not with reference to a law which had then been repealed.

It is the essential characteristic of an *ex post facto* law, that it should operate retrospectively, so as to change the law in respect to an act or transaction already complete and past. Such is not the effect of the rule of the Constitution of Missouri now in question. As has been shown, it does not, in any particular, affect the crime charged, either in its definition, punishment or proof. It simply declares what shall be the legal effect, in the future, of acts and transactions thereafter taking place. It enacts that any future erroneous and unlawful conviction for a less offense, thereafter reversed on the [241] application of the accused, shall be held for naught, to all intents and purposes, and shall not, after such reversal, operate as a technical acquittal of any higher grade of crime, for which there might have been a conviction under the same indictment. It imposes upon the prisoner no penalty or disability. It cannot affect the case of any individual, except upon his own request, for he must take the first step in its application. When he pleads guilty of murder in the second degree, he knows that its acceptance cannot operate as an acquittal of the higher offense. When he asks to have the conviction reversed, he understands that if his application is granted, the judgment must be set aside with the same effect as if it had never been rendered. It does not touch the substance or merits of his defense, and is in itself a sensible and just rule in criminal procedure.

And, "So far as mere modes of procedure are concerned," says *Judge* Cooley, Const. Lim., 372, "a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the Legislature, and it would create endless confusion in legal proceedings, if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts, in existence when its facts arose. The Legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime. Statutes giving the government additional challenges and others which authorized the amendment of indictments, have been sustained and applied to past transactions, as doubtless would be any similar statute calculated merely to improve the remedy, and in its operation working no injustice to the defendant and depriving him of no substantial right." Accordingly, it was held by this court, in *Gut* v. *State*, 9 Wall., 35 [76 U. S., XIX., 573], in the language of *Mr. Justice* Field, delivering its opinion, that "A law, changing the place of trial from one county to another county in the same district or even to a different district from that in which the offense was committed or the [242] indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offense or the finding of the indictment." And in the case of *Ex parte McCardle*, 7 Wall., 506 [74 U. S., XIX., 264], it was the unanimous decision of the court, that it was competent for Congress, in a case affecting personal liberty, to deprive the complaining party of the benefit of an appeal from the judgment of an inferior court, after his appeal had taken effect and while it was pending. It would have been equally competent for the Constitution of Missouri to have declared that no appeal or writ of error should thereafter be allowed to reverse the judgment of the court of original jurisdiction in any pending criminal cause, which certainly would be giving a different, because irreversible, effect to that judgment from what such judgments would have had under the law in force when the offense was committed. If it be true, in the logic of the law, as it is in all its other applications, that the greater includes the less, then it was competent for that Constitution to provide that, as to all judgments in criminal cases thereafter rendered, which should be reversed for error, on the appeal of the defendant, the effect of the reversal should be such as not to be a bar to a subsequent conviction for any crime described in the indictment; for that would have been to say, not that there shall be no appeal at all, but that, if an appeal is taken, its effect shall only be such as is prescribed in the law allowing it.

In *Commonwealth* v. *Holley*, 8 Gray, 458, Shaw, *Ch. J.*, said: "The object of the Declaration of Rights was to secure substantial privileges and benefits to parties criminally charged; not to require particular forms, except where they are necessary to the purposes of justice and fair dealing towards persons accused, so as to insure a full and fair trial." And in *Commonwealth* v. *Hall*, 97 Mass., 570, the court, speaking of a statutory provision authorizing the amendment of indictments, so as to allege a former conviction, the effect of which was to in-

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crease the penalty, said: "We entertain no doubt of the constitutionality of this section, which promotes the ends of justice by taking away a purely technical objection, while it [243] eaves the defendant fully and fairly informed of the nature of the charge against him, and affords him ample opportunity for interposing every meritorious defense. Technical and formal objections of this nature are not constitutional rights." These observations, it is not necessary to point out, are entirely applicable to the present argument.

Still stronger and more to the point is what was said by Shaw, *Ch. J.*, in *Jacquins* v. *Commonwealth*, 9 Cush., 279, where it was held that a statute authorizing the Supreme Judicial Court, on a writ of error, on account of error in the sentence, to render such judgment therein as should have been rendered, applied to past judgments, and was not, on that account, an *ex post facto* law. That eminent Judge said: "It was competent for the Legislature to take away writs of error altogether, in cases where the irregularities are formal and technical only, and to provide that no judgment should be reversed for such cause. It is more favorable to the party to provide that he may come into court upon the terms allowed by this statute, than to exclude him altogether. This Act operates like the Act of Limitations. Suppose an Act was passed that no writ of error should be taken out after the lapse of a certain period. It is contended that such an Act would be unconstitutional, on the ground that the right of the convict to have his sentence reversed upon certain conditions had once vested. But this argument overlooks entirely the well settled distinction between rights and remedies."

Precisely the same distinction between laws *ex post facto* and those which merely affect the remedy, and are, therefore, applicable to the case of an offense previously committed, is well illustrated by the case of *Ratzky* v. *People*, 29 N. Y., 124. There the prisoner had been convicted of murder in the first degree; the offense was committed when the Act of 1860 was in force, which prescribed the mode of punishment; he was sentenced, however, in accordance with the terms of an Act passed in 1862, subsequently to the commission of the offense, and which prescribed a different mode of punishment. On this account the judgment was held to be erroneous and was reversed on the ground that the Act of 1862, applied to offenses previously committed, was *ex post facto*. But [244] at the time of the commission of the offense, in 1861, it was the well settled law of New York, as decided in *Shepherd* v. *People*, 25 N. Y., 406, that when a wrong judgment had been pronounced, although the trial and conviction were regular, the prisoner could not, on reversal of the judgment, be subject to another trial, but would be entitled to his discharge. But, on April 24, 1863, after the prisoner had been tried and convicted, but before judgment and sentence were pronounced, an Act of the Legislature took effect, which provided that the appellate court should have power, upon any writ of error, when it should appear that the conviction had been legal and regular, to remit the record to the court in which such conviction had been had, to pass such sentence thereon as the appellate court should direct. But for the authority conferred by this Act, the Court of Appeals stated that it would have had no power upon reversal of the judgment of the Supreme Court, either to pronounce the appropriate judgment, or remit the record to the oyer and terminer to give such judgment; but, on the contrary, would have been obliged to have discharged him, the law not authorizing another trial. Nevertheless, the Court of Appeals gave effect to the Act of 1863, reversed the judgment and sent the record down with directions to sentence the prisoner to death, in accordance with the provisions of the Act of 1860, holding that the Act of 1863 was not an *ex post facto* law. And yet it deprived the prisoner of the benefit of a rule of law, in force at the time the offense was committed, *viz.*: that if he should be erroneously sentenced and the judgment should be reversed, he would be entitled to be discharged and forever after protected against further prosecution for the same offense, as well as against any second judgment upon the same verdict.

This decision deserves particular consideration, for it involves the very question under discussion. At the time of the commission of his offense, and at the time of his trial and conviction, a rule of law in New York had been well established, that upon a reversal of judgment in a capital case, for error in the sentence, the prisoner was entitled to be discharged, and his former conviction, notwithstanding the reversal, was a conclusive defense upon any subsequent trial for the same offense. After trial and conviction, a statute was passed which abrogated that rule and declared that a subsequent reversal of judgment for error merely in [245] the sentence should not have that effect, but that, even without a new trial, a new judgment might be entered upon the verdict. This gave to the verdict and to the subsequent proceeding an effect entirely different from what they would have had under the law as it stood at the time of the commission of the offense, and deprived the prisoner of the advantage of the rule then in force. After that statute took effect, he prosecuted a writ of error and reversed the judgment for error in the sentence, and it was held that the effect of that reversal was determined by the law in force when it was rendered, and not by the law in force when the trial and verdict were had and when the offense was committed.

Mr. Justice Davies said, p. 132: "It would follow from these considerations and the authority of the case of *Shepherd* v. *People*, 25 N. Y., 406, that a wrong judgment having been pronounced, although the trial and conviction were regular, this prisoner could not be subjected to another trial and would be entitled to his discharge. That would, unquestionably, be so but for the Act of April 24, 1863. * * * In the present case, that Act became operative before the judgment and sentence were pronounced and given, and before the writ of error was prosecuted to this court. It was, therefore, in force when the writ of error in this case was prosecuted, and its provisions are applicable to the duty imposed upon this tribunal by virtue of that proceeding. * * * But for the authority conferred upon this court by that statute it would have had no power, upon reversal of the judgment of the Supreme Court, either to pronounce the appropriate judgment or re-

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mit the record to the oyer and terminer to give such judgment."

And *Chief Justice* Denio said: "The remaining question is, whether the judgment should be reversed and the prisoner discharged, according to the former rule, or the record be remitted to the oyer and terminer to pass a legal sentence upon the conviction. This latter course is now authorized by statute. Laws 1868, ch. 226, p. 406. The conviction was legal and the sentence only was erroneous. The only question is, whether the Act, having been passed after the conviction though before judgment was given in the Supreme Court, could be applied to the case. / I am of opinion that it can be applied. The forms of judicial proceedings are under the control of the Legislature." And the court accordingly, instead of ordering the prisoner to be discharged, according to the rule in force at the time the offense was committed, and even at the time of his trial and conviction, directed the record to be remitted to the court of oyer and terminer, with instructions to sentence him to suffer death for the crime of which he had been convicted.

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The counterpart and complement of the decision in *Ratzky's Case* are found in *Hartung* v. *People*. There the prisoner had been convicted of murder and sentenced to death; but at the time the judgment was rendered, the law in force at the time of the commission of the offense providing for its punishment had been repealed, and the repealing Act substituted a different punishment. It was on this account adjudged to be an *ex post facto* law and void, and the judgment was reversed. 22 N. Y., 95. Subsequently the repealing Act was itself repealed, and the former Act in force when the offense was committed, was restored. Then the prisoner was again tried, having pleaded a former conviction, but was found guilty and adjudged to suffer death in accordance with the law existing at the time the offense was committed. This judgment was thereupon reversed, and the prisoner ordered to be discharged, on the ground that the Act restoring the law as it stood when the offense was committed was an *ex post facto* law, because at the time it was passed the prisoner had been adjudged to be legally free from punishment of any kind on account of her offense. 26 N. Y., 167. The very point of the decision was, that while it was competent for the Legislature to repeal the repealing Act so that it could not thereafter be availed of, it could not destroy the effect of a judgment actually pronounced, while that Act was in force. It is manifest that if in that case the prisoner had not been tried at all until after the law had been thus twice changed, she could not have claimed to have had the vested interest in the first repealing Act, which was allowed to her in the judgment actually rendered when it was in force. It was because the subsequent law, if applied, would have changed the legal effect of that judgment, that it was adjudged to be an *ex post facto* law.

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It was precisely upon this principle that the Supreme Court of North Carolina proceeded in the case of *State* v. *Keith*, 63 N. C., 140. There the prisoner, in custody on a charge of murder, moved for a discharge, on the ground that his offense was within the provisions of the Amnesty Act of 1866-7. This was admitted to be the case, but the motion was opposed on the ground that the Amnesty Act had been repealed. It was held that the effect of the pardon was, so far as the State was concerned, to destroy and entirely efface the previous offense, as if it had never been committed; and that to give to the repeal of the Amnesty Act the effect, as claimed, of reviving the offense, would make it an *ex post facto* law, making criminal that which, when it took effect, was not so, and taking from the prisoner his vested right to immunity.

But suppose, in that case, the provisions of the Amnesty Act had been conditional and not absolute, so that no one could plead its pardon unless he had taken certain formal preliminary steps to obtain the benefit of its terms, and that before the prisoner had done so the Act had been repealed, could it be claimed that, in that event, he had obtained a vested right to immunity, and that its repeal operated as an *ex post facto* law? Clearly not. And in reference to this case, it is also to be observed, that the fact, the legal character of which was changed by the subsequent law, was the fact of pardon, and not a fact which existed at the time of the commission of the offense. The repealing Act was *ex post facto*, because it had the effect to change the legal character of the facts as they existed at the time of its passage.

In *State* v. *Arlin*, 39 N. H., 179, a prisoner was indicted for a robbery, which, at the time of its commission, was punishable by imprisonment for life; but by the same law he was entitled to have counsel assigned him by the government, process to compel the attendance of witnesses, and other similar privileges. A subsequent law mitigated the severity of the punishment and repealed the Act giving these privileges. It was held that the Act was not *ex post facto*, because it changed the punishment to the advantage of the prisoner, and that he was not entitled to the incidental benefits secured by the law in force when the offense was committed. The court remarked, that, by committing the offense, the prisoner had not acquired a vested right to enjoy the privileges to which he would have been entitled if tried under the law subjecting him to imprisonment for life.

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The rule of law in Missouri, the benefit of which is claimed for the prisoner in this proceeding, notwithstanding its repeal by the Constitution of the State before it could have been applied in his case, was established, not by statute, but by a series of judicial decisions of the Supreme Court of the State. Those decisions might at any time have been reversed by the same tribunal, and a new rule introduced, such as that actually declared by the Constitution. In that event, could it be said, with any plausibility, that the later decisions, reversing the law as previously understood, could not be applied to all subsequent proceedings in cases where, upon a plea of guilty of murder in the second degree thereafter entered and accepted, an erroneous judgment thereon had been reversed, notwithstanding, when the offense was committed, the prior decisions had been in force? Would the new rule, as introduced and applied by the later judicial decisions, be in violation of the prohibition of the Constitution of the United States against *ex post facto* laws? But the Constitution of Missouri has done no more than this.

The nature and operation of the rule are not

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affected by any peculiarity in the authority which establishes it. If it is not objectionable as an *ex post facto* law, when introduced by judicial decision, it is because it is not so in its nature; and, if not, it does not become so when introduced by a legislative declaration.

There are, doubtless, many matters of mere procedure which are of vital consequence; but in respect to them the power of Congress, as to crimes against the United States, is restrained by positive and specific limitations, carefully inserted in the organic law, prohibiting unreasonable searches and seizures, and general warrants; providing that no one shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the military service; that no person shall, for the same offense, be twice put in jeopardy of life or limb, nor be compelled to testify against himself; that every accused person shall be secured in the right to a public trial by an impartial jury in a [249] previously ascertained district, in which the alleged offense is charged to have been committed; to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. But these are limitations upon the legislative power of the United States, whether prospective or retrospective, and not upon that of the States; and although the Constitutions of all the States probably have equivalent guaranties of individual rights, the violation of none of them by a state tribunal, under state legislation, could present a case for the exercise of supervisory jurisdiction by this court. The prohibition against bills of attainder is the only one of this class which applies to both the Government of the United States and those of the States; and while a bill of attainder may be an *ex post facto* law, it is not necessarily so, as it may be merely a matter of procedure, a trial by a legislative instead of a judicial body.

But, in addition to these matters of procedure, which are specially protected against legislative change, either for the past or the future, there may be others, in which changes with a retrospective effect are forbidden by the prohibition against *ex post facto* laws. Such, we have already seen, would be laws which authorize conviction upon less evidence than was required at the time of the commission of the offense, or which altered, to the disadvantage of the accused, the nature and quantity of proof at that time required to substantiate a legal defense; or which, in other words, gave to the circumstances which constituted and attended the act, a legal signification more injurious to the accused, than was attached to them by the law existing at the time of the transaction.

It is doubtless quite true that it is difficult to draw the line in particular cases beyond which legislative power over remedies and procedure cannot pass without touching upon the substantial rights of the parties affected, as it is impossible to fix that boundary by any general words. The same difficulty is encountered, as the same principle applies, in determining, in civil cases, how far the Legislature may modify the remedy without impairing or enlarging the obligation of contracts. Every case must be decided upon its own circumstances, as the question continually arises and requires an an- [250] swer. But it is a familiar principle that, before rights derived under public laws have become vested in particular individuals, the State, for its own convenience and the public good, may amend or repeal the law without just cause of complaint. "The power that authorizes or proposes to give," said *Mr. Justice* Woodbury in *Merrell* v. *Sherburne*, 1 N. H., 213, "may always revoke before an interest is perfected in the donee." Accordingly, the heir apparent loses no legal right if, before descent cast, the law of descents is changed so as to shift the inheritance to another, however his expectations may be disappointed. And while it would be a violation of the constitutional maxim which forbids retrospective legislation inconsistent with vested rights, to deprive, by a repeal of statutes of limitation, a defendant of a defense which had become perfect while they were in force; yet if, before the bar had become complete, he should be deprived of an expected defense, by an extension of time in which suit might be brought, he would have no just cause to object that he was compelled to meet the case of his adversary upon its merits.

In respect to criminal offenses it is undoubtedly a maxim of natural justice, embodied in constitutional provisions, that the quality and consequences of an act shall be determined by the law in force when it is committed, and of which, therefore, the accused may be presumed to have knowledge; so that the definition of the offense, the character and degree of its punishment, and the amount and kind of evidence necessary to prove it, cannot be changed to the disadvantage of the party charged, *ex post facto*. And this equally applies to because it includes the matters which, existing at the time and constituting part of the transaction, affect its character, and thus form grounds of mitigation or defense; for the accused is entitled to the benefit of all the circumstances that attended his conduct, according to their legal significance, as determined at the time. All these are incidents that belong to the substance of the thing charged as a crime and, therefore, come within the saving which preserves the legal character of the principal fact. But matters of possible defense, which accrue under provisions of positive law which are arbitrary and technical, introduced for public convenience or from motives of policy, which do not affect the substance of the [251] accusation or defense, and form no part of the *res gestæ*, are continually subject to the legislative will, unless, in the meantime, by an actual application to the particular case, the legal condition of the accused has been actually changed. His right to maintain that *status*, when it has become once vested, is beyond the reach of subsequent law.

The present, as we have seen, is not such a case. The substance of the prisoner's defense, upon the merits, has not been touched; no vested right under the law had wrought a result upon his legal condition before its repeal. He is, therefore, in no position to invoke the constitutional prohibition, which is, by the judgment of this court, now interposed between him and the crime of which he has been convicted.

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In our opinion, the judgment of the Supreme Court of Missouri should be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—110 U. S., 568.

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[636] MRS. PETER DUFF ET AL. AND UNION MANUFACTURING COMPANY, *Appts.*,

v.

STERLING PUMP COMPANY.

(See S. C., 16 Otto, 636-639.)

Letters patent, construction of—how limited—new form to accomplish results.

*1. Re-issued letters patent No. 6673, granted to Mrs. P. Duff, E. A. Kitzmiller and R. P. Duff, October 5, 1875, for an improvement in wash-boards, on the surrender of original letters patent No. 111585, granted to Westly Todd, as inventor, February 7, 1871, are not infringed by a wash-board constructed in accordance with the description contained in letters patent No. 171568, granted to Aaron J. Hull, December 28, 1875.

2. In view of prior inventions, the claims of the Todd patent must be limited to the form shown, namely: projections bounded by crossing horizontal and vertical grooves, and do not cover diamond shaped projections bounded by crossing diagonal grooves.

3. In the field of wash-boards made of sheet metal, with the surface broken into protuberances formed of the body of the metal, so as to make a rasping surface, and to strengthen the metal by its shape, and to provide channels for the water to run off, Todd was not a pioneer, but merely devised a new form to accomplish those results; and his patent does not cover a form which is a substantial departure from his.

[No. 187.]

Argued Mar. 19, 1883. Decided Apr. 2, 1883.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **Lester L. Bond,** for appellant.

No counsel appeared for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity brought for the alleged infringement of re-issued letters patent No. 6673, granted to Mrs. P. Duff, E. A. Kitzmiller and R. P. Duff, October 5, 1875, for an improvement in wash-boards, on the surrender of original letters patent No. 111585, granted to Westly Todd, as inventor, February 7, 1871. The specification of the re-issue says: "The nature of my invention consists in the construction of a sheet metal wash-board with a rubbing face longitudinally and transversely corrugated or ribbed, whereby such rubbing surface shall be made up of a series of projections, bounded by a series of horizontal, vertical and angularly shaped grooves. The rubbing face somewhat resembles the face of a rasp or file in general appearance, though the projections are less sharp and angular." "In the accompanying drawing, A represents the frame of the wash-board and is of ordinary construction. [637] The rubbing surface is formed of sheet zinc or other suitable sheet metal, corrugated or provided with a series of raised portions, B, alternating, along the line of the corrugation or rib which forms them, with depressions or unraised portions, *a*, the corrugations and depressions extending in either direction across the sheet, so that a series of horizontal and vertical and also angularly shaped grooves are formed between the projections. Each projection, B, represents four inclined surfaces sloping from the apex of the projection into the grooves which surround and bound it. The grooves between the corrugations are also broken or interrupted at intervals by small projections or raised portions, C, each of which presents two lateral surfaces. In a wash-board thus longitudinally and transversely ribbed or corrugated, the inequalities of the rubbing surfaces are such that the desired effect is more readily and effectively attained, whereby the labor of washing is greatly diminished and is accomplished with ease and facility, and with less than the usual wear on the clothes." There are three claims in the patent, as follows: "1. A sheet metal wash-board having a series of raised projections, B, each bounded by longitudinal and transverse grooves or depressions, substantially as set forth. 2. In a sheet metal wash-board the projections, B, each bounded by grooves or depressions, in combination with raised projections, C, in the bottoms of the interlying grooves, substantially as set forth. 3. As a new article of manufacture, a sheet metal wash-board, having a rubbing face both longitudinally and transversely ribbed or corrugated, substantially as set forth."

The wash-board of the defendant is made in accordance with the description contained in letters patent No. 171568, granted December 28, 1875, to Aaron J. Hull. That description shows a sheet metal wash-board provided with diamond shaped projections, each bounded by diagonal grooves or depressions. The metal plate is described as being crimped to form oblong, diamond shaped projections, having the largest diameter running transversely across the board, each projection being bounded by a diagonal groove or depression, the upper corner of each diamond, where the grooves cross each other, being raised higher than any other part [638] of the same, and the corresponding lower corner being the lowest part of the diamond. The claim of the patent is this: "A wash-board of sheet metal, formed with a series of raised diamond shaped projections, B, and a series of narrow diagonal grooves, *b*, between the projections, which cross each other, substantially as set forth."

The case was heard on pleadings and proofs in the circuit court. That court entered a decree declaring that the equities were with the defendant and dismissing the bill.

It is entirely clear that the specification of the Todd patent describes the grooves in the metal as being horizontal and vertical, and gives no other meaning to the words transverse and longitudinal. It describes the transverse and longitudinal corrugating or ribbing as producing projections which are bounded by horizontal and vertical grooves. From the evidence, Todd took the old zinc wash-board corrugated into horizontal grooves, and corrugated or ribbed it

*Head notes by *Mr. Justice* BLATCHFORD.

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again by vertical grooves crossing the horizontal grooves at right angles. Nothing is said in the specification as to the method of producing the corrugating or ribbing, nor does the patent claim any process or machinery.

In the Galusha and Safford patent of December, 1857, there is shown a wash-board formed of corrugated sheet metal. The specification states that the corrugations are formed of a series of elevations and depressions, the elevations and depressions being in parallel rows and in alternate positions with respect to each other; that the corrugations are oblong, their ends and sides inclined, and their edges somewhat rounded; that each elevation forms a figure approximating to a semi-cylinder pointed at each end, the ends of the elevations in one row overlapping the ends of those in the adjoining rows; that thus channels are formed for the escape of water downward; and that the form of the corrugations stiffens the board, as compared with the old form of parallel flutes extending entirely across the plate.

In the Crihfield patent of October, 1870, there is shown a zinc wash-board, composed of a series of irregularly placed diamond shaped raised pieces, arranged in rows crosswise of the board from top to bottom, each alternate row being composed of more elevations than the adjacent row; [639] the elevations in one row being opposite the spaces between the elevations in the two adjacent rows, and a series of oblique channels being thus formed up and down the board from either side. The specification states that the boards can be stamped out by die plates.

Nothing is shown in evidence to defeat the novelty of the claims of the Todd re-issue; but, in view of the structure shown in the patents of Galusha and Safford and of Crihfield, the claims of the Todd re-issue must be so limited as not to extend to a structure such as is described in the Hull patent. We do not perceive that in the wash-boards made by the defendant there is any substantial departure from the description in the Hull patent.

The case is one where, in view of the state of the art, the invention must be restricted to the form shown and described by the patentee. In the field of wash-boards, made of sheet metal, with the surface broken into protuberances formed of the body of the metal, so as to make a rasping surface and to strengthen the metal by its form and to provide channels for the water to run off, Todd was not a pioneer. He merely devised a new form to accomplish these results. *R. Co.* v. *Sayles*, 97 U. S., 554 [XXIV., 1053]. The defendant adopts another form. Under such circumstances, the Todd patent cannot be extended so as to embrace the defendant's form. The latter is not a mere colorable departure from the form of Todd, but is a substantial departure. These views are in accordance with those heretofore announced by this court in *Merrill* v. *Yeomans*, 94 U. S., 568 [XXIV., 235]; *Bridge Co.* v. *Iron Co.*, 95 Id., 274 [XXIV., 344], and *Burns* v. *Meyer*, 100 Id., 671 [XXV., 738].

The decree of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

MEMPHIS AND CHARLESTON RAILROAD COMPANY, *Appt.*, [581]

v.

STATE OF ALABAMA, For the Use of JACKSON COUNTY.

(See S. C., 17 Otto, 581-585.)

Citizenship of corporation.

*The Memphis and Charleston Railroad Company is made, by the statutes of Alabama, an Alabama Corporation; and, although previously incorporated in Tennessee also, cannot remove into the Circuit Court of the United States a suit brought against it in Alabama by a citizen of Alabama.

[No. 195.]

Argued Mar. 16, 1883. Decided Apr. 2, 1883.

APPEAL from the Circuit Court of the United States for the Northern District of Alabama.

The history and facts of the case appear in the opinion of the court.

Messrs. **W. Y. C. Humes** and *Milton Humes*, for appellant:

The intention and effect of the Alabama Legislature was to grant the right of way to the Railroad Company which had been incorporated by the Legislature of Tennessee.

R. R. Co. v. *Harris*, 12 Wall., 65 (79 U. S., XX., 354); *R. R. Co.* v. *Whitton*, 13 Wall., 270 (80 U. S., XX., 576); *Williams* v. *R. R. Co.*, 3 Dill., 267; *Treadway* v. *R. R. Co.*, 21 Ia., 351; *Ex parte Schollenberger*, 96 U. S., 369 (XXIV., 853); *St. Louis, etc., R. R. Co.* v. *Ind. & St. Louis R. R. Co.*, 9 Rep., 103; see, 9 Biss., 103; *R. R. Co.* v. *Koontz*, 104 U. S., 5 (XXVI., 643).

The Albama Act of 1850 granted to appellant nothing more than was expressly granted. That Act did not expressly grant corporate powers to appellant as a newly created domestic corporation. It did expressly grant a right of way to appellant, as a Tennessee Corporation, through the State of Alabama.

Abb. Dig. Law of Corp., 151, sec. 64, 152, sec. 70.

The title of an Act is entitled to very little weight.

Potter, Dwar. Stat., 102, 103.

Sedg. Stat., 2d ed., 40; *Hadden* v. *Collector*, 5 Wall., 110 (72 U. S., XVIII., 519); *Bartlett* v. *Morris*, 9 Port., 266.

On the other hand, the preamble of an Act is entitled to great weight.

Potter's Dwar., 107, 265, 269; *Beard* v. *Rowan*, 9 Pet., 301, 317.

Mr. Enoch Totten, for appellee.

Mr. Justice **Gray** delivered the opinion of the court:

This action was brought by the State of Alabama, for the use of Jackson County, in a court of that State, against a Railroad Corporation whose road passed through that State and county, to recover the amount of a county tax assessed upon its property. It was removed into the Circuit Court of the United States for the Northern District of Alabama, upon the petition of the Corporation, alleging that it was a citizen of the State of Tennessee and the plaintiff was a citizen of Alabama. Upon the motion of the plaintiff and the introduction in evidence of the Acts of the Legislatures of Tennessee,

*Head note by *Mr. Justice* GRAY.

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Alabama and Mississippi, relating to the defendant Corporation, and of its organization under those Acts, the Circuit Court, following its own decision in *Copeland* v. *R. R. Co.*, 3 Woods, 651, remanded the case to the state court, upon the ground that the defendant was a Corporation chartered by the State of Alabama; and from the order remanding the case the defendant appealed.

The question decided by the Circuit Court, and argued by the appellant, depends upon the provisions of the statutes of Alabama.

The first Act of the Legislature of Alabama upon the subject, passed on the 7th of January, 1850, is entitled "An Act to Incorporate the Memphis and Charleston Railroad Company," [582] and has this preamble: "Whereas, an Act was passed by the State of Tennessee, bearing date the 2d day of February, 1846, and the same was amended by an Act of the same State, dated February 4, 1848, for the formation of a company, under the name and style of the Memphis and Charleston Railroad Company, for the purpose of establishing a communication by railroad between Memphis, Tennessee and Charleston, South Carolina; and whereas, it is believed that the most eligible route for said road is through a portion of this State; and whereas, it is also believed that great and lasting benefits will accrue to the inhabitants of the State from said improvement; Therefore,"

It then proceeds, in the 1st section, to provide that "The said Company shall have the right of way through the territory of this State to construct their road" between certain points named, "and said Company shall have and enjoy all the rights, powers and privileges granted to them by the Act of incorporation above mentioned, and shall be subject to all the liabilities and restrictions imposed by the same, together with the following requirements."

The 2d section provides that "In the event said road shall be located through Tuscumbia, it shall be the duty of the Company to construct a branch to Florence; and in the event said road shall pass on the north side of the Tennessee River near Florence, it shall be the duty of said Company to construct a branch to Tuscumbia; *Provided*, That the subscription in the town or county applying for such branch shall be fully sufficient to pay the cost of the same."

The 3d section provides that "The said Company shall be authorized and required to open books for the subscription of stock in the capital of said Corporation in the State of Alabama, so as to afford the citizens thereof an opportunity to take stock to the amount of $1,500,000 of the capital of said Company; *Provided*, That if said $1,500,000 be not subscribed in Alabama within ninety days after the books are opened, then it may be taken elsewhere."

The 4th section provides that "The said Company shall, at the first meeting of the stockholders, designate a time when, and a place or [583] places in North Alabama where, for the convenience of the citizens of the State who may be stockholders, the subsequent election for directors shall be held, and shall give notice thereof in one or more newspapers published in North Alabama; and said elections shall be held at the same time, both in this State and in Tennessee."

The 5th section provides that "The moneys subscribed by the citizens of Alabama, whether by the State, counties, corporations or individuals, shall first be applied to the construction of the road within the limits of the State of Alabama, and said moneys shall be placed in some safe depository in North Alabama until required for use; *Provided*, That nothing in this section shall be so construed as to prevent the Company from putting under contract the whole road whenever in their estimation a sufficient amount of funds shall have been obtained."

The 6th section provides that "Said Company shall not charge for the transportation of persons or property any higher rates on one part than on another of said road; but the tolls shall be equal and uniform on every part of said road for articles of the same description, whether passing in one direction or the other."

So far, it is not made quite clear whether the words "said Company," as used in the body of the Act, refer to the Company which the Act in its title purports to incorporate, or to the Company, mentioned in the preamble, for the formation of which Acts had been passed by the State of Tennessee.

But that these words do not refer to the Tennessee Corporation and are meant to designate an Alabama Corporation, is made plain by the repeated use of the words "the Company hereby incorporated" in the 7th section, which is as follows: "The Company hereby incorporated shall not locate their road on the track of the Tennessee Valley Railroad, nor of any other railroad which has heretofore been chartered by this State; *Provided*, Companies have been organized under the same, without first procuring the assent by agreement with said companies; but it shall be lawful for the Company hereby incorporated to acquire by purchase, gift, release or otherwise, from any other Company, all the rights, privileges and immunities of said Company, and possess and enjoy the same as fully as they were or could be possessed or enjoyed [584] by the Company making the transfer."

The two other sections of the Act also seem to regard the Corporation as created as well as controlled by the State of Alabama; for the 8th section provides that "Any railroad company now chartered or hereafter to be chartered in this State shall have the right to connect their road with the road authorized by this Act;" and the 9th section provides that "Nothing contained in this Act shall prevent the State of Alabama from levying and collecting such taxes on the property of said Company within this State as shall by the General Assembly of the State be assessed on the property of other railroads in this State; nor shall anything therein be construed so as to prevent the chartering and building other railroads in the State coming within any distance whatever of said road, anything in the said law of Tennessee to the contrary notwithstanding." Stat. Ala., 1849-50, ch. 128.

The whole Act, taken together, manifests the understanding and intention of the Legislature of Alabama, that the Corporation, which was thereby granted a right of way to construct through this State a railroad, with which any railroad company chartered or to be chartered in this State should have the right to connect its road; and which was required to construct

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a branch railroad in this State; to open books for subscriptions of stock to a certain amount in this State; to apply the moneys here subscribed to the construction of the road within this State, and to hold elections in this State; was and should be in law a Corporation of the State of Alabama, although having one and the same organization with the Corporation of the same name previously established by the Legislature of Tennessee.

The subsequent Acts of the State of Alabama point in the same direction, and each speaks of the Company as incorporated or chartered by the Legislature of Alabama.

The Act of the 12th of February, 1850, is entitled "An Act to Amend an Act Entitled 'An Act to Incorporate the Memphis and Charleston Railroad Company,'. Approved January 7, 1850," and provides that if "The subscribers to the capital stock of the Memphis and Charleston Railroad in the State of Alabama, [585] from a failure to obtain the necessary legislation from the States of Tennessee and Mississippi, or from any other cause, deem it expedient to form a separate and independent organization, then and in that event they are hereby vested with full power and authority to do the same; and said Company so organized shall be known by the name and style of the Mississippi and Atlantic Railroad Company, and shall have and enjoy all the rights, privileges and powers heretofore granted or intended to be granted, and be subject to all the limitations, restrictions and liabilities heretofore imposed or intended to be imposed, in the several Acts incorporating the Memphis and Charleston Railroad Company." Stat. Ala., 1849–50, ch. 129.

The Act of the 7th of February, 1856, which, as mentioned in its title and provided in its 1st section, grants to "The Memphis and Charleston Railroad Company" a right of way for an extension of its road through the territory of this State, expressly provides in the 2d section that "Said right of way is granted upon the same terms, restrictions, liabilities and conditions, that the right of way is granted to said Company under the charter granted to said Company by the General Assembly of this State and approved 7th January, 1850." Stat. Ala., 1855–56, ch. 302.

The defendant, being a Corporation of the State of Alabama, has no existence in this State as a legal entity or person, except under and by force of its incorporation by this State; and although also incorporated in the State of Tennessee, must, as to all its doings within the State of Alabama, be considered a citizen of Alabama, which cannot sue or be sued by another citizen of Alabama in the courts of the United States. *R. R. Co.* v. *Wheeler*, 1 Black, 286 [66 U. S., XVII., 130]; *R. Co.* v. *Whitton*, 13 Wall., 270, 288 [80 U. S., XX., 571, 575].

This view being conclusive against the claim of the appellant, it is unnecessary to consider whether the action, brought by the State of Alabama for the use of one of its counties, can be considered as a suit brought by a citizen of the State of Alabama, within the meaning of the Constitution and laws of the United States.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 452; 111 U. S., 147.

UNITED STATES, *Plf.*,

v.

JAMES H. BRITTON.

(See S. C., 17 Otto, 655–671.)

Indictment for false entry by officer of bank—sufficiency of—repugnant counts—examiner—language of statute—willful act—buying stock.

1. An indictment under section 5209 of the Revised Statutes against the president of a national bank for making a false entry in a book of the bank, with intent to deceive an agent appointed to examine the affairs of the bank, and to defraud the bank is sufficient, although it does not contain an averment that the false entry was made in an account of and in the due course of business of the bank, if it is alleged that the false entry was made in a book belonging to and in use by the bank, and known and designated as "profit and loss, number six." This averment points out with certainty the book used by the association.

2. It is no objection that the false entries, as set out in the counts, do not of themselves have any significance, and are unintelligible without explanation, if the pleader explains them by averring what the entries indicate, so as to be intelligible to accountants, although not intelligible to persons not skilled in book-keeping.

3. Counts in such indictment are not argumentative or repugnant, because they do not allege that the interest entered was due, or because the false entry could not deceive the bank examiner, and the attempt to deceive was not an adroit and skillful one.

4. Counts in such indictment are sufficient, although it is not alleged therein that at the time the false entries were made an agent had been appointed to examine the affairs of the bank, if it is alleged that they were made with intent to defraud the association or any person or to deceive the examiner.

5. Counts, which embody the language of the statute, which charge every element of the offense created by the statute with sufficient certainty, and give the defendant clear notice of the charge he is called on to defend, are sufficient.

6. Counts which charge a purchase for the use of a bank, of its own stock by its president, when not necessary to secure a debt due it, do not allege a willful misapplication of ts funds, punishable by section 5209. The willful misapplication, which is an offense by this section, means one made for the use or benefit of the party charged, or of some person other than the bank, with intent to defraud the bank or some person, and not a mere act of official maladministration.

7. Counts which simply charge that the defendant, president of the bank, willfully misapplied its funds by buying therewith shares of its stock, with intent to injure and defraud, etc., and do not aver that such purchase was not necessary to prevent loss upon a debt, are insufficient.

[No. 406.]

Argued Mar. 15, 16, 1883. Decided Apr. 2, 1883.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Eastern District of Missouri.

The history and facts of the case fully appear in the statement by the court. See, also, the related cases of *United States* v. *Britton*, *post*.

Statement of the case by *Mr. Justice* **Woods:**

Section 5209 of the Revised Statutes of the United States is as follows:

"Every president, director, cashier, teller, clerk or agent of any national banking association who embezzles, abstracts or willfully misapplies any of the moneys, funds or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of

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exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree; or who makes any false [656] entry in any book, report or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association or any agent appointed to examine the affairs of any such association; and every person who, with like intent, aids or abets any officer, clerk or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

An indictment based on this section was, on Jan. 20, 1879, found against defendant, James H. Britton, in the District Court of the United States for the Eastern District of Missouri. It contained one hundred and nineteen counts. The first count charged as follows:

"That James H. Britton, late of said district, on the 30th day of June, in the year of our Lord 1876, at said district, being then and there president of a certain national banking association then and there known and designated as the 'National Bank of the State of Missouri, in St. Louis,' which said association had been theretofore created and organized under and by virtue of an Act of Congress, entitled 'An Act to Provide a National Currency Secured by a Pledge of United States Bonds, and to Provide for the Circulation and Redemption Thereof,' approved June 3, in the year of our Lord 1864, and which said association was then and there acting and carrying on a banking business in the City of St. Louis, in said district, under the said Act of Congress and the Acts amendatory thereof, did make in a certain book then and there belonging to and in use by the said association in transacting its said banking business, and then and there designated and known as 'profit and loss, number six,' a certain entry to the credit of a certain account known as profit and loss, which said entry was then and there in the words and figures following, that is to say:

'Richard L. Dickson:
182 days int., 8 per cent, 182,678.49, to
July 1, '76 ..... 5,365.88,

and which said entry, so as aforesaid made in said book, then and there purported to show and did, in substance and effect, indicate and [657] declare that the sum of $5,365.88 was then and there received by said association, on account of interest then and there due and payable to said association by one Richard L. Dickson.

And the jurors aforesaid, on their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there false in this, that the said sum of $5,365.88 was not then and there received by said association on account of interest then and there due and payable to said association from the said Richard L. Dickson, as he, the said James H. Britton, then and there well knew; and that the said entry, so made as aforesaid, was then and there false in this, that the said sum of $5,365.88 was not then and there received by said association upon any account from any source, as he, the said James H. Britton, then and there well knew; and that the said false entry was then and there made as aforesaid with the intent then and there on the part of him, the said James H. Britton, to deceive any agent who might be thereafter appointed by the Comptroller of the Currency to examine the affairs of said association, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity."

The thirty-four counts next following, numbered from two to thirty-five, inclusive, charged, in the same language, the making of similar false entries in the same book with the same intent.

The thirty-sixth count was in all respects similar to the preceding thirty-five counts, except that it omitted the averment that the false entry was made with the intent "To deceive any agent who might be thereafter appointed by the Comptroller of the Currency to examine the affairs of said association," and in lieu thereof alleged it to be with intent to injure and defraud the said association and certain persons to said jurors unknown.

The thirty-seventh count charged as follows: "That the said James H. Britton, late of said district, on the 2d day of April, in the year of our Lord 1877, at said district, being then and [658] there president of a certain national banking association then and there known and designated as the 'National Bank of the State of Missouri, in St. Louis,' which said association had been theretofore created and organized under and by virtue of an Act of Congress, entitled 'An Act to Provide a National Currency Secured by a Pledge of United States Bonds, and to Provide for the Circulation and Redemption Thereof,' approved June 3, in the year of our Lord 1864, and which said association was then and there acting and carrying on a banking business in the City of St. Louis, in said district, under the said Act of Congress and the Acts amendatory thereof, did pay to a certain person, to the jurors aforesaid unknown, a large sum of money, to wit: $2,400, out of the moneys and funds then and there belonging to, and the property of, said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit: forty certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one Francis Fisher.

And the jurors aforesaid, on their oaths aforesaid, do further present that the said James H. Britton, president as aforesaid, did then and there, by means of the payment aforesaid, in manner and form aforesaid, willfully misapply the said sum of $2,400 of the moneys and funds as aforesaid of said association, with intent then and there, on the part of him, the said James H. Britton, to injure and defraud the said association and certain persons, to the jurors aforesaid unknown, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity."

The next following nineteen counts, numbered from 38 to 56, inclusive, are similar to count 37, and need not be set out.

The next succeeding counts, numbered from 57 to 76, inclusive, but excepting the seventy-fourth, are similar to count thirty-seven, except that they omit the averment that the misapplication was made with intent "To injure and de- [659] fraud the said association and certain persons to

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the jurors aforesaid unknown." These counts aver no intent whatever. The seventy-fourth count is similar to the thirty-seventh.

The next twenty counts, numbered from 77 to 96, inclusive, are in all respects similar to count 37, except that they contain the following additional averment, forming the conclusion of the first clause of the count, namely: "And which said shares of stock, so purchased as aforesaid, were then and there held by him, the said James H. Britton, in trust for the use of said association, and which said shares of stock were not purchased as aforesaid in order to prevent loss upon any debt theretofore contracted with said association in good faith."

The next twenty counts numbered from 97 to 116, are all similar to count 96, except that they omit the averment that the misapplication of the funds of the association was with the intent "To injure and defraud the said association and certain persons to the jurors aforesaid unknown." These counts charge no intent.

The count numbered 117 was similar to count 36, and count numbered 118 was similar to count 1.

As no division of opinion respecting count numbered 119 is certified, it is unnecessary to notice that count.

The defendant demurred to the indictment. By order of the District Court, the indictment was, on May 16, 1879, remitted and transferred to the next regular Term of the United States Circuit Court for the Eastern District of Missouri, at which Term the cause was heard upon the demurrer. Upon such hearing, the following questions arose, upon which the Judges of the Circuit Court were divided and opposed in opinion, namely:

1. Whether it was necessary, in the counts of said indictment charging a fraudulent purchase by the defendant, of certain shares of the capital stock of said association, to state for whose use the purchase was made, and whether, where it is charged in the indictment that the purchase of stock was made for the use of the bank, such averment vitiates the indictment.

2. Whether it was necessary in the said counts [660] to allege that the purchase of stock was not made in order to prevent loss on some previously contracted debt.

3. Whether it was necessary in the said counts to set forth the means by which the defendant, as president of said bank, possessed himself of the moneys of the bank, which he employed in purchasing said stock.

4. Whether it was necessary to charge in the said counts that the defendant, as president of the bank, was in possession of the funds of the bank, in addition to charging misapplication of said funds.

5. Whether the counts of said indictment charging the fraudulent purchase by the defendant, as president of said banking association, of certain shares of stock "in trust, for the use of said association, and which said shares of stock were not purchased as aforesaid in order to prevent loss upon any debts theretofore contracted with said association in good faith," alleged with sufficient certainty an offense under said section 5209 of the Revised Statutes of the United States.

6. Whether count numbered 116 of the said indictment charges with sufficient certainty an offense under said section 5209 of the Revised Statutes of the United States.

7. Whether it is necessary under an indictment under section 5209 of the Revised Statutes, charging willful misapplication of the funds of a banking association, to allege that such misapplication was with intent to defraud.

8. Whether the purchase of stock in violation of section 5201 of the Revised Statutes of the United States, if made with intent to defraud, and by one or more of the officers of the bank named in said section 5209 of the Revised Statutes, is a crime punishable under the latter section.

9. Whether those counts which cover alleged false entries sufficiently state an offense under section 5209.

These questions, together with the pleadings upon which they arose, were, on motion of counsel for the United States, certified by the Judges of the Circuit Court to this court for its opinion thereon.

Mr. **William A. Maury,** *Asst. Atty-Gen.*, for plaintiff.

Messrs. **Geo. H. Shields, Chester H. Krum,** *John B. Henderson* and *Thomas C. Fletcher*, for defendant.

Mr. Justice **Woods** delivered the opinion of the court: [661]

In passing upon the questions certified to us by the circuit court, it will be convenient to follow the order in which they have been argued by counsel, rather than that in which the questions are presented by the certificate of division.

The section of the Revised Statutes, upon which the indictment is based, creates and describes certain offenses, and expressly denominates them misdemeanors. In the case of *U. S.* v. *Mills*, 7 Pet., 138, it was said by this court that "The general rule is that, in indictments for misdemeanors created by statutes, it is sufficient to charge the offense in the words of the statute. There is not that technical nicety required as to form which seems to have been adopted and sanctioned by long practice in cases of felony, and with respect to some crimes, where particular words must be used, and no other words, however synonymous they may seem, can be substituted. But in all cases the offense must be set forth with clearness, and all necessary certainty to apprise the accused of the crime with which he stands charged."

In the case of *U. S.* v. *Simmons*, 96 U. S., 362 [XXIV., 820], it was said by this court, speaking by *Mr. Justice* Harlan, that, "When an offense is plainly statutory, it is, as a general rule, sufficient in the indictment to charge the defendant with acts coming within the statutory description in the substantial words of the statute, without any further expansion of the matter. * * * But to this rule there is a qualification, fundamental in the law of criminal procedure, that the accused must be apprised in the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution against him."

So in *U. S.* v. *Carll*, 105 U. S., 611 [XXVI., 1135], it was said by *Mr. Justice* Gray, speaking for the court, that "In an indictment upon a statute, it is not sufficient to set forth the offense

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in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the [662] common law and of other statutes on the like matter, enables the court to infer the intent of the Legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

In case of *U. S.* v. *Pond*, 2 Curt. (C. C.), 265, the rule was thus stated by *Mr. Justice* Curtis: "It must be remembered that this is an indictment for a misdemeanor created by the statute, and that in general it is sufficient to describe such an offense in the words of the statute, unless they embrace cases which it was not the intention of the Legislature to include within the law. If they do, the indictment should show that this is not one of the cases thus excluded."

Applying the rules thus laid down, to the counts of the indictment, we are to consider whether they sufficiently state an offense under section 5209 of the Revised Statutes.

To describe the offense described in the first thirty-six counts of the indictment, section 5209 requires the following averments:

1. That the accused was the president or other officer of a national banking association, which was carrying on a banking business.

2. That, being such president or other officer, he made in a book, report or statement of the association, describing it, a false entry, describing it.

3. That such false entry was made with intent to injure or defraud the association, or to deceive any agent, describing him, appointed to examine the affairs of the association.

4. Averments of time and place.

An examination of the counts under consideration shows that they contain all these averments pleaded with clearness and reasonable certainty. They must, therefore, be held sufficient unless some of the objections made to them by counsel for defendant are well taken.

It is urged that these counts are defective because they do not contain an averment that the false entry was made "in an account of, and in the due course of, business of the bank." Neither of these averments is required by the statute. It is alleged that the false entry was made in a book belonging to and in use by the association in transacting its banking business, and known and designated as "profit and loss, [663] number six." To hold this insufficient, would carry refinement in criminal pleading to an impracticable extent. The counts point out to the defendant and the court, with certainty and precision, the book used by the association in which the false entry was made, and this is all that is necessary under the statute.

It is next objected that the false entries as set out in the counts do not of themselves have any significance, and are unintelligible, without explanation. This is mere assumption. Conceding that the entries may be unintelligible to persons not skilled as accountants, it does not follow that they are so to the agent appointed by the comptroller, who, it is alleged, was the person whom the entries were intended to deceive. But, if the entries needed explanation, it was perfectly competent for the pleader to explain them by *innuendo*. *Rex* v. *Griepe*, 1 Ld. Raym., 256; *Rex* v. *Aylett*, 1 T. R., 63; *Rex* v. *Taylor*, 1 Camp., 404; *Reg* v. *Virrier*, 12 Ad. & E., 317, *Mix* v. *Woodward*, 12 Conn., 262; *Van Vechten* v. *Hopkins*, 5 Johns., 211. This he has done by averring what the entries purported to show, and did in substance indicate and declare. Having explained the entries, he avers them to be false. To hold this insufficient, would be to decide that the making of false entries, in the books of a banking association, in the usual method of book-keeping and which were intelligible to all accountants, could not be punished under the statute because not intelligible to persons generally, or to persons not skilled in book-keeping.

It is next objected that the counts under consideration are argumentative and repugnant, because they do not allege that interest was due to the association from the individuals named in the alleged false entries.

This objection is not well founded. Whether interest was due or not, is quite immaterial. The charge is that a false entry was made in the books of the association, which purported that a certain sum was, on a day named, received from a person named, on account of interest then and there due from him to the association; that the said sum was not then and there received on account of interest due, and was not received on any account from any source whatever. The falsity of the entry does not consist in the fact that there was no interest due from the person named, but in the fact that [664] money, which the entries declared had been received from him on account of interest due, had not been received from him on that or any other account. It was, therefore, entirely unnecessary to aver that no such interest was due, and the want of such averment does not render the counts argumentative or repugnant.

It is further objected to these counts, that a false entry to the credit of profit and loss alone could not deceive a bank examiner and, therefore, that the counts are repugnant. This is also mere assumption. But if the false entry is calculated to deceive, the making of it in the books of the association, with intent to deceive, is all that is necessary to bring the Act within the meaning of the statute. It is perfectly apparent that any false entry in any account book of the bank used in transacting its banking business is calculated to deceive. The fact that its falsity may be exposed by an examination of other books of account, does not render it any the less a false entry made with intent to deceive. The circumstance that the attempt to deceive by making a false entry was not an adroit and skillful one, does not relieve the act of its criminal character.

It is further contended that the counts under consideration are insufficient, because it is not alleged that at the time the false entries were made, an agent had been appointed to examine the affairs of the association. This objection is based on the theory that the statute was designed to punish only those officers of a banking association who made false entries in its books with intent to deceive examiners appointed before the false entries were made. We do not think the statute will bear this construction.

The appointment of agents to examine the affairs of national banking associations is provided for by section 5240 of the Revised Statutes,

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which declares: "The Comptroller of the Currency, with the approval of the Secretary of the Treasury shall, as often as shall be deemed necessary or proper, appoint a suitable person or persons to make an examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association."

[655] It appears, from this section, that the appointment of these agents is not permanent but occasional and temporary, and that the appointments shall be made as often as shall be deemed necessary and proper. It is, therefore, apparent that the statute which punishes false entries, made with intent to deceive such agents, refers to any entries made with that intent whether before or after the appointment of the agent.

There is nothing impossible in the averment that false entries have been made with intent to deceive an agent to be appointed after they are made. The agents are often purposely appointed without notice to the association. The fact that the Comptroller of the Currency has information that the officers of an association are making false entries in its books may be the occasion for appointing an agent to examine its affairs. To hold that the officers of the association would only be punishable for false entries made after an agent had been appointed, would rob the law of a large part of its salutary effect. Its purpose is clear, to punish all false entries in the books of the bank, no matter when made, if made with intent to defraud the association or deceive the examiner. We think that in respect to the point under consideration the indictment is sufficient.

We are of opinion that none of the objections raised to the first thirty-five counts are well taken. They are refined and unsubstantial, and not sustained by the rules of criminal pleading in cases of misdemeanor, or by the fair construction of the statute on which the indictment is based. These counts embody the language of the statute; they charge every element of the offense created by the statute with sufficient certainty, and give the defendant clear notice of the charge he is called on to defend. They are, therefore, sufficient. *U. S.* v. *Cook*, 17 Wall., 168 [84 U. S., XXI., 588]; and cases already cited.

The thirty-sixth count differs from the first thirty-five, in charging the intent with which the offense was committed. The intent is charged to be, to injure and defraud the said association, and certain persons to the grand jurors unknown. This follows the language of the statute.

Clearly, it is possible to injure and defraud the association or its stockholders or other persons, by false entries in its account of profit and loss

[666] The charge is not repugnant or impossible. We are of opinion, therefore, that the first thirty-six counts of the indictment, being those which charge false entries in the books of the association, sufficiently state an offense under section 5209. It follows that count 117, which is similar in all respects to count 1, and count 118, which is in all respects similar to count 36, are good and sufficient.

We shall next consider count numbered 77 and the similar counts. That portion of the section on which they are based makes it an offense for the president or other officer of a banking association to embezzle, abstract of willfully misapply the moneys of the association with intent to injure or defraud the association or any company or person.

The seventy-seventh count the indictment charged that the defendant, being president of the association, paid to a certain person unknown, the sum of $2,400 of the moneys of the association in the purchase of forty shares of its capital stock, which stock, so purchased, was held by the defendant in trust for the use of the association, and the same was not purchased to prevent loss on any debt theretofore contracted with the association in good faith, and that so the defendant did willfully misapply the moneys of the association with intent to injure and defraud the association and certain persons to the grand jury unknown.

The question is propounded to us, whether this count sufficiently describes an offense under section 5209, of the Revised Statutes.

The purchase of its own stock by the association, except to secure a debt due it, is forbidden by law. Is a purchase for the use of a banking association, of its own stock by its president, when not necessary to secure a debt due the association, a willful misapplication of its funds, punishable by section 5209?

We think the willful misapplication made an offense by this statute means, a misapplication for the use, benefit or gain of the party charged, or of some company or person other than the association. Therefore, to constitute the offense of willful misapplication, there must be a conversion to his own use or the use of some one else, of the moneys and funds of the association by the party charged. This essential ele- [667] ment of the offense is not averred in the counts under consideration, but is negatived by the averment that the shares purchased by the defendant were held by him in trust for the use of the association, and there is no averment of a conversion by the defendant to his own use or the use of any other person, of the funds used in the purchase of the shares. The counts, therefore, charge maladministration of the affairs of the bank, rather than criminal misapplication of the funds.

If we hold these counts to be good, then every official act of an officer, clerk or agent of a banking association, by which its funds are applied in a way not authorized by law, would be punishable under section 5209.

For instance; section 5200 of the Revised Statutes declares that "The total liabilities to any association of any person * * * for money borrowed * * * shall at no time exceed one tenth part of the capital stock of the association actually paid in." Section 5201 provides, that no association shall make any loan or discount on the security of the shares of its own capital stock, unless such security shall be necessary to prevent loss on a previously contracted debt. If the counts under consideration are sustained, then every president, director, cashier, teller, clerk or agent of a banking association, who has any part in lending the money of the association contrary to the provisions of these sections, is guilty of a criminal misapplication of its funds.

So, by section 5137 of the Revised Statutes, the purposes for which a banking association may purchase and hold real estate are limited

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and specifically pointed out. If the directors of a banking association should authorize the purchase of a piece of real estate for its use, but not for purposes authorized by the statute, even though with intent to injure some corporate body or natural person, it could hardly be claimed that the directors who made the order, and the other officers or agents of the association, who, with a like intent, had any hand in making the purchase or in paying out the money of the bank therefor, would be liable to indictment and imprisonment under section 5209.

The acts charged by the counts under consideration are precisely of the same character as [668] those just mentioned. They are acts of maladministration of the affairs of the association by its officers. The penalty for such acts is prescribed by section 5239, which declares: "If the directors of any national banking association shall knowingly violate or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title, national banks, all the rights, privileges and franchises of the association shall be hereby forfeited. * * * And in case of such violation, every director who participated in or assented to the same shall be held liable, in his personal and individual capacity, for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation."

We are, therefore, of opinion that the willful misapplication of the moneys and funds of the banking association, which is made an offense by section 5209, means something different from the acts of official maladministration referred to in section 5239, and it must be a willful misapplication for the use or benefit of the party charged, or of some person or company other than the association, with intent to injure and defraud the association, or some other body corporate, or some natural person.

As the counts under consideration, namely: count 77, and the similar counts down to and including count 96, do not show that the willful misapplication therein alleged was made by the defendant for his own use, benefit or advantage, but for the use of the association, we are of opinion that they do not allege an offense under section 5209 and are, therefore, insufficient and bad.

The counts are, in our opinion, bad also for repugnancy. They aver that the defendant purchased the shares of the association, and held them in trust for the association. This charge, without further averments, is clearly repugnant. It is true that it is possible for an officer of a banking association, with intent to defraud it, to misappropriate its funds in the purchase for its use of its own stock. But the count which avers such an act, should also make other averments to show that the application was not merely a use of the money for the benefit of the association forbidden by law, but a criminal misapplication, by which it was possible that the association could be defrauded.

[669] For the reasons assigned, the counts next following, numbered from 97 to 116, inclusive, which are similar to count 77, except that they severally fail to aver that the act therein charged was done with intent to injure and defraud, must be held to be insufficient.

The counts last mentioned, as well as the counts numbered from 56 to 76, inclusive, are bad for the further reason that they fail to aver any intent to injure and defraud mentioned in section 5209. The intent to injure and defraud is an essential ingredient to every offense specified in the section, and the failure to aver the intent is a fatal defect in the counts in which it occurs.

We shall next consider count numbered 37, and the counts which are similar to it. These counts simply charge that the defendant, being president of the association, willfully misapplied its moneys and funds by buying therewith certain shares of its stock, with intent to injure and defraud the association and certain persons to the grand jurors unknown.

The words "willfully misapplied" are, so far as we know, new in statutes creating offenses, and they are not used in describing any offense at common law. They have no settled technical meaning like the words "embezzle," as used in the statutes, or the words "steal, take and carry away," as used at common law. They do not, therefore, of themselves fully and clearly set forth every element of the offense charged. It would not be sufficient simply to aver that the defendant "willfully misapplied" the funds of the association. This is well settled by the authorities we have already cited. There must be averments to show how the application was made, and that it was an unlawful one. These averments the pleader has in these counts attempted to make by charging that the defendant paid out the funds of the association in the purchase of its own stock. But this is not, necessarily, an unlawful use of the funds of the association. It is not every purchase of its own shares by an association that is forbidden. The very section (5201) and sentence of the statute which declares that no banking association shall be a purchaser of its own shares, contains the exception, "Unless such purchase shall be necessary to prevent loss upon a debt previously [670] contracted in good faith." This exception should have been negatived in these counts. The rule of pleading as laid down by Mr. Chitty is, that "When a statute contains provisos and exceptions in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the provisos it contains. On the contrary, if the exceptions themselves are stated in the enacting clause, it will be necessary to negative them in order that the description of the crime may in all respects correspond with the statute." 1 Chitty, Cr. L., 288 *b*, 284.

Thus, where a statute declared that if one on the Sabbath day "Shall exercise any secular labor, business or employment, except such only as works of necessity and charity, he shall be punished," etc., a negative of the exception was held indispensable. *The State* v. *Farker*, 18 Vt., 195; see, also, *Com.* v. *Maxwell*, 2 Pick., 189; 1 East, Pleas of the Crown, 167; *Spiers* v. *Farker*, 1 T. R., 141; *Gill* v. *Scrivens*, 7 T. R., 27; 1 Bish. Cr. Pr., sec. 636.

The failure of the counts under consideration to aver that the purchase of the shares of the association was not necessary to prevent loss

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upon a debt previously contracted in good faith is a fatal defect. These counts merely charge that the defendant willfully misapplied the funds of the association, and then aver a use of the funds which, from all that appears to the contrary, was a perfectly lawful application of them. The result is, that no offense is described in the counts numbered from 37 to 56, inclusive, and that they are, therefore, insufficient and bad. It also follows that counts numbered from 57 to 76, inclusive, which are similar to the series just mentioned, except that they contain no charge of intent to injure and defraud, are also bad.

What we have said disposes of all the questions propounded to us which it is necessary that we should answer.

We answer the first, second, seventh and ninth questions in the affirmative, and the fifth sixth and eighth questions in the negative.

From these answers it appears that all the counts from the thirty-seventh to the one hundred and eighteenth, inclusive, are insufficient and bad. We, therefore, decline to answer the third and fourth questions, which relate to the same counts. U. S. v. *Buzzo*, 18 Wall., 125 [85 U. S., XXI., 812].

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True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 198, 206.

EDGAR A. BALDWIN ET AL., *Plffs. in Err.*,

v.

FRANCIS G. STARKS.

(See S. C., 17 Otto, "*Baldwin* v. *Stark*," 463-466.)

Jurisdiction over state decree—decision of land department—question affecting the merits—preemption right.

1. This court has jurisdiction to review the decree of a state court which denies to a party the right which he asserted under a patent for land from the United States, and decrees that he held the title in trust for another and should convey it to him, and that he be enjoined from prosecuting an action of ejectment founded on such patent.
2. The land department is a tribunal appointed by Congress to decide the question whether a person has filed a prior preemption claim, and its decision thereon is conclusive everywhere else as regards all questions of fact.
3. The right of a party to question the equitable jurisdiction of a state court to review the action of the United States Land Department, belongs to the merits of the case.
4. When a party has filed his declaration of intention to claim the right of preemption for one tract of land, he cannot at any future time file a second declaration for another tract.

[No. 185.]

Submitted Mar. 16, 1883. Decided Apr. 2, 1883.

IN ERROR to the Supreme Court of the State of Nebraska.

The bill in this case was filed in the District Court for the County of Lancaster, Nebraska, by the defendant in error, to recover a certain tract of land.

The court entered a decree dismissing the bill. The court below, on appeal, having reversed this decree and entered a decree in favor of the complainant, the defendants sued out this writ of error.

The facts of the case appear in the opinion of the court.

Messrs. **G. M. Lambertson,** *E. E. Brown* and *W. J. Lamb*, for plaintiffs in error:

The matter is one wholly within the determination of the Land Department, and its determinations are conclusive.

Johnson v. *Towsley*, 13 Wall., 86 (80 U. S., XX., 487), and cases cited; *Hosmer* v. *Wallace*, 47 Cal., 461; *Quinby* v. *Conlan*, 104 U. S., 420 (XXVI., 800); *Morrison* v. *Stalnaker*, 104 U. S., 213 (XXVI., 741); *Cumens* v. *Cyphers*, 56 Cal., 383; *Vance* v. *Burbank*, 101 U. S., 514 (XXV., 929), and cases cited; *Marquez* v. *Frisbie*, 101 U. S., 473 (XXV., 800).

Messrs. **Samuel Shellabarger** and **Jeremiah M. Wilson,** for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Nebraska, and the jurisdiction of this court is questioned.

The substance of the original bill in the state court is, that, in a contest for the right to enter a tract of land between Starks and Van Pelt, before the Land Department, the Secretary of the Interior erroneously decided in favor of Van Pelt, to whom a patent was issued; and the prayer of the bill is, that Baldwin, who holds under Van Pelt, shall be decreed to hold the title in trust for Starks and convey it to him, and be enjoined from prosecuting further an action of ejectment against plaintiff, which he has commenced for the land in controversy. That the decree which granted this relief denied to plaintiffs in error the right which they asserted under the patent from the United States, and was a decision against the title so asserted, and is therefore within section 709 of the Revised Statutes, is too well settled by numerous similar cases decided in this court to admit of further question. *Johnson* v. *Towsley*, 13 Wall., 86 [80 U. S., XX., 487]; *Morrison* v. *Stalnaker*, 104 U. S., 213 [XXVI., 741]; *Marquez* v. *Frisbie*, 101 U. S., 475 [XXVI., 801].

The case was tried in the state court upon the record of the proceedings before the Land Office, including the evidence on which the patent was issued to Van Pelt in the contest between him and Starks, with a stipulation involving a few other unimportant matters.

That record shows that, upon all the questions involved, the Department decided in favor of Starks, except one; which was, that he was disqualified to make the preemption claim he was then prosecuting, by reason of having previously exercised that right in regard to other lands.

Whether he had thus made a filing of a former declaratory statement was a question of fact much contested before the department, in regard to which Starks himself was sworn, as were also several other witnesses, and the record of the alleged filing was also produced. On all this evidence, the Commissioner of the General Land-Office decided that he *had* filed the previous declaration and was, therefore, disqualified as a preemptor of the land now in controversy. On appeal to the Secretary of the Interior this decision was affirmed, and Starks' claim was rejected and Van Pelt's allowed and the patent issued to him. [465]

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The Supreme Court of Nebraska holds that the Land Department decided this question of fact erroneously, and that Starks never filed or made the former declaratory statement, that he was a qualified preemptor for the land patented to Van Pelt, and decrees a conveyance to him by Baldwin of the legal title vested by the patent. *Starks* v. *Baldwin*, 7 Neb., 114.

It has been so repeatedly decided in this court, in cases of this character, that the Land Department is a tribunal appointed by Congress to decide questions like this, and when finally decided by the officers of that department, the decision is conclusive everywhere else as regards all questions of fact, that it is useless to consider the point further. Where fraud or imposition have been practiced, on the party interested or on the officers of the law, or where these latter have clearly mistaken the law of the case as applicable to the facts, courts of equity may give relief, but they are not authorized to re-examine into a mere question of fact dependent on conflicting evidence, and to review the weight which those officers attached to such evidence. *Johnson* v. *Towsley* [*supra*]; *Gibson* v. *Chouteau*, 13 Wall., 102 [80 U. S., XX., 537]; *Marquez* v. *Frisbie* [*supra*]; *Shepley* v. *Cowan*, 91 U. S., 330 [XXIII., 424].

The case before us is a simple re-examination by the Supreme Court of Nebraska, of the evidence on which the Commissioner of the Land-Office and the Secretary of the Interior decided that Starks had made a prior declaratory statement for the preemption of other land, and a reversal of that decision. 7 Neb., 114.

It is urged upon us that a written stipulation in the case describing what evidence shall be introduced, and the right to file written arguments, and that neither party shall be prejudiced by any defect in the pleadings, but that the case shall be decided on its merits, is a waiver of this point.

But Van Pelt, the real party in interest, became a party to the suit, in a court below, six months after this stipulation was made between [466] the counsel of Baldwin and of Starks, and is not bound by it. It would be strange, also, if in a case like this, the right of the party to question the equitable jurisdiction of the court on the facts found, did not belong to the merits of the case.

Some attempt is made to show that, under the decision of this court in *Johnson* v. *Towsley*, the objection to a double preemption does not apply except where the land is subject to entry by purchase. But the court was there speaking of the effect of such former filing of a declaration of intention under the Act of 1841 on the rights afterwards asserted under the Act of 1843. It is sufficient to say that both these Acts, with all others on that subject, were considered in the Revised Statutes, and section 2261, which is a reproduction of the law in force when the rights of the parties here accrued is positive that, when a party has filed his declaration of intention to claim the benefits of such provision, the right of preemption, for one tract of land, he shall not, at any future time, file a second declaration for another tract.

The decree of the Supreme Court of Nebraska is reversed and the case remanded to that court, with directions to affirm the decree of the District Court for the County of Lancaster dismissing the bill.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

EMANUEL HAHN, *Appt.*, *v.* UNITED STATES.

(See S.C., 17 Otto, 402–406.)

Surveyor of customs, right to share of fines.

* A person was surveyor of customs at the Port of Troy, N. Y., a port of delivery and not a port of entry, in the collection district of the City of New York, from June 13, 1872, to May, 1876. At various times during the period from June 13, 1872, to June 22, 1874, there was a surveyor of customs at the Port of New York, which was a port of entry, and surveyors of customs at two other ports, which were ports of delivery and not ports of entry, all of said ports being in said collection district. In accordance with the uniform practice of the treasury department, under section 1 of the Act of March 2, 1867, ch. 188, 14 Stat. at L., 546, the Secretary of the Treasury distributed to the collector, naval officer and surveyor at the Port of New York, as such officers, and not as informers or seizing officers, one fourth part of the proceeds of fines, penalties and forfeitures incurred at the Port of New York between June 13, 1872, and June 22, 1874, and paid no part thereof to the surveyor at Troy. He sued the United States in the Court of Claims in May, 1877, claiming to share equally with the collector and the naval officer at the Port of New York, and all the surveyors in the district, in said one fourth, under the provisions of section 1 of said Act. As said provisions had been repealed by section 2 of the Act of June 22, 1874, ch. 391, 18 Stat. at L., 186, and as Congress had not interfered with such construction while the Act was in force, and as the claimant had raised no question in regard to such construction until March, 1874, and had been informed by the treasury department, in June, 1874, that it adhered to such construction, and had not complained again until March, 1877, but had permitted moneys to be distributed under such view until he sued, the Court of Claims held that, as such construction did not appear unreasonable, and might well have been reached in the exercise of a sound judgment, all the circumstances of the case were such, regarding the statute as ambiguous, as to justify the application of the principle of interpretation, that the contemporaneous construction of those who had been called upon to carry the law into effect was entitled to great respect, and it refused to interfere with such construction. This court, being satisfied with the decision of the Court of Claims, and with the grounds above stated as assigned by it therefor, affirmed its judgment.

[No. 222.]

Submitted Mar. 30, 1883. Decided Apr. 9, 1883.

APPEAL from the Court of Claims.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **Halbert E. Paine**, for appellant.

Mr. **S. F. Phillips**, *Solicitor-Gen.*, for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

This case comes before this court on an appeal by the claimant, Emanuel Hahn, from the judgment of the Court of Claims finding in favor of the United States and dismissing the petition of the claimant. The following were the material facts found by that court: "1. On the 13th of June, 1872, the claimant was appointed Surveyor of Customs at the Port of Troy,

*Head note by *Mr. Justice* BLATCHFORD.

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N. Y., and continued to act as such officer until May 28, 1876. 2. During that period, from June 13, 1872, to June 22, 1874, Alonzo B. Cornell was Surveyor of Customs at the Port of New York to March 31, 1873, and George H. Sharpe from March 31, 1873, to June 22, 1874; Isaac N. Keeler was Surveyor of Customs at the Port of Albany; and from April 28, 1874, Frank P. Norton was Surveyor of Customs at the Port of Port Jefferson; all in the collection district of the City of New York. 3. There was collected and paid into the Treasury of the United States, from the proceeds of fines, penalties and forfeitures incurred at the Port of New York, between June 13, 1872, and April 28, 1874, the sum of $839,819.40, and more, and between April 28 and June 22, 1874, $14,604.11, and more, after making the deductions required by law; of which sums, in the distribution made by the Secretary of the Treasury, one fourth part was paid to the collector, naval officer and surveyor at the Port of New York, as such officers, and not as informers or seizing officers, and none thereof was paid to the claimant, which distribution was made in accordance with the uniform practice of the Treasury Department, under the law of March 2, 1867, ch. 188, 14 Stat. at L., 546. 4. During the same period between June 13, 1872, and June 22, 1874, there was paid into the Treasury, from fines incurred at the Port of Troy aforesaid, on persons for not surrendering licenses of canal-boats as required by law, the sum of $1,000, of which, in the distribution thereof by the Secretary of the Treasury, one fourth was paid to the claimant as informer or seizing officer, and no other share was allowed to him." On these facts, the claimant [404] contends that under the provisions of section 1 of the Act of March 2, 1867, ch. 188, 14 Stat. at L., 546, he was entitled, for the period from June 13, 1872, to April 28, 1874, to share equally with the collector, the naval officer and two other surveyors in the collection district of the City of New York in the one fourth part of the said sum of $839,819.40, and thus to recover one twentieth part of said sum, and for the period from April 28, 1874, to June 22, 1874, to share equally with the collector, the naval officer and three other surveyors in said collection district, in one fourth part of said sum of $14,604.11, and thus to recover one twenty-fourth part of said sum.

The statute in question was in these words: "That from the proceeds of fines, penalties and forfeitures incurred under the provisions of the laws relating to the customs, there shall be deducted such charges and expenses as are by law in each case authorized to be deducted; and in addition, in the case of the forfeiture of imported merchandise of a greater value than $500 on which duties have not been paid, or in case of a release thereof, upon payment of its appraised value, or of any fine or composition in money, there shall also be deducted an amount equivalent to the duties in coin upon such merchandise (including the additional duties, if any), which shall be credited in the accounts of the collector as duties received, and the residue of the proceeds aforesaid shall be paid into the Treasury of the United States, and distributed, under the direction of the Secretary of the Treasury, in the manner following, to wit: one half to the United States; one fourth to the person giving the information which has led to such seizure, or to the recovery of the fine or penalty, and if there be no informer other than the collector, naval officer or surveyor, then to the officer making the seizure; and the remaining one fourth to be equally divided between the collector, naval officer and surveyor, or such of them as are appointed for the district in which the seizure has been made, or the fine or penalty incurred or, if there be only a collector, then to such collector."

The findings in this case show: (1) that the moneys claimed were the proceeds of fines, penalties and forfeitures incurred at the Port of New York; (2) that the claimant was not the surveyor at that port, but was surveyor at another port in the same collection district; (3) that the [405] Secretary of the Treasury actually distributed one fourth part of the distributable sums to the collector, naval officer and surveyor at the Port of New York, as such officers, and not as informers or seizing officers, and paid no part to the claimant; and (4) that such distribution was made in accordance with the uniform practice of the Treasury Department, under the said Act of 1867. From these findings, it is to be understood that it was the uniform practice of the Treasury Department, under the Act of 1867, to distribute one fourth part of the proceeds of fines, penalties and forfeitures incurred at the Port of New York (such as the proceeds in this case were), to the collector, naval officer and surveyor at that port, as such collector, naval officer and surveyor, such one fourth part not including any part of any share which under said statute goes to the informer or to the officer making the seizure. The demand made by the claimant in this case in his petition has no reference to the one fourth part which the statute awards to the informer or the seizing officer.

The controversy arises over the meaning of these words in the Act of 1867: "The remaining one fourth to be equally divided between the collector, naval officer and surveyor, or such of them as are appointed for the district in which the seizure has been made, or the fine or penalty incurred." It is said, in substance, in the opinion of the Court of Claims in this case, [*Hahn* v. *U. S.*], reported in 14 Ct. of Cl., 605, that the Secretary of the Treasury, in the practice spoken of, proceeded on the view that the Port of New York was the only port of entry in said collection district; that the Ports of Albany, Troy and Port Jefferson, though ports in said collection district and ports of delivery, were not ports of entry; that the statute spoke only of "the collector, naval officer and surveyor;" that the words "or such of them as are appointed for the district in which the seizure has been made, or the fine or penalty incurred" could not enlarge the meaning of the word "surveyor" to the plural sense, because it could not so enlarge the meaning of the word "collector" or the word "naval officer" as there was but one of each of them in any district; and that the surveyor intended, in reference to cases like the present, was the surveyor of the port where the fines, penalties and forfeitures were incurred. The court observed that, as the provisions of the [406] Act of 1867 awarding shares of forfeitures had been repealed by section 2 of the Act of June 22, 1874, ch. 391, 18 Stat. at L., 186, and as

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Congress had not interfered with such construction by the Secretary of the Treasury while the Act was in force, and as the claimant had raised no question in regard to such construction until March, 1874, and had been informed by the Treasury Department in June, 1874, that it adhered to such construction, and had not complained again until March, 1877, but had permitted moneys to be distributed under such view, until he brought this suit in May, 1877 (facts which appear in the findings of the court below), the construction adopted had become the one which must govern all distributions under the Act. The court added that such construction did not appear to it unreasonable and might well have been reached in the exercise of a sound judgment, and that, regarding the statute as ambiguous, all the circumstances of the case were such as to justify the application of the principle of interpretation sanctioned by this court in *U. S.* v. *Pugh*, 99 U. S., 265 [XXV., 322], that, "In the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect. *Edwards* v. *Darby*, 12 Wheat., 210," and where this court refused to interfere with such construction after it had been acted upon for a long time. See, also, *U. S.* v. *Alexander*, 12 Wall., 177 [79 U. S., XX., 381]; *Peabody* v. *Stark*, 16 Wall., 240 [83 U. S., XXI., 311]; *Smythe* v. *Fiske*, 23 Wall., 382 [90 U. S., XXIII., 49]; *U. S.* v. *Moore*, 95 U. S., 763 [XXIV., 589].

We are satisfied with the decision of the Court of Claims, and with the grounds above stated as assigned by it therefor, and its judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—113 U. S., 571.

SAMUEL T. WILLIAMS, *Appt.*,

v.

BENJAMIN L. JACKSON ET AL.

BENJAMIN L. JACKSON ET AL., *Appts.*,

v.

JEANNIE K. STICKNEY, Admrx. of WILLIAM STICKNEY, Deceased.

(See S. C., 17 Otto, 478–484.)

Trust deed—priority of payment—decree against trustee.

*1. By a trust-deed, duly recorded, land was conveyed to the trustees in fee, and they were authorized to release it to the grantor upon payment of the negotiable promissory note thereby secured. Before that note was paid or payable, and after it had been negotiated to an indorsee in good faith for full value, a deed of release, reciting that it had been paid, was made to the grantor by the trustees and by the payee of the note, and recorded; and the grantor executed and recorded a like trust-deed to secure the payment of a new note for money lent to him by another person, who had no actual notice that the first note had been negotiated and was unpaid, and who required and was furnished with a conveyancer's abstract of title, showing that the three deeds were recorded and the land free from incumbrance, before he would make the loan. Held, that the legal title was in the trustee, under the second trust-deed, and that the note thereby secured was entitled to priority of payment out of the land.

2. Upon a bill in equity by the holder of a debt secured by deed of trust, to set aside a release negligently executed by the trustee to the grantor, the plaintiff cannot have a decree for the payment of his debt by the trustee personally.

[Nos. 209, 482.]

Argued Mar. 27, 1883. Decided Apr. 9, 1883.

APPEALS from the Supreme Court of the District of Columbia.

The history and facts of the case appear in the opinion of the court.

Messrs. **William A. Maury, Philip Phillips** and *W. Hallett Phillips*, for Williams, appellant.

Messrs. **Job Barnard** and *James S. Edwards*, for Jackson, Brother & Co., appellees and appellants.

Messrs. **James M. Johnston** and *John F. Hanna*, for Stickney, appellee.

Mr. Justice **Gray** delivered the opinion of the court:

This is a bill in equity, filed by Benjamin L. Jackson and others, partners under the name of Jackson, Brother & Company, and heard on the pleadings and proofs, by which the material facts appear to be as follows:

On the first of January, 1875, Edwin J. Sweet and his wife purchased and took a deed from Augustus Davis, of a house and land in Washington, and executed and acknowledged a trust-deed thereof, in which they recited that they were indebted to Augustus Davis in the sum of $8,000 for deferred payments of the purchase money, for which they had given him their four promissory notes of the same date and payable to his order, three for the sum of $1,833.33 each, and payable in one, two and three years respectively, and one for the sum of $2,500 payable in three years, and all bearing interest at eight per cent, and by which deed, in order to secure the payment of those notes as they matured, they conveyed the land to Charles T. Davis and William Stickney, and the survivor of them, their and his heirs and assigns, in trust to permit the grantors to occupy the premises until default in payment of principal or interest of the notes; and upon the full payment of all the notes and interest, and all proper costs, charges and commissions, to release and convey the premises to Mrs. Sweet, her heirs and assigns; with a power of sale upon default of payment, and a provision that the purchaser at the sale should not be bound to see to the application of the purchase money. That deed of trust was recorded on the 14th of January, 1875.

The notes secured by that deed were indorsed by Augustus Davis and Charles T. Davis, had on the margin the printed words, "Secured by deed of trust," and were soon after their date transferred by the indorsers for full value and before maturity to the plaintiffs, and have since been held by them, except the one due at the end of the first year, which was paid by the indorsers. Charles T. Davis was a son and a partner of Augustus Davis, and was a broker and real estate agent. [480]

On the 15th of September, 1876, before any of the other notes fell due, and without the plaintiffs' knowledge, the trustees, Davis and

*Head notes by *Mr. Justice* GRAY.

See 17 OTTO.

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Stickney, executed a deed of release of the land to Mrs. Sweet, reciting that the debt secured by the trust-deed had been fully paid and discharged, as appeared by the signature of Augustus Davis, who joined in the execution of the release.

At or before the same time, Sweet and wife employed Charles T. Davis to make some arrangement by which they could take up those notes and give others running for a longer time; he went to Samuel T. Williams, and offered him the land unincumbered, as security for a loan of $5,000, payable in four years, and bearing nine per cent interest; and Williams agreed to make the loan, if satisfied by a conveyancer's abstract of title that the land was free of all incumbrance, but not otherwise.

[481] On the 27th of September, 1876, a deed of trust, containing provisions like those in the first deed of trust, was executed by Sweet and wife to Robert K. Elliott and Charles T. Davis to secure the payment of a note for $5,000 in four years to Williams, with interest at the rate of nine per cent. On the 28th of September, the deed of release and the second deed of trust were recorded; Charles T. Davis furnished Williams with certificates of a conveyancer that he had examined the title on the 14th of September and found it good, subject to the first trust-deed, and again on the 28th, when the only changes were the release and the second deed of trust; and Williams thereupon gave to Davis his check, payable to Davis' order, for $5,000, which Davis applied to his own use, and received from him the note of Sweet and wife for the same amount and the trust-deed to secure its payment. Neither Williams nor Sweet and wife then knew that, at the time of the execution of the release, Augustus Davis was not the holder of the notes secured by the first trust-deed. On the 29th of September, Sweet and wife executed another trust-deed to Charles T. Davis to secure the payment of six promissory notes to Augustus Davis for $530.26 each, payable at intervals of six months from their date.

On the 27th of July, 1877, the interest due on the note to Williams not having been paid, the trustees, Elliott and Davis, sold the land by auction for the sum of $6,325 to Eli S. Blackwood, who paid them $1,325 in cash, which was applied to the payment of the interest and of other charges, and gave them his note for $5,000, secured by a trust-deed of the land.

The bill, which was against Williams, Sweet and wife, Augustus Davis and Blackwood in their own right, against Charles T. Davis and Stickney in their own right and as trustees, and against Elliott as trustee only, prayed that the release by Stickney and Charles T. Davis, as well as all the subsequent conveyances, might be declared void as against the first trust-deed, and the trust created by that deed be declared to have priority over all subsequent incumbrances; that Charles T. Davis be removed from his trust and a new trustee be appointed in his stead; that the land be sold and the proceeds applied, under order of the court, to the payment of the notes held by the plaintiffs and of any other lawful claims; and for an injunction, a discovery, an account and further relief.

The Judge, before whom the case was first heard, made a decree, declining to set aside the release or to declare that the first deed of trust had priority over the second; adjudging that the first deed of trust was fraudulently and negligently released by Augustus Davis and Charles T. Davis, and wrongfully and negligently released by Stickney and, therefore, ordering that the plaintiffs recover against Augustus Davis, Charles T. Davis, Stickney and Sweet and wife the amount due on the notes held by them, with interest; declaring that the note for $5,000 held by Williams was the first charge on the land; and ordering the land to be sold and the proceeds to be distributed in paying off the incumbrances in the order thus established.

The court at General Term reversed those parts of the decree which declined to set aside the release and which declared that Williams was entitled to priority; and also that part which adjudged that the plaintiffs recover against Stickney the amount of their debt; affirmed it in other respects and ordered the proceeds to be first applied to the payment of the plaintiffs' debt. Williams appealed from so much of this decree as gave priority to the plaintiffs' claim; [482] and the plaintiffs appealed from so much as reversed the decree against Stickney.

By the statutes regulating the conveyance of real estate in the District of Columbia, all deeds of trust and mortgages, duly acknowledged, take effect and are valid, as to all subsequent purchasers for valuable consideration without notice, and as to all creditors, from the time of their delivery to the recorder for record; whereas, other deeds, covenants and agreements take effect and are valid, as to all persons, from the time of their acknowledgment, if delivered for record within six months after their execution. Any title bond or other written contract in relation to land may be acknowledged and recorded in the same manner as deeds of conveyance; and the acknowledgment, duly certified, and the delivery for record, of such bond or contract, shall be taken and held to be notice of its existence to all subsequent purchasers. R. S., D. C., secs. 446, 447, 449.

The first deed of trust from Sweet and wife did not give the trustees merely a power to release the land on payment of the notes secured thereby, and to sell on default of payment; but it vested the legal title in them. A release of the land before payment of the notes would be a breach of their trust, and would be unavailing in equity to anyone who had knowledge of that breach. *Ins. Co.* v. *Eldredge*, 102 U. S., 545 [XXVI., 245]. But it would pass the legal title. *Taylor* v. *King*, 6 Munf., 358; *Den* v. *Troutman*, 7 Ired., 155. The legal title in the land, being in the trustees under the first deed of trust, passed by their deed of release to Mrs. Sweet, and from her by the second deed of trust to the trustees for Williams.

The first deed of trust having been made to the trustees therein named for the benefit of Augustus Davis, and to secure the payment of the notes from the grantors to him; and the plaintiffs, upon the transfer and indorsement to them of those notes, having taken no precaution to obtain and put on record an assignment of his rights in such form as would be notice to all the world; the recorded deed of release, executed by him as well as by the trustees, reciting that the notes had been paid, and conveying the legal title, bound the plaintiffs, as well as himself, in favor of anyone acting upon the faith

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of the record and ignorant of the real state of facts.

[483] If the plaintiffs wished to affect subsequent purchasers with notice of their rights, they should have obtained a new conveyance or agreement, duly acknowledged and recorded, in the form either of a deed from the original grantors, or of a declaration of trust from the trustees, or of an assignment from Augustus Davis of his equitable interest in the land as security for the payment of the notes. The record not showing that any person other than Augustus Davis had any interest in the notes, or in the land as security for their payment, an innocent subsequent purchaser or incumbrancer had the right to assume that the trustees, in executing the release, had acted in accordance with their duty.

Williams is admitted to have had no actual knowledge that the notes secured by the first trust-deed were held by the plaintiffs, or that they were unpaid. The knowledge of those facts by Charles T. Davis, through whom Williams made the loan, does not bind him, because upon the evidence Charles T. Davis appears not to have been his agent, but the agent of Sweet and wife.

Williams took every reasonable precaution that could have been expected of a prudent man, before advancing his money to Charles T. Davis for Sweet and wife. He declined to lend his money, until after he had been furnished with a conveyancer's abstract of title, showing that the deed of release from the trustees under the first deed of trust and from the original holder of the notes secured thereby, as well as the second deed of trust to secure the repayment of the money lent by Williams, had been recorded, and that the land was not subject to any incumbrance prior to the second deed of trust.

It was suggested in argument that as the first deed of trust showed that the notes secured thereby were negotiable and were not yet payable, and that the land was not intended to be released from this trust until all the notes were paid, Williams was negligent in not making further inquiry into the fact whether they were still unpaid. But of whom should he have made inquiry? The trustees under the first deed and the original holder of the notes secured thereby having expressly asserted under their own hands and seals that the notes had been paid, and Sweet and wife having apparently concurred in the [484] assertion by accepting the deed of release and putting it on record, he certainly was not bound to inquire of any of them as to the truth of that fact; and there was no other person to whom he could apply for information, for he did not know that the notes had ever been negotiated, and he had no reason to suppose that they had not been canceled and destroyed.

To charge Williams with constructive notice of the fact that the notes had not been paid, in the absence of any proof of knowledge, fraud, or gross or willful negligence, on his part, would be inconsistent with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business. *Hine* v. *Dodd*, 2 Atk., 275; *Jones* v. *Smith*, 1 Hare, 43; *S. C.*, 1 Phill., 244; *Agra Bank* v. *Barry*, Irish R., 6 Eq., 128, and L. R., 7 H. L., 135; *Wilson* v. *Wall*, 6 Wall., 83 [73 U. S., XVIII., 727]; *Norman* v. *Towne*, 130 Mass., 52.

The equity of Williams being at least equal with that of the plaintiffs, the legal title held for Williams must prevail, and he is entitled to priority. The decree appealed from is, in this respect, erroneous and must be reversed.

But that decree, so far as it refuses relief against Stickney personally, is right. The main purpose of the bill is to set aside the deed of release and to satisfy the plaintiffs' debt out of the land. The attempt to charge Stickney with the amount of that debt, by reason of his negligence in executing the release, is wholly inconsistent with this. The one treats the release as void; the other assumes that it is valid. In the one view, Stickney is made a party in his capacity of trustee only; in the other, it is sought to charge him personally. The joinder of claims so distinct in character and in relief is unprecedented and inconvenient. *Shields* v. *Barrow*, 17 How., 130, 144 [58 U. S., XV., 158, 162]; *Walker* v. *Powers*, 104 U. S., 245 [XXVI., 729].

The result is that the decree appealed from must be reversed and the case remanded, with directions to enter a decree in conformity with this opinion, and without prejudice to an action at law or suit in equity against Stickney.

Decree reversed.

Mr. Justice **Harlan** did not sit in this case, and took no part in the decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 512.

JOHN L. MERRIAM, *Appt.*,
v.
UNITED STATES.

(See S. C., 17 Otto, 437-444.)

Construction of government contract—rule of construction.

1. A contract with the United States to supply 600,000 pounds more or less, of oats, or such other quantity, more or less, as might be required from time to time for the wants of a specified military station, between certain specified dates, in such quantities and at such times as the receiving officer might require, made with the knowledge of a similar existing contract with another person, binds the contractor to deliver, and the United States to receive, 600,000 pounds of oats and no more, unless required to deliver more by the quartermaster.

2. In the construction of contracts the courts may look, not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made.

[No. 210.]

Argued Mar. 27, 28, 1883. Decided Apr. 9, 1883.

APPEAL from the Court of Claims.

The history and facts fully appear in the

Statement of the case by *Mr. Justice* **Woods:**

The appellant brought suit in the Court of Claims against the United States, to recover damages for the breach by the United States of a contract by which the appellant agreed to sell and deliver, and the United States to receive and pay for a quantity of oats. The Court of

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Claims, after hearing the case, dismissed the claimant's petition, and from its judgment this appeal was taken by him.

The Court of Claims found the following facts: the Chief Quartermaster of the Military Department of Dakota published an advertisement, the parts of which, and of the circular therein referred to material to this case, were as follows:

"Chief Quartermaster's Office,
St. Paul, Minn. March 1st, 1877.

Sealed proposals in triplicate, subject to the usual conditions, will be received at this office * * * until 12 o'clock noon, on the 26th day of April, at which time they will be opened in the presence of bidders * * * for furnishing and delivering of wood, coal, grain, hay and straw, required during the fiscal year commencing July 1, 1877, and ending June 30, 1878, at the following posts and stations, *viz.*: [438] (Here follows a list of the posts and stations for which the supplies were required).

Separate bids should be made for each post and for each class of supplies. * * * The Government reserves the right to reject any and all bids. In bidding for grain, bidders will state the rate per one hundred pounds and not per bushel.

Blank proposals and printed circulars stating the kind and estimated quantities required at each post, and giving full instructions as to the manner of bidding, conditions to be observed by bidders and terms of contract and payment will be furnished on application," etc.

The circular referred to contained these clauses:

"The following are the estimated quantities of supplies that will be required at each post, but the Government reserves the right to increase or diminish the same at any time during the continuance of the contract, and to require deliveries to be made at such times and in such quantities as the public service may demand: Fort Abraham Lincoln, D. T., 2,404,000 pounds oats; Fort Buford, D. T., 256,000 pounds oats; Cheyenne Agency, D. T., 131,000 pounds oats; Camp Hancock, D. T., 5,400 pounds oats; Lower Brule Agency, D.T., 34,300 pounds oats; Fort Randall, D.T., 233,000 pounds oats; Fort Rice, D. T., 1,000,000 pounds oats; Standing Rock Agency, D. T., 255,000 pounds oats; Fort Stevenson, D. T., 96,000 pounds oats; Fort Sully, D. T., 50,000 pounds oats.

Proposals are invited for the furnishing and delivering" of "grain for Forts Abraham Lincoln, Buford, Randall, Rice, etc., etc., either at Sioux City, Yankton, Bismarck or Fort Abraham Lincoln."

In accordance with the advertisement one Hall proposed to furnish 4,000,000 pounds of oats, to be delivered at Bismarck, for $2.25 per hundred pounds, and the appellant proposed to furnish, at the same place, 1,600,000 pounds of oats at 2.23\frac{7}{16}$ per hundred pounds, a like quantity at 2.28\frac{1}{4}$, another like quantity at $2.31 and another like quantity at $2.37, making the entire quantity which he bid to furnish and deliver 6,400,000.

On May 18, 1877, an award was made to the appellant for furnishing and delivering at Bismarck 1,000,000 pounds of oats at 2.23\frac{7}{16}$ per one hundred pounds. On June 27 an award was made to Hall for furnishing and delivering [439] at Bismarck 2,620,000 pounds of oats at $2.25 per hundred pounds, and on the same day a further award was made to the appellant for furnishing and delivering, at the same place, 600,000 pounds of oats at 2.23\frac{7}{16}$ per hundred pounds.

On June 29, 1877, the contract on which the action was brought was executed by the appellant and by the quartermaster in behalf of the United States. It was made on a printed blank furnished by the quartermaster. The first article of the agreement was as follows:

"Article I. That the said John L. Merriam, his heirs, assigns, administrators and executors, shall supply or cause to be supplied and delivered to the quartermaster's department at the military station of Bismarck, D. T., six hundred thousand pounds, more or less, of oats at two dollars and twenty-three and seven-sixteenths cents (2.23\frac{7}{16}$) per one hundred pounds, the oats to be of good merchantable quality, free from dirt or other foreign matter, and to be delivered in good, new burlap sacks, each sack to contain no greater quantity than 128 pounds, or such other quantity, more or less, as may be required from time to time for the wants of said station, between the first day of July, 1877, and the thirty-first day of December, 1877, in such quantities and at such times as the receiving officer may require. Provided, that this contract is approved by the commanding generals of the Department of Dakota, and of the Military Division of the Missouri; otherwise not until such approval is obtained."

The appellant had previously, in accordance with the award to him, dated May 18, 1877, entered into another contract with the quartermaster acting on behalf of the United States, bearing date May 15, 1877, for the delivery of 1,000,000 pounds of oats, which was identical in terms with the above mentioned contract of June 29, 1877, except that the words "Or such other quantity, more or less, as may be required from time to time for the wants of said station, between the first day of July, 1877, and the 31st day of December, 1877, in such quantities and at such times as the receiving officer may require," found in article I, were omitted.

Two other contracts, dated June 29, 1877, were made between said quartermaster and said Hall, in accordance with his said bid, one for the delivery of 665,000 pounds of oats, and the other for the delivery of 1,955,000 pounds, each [440] at $2.25 per one hundred pounds; and in other respects the two contracts were identical in form with those of the appellant, the one first above mentioned having the same words omitted which were omitted from the appellant's contract of May 15, 1877, and the other containing them.

There were delivered at Bismarck, as under the two contracts of Hall, by parties other than the appellant, 3,116,616 pounds of oats, between July 1, 1877, and December 31, 1877.

The claimant after the execution of his said contracts respectively commenced delivering oats thereunder, and by July 12, 1877, had delivered more than 1,600,000 pounds specifically mentioned in the two contracts, the excess having been received by the acting assistant quartermaster at Bismarck, by mistake, and he was paid in full for all that he had delivered.

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Subsequently he offered to deliver nine carloads of oats, but they were refused.

Neither the receiving officer nor any other officer of the defendants required the appellant to supply for the wants of said station any other quantity of oats than that specifically mentioned in the contract sued on; and the appellant did not ask to be informed whether or not any other quantity would be required, and although he repeatedly offered the several carloads of oats above mentioned to the acting assistant quartermaster, and requested him to take them in order to clear up all he had at Bismarck, and get the railroad company's cars unloaded, he never demanded it as a right under his contract.

The appellant had the means to deliver oats within the time mentioned in his contract to the full extent of the quantity delivered under Hall's contract by other parties, in addition to that which was received from him, had he been required and permitted so to do, and was ready and willing to make such delivery, although he gave the defendant's officers no notice to that effect, and made no other offers than that above set forth.

The appellant suffered some loss by reason of the non-receipt by the defendants of the several car-loads of oats above mentioned, and by being obliged to sell the same to other parties; and some loss of profits which he would have made if he had delivered at the contract price [441] oats to the extent of the quantity received by the defendants under said Hall's contracts, in addition to the quantity which he did deliver, and for which he was paid.

Messrs. **John B. Sanborn** and **George A. King**, for appellant.

Mr. **S. F. Phillips**, *Solicitor-Gen.*, for appellee.

Mr. Justice **Woods** delivered the opinion of the court:

The contention of the appellant is, that under that clause of the contract sued on which provided as follows: "Said Merriam shall supply 600,000 pounds, more or less, of oats * * * or such other quantity, more or less, as may be required from time to time for the wants of such station between the first day of July, 1877, and the thirty-first day of December, 1877, in such quantities and at such times as the receiving officer may require," he was bound to deliver, and the United States to receive, in addition to the 1,600,000 for which his bid was accepted, all the oats needed for the wants of the station between the dates mentioned. And as it appears from the finding of the Court of Claims that a large quantity of oats, over and above that received from the appellant, was received at Bismarck between the dates mentioned, under the contract made with Hall, and that appellant's offer to furnish a quantity of oats in addition to the amount specifically mentioned in his contract was declined, that a breach of his contract is shown, for which he is entitled to damages. It is contended on behalf of the United States that, under the contract sued on, the appellant was bound to deliver, and the United States to receive, 1,600,000 pounds of oats, and no more, unless required to do so by the quartermaster. The only question presented by the record is which of these two constructions of the contract is the true one.

It is a fundamental rule that in the construction of contracts the courts may look, not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made. *Nash* v. *Towne*, 5 Wall., 689 [72 U. S., XVIII., 527]; *Barreda* v. *Silsbee*, 21 How., 161 [62 U. S., XVI., 91]; *Shore* v. *Wilson*, 9 Cl. & F., 555; *McDonald* v. *Longbottom*, 1 El. & El., 977; *Munford* v. *Gething*, 29 L. J., C. P., 110; [442] *Carr* v. *Mantefiore*, 5 B. & S., 408; *Brawley* v. *U. S.*, 96 U. S., 168 [XXIV., 622].

Thus, in the case of *Doe* v. *Burt*, 1 T. R., 703, where a lease had been made by the plaintiff to the defendant of part of a messuage, together with a piece of ground thereunto adjoining, which piece of ground was used as a yard, and beneath the yard was a cellar, occupied by a third party under a lease previously granted to him by the plaintiff, and the occupant of the cellar continued to reside in it and to pay rent to the plaintiff for three or four years after the latter had demised the yard to the defendant, but his lease having expired, and he having quitted the cellar, the defendant took possession of it, contending that the cellar had passed to him by the demise of the yard, the court held that parol evidence of the surrounding circumstances was admissible to show that it did not pass.

Availing ourselves of the light thrown on the contract in this case by the circumstances under which it was made, we are of opinion that the construction claimed for it by the appellant cannot be sustained.

The specific quantity of oats to be delivered at Bismarck, for which the circular for the information of bidders invited proposals, was 4,464,700 pounds. The appellant made bids for 6,400,000 pounds; 1,600,000 pounds of which were at the price of 2.23\frac{7}{16}$ per hundred pounds, 1,600,000 at 2.28\frac{1}{4}$ per hundred pounds, and the residue at still higher prices. His bid for 1,600,000 pounds at 2.23\frac{7}{16}$ per hundred pounds was the only bid made by him which was accepted. The bid of Hall was at the same time accepted for 2,620,000 pounds at $2.25 per hundred pounds, and contracts were made with him for the delivery of that amount. It thus appears that the lowest bids were accepted and contracts made in accordance therewith. The contracts made with both the appellant and Hall were identical in form. The bids accepted fell a little short of the entire quantity for which bids were asked. The appellant now insists that, by reason of the clause in his second contract, by which, in addition to the specific quantity of oats therein mentioned, he agreed to supply such other quantity, more or less, as might be required for the wants of said station, and which also was found in the second contract made with Hall, the United States were [443] bound to receive from him oats for which his bid was not accepted, and for the delivery of which the bid of Hall, lower than his own, was accepted. It is perfectly clear, from these circumstances, that the officers of the United States who had this matter in charge did not understand the contract with appellant as he now

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claims to construe it. In other words, they did not intend to contract with two different persons for twice the quantity of oats needed for the wants of the station. Nor did they intend, after making awards to two different bidders for specific quantities of oats, to disregard the awards and enter into contracts by which the higher bidder should supply all the oats.

We think the facts found by the Court of Claims show also that the construction now claimed by the appellant could not have been his understanding of the contract when it was made. The advertisement calling for bids announced that they would be opened in the presence of bidders. The appellant bid to furnish 6,400,000 pounds of oats. His bid was accepted for only 1,600,000 pounds out of the 4,464,700 pounds for which bids were specifically invited. On the same day on which the contract sued on was executed, the same quartermaster executed two contracts with Hall for the oats, the furnishing of which had been awarded to him.

It is not specifically found by the Court of Claims that the appellant knew that the bids of Hall for nearly all the oats needed at the station, not awarded the appellant, had been accepted, nor that he knew that contracts had been made with Hall for the delivery of the oats in accordance with the awards made to him. But he knew that his own bid was accepted for less than half of the quantity for which bids were invited. He must have known, therefore, that he had a successful competitor in the biddings, and he must have known that a contract had been made with his successful competitor for the delivery of the oats for which the bid of the latter was accepted; for the printed circular informed him that the bidder whose proposal was accepted would be required to enter into a contract to perform his bid, and he himself had been required to execute a contract to deliver the oats which it was awarded to him to furnish.

[444] These facts being known to appellant, he could not have understood the contract sued on, which was made on the same day as the contract with Hall, as he now contends it should be interpreted. If, therefore, the circumstances surrounding the making of the contract were such that neither party to it could have construed it as the appellant now claims it should have been construed, we must reject that construction and seek one fairly justified by the language of the contract, more consistent with the circumstances of the case. Under the light of these circumstances, it is clear that the contract bound the appellant to deliver, in addition to the specific quantity named, such other quantity, more or less, of oats, as might be needed from time to time for the wants of the station, and as he might be required to deliver.

That such was the appellant's understanding of the contract is evident from the further fact found by the Court of Claims, that the appellant never asked to be informed whether or not any other oats above the quantity specifically mentioned in his contract would be required; and when he offered the nine car-loads of oats to the receiving officer he requested him to take them in order to clear up all he had at Bismarck and get the railroad company's cars unloaded, but never claimed that he had the right to deliver the oats under his contract. It is, therefore, plain that the interpretation he now puts on his contract is an afterthought, and is not the interpretation put upon it by the parties when it was executed.

The construction we have put upon the contract does no violence to its language. The provision that the oats required for the wants of the station, over and above the quantity specifically mentioned in the contract, were to be delivered in such quantities and at such times as the receiving officer might require, may well be construed to leave with that officer a discretion to call for the additional oats or not, as in his judgment they were or were not necessary for the wants of the station; and if he required none, the appellant was bound to deliver and the United States to receive none.

We are of opinion that the Court of Claims was right in dismissing the petition of the appellant. Its judgment must, therefore, be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Plff.*,
v.
EDWARD P. CURTIS.

(See S. C., 17 Otto, 671-676.)

Indictment against officer of national bank.

*1. Prior to the passage of the Act of February 26, 1881, 21 Stat. at L., 352, notaries public, in the several States had no authority to administer to officers of national banking associations the oath required by section 5211 of the Revised Statutes of the United States.

2. An indictment against an officer of a national bank under section 5392, for a willfully false declaration or statement in a report made under section 5211, verified by his oath administered by a notary public of a State prior to the Act of February 26, 1881, cannot be sustained. By section 5392 it was meant that the oath must be permitted or required by at least the laws of the United States, and be administered by some tribunal, officer, or person authorized by such laws to administer oaths in respect of the particular matters to which it relates.

[No. 408.]

Argued Mar. 15, 16, 1883. Decided Apr. 9, 1883.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Eastern District of Missouri.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **William A. Maury**, *Asst. Atty-Gen.*, for plaintiff.

Messrs. **Chester H. Krum** and *J. B. Henderson*, for defendant:

A state officer, not authorized by statute of the United States, cannot lawfully administer

*Head notes by *Mr. Justice* HARLAN.

NOTE.—*Criminal law; the oath must be lawfully administered by competent authority to convict of perjury.*

It is essential to the crime of perjury that the court have jurisdiction of the subject-matter and power to administer oaths. U. S. v. Bailey, 34 U. S. (9 Pet.), 238; Montgomery v. State, 10 Ohio, 220; State v. Hayward, 1 Nott & McC., 546; State v. Furlong, 26 Me., 69; Steinson v. State, 6 Yerg., 531; Com. v. Knight, 12 Mass., 274; Conner v. Com., 2 Va. Cas., 30; State v. Alexander, 4 Hawks, 182; State v. Wyatt, 2 Hayw. (N. C.), 56; Arden v. State, 11 Conn., 408; Reg. v. Lawlor, 6 Cox C. C., 187; Lavey v. Reg., 17 Q. B.,

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an oath required by the laws of the United States, so as to make the affiant guilty of perjury, if he swear falsely. It must be accepted as a fundamental proposition in this case, that the competency of the officer must result from the grant of authority under the federal laws.

Muir v. *State*, 8 Blackf., 154; *State* v. *Hayward*, 1 Nott & M., 546; *Jackson* v. *Humphrey*, 1 Johns., 498; *U. S.* v. *Bailey*, 9 Pet., 238; *J.* McLean's Op.; *People* v. *Travis*, 4 Parker, C. R., 213.

Mr. Justice **Harlan** delivered the opinion of the court:

This case comes before us on a certificate of division as to certain questions of law arising in a criminal prosecution against Edward P. Curtis, based upon sections 5211 and 5392 of the Revised Statutes of the United States.

The first of those sections provides that every national banking association "Shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors. Each such report shall exhibit in detail, and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified; and shall be transmitted to the comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is [672] made to the comptroller shall be published in a newspaper where such association is established," etc.

Section 5392 provides that "Every person who, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

The willfully false declarations or statements which the defendant is charged to have made are contained in several written reports transmitted to the Comptroller of Currency by the National Bank of the State of Missouri, in St. Louis, in pursuance of section 5211, and to the truth of which declarations or statements Curtis, as cashier of that bank, made oath before a notary public within and for the county of St. Louis in that State. These declarations or statements relate to the condition of the bank as to loans, discounts, checks, cash items, overdrafts, individual deposits subject to checks, surplus fund, currency on deposit, and money due from that association to other national banks. The indictment contains five counts, which, as respects any matter now to be determined, do not substantially differ, except as to the several dates when the alleged oaths were taken. Those dates were July 18 and Oct. 10, 1876, and Jan. 15, Jan. 26 and April 5, 1877.

The controlling question is as to the authority of the notary to administer the oaths, upon the falsity of which the indictment is laid.

It is fundamental in the law of criminal procedure that an oath before one who has no legal authority to administer oaths of a public nature, or before one who, although authorized to administer some kind of oaths, but not the one which is brought in question, cannot amount to perjury at common law, or subject the party taking it to prosecution for the statutory offense [673] of willfully false swearing. 1 Hawk. P. C., b. 1, ch. 27, sec. 4, p. 430, 8th ed. by Curwood; Roscoe, Cr. Ev. 7th Am. ed., p. 817; 2 Whart. Crim. Law, sec. 2211; 2 Arch. Crim. Pr. & Pl., 8th ed., p. 1722. If, therefore, Curtis, at the time the several oaths alleged to be false were taken, was not authorized by the laws of the United States to take them before a notary public, he cannot be proceeded against under section 5392. The statute, in conformity with an established rule of criminal law, expressly declares that the oath must be taken before some "competent tribunal, officer, or person." This does not necessarily mean that the tribunal by which the oath is administered shall have been created by the government which required it to be taken, nor that the officer who administers it shall be an officer of that government. But the statute does mean that the oath must be permitted or required, by at least the laws of the United States, and be administered by some tribunal, officer, or person authorized by such laws to administer oaths in respect of the particular matters to which it relates. So that the underlying

v. Doty, 13 Up. Can. C. P., 307; Wood's Case, 4 C. H. Rec., 120.

Nor where the officer was not duly qualified or not duly appointed. 2 Chit. Cr. L., 313; 1 Hawk. P. C. Ch., 69, sec. 4; State v. Hayward, 1 Nott & McC., 546; Rex v. Verelst, 3 Camp., 432; Muir v. State, 8 Blackf., 154.

There can be no conviction where the oath was not required by law. U. S. v. Babcock, 4 McLean, 113.

If the court is illegally constituted there can be no perjury before it. People v. Tracy, 9 Wend., 265.

An oath administered upon a book other than the Bible, the parties administering it and taking it supposing it to be the Bible, is valid. People v. Cook, 8 N. Y., 84; S. C., 14 Barb., 287.

Perjury cannot be predicated of an affidavit sworn to before a notary public professing to act in the City of New York, but who was a non-resident of the State at that time and at the time of his appointment. Lambert v. People, 76 N. Y., 220; S. C., 32 Am. Rep., 298; Rex v. Verelst, 3 Camp., 432.

496; State v. Gallimore, 2 Ired., 374; State v. McCroskey, 3 McCord, 308; Jackson v. Humphrey, 1 Johns., 498.

If the court has jurisdiction, it may be committed, though the proceedings are not strictly regular. State v. Hall, 7 Blackf., 25; State v. Lavalley, 9 Mo., 824.

Where there is no jurisdiction or officer acted beyond his jurisdiction, there can be no conviction. State v. Furlong, 26 Me., 69; Reg. v. Row, 14 Up. Can. C. P., 307; Reg. v. Atkinson, 17 Up. Can. C. P., 295.

Nor can there be where the party administering the oath had no authority; the officer must be duly authorized to administer it. 2 Bish. (C. L.), 6th ed., sec. 1017; Morrell v. People, 32 Ill., 499; State v. McCroskey, 3 McCord, 308; State v. Dayton, 23 N. J., 49; Stewart v. State, 6 Tex. Ct. App., 184; State v. Powell, 28 Tex., 627; McGregor v. State, 1 Ind., 179; Com. v. Hughes, 5 Allen, 499; Lambert v. People, 6 Abb. (N. C.), 181; Rex v. Hanks, 3 Car. & P., 419; Reg.

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question is, whether the notary public, whose commission is from the State, was, at the respective dates of the oaths taken by Curtis, authorized by the laws of the United States to administer such oaths.

This question we are constrained to answer in the negative. We are not aware of any Act of Congress which gave such authority to notaries public in the different States at the several dates given in the indictment. The Assistant Attorney-General insists that such authority may be found in section 1778 of the Revised Statutes, which declares: "In all cases in which, under the laws of the United States, oaths or acknowledgments may now be taken or made before any justice of the peace of any State or Territory, or in the District of Columbia, they may also be taken or made by or before any notary public duly appointed in any State, district or Territory, or any of the commissioners of the circuit courts, and, when certified under the hand and official seal of such notary or commissioner, shall have the same force and effect as if taken or made by or before such justice of the peace."

[674] The authority of the notary to administer these oaths to Curtis cannot be derived from that section, unless at the dates in question, they could, under the laws of the United States, have been taken before justices of the peace in Missouri. But the latter officers had no such authority by any federal statute to which our attention has been called, or which we are able to find. Section 1778, so far as notaries public are concerned, embodies the substance of similar provisions in the Acts of Sep. 16, 1850, 9 Stat. at L., 458, and July 29, 1854, 10 Stat. at L., 315, sec. 1, and June 22, 1874, 18 Stat. at L., 186, sec. 20. But nothing in these Acts, even if they remained in force after the adoption of the Revised Statutes, supports the authority exercised by the notary public who administered these oaths to defendant.

Counsel for the United States further insists that a proper construction of section 1778 will authorize a notary public in *any* State to administer oaths to officers of national banking associations; when making reports to the Comptroller of the Currency, if justices of the peace may lawfully do so in this district. But in our judgment no such interpretation of that provision is admissible. What Congress intended by that section was to give notaries public in their respective States the same authority, in the administration of oaths, as is given under the laws of the United States, to justices of the peace in the same States; and to notaries public in this District the same authority, in administering oaths, which, under the laws of the United States, might be exercised by justices of the peace in this District. We have seen, however, that justices of the peace, in the several States, had not beeen given such authority by any provision in the Revised Statutes, or by any Act of Congress prior to their adoption.

Nor can any support for the indictment be derived from the Act of August 15, 1876, 19 Stat. at L., 206, which declares "That notaries public of the several States, Territories, and the District of Columbia, be, and they are hereby authorized to take depositions, and do all other acts in relation to taking testimony to de used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States Circuit Courts may now lawfully take or do."

The power of commissioners of the circuit courts did not, at the passage of that Act, extend to the taking of oaths to reports by officers of national banks. They could take affidavits when required, or allowed in any civil cause in a circuit or district court, Rev. Stat., sec. 945; Act of Feb. 20, 1812, 2 Stat. at L., 679, sec. 1; Act of March 1, 1817, 3 Stat. at L., 350; or administer oaths where, in the same State, under the laws of the United States, oaths, in like cases, could be administered by justices of the peace, Rev. Stat., sec. 1778; or they could take evidence, affidavits, and proof of debts in proceedings in bankruptcy, Rev. Stat., secs. 5003, 5076; Acts of March 2, 1867, 14 Stat. at L., 527; July 27, 1868, 15 Stat. at L., 228, sec. 3; and June 22, 1874, 18 Stat. at L., 186, sec. 20. But the authority of commissioners did not extend to such oaths as were administered to Curtis. [675]

Our attention is called by counsel for the Government to *U. S.* v. *Bailey*, 9 Pet., 238. That case, it is claimed, furnishes ample ground for an implication that the notary public who administered the oath in this case was fully empowered to do so. We do not so interpret that decision. That was an indictment for false swearing. It was based upon an Act of Congress which provided that if any person shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, he should, upon conviction, suffer as for willful, corrupt perjury. The alleged false oath was administered before a justice of the peace for the Commonwealth of Kentucky. It was admitted that there was no statute of the United States expressly empowering a justice of the peace to administer the oath taken by Bailey. But the authority of that officer was sustained, upon the ground that the Secretary of the Treasury had previously, and as incident to his duty and authority under an Act of Congress, established a regulation permitting affidavits in support of claims against the United States to be made before justices of the peace. Except for that regulation the court, it is manifest, would not have sustained the indictment in *Bailey's Case*.

The conclusion, therefore, is not to be avoided, and it will accordingly be certified to the court below, that the alleged false oaths of the defendant were not taken before an officer competent, at the time, under the laws of the United States, to administer them. The absence of such authority in notaries public seems to have been recognized by Congress when it passed the Act of February 26, 1881, 21 Stat. at L., 352, declaring "That the oath or affirmation required by sec. 5211 of the Revised Statutes, verifying the returns made by national banks to the Comptroller of the Currency, when taken before a notary public properly authorized and commissioned by the State in which such notary resides and the bank is located, or any other officer having an official seal, authorized in such State to administer oaths, shall be a sufficient verification, as contemplated by said section 5211; *Provided*, That the officer administering the oath is not an officer of the bank." [676]

What has been said renders it unnecessary

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to consider any other question of law certified by the Judges of the Circuit Court.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

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[445] COOK COUNTY NATIONAL BANK AND AUGUSTUS H. BURLEY, Receiver of SAID BANK, *Appts.*,

v.

UNITED STATES.

(See S. C., 17 Otto, 445-453.)

Priority of the United States as against insolvents—national bank Act—bankrupt Act—repeal of statute—trust funds.

1. Under section 3466, U. S. R. S., giving priority to the demands of the United States against insolvents, the United States, having demands against an insolvent national bank, is not entitled to priority of payment out of its assets over other creditors.

2. The Act authorizing the formation of national banks is a separate Code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates, and giving no preference to any claim, except for moneys to re-imburse the United States for advances in redeeming the notes.

3. This view of the banking law is not affected by the subsequent enactment of 1867 of the Bankrupt Act giving priority to the demands of the United States against the estates of bankrupts.

4. If a particular statute is clearly designed to prescribe the only rules which should govern the subject to which it relates, it will repeal any former one as to that subject.

5. The United States has no right to claim the payment of a demand arising out of the deposit of its funds with a bank, out of the surplus of the proceeds of the bonds deposited in the Treasury, in trust as security for the circulating notes of the bank.

6. A trustee cannot set off against the funds held by him in that character, his individual demand against the grantor of the trust.

[No. 115.]

Argued Dec. 5, 1882. Ordered for reargument Mar. 5, 1883. Reargued Mar. 8, 9, 1883. Decided Apr. 9, 1883.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois. The history and facts of the case appear in the

Statement of the case by *Mr. Justice* **Field**:

This is an appeal from a decree of the circuit court overruling a general demurrer to a bill filed by the United States against the Cook County National Bank of Chicago, Illinois, and Augustus H. Burley, its Receiver. The facts, as stated in the bill, are briefly as follows: previously to 1872, the Bank was formed under the Acts of Congress authorizing the organization of national banks, and was designated as a depository of moneys of the United States. In January, 1875, it became insolvent and suspended business. In February following, Burley was appointed, by the Comptroller of the Currency, its Receiver, and he immediately entered upon the discharge of his duties.

At the time of its suspension, the Bank had on deposit of postal funds, $24,900; and of money order funds, $14,684, which are respectively designated on its books by those names. These moneys had been deposited with the Bank by John McArthur, a deputy-postmaster at Chicago.

The treasury department at the time held United States bonds, placed with it by the Bank, to the amount of $150,000 par value, as security for all public moneys which might be deposited with the Bank. These bonds were afterwards sold for $174,544.52. Of the proceeds, $155,305.47 were appropriated to pay the amount then on deposit with the Bank to the credit of the Treasurer of the United States. Of the balance remaining, $11,803.98 were applied on the postal funds, and $7,435.07 on the money order funds deposited by the deputy-postmaster at Chicago, leaving still due on account of those two funds $20,344.95.

In addition to these bonds, there were at the time, in the treasury department, United States bonds to the amount of $100,000 par value, deposited by the Bank to secure its notes issued for circulation. When, in 1875, the Bank failed to pay these notes, the comptroller of the currency declared the bonds forfeited to the United States. A part of them have been sold, and it [446] is the intention of the treasury department to sell the remainder, and apply the proceeds to pay the notes in circulation, and re-imburse the United States for sums already advanced for that purpose. The proceeds of all the bonds, when sold, will be sufficient to redeem the notes, re-imburse the United States in full for their advances, and leave a balance exceeding $30,000, more than sufficient to pay the debts due by the Bank to the United States, for postal funds and money order funds, deposited by the deputy-postmaster at Chicago.

The treasury department, in addition to the bonds to secure the circulation of the notes, has a sum exceeding $30,000 belonging to the Bank, collected from bills receivable and debts due to it; but its liabilities notwithstanding greatly exceed its assets.

Upon these facts, the question arose whether the claim of the United States for moneys deposited by the deputy-postmaster, is a preferred debt or not; and the officers of the United States are in doubt as to their duty on the subject; that is, whether they should reserve from the funds in the treasury department belonging to the Bank a sufficient amount to pay the debt for postal funds and money order funds due to the United States, or whether they should distribute the said moneys *pro rata* to all the creditors of the Bank, including the United States.

The bill prays that an account be taken of the amount due to the United States by the Bank for moneys so deposited with it by the deputy-postmaster, and that a decree be entered directing the disposition of the funds belonging to the Bank in the control of the treasury department.

The defendants treated the bill as filed to obtain a decree adjudging to the United States a priority in the payment of their demand against the Bank for the balance due on the postal and money order funds, and interposed a general demurrer to it. The court taking a similar view of the bill, overruled the demurrer. The defendants thereupon elected to stand by their demurrer, and as they at the same time admitted that the Bank had a sufficient amount to pay the whole of the principal and interest due to the United States for the funds deposited by the deputy-postmaster as postal funds, and as money [447]

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order funds, the court ordered that the amount thus due should be paid in full out of the assets of the Bank. From this decree the appeal was taken.

Messrs. **Roscoe Conkling** and *Henry S. Monroe*, for appellants.

Mr. **W. C. Goudy**, for appellee.

Mr. Justice **Field** delivered the opinion of the court:

The Revised Statutes in section 3466 provide that:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

This section is substantially a copy of section 5 of the Act of March 3, 1797 [1 Stat. at L., 514], entitled "An Act to Provide more Effectually for the Settlement of Accounts between the United States and Receivers of Public Money." Statutes passed before 1797 embodied similar provisions and also declared that parties who are sureties of insolvents may pay to the United States any balance due to them, and have the same priority in the payment of their demands out of the estates of such insolvents as the United States would have if no such payment were made.

The language of the section in the Revised Statutes is general and comprehensive in its terms and applies to demands of the United States, against any insolvent person living or the estate of any insolvent person dead; and also to demands against any person who, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, and against any estate of an absconding, concealed or absent debtor, whose effects have been attached by process of law.

The question is whether, under this broad and general language, the United States, having demands against an insolvent national [448] bank, are entitled to priority of payment out of its assets over other creditors. The appellants contend that the statute refers to such insolvency as is determined by judicial decree, as under a bankrupt Act, or if manifested by the debtor's voluntary assignment of his property, or by its attachment under process against him, as an absconding, concealed or absent debtor; and that, within this meaning, the Cook County National Bank never became insolvent, and that, therefore, the provisions giving priority of payment to demands of the United States against insolvents do not apply.

From the view we take, of the Act authorizing the formation of national banks, it is unnecessary to consider whether or not this position is tenable. We consider that Act as constituting by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed; the amount of circulating notes they may issue, the security to be furnished for the redemption of those in circulation; their obligations as depositaries of public moneys, and as such to furnish security for the deposits, and designating the consequences of their failure to redeem their notes, their liability to be placed in the hands of a receiver, and the manner, in such event, in which their affairs shall be wound up, their circulating notes redeemed and other debts paid or their property applied towards such payment. Everything essential to the formation of the banks, the issue, security and redemption of their notes, the winding up of the institutions and the distribution of their effects, are fully provided for, as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates.

In the first place, the banks are required to deposit with the Treasurer, bonds of the United States as security for any notes that may be issued, the amount of which cannot in any case exceed ninety per cent of the par value of the bonds. R. S., sec. 5171. Should the market or the cash value of the bonds become reduced at any time below the amount of the notes issued, the comptroller of the currency may require that the amount of the depreciation be deposited with the Treasurer in other United States [449] bonds, or in money, so long as such depreciation continues. R. S., sec. 5167. In case of the refusal of a bank to pay its notes, the bonds may be sold at public auction in the City of New York, and their proceeds applied to reimburse the United States the amount expended by them in paying the circulating notes; and for any deficiency which may remain, the United States are entitled to a paramount lien upon all the assets of the bank, which is to be paid in preference to all other claims, except for costs and necessary expenses in administering the same. R. S., sec. 5230.

In the second place, when the banks are made depositaries of public moneys and employed as financial agents of the Government, it is the duty of the Secretary of the Treasury to require them to give satisfactory security, by the deposit of United States bonds or otherwise, for the safe-keeping and prompt payment of the public money deposited and for the faithful performance of their duties as financial agents. The amount of security which the Secretary may thus require has no limit but his own judgment as to its necessity. Every officer of a bank which is not an authorized depositary, and which has not therefore given the required security, who knowingly receives any public money on deposit, is liable for embezzlement. R. S., sec. 5497. The Government can thus always have security, limited in amount only by the judgment of the Secretary of the Treasury, for public moneys deposited with any national bank.

With these provisions for security against possible loss for moneys deposited, it would seem only equitable that the Government should call for such security and, if it prove insufficient, take the position of other creditors in the distribution of the assets of the bank in case of its failure. The framers of the banking law evidently so regarded the matter. After pro-

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viding for the appointment of a receiver by the comptroller of the currency upon the suspension or failure of a bank, the law requires the receiver to take possession of its books and records, and assets of every description, and to collect all debts, dues and claims belonging to it; and authorizes him upon an order of a court of competent jurisdiction, to sell or compound bad or doubtful debts; to sell the real or [450] personal property of the bank and, if necessary in order to pay its debts, to enforce the individual liability of its stockholders, and it directs him to pay over all moneys thus received to the Treasurer of the United States, subject to the order of the comptroller of the currency. It also requires the comptroller, upon appointing a receiver, to cause notice to be published, calling upon all persons having claims against the bank to present the same with legal proof thereof. It then declares as follows, in section 5236: "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver, on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

This section provides for the distribution of the entire assets of the bank, giving no preference to any claim except for moneys to re-imburse the United States for advances in redeeming the notes. When this re-imbursement is fully provided for, the balance of the assets, as the proceeds are received, is subject to a ratable dividend on all claims proved to the satisfaction of the receiver, or adjudicated by a court of competent jurisdiction. Any sum remaining after the payment of all these claims is to be handed over to the stockholders in proportion to their respective shares. These provisions could not be carried out if the United States were entitled to priority in the payment of a demand not arising from advances to redeem the circulating notes. The balance, after re-imbursement of the advances, could not be distributed, as directed, by a ratable dividend to all holders of claims, that is, to all creditors.

These provisions must be deemed, therefore, to withdraw national banks, which have failed, from the class of insolvent persons out of whose estates demands of the United States are to be paid in preference to the claims of other credit- [451] ors. The Law of 1797 [1 Stat. at L., 514], re-enacted in the Revised Statutes, giving priority to the demands of the United States against insolvents, cannot be applied to demands against those institutions. The provisions of that law and of the national banking law being, as applied to demands against national banks, inconsistent and repugnant, the former law must yield to the latter and is, to the extent of the repugnancy, superseded by it. The doctrine as to repugnant provisions of different laws is well settled, and has often been stated in decisions of this court. A law embracing an entire subject, dealing with it in all its phases, may thus withdraw the subject from the operation of a general law as effectually as though, as to such subject, the general law were in terms repealed. The question is one respecting the intention of the Legislature. And although as a general rule the United States are not bound by the provisions of a law in which they are not expressly mentioned, yet if a particular statute is clearly designed to prescribe the only rules which should govern the subject to which it relates, it will repeal any former one as to that subject. *Davies* v. *Fairbairn*, 8 How., 636; *U. S.* v. *Tynen*, 11 Wall., 88 [78 U. S., XX., 153].

In addition to these conflicting provisions in the banking law, necessarily superseding those of the Law of 1797, as to the priority of the United States in the payment of their demands out of the estates of insolvents, there is the significant declaration of the banking law that, for any deficiency in the proceeds of the bonds deposited as security for the circulating notes of the bank, the United States shall have a paramount lien upon all its assets, which shall be made good in preference to all other claims, except for costs and expenses in administering the same. This declaration was unnecessary and quite superfluous if, for such deficiency, the United States already possessed, under the Act of 1797, the right to be paid out of the assets of the bank in preference to the claims of other creditors. The declaration considered in connection with the ratable distribution of the assets, prescribed after such deficiency is provided for, is equivalent to a declaration that no other priority in the distribution of the proceeds of the assets is to be claimed.

This view of the banking law is not affected by the subsequent enactment in 1867 [14 Stat. at L., 517], of the Bankrupt Act, giving priority to the demands of the United States against [452] the estates of bankrupts. That enactment was dealing with the estates of persons adjudged to be insolvent under that law and covers only the distribution of their estates. It has no further reach.

It remains only to consider whether the United States have the right to claim the payment of this demand out of the surplus moneys remaining in the Treasury, of the proceeds of the bonds deposited as security for the circulating notes of the Bank. The surplus is sufficient to pay the demand of the United States in full. Can the United States set off their demand against these proceeds? We have no hesitation in answering this question in the negative. The bonds were received in trust as a pledge for the payment of the circulating notes. The statute so declares in express terms. R. S., 5162 and 5167. They were to be returned to the Bank when the notes were paid, if not sold to re-imburse the United States for moneys advanced to redeem the notes. The Bank could have claimed their return at any time upon a surrender of the notes. The surplus constituted the assets of the Bank, and part of the fund appropriated by the statute for its creditors. It was charged with this liability, and was held subject to it after the purposes of the original trust were accomplished, although remaining in the Treasury. It was then subject to a new trust. A trustee cannot set off against the funds held by him in

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that character his individual demand against the grantor of the trust. Courts of equity and courts of law will not allow such an application of the funds so long as they are affected by any trust. It would open the door to all sorts of chicanery and fraud. The fund must be relieved from its trust character before it can be treated in any other character.

This doctrine is well illustrated in the case of *Sawyer* v. *Hoag*, 17 Wall., 622 [84 U. S., XXI., 736]. There a stockholder indebted to an insolvent corporation for unpaid shares, undertook to set off against the claim upon him a debt due to him by the corporation. But it was held that this could not be done. Said the court, speaking by *Mr. Justice* Miller: "The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became [453] known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim."

Here the surplus being a fund for all the creditors, was subject to be distributed to them immediately upon the re-imbursement of the advances of the United States, and the right of the creditors to it was not affected by the fact that it was at the time in the actual possession of the treasury department.

Nor is the relation of the United States to this fund changed by the forfeiture of the bonds, which the comptroller of the currency was authorized, upon the failure of the Bank, to declare. The forfeiture was not a confiscation of the bonds to the Government. It amounted only to an appropriation of them, against any other claim, to the specific purposes for which they had been deposited, authorizing their cancellation at market value when not above par, or their sale, so far as necessary to redeem the circulation or re-imburse the United States for moneys advanced for that purpose. When that purpose was accomplished, the Bank had the right to any surplus of their proceeds, equally as though that right had been in express terms declared.

It follows, from the views expressed, that the decree of the court below must be reversed and the cause be remanded, with directions to sustain the demurrer and dismiss the bill; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MAGDALENE VON COTZHAUSEN, *Plff. in Err.*,
v.
JOHN NAZRO, Collector of Customs, AND HENRY C. PAYNE, Postmaster.

(See S. C., "*Cotzhausen* v. *Nazro*," 17 Otto, 215-220.)

Importing goods in mail—liable to seizure.

* 1. Dutiable goods cannot lawfully be imported in the foreign mail under the International Postal Treaty of Berne, of October 9, 1874.

*Head notes by *Mr. Justice* MILLER.

2. Articles so introduced are, in the hands of the receiver of them from the postoffice, liable to seizure by the officers of customs.

3. The fact that there was no intent on the part of the sender or receiver of such goods to defraud the United States of the duty, does not render the custom officer liable to an action for making the seizure.

[No. 200.]

Submitted Mar. 22, 1883. Decided Apr. 9, 1883.

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

The history and facts of the case appear in the opinion of the court.

Mr. **F. W. Cotzhausen,** for plaintiff in error.

Mr. **Wm. A. Maury,** *Asst. Atty-Gen.*, for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This was a suit commenced before a justice of the peace by the plaintiff in error, against the defendants, for seizing and converting to their own use a flexible woolen scarf or shawl of the value of $4. It was removed into the Circuit Court of the United States by a writ of *certiorari*, on the ground that Nazro was Collector of Customs of the United States for the Port of Milwaukee, and that what was done in seizing [216] the shawl was in performance of his duty as such Collector.

On the trial in that court it appeared that the article in question came in a closed or sealed envelope by foreign mail from Germany, and the proper officer of the customs at Milwaukee being notified to be present when the letter was delivered to and opened by plaintiff, seized it as forfeited under the customs laws of the United States.

The jury being requested to make a special verdict, answered the questions propounded to them by the court as follows:

"Question 1. Was the article in question sent from a foreign country by mail, inclosed in a sealed envelope addressed to the plaintiff at Milwaukee, and was it transmitted by mail, thus inclosed, to its point of destination?

Answer. Yes.

Question 2. Were the contents of the package disclosed by any writing placed upon it by the sender?

Answer. Yes.

Question 3. Was the package received at the postoffice in Milwaukee, and if so, was the Collector of Customs for this district notified of its receipt?

Answer. Yes.

Question 4. Was the package placed in the hands of the plaintiff by a clerk in the postoffice, in the presence of the deputy collector, and did she open it?

Answer. Yes.

Question 5. Did the deputy collector of customs then seize the article in question, after it was opened?

Answer. Yes.

Question 6. Did the Collector thereafter cause said article to be appraised by the appraiser for this collection district, and did he refuse to surrender it to the plaintiff without payment of the amount of such appraisal?

Answer. Yes.

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Question 7. Was the article sent by mail for the purpose or with intent on the part of the sender or the plaintiff to avoid the payment of duties thereon?

Answer. No.

[217] Question 8. What was the value of said article on the 21st day of May, 1877?

Answer. $4,00."

And on this verdict the circuit court rendered a judgment for defendants with costs.

A bill of exceptions is signed, embodying all the evidence in the case, from which it appears that there was no little ill-feeling in the case on the part of plaintiff and her attorneys, who refused to make application to the Secretary of the Treasury for a remission of the penalty, and that the seizure was reported to him and to the proper law officers by the Collector. But as no ruling of the court was made on the admission or rejection of this evidence, and as no instructions of the court were given or asked, and no exception taken to any ruling of the court at the trial, the bill of exceptions is of no value here.

The plea to the action was the general issue, and we must look alone to the special verdict to see if it justified the judgment of the court.

The letter containing this scarf came from Germany to the United States under the international postal system, established by the Treaty of Berne, of October 9, 1874 [19 Stat. at L., 604].

The 25th article of the protocol to that Treaty, which, under the signatures of the plenipotentiaries who negotiated it, is declared to be of the same force as if it was inserted in the Treaty, provides that "There shall not be admitted for conveyance by the post any letter or *other packet* which may contain either gold or silver money, jewels, precious articles, or any article whatever liable to custom duties." 19 Stat. at L., 604, art. XXV.

While some attempt in argument is made to show that, either by Treaty or by Act of Congress, books, patterns of merchandise and perhaps other articles may come through the foreign mail without liability to forfeiture, it is sufficient to say that the article seized in this case was not sent as a sample, nor is it a book or other article asserted to be admissible.

Its introduction into the United States in this manner is, therefore, forbidden by the express provisions of the postal treaty under which it came, which is the law of the land, and is unauthorized by any Act of Congress.

[218] No question is made in this case that the shawl was dutiable, or that the amount of the duty claimed on it was the proper duty.

Being dutiable, its introduction by mail into the United States was forbidden by the Treaty. The revenue laws of the United States require that every owner or consignee of property imported from other countries shall report the same to the customs officers before it is landed from the vessel, and shall furnish an invoice of its character and purchase price, for valuation, or that it may be seen if it is duty free, and all the vexatious and annoying machinery of the custom-house, and the vigilance of its officers, are imposed by law to prevent the smallest evasion of this principle.

Of what avail would it be that every passenger, citizen and foreigner, without distinction of country or sex, is compelled to sign a declaration before landing, either that his trunks and satchels in hand contain nothing liable to duty or, if they do, to state what it is, and even the person may be subjected to a rigid examination, if the mail is to be left unwatched, and all its sealed contents, even after delivery to the person to whom addressed, are to be exempt from seizure, though laces, jewels and other dutiable matter of great value may thus be introduced from foreign countries.

It is a violation of the law to introduce dutiable articles at all in that mode, and articles so introduced are liable to seizure for such violation.

But the jury found that the shawl was not sent by mail, for the purpose or with the intent, on the part of the sender or the plaintiff, to avoid the payment of duties thereon; and it is said that, under section 3082 of the Revised Statutes, the goods cannot be seized or forfeited unless fraudulently or knowingly imported contrary to law.

R. S., sec. 3082, provides: "If any person shall *fraudulently* or *knowingly* import or bring into the United States or assist in so doing any merchandise, contrary to law; or shall receive, conceal, buy, sell or in any manner facilitate the transportation, concealment or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited, and the offender shall be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both." [219]

The language of this section is, that if a person fraudulently *or knowingly* brings into the United States or assists in so doing any merchandise contrary to law, the goods shall be forfeited and the offender punished by fine and imprisonment; and while the jury negative the fraudulent intent, they do not negative the knowledge of the sender that the goods were sent in violation of law, or that they were dutiable goods.

This fraudulent and guilty knowledge, however, relates mainly to the punishment of the offender by fine and imprisonment, and other sections, as 3061, authorize and direct the seizure of any property imported contrary to law, and the officer is to open envelopes for that purpose and, on reasonable ground to believe it subject to duty or to have been unlawfully imported, he shall seize and secure the same for trial.

In this case the article was unlawfully imported in a sealed envelope, and it was discovered and seized by the proper officer, in the hands of the owner after she had opened it.

There is no finding by the jury as to what he did with it, except that he had it appraised. But the presumption is that he did his duty, by notifying the officers whose business it was to institute proceedings for condemnation, and though we may not properly look at the bill of exceptions, which shows what he did with it, this is unnecessary, for if the seizure was rightful, there is no evidence whatever of a wrongful conversion.

It has been suggested that by reason of section 16 of the Act of June 22, 1874 [18 Stat. at L., 189], Supplement Revised Statutes, 80, and the finding of the jury that there was no intention to defraud in this case, the defendants are liable. But that section relates to actions

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brought by the government to enforce the revenue laws by fine, forfeiture and penalty, and declares that in such cases, unless there is a verdict of the jury or finding of the court that the alleged acts were done with an actual intention to defraud the United States, no fine, penalty or forfeiture shall be imposed.

If the plaintiff in this case shall, in any proceeding in court for its condemnation, appear and claim this property, or any suit shall be instituted against her personally for a violation of [220] the revenue law, she can have the full benefit of this statute.

Or, if she is impatient of the delay of the officers in instituting such proceeding, she can, under section 3076 of the Revised Statutes, cause such proceeding to be instituted, in which she can have the same relief.

But if the present action be sustained on the ground of absence of fraudulent intention on her part, the officer making the seizure is held liable in the absence of such a proceeding, though in such case the court might have protected him by a certificate of probable cause, and though he may have done his duty and been guilty of no conversion. Such a construction of the statute requires him to know the guilty or innocent intent of a party violating the law at the hazard of personal liability for the result.

It is to be observed, also, that all the trouble, cost and vexation of this suit could have been avoided by an application to the Secretary of the Treasury under section 5298 and the rules prescribed by that officer for such cases, when he would undoubtedly have remitted the forfeiture on what were the undisputed facts of the case, on payment of the small sum assessed as the duty.

We think that in making the seizure the defendants only did their duty, and whatever the hardship to plaintiff, they are not liable in this action on the facts found in the verdict of the jury.

The judgment of the Circuit Court is, therefore, affirmed.

Mr. Justice **Field** did not sit on the hearing of this case, and took no part in its decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[414] THOMAS J. WOOD, *Appt.*,

v.

UNITED STATES.

(See S. C., 17 Otto, 414–417.)

Rank and pay of army officers.

*Under section 32 of the Act of July 28, 1866, ch. 299, 14 Stat. at L., 337, a colonel of cavalry in the army was retired in June, 1868, with the rank and retired pay of a major-general, because that was the rank of the command held by him when he was wounded. Under the Act of March 3, 1875, ch. 178, 18 *Id.*, 512, his retired rank and pay were changed to those of a brigadier-general, that being the actual rank held by him when he was wounded; held, that his being retired with the rank of a major-general did not confer on him the office of a major-general, and that Congress had power to change his retired rank and pay.

[No. 231.]

*Head note by *Mr. Justice* BLATCHFORD.

Submitted Apr. 4, 1883. Decided Apr. 16, 1883.

APPEAL from the Court of Claims.

The history and facts of the case appear in the opinion of the court.

Messrs. **Halbert E. Paine** and *B. F. Grafton*, for appellant.

Mr. **Wm. A. Maury**, *Asst. Atty-Gen.*, for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an appeal from the Court of Claims. The claimant, Thomas J. Wood, was appointed to the office of Colonel of the 2d Regiment of Cavalry, in the Army of the United States, in November, 1861, having been commissioned as a brigadier-general of volunteers in October, 1861. In December, 1862, while in command of the first division, left wing, of the 14th Army Corps, he was wounded at the battle of Stone River. In September, 1864, while in command of the third division of the 4th Army Corps, he was wounded at the battle of Lovejoy's Station, Georgia. These divisional commands were the commands of an officer of the rank of major-general, but he was not commissioned as a major-general of volunteers until January, 1865, nor breveted as a major-general in the army until March, 1865.

On the 28th of July, 1866, an Act was passed by Congress, ch. 299, 14 Stat. at L., 337, which provided as follows, section 32: "Officers of the regular army, entitled to be retired on account of disability occasioned by wounds received in battle, may be retired upon the full rank of the command held by them, whether in the regular or volunteer service, at the time such wounds were received." In January, 1868, General Wood was ordered, at his own request, to appear before a retiring board. In February, 1868, the board made the following finding: "The board is of the opinion that Brevet Major-General Thomas J. Wood, Colonel 2d United States Cavalry, is incapacitated for active service, and that said incapacity is the result of three wounds received in battle in the line of his duty, while commanding a division of troops in the [415] service of the United States." This finding was approved by the President, and by his authority and direction this order was issued from the Adjutant-General's Office, June 9, 1868: "Brevet Major-General Thomas J. Wood, Colonel 2d United States Cavalry, having, at his own request, been ordered before a board of examination, and having been found by the board to be physically incompetent to discharge the duties of his office on account of wounds received in battle, and the finding having been approved by the President, his name will be placed upon the list of retired officers of that class in which the disability results from long and faithful service, or some injury incident thereto. In accordance with section 32 of the Act approved July 28, 1866, General Wood is, by direction of the President, retired with the full rank of major-general." General Wood accepted the rank of major-general on the retired list, as contained in said order, and received the pay of that rank from June 10, 1868, to March 3, 1875.

On the 3d of March, 1875, Congress passed an Act, ch. 178, 18 Stat. at L., 512, entitled "An Act for the Relief of General Samuel W. Craw-

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ford, and to Fix the Rank and Pay of Retired Officers of the Army." The 1st section of this Act provided that the retirement of General Crawford, as a colonel, for disability on account of a wound received in battle, should be amended so that he should be retired and be borne on the retired list of the army as a brigadier-general, he having held the rank of a brigadier-general at the time he was wounded, his retired pay as brigadier-general to commence from the passage of the Act. The 2d section of the Act provided as follows: "All officers of the army who have been heretofore retired by reason of disability arising from wounds received in action shall be considered as retired upon the actual rank held by them, whether in the regular or volunteer service, at the time when such wound was received, and shall be borne on the retired list and receive pay hereafter accordingly; and this section shall be taken and construed to include those now borne on the retired list placed upon it on account of wounds received in action." The section contains some exceptions, which it is not contended apply to the case of General Wood.

On the 23d of March, 1875, an order was issued from the Adjutant-General's Office, [416] providing that, by direction of the President and conformably to said Act of March 3, 1875, the retired list of the army, under the heading, "Officers retired with the full rank of the command held by them when wounded, in conformity with sections 16 and 17 of the Act of August 3, 1861 [12 Stat. at L., 289], and section 32 of the Act of July 28, 1866," is amended to fix the rank of the following named officers, from March 3, 1875, as below enumerated: "Brigadier-Generals, Thomas J. Wood (heretofore major-general), and two other major-generals; colonels, three brigadier-generals; lieutenant-colonels, two colonels; major, one colonel; mounted captain, one lieutenant-colonel; captains, two colonels; mounted first lieutenants, two mounted captains; first lieutenants, three captains, and one mounted first lieutenant; second lieutenant, one mounted second lieutenant."

There were 73 officers retired on the rank of the command held by them when wounded, under section 32 of the Act of 1866. Of these, all but 19 fell within the exceptions named in section 2 of the Act of 1875. Of these 19, 8 were restored to the rank on which they were originally retired, after the promulgation of the order of March 23, 1875. After March 3, 1875, General Wood received only the pay of a brigadier-general retired, $4,125 per year, the pay of a major-general retired during the same time having been $5,625 per year. In September, 1879, General Wood brought suit against the United States in the Court of Claims to recover the sum of $1,500 a year for 4½ years, as such difference in pay, claiming that he held the office of major-general on the retired list of the army by appointment of the President, by said order of June 9, 1868, and that Congress had no power to remove him from that office and appoint him to the office of brigadier-general on the retired list. The Court of Claims dismissed the petition on the merits. The view of that court was that under the statutes of the United States in reference to the army, the office of an officer of the army and his rank are not necessarily identical; that the office has a rank attached to it, expressed by its title, when no other rank is conferred on the officer; that, the office remaining the same, the officer may have a different rank conferred on him, as a title of distinction, to fix his relative position [417] with reference to other officers as to privilege, precedence or command, or to determine his pay; that, by section 1274 of the Revised Statutes, the pay of officers on the retired list of the army is determined by the rank upon which they are retired; that, by section 1094, the officers of the army on the retired list are a part of the Army of the United States and, therefore, no one can be upon that list who is not an officer appointed in the manner required by section 2 of article 2 of the Constitution; that an officer of any grade, on the active list, thus appointed, may be retired with a different rank from that which belongs to his office, when Congress so provides; that this is not to appoint him to a new and different office, but is to transfer him to the retired list, and to change his rank, while he holds the same office; and that in connection with this change of rank his pay may be changed. These views appear to us to be sound. General Wood, holding the office of a colonel of cavalry in the army, his retirement with the rank of major-general, under the Act of 1868, did not confer on him the office of major-general. He remained in the office of colonel of cavalry, and acquired a higher rank, and higher pay, as a retired officer. Such rank not being an office, Congress could change his rank, and with it his pay, as it did by the Act of 1875. His actual rank, when he was wounded, was that of brigadier-general of volunteers, although the rank of the command which he then held was that of a major-general. The rank of his command when wounded was the test of rank and pay under the Act of 1866, while his actual rank when wounded, whether in the regular or volunteer service, was the test of rank and pay under the Act of 1875. Congress had the same right to change the claimant's rank and pay, by reducing them, that it had to change the rank and pay of General Crawford, by section 1 of the Act of 1875, by increasing them, the standard in both cases being the actual rank held by the officer at the time he was wounded. The offices of both were left untouched. The pay of retired officers is a matter entirely within the control of Congress, and so is their rank.

The judgment of the Court of Claims is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

THOMAS COCHRAN ET AL., Survivors, etc., [625]
Plffs. in Err.,
v.
AUGUSTUS SCHELL, Late Collector of Customs.

AUGUSTUS SCHELL, Late Collector of Customs, *Plff. in Err.*,
v.
THOMAS COCHRAN AND WILLIAM BARBOUR, Survivors, etc.

(See S. C., "*Schell* v. *Cochran*" 17 Otto, 625-628.)

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Interest on judgment, when allowed—final judgment, what is.

*1. Where a writ of error to review a judgment recovered against a collector of customs for moneys exacted by and paid to him on entries, is brought by the collector, this court will, if it affirms the judgment, allow interest on it, under Rule 22.

2. In such a case, the "final judgment" intended by section 989 of the Revised Statutes is the judgment as it stands after its affirmance by this court, and after the court below has rendered such judgment as the mandate of this court requires.

[Nos. 1126, 1127.]

Submitted Apr. 16, 1883. Decided May 7, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the opinion of the court. See, also, the report of the decision of this court on the merits, *ante*, 490.

On motion to reform mandate.

Mr. **S. F. Phillips,** *Solicitor-Gen.*, for Schell, defendant, in support of motion.

Mr. **George Bliss,** for Cochran *et al.*, plaintiffs, *contra.*

Mr. Justice **Blatchford** delivered the opinion of the court:

These writs of error were brought to review a judgment rendered by the Circuit Court of the United States for the Southern District of New York, October 14, 1882, *nunc pro tunc* as of October 7, 1882, in favor of Thomas Cochran and William Barbour, surviving partners of S. Cochran & Co., against Augustus Schell, late Collector of Customs, for the sum of $1,892.83, composed of $1,734.80 damages and $158.03 costs. The damages were for excessive fees exacted at the custom-house on entries, and the writ of error brought by Schell was brought to review the judgment in respect to the recovery for such fees. The writ of error brought by S. Cochran & Co. was based on their failure to recover in the suit for duties paid under protest. The writs of error were heard together at this Term and the judgment was affirmed, the recovery for the fees and the failure to recover for the duties being both of them sustained. The judgment of this court, as set forth in the mandate, was rendered March 19, and covered both writs of error, and directed that the judgment of the circuit court be affirmed, "With interest until paid, at the same rate per annum that similar judgments bear in the courts of the [626] State of New York." The mandate was sent to the court below on the 4th of April, and now the Solicitor-General, representing the United States, moves, on behalf of Schell, to correct the judgment and the mandate by striking out the direction as to interest, so that the judgment rendered October 14, 1882, shall not carry interest up to the time a new judgment is rendered by the court below on the mandate.

This application appears to be based on the construction given to a decision made by the Circuit Court for the Southern District of New York, in January, 1882, in *White* v. *Arthur*, 10 Fed. Rep., 80 [20 Blatchf., 237]. That was a suit against a collector of customs to recover duties paid, in which the circuit court rendered a judgment for the plaintiffs, March 1, 1881, for $2,295.90, and where at the trial of the action the court had made a certificate of probable cause, under section 989 of the Revised Statutes. The judgment being presented for payment out of the Treasury, under that section, the amount of the face of it was paid, without any interest on it after its rendition. The court being applied to by the attorney for the United States to direct satisfaction of the judgment to be entered of record, it was held that the government was not liable for any interest on the amount of the judgment after its entry. This decision was founded on a consideration of the statutory provisions on the subject of the payment out of the Treasury of the amount of a judgment recovered against a Collector of Customs or other officer of the revenue, for money paid to him and by him paid into the Treasury in the performance of his official duty, where a certificate of probable cause is granted. The result reached was that, under the language of the appropriation bills of 1878, 1879, 1880 and 1881 (Act of June 14, 1878, sec. 3, 20 Stat. at L., 128; Act of March 3, 1879, sec. 1, *Id.*, 414; Act of June 16, 1880, sec. 1, 21 *Id.*, 242; Act of March 3, 1881, sec. 1, *Id.*, 418), interest accruing after the entry of such a judgment, on its amount, or on the money so paid to the officer, is not to be paid by the government; and that, under section 989, the officer is not personally liable for such interest.

This court has never made any decision on the points thus ruled on in *White* v. *Arthur*. The case of *Erskine* v. *Van Arsdale*, 15 Wall., 75 [82 U. S., XXI., 68], was a suit to recover back an internal revenue tax illegally exacted. The court below had instructed the jury that they might, in their verdict, add interest to the [627] tax paid. This court held that instruction to be correct, but the only decision was that interest might be added from the time of the illegal exaction to the verdict. Nothing was decided as to interest on the judgment when the government should come to pay it. The interest included in the verdict is put in before there is any certificate of probable cause and, if there is no such certificate, the government assumes no part of the liability of the defendant.

In *U. S.* v. *Sherman*, 98 U. S., 565 [XXV., 235], all that was decided was that there must be a certificate of probable cause, under section 989, before the liability of the government to pay a judgment against a revenue officer can attach and that, where a certificate of probable cause is made after the judgment is rendered, there is no liability of the government, for the interest which accrues on the judgment before the making of the certificate. In that case, the government had voluntarily paid the interest which accrued after the making of the certificate.

It is provided by section 1010 of the Revised Statutes, that "Where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court, the court shall adjudge to the respondent in error just damages for his delay." Rule 23 of this court provides that, where a judgment is affirmed on a writ of error, "The interest shall be calculated and levied from the date of the judgment below, until the same is paid, at the same rate that similar judgments bear interest in the courts of the States where such judgment is rendered." This statute and rule, and the practice under them, followed in

* Head notes by *Mr. Justice* BLATCHFORD.

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the mandate in the present case, of allowing interest on the affirmance of a judgment where a Collector is plaintiff in error were urged by the counsel for the defendant in *White* v. *Arthur*, as showing that in that case interest on the judgment should be paid, but the court held that such practice could not affect the question there raised, because the allowance of such interest belonged solely to the putting the judgment in shape, as one in a private suit.

The interest allowed in the present case, in the judgment of this court, was allowed under Rule 23, which, in its provisions as to interest, is in harmony with section 966 of the Revised [628] Statutes, originally enacted August 23, 1872, ch. 118, sec. 8, 5 Stat. at L., 518. Such interest, for the time a writ of error is pending, is really damages for delay. When the mandate of this court goes to the court below, it is necessary that that court, with a view to execution, should enter a further judgment in accordance with the mandate, covering the direction of this court as to interest and as to costs in this court on the writ of error. A writ of error in a case of this kind, being brought by direction of a department of the government, operates as a *supersedeas*, under sections 1000 and 1001 of the Revised Statutes, without any bond to answer in damages being given. The plaintiff in the judgment being stayed as to execution while the case is in this court, and there being a new judgment rendered by this court in the suit, "the final judgment" referred to in section 989 is the judgment as it stands after its affirmance by this court, and after the court below has rendered such judgment as the mandate of this court requires. Therefore, the interest allowed in this case, is interest before final judgment, and is of the same character as the interest allowed before judgment in a suit against a collector where there is no writ of error. In both cases, when there is a final judgment, the principle applies, declared by this court in *Erskine* v. *Van Arsdale, ubi supra*, that it is to be presumed the government is always ready and willing to pay its ordinary debts. But, where there is a judgment and a certificate of probable cause, and thus a case for payment out of the Treasury under section 989, and then, by direction of the government, a writ of error is taken which operates as a stay, interest on the judgment during the stay ought to be allowed, and the statutes not only do not forbid such allowance but permit it. The expression "interest and costs in judgment cases," in the appropriation bills before referred to, clearly includes the interest in the present case, it being interest before final judgment.

The application is denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—107 U. S., 680.

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[336] MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH, *Appt.*,
v.
DALLES CITY.

(See S. C., 17 Otto, 336-347.)

Public lands in Oregon—religious society—donation Act.

1. Under the 1st section of the Act of 1848, entitled An Act to Establish the Territorial Government of Oregon, a religious society, in order to establish a title to public lands as occupied as a missionary station, must be in the actual occupancy of the lands at the date of the Act.

2. Such Act did not confer title on a religious society for lands which it did not occupy at the date of the Act, but which it had voluntarily abandoned eleven months before, and the occupancy of which it never resumed, either for missionary or any other purposes.

3. Until the passage of the Act of 1850, called the Donation Act, no one could acquire as against the government any title to or interest in the public lands in Oregon Territory and there could be no constructive possession of them.

[No. 206.]

Argued Mar. 22, 1883. Decided Apr. 16, 1883.

APPEAL from the Circuit Court of the United States for the District of Oregon.

The history and facts of the case appear in the

Statement of the case by *Mr. Justice* **Woods.**

This was a bill in equity filed by Dalles City, a municipal Corporation organized under the laws of the State of Oregon, against the Missionary Society of the Methodist Episcopal Church, a Corporation organized under the laws of the State of New York.

The following facts were disclosed by the pleadings and evidence: the complainant was incorporated by an Act of the Legislature of Oregon passed January 26, 1857, which was afterwards amended by an Act passed January 20, 1859. By the last named Act the boundaries of Dalles City were established. Long prior to the passage of said Acts of incorporation, to wit: in the year 1852, a large portion of the land within said boundaries was settled upon and occupied as a town site for the purposes of business and trade and not for agriculture, and has been so occupied ever since that time. During the year 1855, the lawfully constituted authorities of the County of Wasco, within which Dalles City was situate, caused the land so occupied to be surveyed and platted into lots, blocks, streets and alleys, and the plat thereof to be recorded in the recorder's office of said county. A survey was made by the United States of the lands so occupied as a town site and such survey was approved on February 4, 1860, and on April 19, 1860, the corporate authorities of Dalles City entered at the land-office of the United States in Oregon City the fractional northwest quarter of section three, in township one, of range thirteen east, containing one hundred and twelve acres, in trust for the several use and [337] benefit of the occupants thereof, according to their respective interests. All this was done in pursuance of the Act of Congress approved May 23, 1844, and of the Act of July 17, 1854, 10 Stat. at L., 305, by which the provisions of the Act first named were extended to the Territory of Oregon. The said fractional quarter is the land occupied by Dalles City as a town site. The corporate authorities paid to the receiver of the land-office $1.25 per acre for said fractional quarter, and Dalles City claimed to have thereby acquired title thereto in trust as aforesaid.

The defendant, the Missionary Society of the Methodist Episcopal Church, claimed to own in fee simple a tract of land containing 643.57/100 acres, for which a patent was issued to it by the

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United States on July 9, 1875. The land described in the patent included the fractional quarter to which Dalles City claimed title and of which it was in possession.

The bill filed in this case asserted the validity of the title of Dalles City, the complainant, to said fractional quarter, and averred that the patent for 643$\frac{87}{100}$ acres, which included said fractional quarter, was improvidently issued to the Missionary Society in violation of the rights of complainant, and prayed for a decree, declaring the complainant to be the owner of said fractional quarter in trust for the use and benefit of the owners and occupants thereof, declaring that the defendant held the legal title in trust for the complainant, and directing it to make a conveyance to the complainant therefor, to be held by it in trust for the respective occupants thereof.

Upon final hearing, the circuit court rendered a decree in favor of the complainant, in accordance with the prayer of the bill. This appeal is prosecuted to reverse that decree.

Mr. **E. L. Fancher**, for appellant:

The land department finally decided the question of the right of the appellant to the patent; and the decision by the Secretary of the Interior is final.

Quimby v. *Conlan*, 3 Mor. Tran., 487.

Messrs. **John H. Mitchell** and *James K. Kelly*, for appellee.

Mr. Justice **Woods** delivered the opinion of the court:

It is clear and does not seem to be disputed, that the title of the appellee to the fractional quarter of land described in the bill is a good and valid title against all the world, unless it be the appellant, the Missionary Society of the Methodist Episcopal Church. The title of appellee was acquired by virtue of an entry made [339] at the proper land-office, in pursuance of the provisions of two Acts of Congress, one passed May 23, 1844, 5 Stat. at L., 657, and the other, July 17, 1854, 10 Stat. at L., 305. The controversy in the case arises upon the claim of the appellant, which contends that its title is better and superior to that of the appellee.

The patent from the United States to the Missionary Society of the Methodist Episcopal Church for the lands in controversy was issued by virtue of section 2447 of the Revised Statutes and, as directed by that section, declared as follows: "That this patent shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land."

It is, therefore, clear, that the patent does not conclude this controversy and that if the United States had, at the date of the patent, no title to the lands described therein, the patent conveyed none to the defendant. But both parties contend that they had acquired the title of the United States long before the date of the patent. As the appellee is conceded to have *prima facie* a good title, the appellant is driven to show a better title, independently of the patent. This it has undertaken to do. The only question in the case, therefore, is: has it succeeded in establishing a title to the premises superior to that under which the appellee claims, and by virtue of which it is in possession?

The appellant asserts title under the provisions of the 1st section of an Act of Congress, passed August 14, 1848, entitled "An Act to Establish the Territorial Government of Oregon." 9 Stat. at L., 323. This section, among other things, declared: "That the title to the land, not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian Tribes in said Territory, together with the improvements thereon, be confirmed and established in the several religious societies to which said missionary stations respectively belong." The appellant contends that on August 14, 1848, it was, within the meaning of the statute, occupying as a missionary station, among the Indian Tribes of Oregon, the lands now in dispute. Whether this contention is well founded is the turning point of the controversy.

It appears from the testimony in the record that, in the year 1836 or 1837, a missionary sta- [340] tion was established by the Missionary Society of the Methodist Episcopal Church, under the superintendence of the Rev. Jason Lee, on the lands now in controversy, situate on the Columbia River, east of the Cascade Mountains, at a place then called Wascopum, but since then known as The Dalles. In 1844 Lee was succeeded by the Rev. George Gary, who continued to be the superintendent of the station until July, 1847, when he was succeeded by Rev. William Roberts. At this time there were at the station, a two story dwelling-house, a school-house which was used also as a church, a store-house with cellar underneath, a barn, some farming lands inclosed, and farming utensils.

In August, 1847, Mr. Roberts, being still the superintendent of the station, transferred it to Dr. M. Whitman, who was a missionary of the Presbyterian Missionary Society, known as the American Board of Commissioners for Foreign Missions. An account of this transfer is given in the testimony of Mr. Roberts, as follows:

"In August, 1847, I transferred the said station into the hands of Dr. M. Whitman at the assent of the A. B. C. F. M. The mission station was placed in his hands on the conditions and with the understanding that it should be occupied by them for the use and benefit of the Indians residing in that place and vicinity. For the movable property, they were to pay such an amount as might mutually be agreed upon. For the station itself, they were to give no compensation; the understanding being all the while that the mission was to be maintained by them for the use and benefit of the Indians in a religious point of view, which included the education of the children, the instruction of the Indian parents in all matters pertaining to their religious interests and temporal well-being. The reasons for the transfer without compensation were briefly these: the Methodist Mission had but one station east of the Cascades and more work in the Willamette than they could well attend to. The American Board had three stations in the upper country, and it was quite desirable for them to have The Dalles also, as it was the key to that entire region, and as an act of Christian regard and confidence the transfer was thus made."

"The amount which Dr. Whitman was to pay for the movable property was subsequently [341]

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fixed at a fraction over $600. This included a large canoe, farming utensils, fanning mill, some wheat, etc."

Payment of the $600 was made by a draft drawn by Dr. Whitman, dated in September, 1847, upon the American Board.

Mr. Roberts, the Rev. Alvin F. Waller, and Mr. Brewer, the latter two, up to the date of the transfer, having been in the occupancy of the mission, left the station immediately after the transfer and went down the Columbia River. They carried off their movable property which had not been sold to Dr. Whitman. Doctor Whitman, to whom the station had been transferred, remained there a few days and then returned to his home at Wailatpu, distant about one hundred and forty miles. He left his nephew, Perrin B. Whitman, a youth seventeen years of age, at The Dalles in possession of the buildings which had been occupied by the Methodist missionaries. On November 29, 1847, Dr. Whitman was, with his family and a number of other persons, murdered by the Cayuse Indians at his home at Wailatpu. When news of this massacre reached Perrin B. Whitman, he abandoned The Dalles and went down the Columbia River, leaving no one in the occupancy of the station.

After the transfer of the station by Roberts to Whitman in August, 1847, the record does not show that any missionary labors were ever performed at the Dalles, either by the Methodist Society or the American Board, except two or three religious services held by Mr. Waller in June, 1850, when he went to The Dalles to show Mr. Roberts the boundaries of the mission claim. After the month of August, 1847, no person representing the Methodist Missionary Society, and after December, 1847, no person representing the American Board, ever occupied the missionary station at The Dalles.

The reason assigned by the appellant why the American Board abandoned the station and why possession of it was not resumed by the Methodist Society was the fear of Indian hostilities.

It follows that on August 14, 1848, when the Act to organize the Territory of Oregon was passed, the station was not in the occupancy of anyone representing either of the Missionary Societies.

[342] About the last of February or the first of March, 1849, Messrs. Walker, Spaulding and Eels, three missionaries of the American Board, delivered a writing to Mr. Roberts in which they "Offered for his acceptance the mission station at Wascopum, near the Grand Dalles of the Columbia River," and proposed "that it be retransferred to the Oregon Mission of the Methodist Episcopal Church, in the same manner in which it was received by the Oregon Mission of the American Board of Commissioners for Foreign Missions." The draft given to Mr. Roberts for the movable property at The Dalles, sold by him to Dr. Whitman in August, 1847, was delivered up, it having never been paid.

The appellant did not resume missionary work at The Dalles after this attempt to retransfer, nor did it take possession of the premises.

In June, 1850, Mr. Roberts returned to The Dalles for the purpose of making a survey of the 640 acres which he proposed to claim for the Missionary Society of the Methodist Episcopal Church under the Act of 1848. He made a survey and had it recorded.

On February 28, 1859, several years after the lands in controversy had been entered and paid for by Dalles City, the American Board delivered to the Missionary Society of the Methodist Episcopal Church a release of all their right and title to the property in the vicinity of The Dalles on the Columbia River, known as the "mission property."

The question is presented whether, upon these facts, the appellant, the Missionary Society of the Methodist Episcopal Church, has shown a better title to the lands in controversy than that of Dalles City, the appellee.

The title claimed by appellant is based entirely upon the first section of the Act of August 14, 1848, before referred to. This was a public grant. In the case of *R. R. Co.* v. *Litchfield* [64 U. S., XVI., 500], it was said by this court, speaking of a public grant of land: "All grants of this description are strictly construed against the grantees. Nothing passes but what is conveyed in clear and explicit language." See, also, *Jackson* v. *Lamphire*, 3 Pet., 289; *Beaty* v. *Knowler*, 4 Pet., 165; *Bank* v. *Billings*, 4 Id., 514; *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420; *R. R. Co.* v. *U. S.*, 92 U. S., 733 [XXIII., 634]. [343]

The Act of August 14, 1848, confirms and establishes title to land occupied at the date of the Act as missionary stations among the Indian Tribes. The words are "now occupied." To occupy, means to hold in possession; to hold or keep for use; as to occupy an apartment. Webster's Dictionary. The appellant contends that this Act confers title on it for lands which it did not occupy at the date of the Act, but which it had voluntarily abandoned eleven months before, and the occupancy of which it never resumed, either for missionary or any other purposes. Not even a liberal construction would support such a claim.

But the appellant, conceding that it was not in the actual occupancy of the premises, either as a missionary station or otherwise, at the date of the passage of the Act, nevertheless insists that, being in actual occupancy in August, 1847, it transferred its rights therein to the American Board on condition that the latter society should maintain a mission there for the benefit of the Indians, and that as the American Board failed to maintain such a mission and abandoned the premises, the rights of the appellant reverted to it and it, therefore, had a constructive possession when the Act of August 14, 1848, was passed, which brought it within the meaning of the Act.

We do not think this contention can be sustained. In the first place, it cannot be fairly inferred from the testimony in the record that the transfer of the missionary station was a conditional one, and that it was any part of the contract that the rights of the appellant should revert to it if the condition were broken. It is plain that the transfer was absolute. Doubtless it was the expectation of the appellant that the transferee would conduct upon the premises a mission for the religious benefit of the Indians, and such doubtless was the purpose of the American Board. But it does not appear to have been

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any part of the contract that, if the American Board failed to carry on such a mission, the appellant should resume possession.

[344] But conceding that such was the understanding between the parties, there is still a fatal obstacle to any claim on the part of the appellant. When the appellant was in the occupancy of the premises in controversy, and when it made the transfer of possession in August, 1847, and until the passage of the Act of August 14, 1848, to establish the territorial government of Oregon, that part of the country was without an organized territorial government under the laws of the United States. The public domain which was included within the Territory of Oregon by the Act just mentioned, had not then been surveyed nor was it open to settlement, preemption or entry. *Stark* v. *Starr*, 6 Wall., 402 [73 U. S., XVIII., 925]. The title was in the United States, subject to the possessory Indian title to portions of the Territory, and there was no law by which any person or company could acquire title from the government. All persons, therefore, who settled upon the public lands acquired no rights thereby as against the government. They were merely tenants by sufferance. The most they could claim was the right of actual occupancy as against other settlers. Such an occupant could yield his right of actual possession to another settler, but he could convey no other interest in the land. If he abandoned the land and another settler occupied it, the former lost all right to the possession. If he transferred the possession to another and the transferee abandoned the land, the first possessor could claim no right in the land unless he again took actual possession. In short, the settler had no right as against the government, and no rights under the laws of the United States, as against anyone else, to the possession of the land in his actual occupancy, except and only so long as such occupancy continued.

It is true that before the passage of the Act of August 14, 1848. to organize a territorial government for Oregon, the people of that Territory had, in June and July, 1845, met, by their delegates, in convention, and adopted laws and regulations for their government "Until such time," as they declared, "as the United States of America extend jurisdiction over us." In this plan of government it was provided that anyone wishing to establish a claim to land should designate the extent of his claim by line marks and have it recorded in the office of the territorial recorder. The appellant cannot derive any title from this regulation, for it never defined the extent of its claim by boundaries [345] and never recorded the same, as required by the regulation, until long after the passage of the Act of August 14, 1848, "to organize a territorial government for Oregon." That Act in its 14th section declared as follows: "All laws heretofore passed in said Territory making grants of land, or otherwise affecting or encumbering the title to lands, shall be, and are hereby declared to be, null and void."

Referring to this Act, this court declared in the case of *Lounsdale* v. *Parrish*, 21 How., 293 [62 U. S., XVI., 81], that Congress passed no law in anywise affecting title to lands in Oregon till the passage of the Act of September 27, 1850 [9 Stat. at L., 496], and that prior to that date no one could acquire any title to or interest in the public lands in that Territory.

It follows that there could be no constructive possession of the public lands. When, therefore, in August, 1847, the appellant voluntarily abandoned its possession of the lands in controversy to another missionary society it lost every shadow of claim thereto. Its right was a mere possessory right, without other title. It had no rights which it could reserve. When the American Board, in December, 1847, abandoned the lands in controversy, the appellant had no rights therein. The reasons which induced the abandonment of the lands by the missionary societies, whether a new policy on the part of the appellant or fear of the Indians on the part of the American Board, are entirely immaterial. When the lands were abandoned for any reason all right in them was lost, and they were open to the occupancy of anyone who might choose to take and hold them.

The method adopted by the appellant to turn over the station to the American Board by an actual transfer of possession was as effectual as any could be. It could be done only by yielding the actual occupancy, and this could not be effected by a written transfer. It could be accomplished only by the going out of one party and the going in of the other.

If the appellant had, in August, 1847, executed the most formal deed, conveying the lands to the American Board, and had stipulated therein that on failure of the latter to maintain a mission thereon for the benefit of the Indians, or upon its abandonment of the lands, all the rights of appellant should revert to it, and it should be entitled to resume immediate possession, such a writing would have been in- [346] operative and futile. The appellant had no rights in the land which it could convey, and no rights which it could reserve.

These views are supported by the case of *Stringfellow* v. *Cain*, 99 U. S., 610 [XXV., 421], brought up from the Territory of Utah. The Act of March 2, 1867, "for the relief of inhabitants of cities and towns upon the public lands," 14 Stat. at L., 541, provided that whenever any portion of the public lands of the United States had been settled upon as a town site, and were for that reason not subject to entry, it should be lawful for the authorities of the town to enter the lands as settled upon in trust for the several use and benefit of the occupants thereof, the execution of which trust was to be conducted under such rules as the Legislature of the State or Territory might prescribe. Under this Act, it was held in the case cited that where a party had been in the occupancy of a lot, but prior to the passage of the Act voluntarily withdrew therefrom and gave it up to others, her rights, which depended on keeping the possession, were gone.

The appellant contends that the language of the 1st section of the Act of August 14, 1848, under which it claims, implies that it had some title to the lands in question before the Act was passed. It places stress on the words "That the title to the lands be confirmed and established in the several religious societies to which said missionary stations respectively belong," and says there must have been some previous title which could be confirmed and established.

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We have seen that it was not possible to acquire any title as against the United States before the passage of this Act. If, therefore, the force is to be given to the words of the statute which the appellant claims for them, they must refer to the possessory title under the regulations above mentioned of the provisional government. But no steps, as we have seen, were taken by appellant to establish its claim under those regulations. It had simply settled upon the public domain as a tenant by sufferance, without authority of any law or regulation of any government, and had done no act by which it could acquire any claim of title. Whatever, [347] therefore, may have been the case with other missionary societies, the appellant had no title of any kind which could be confirmed and established by the Act of August 14, 1848. The American Board was in no better position.

Neither of the Societies acquired any title under the Act of 1848. The writing executed in 1849 by Messrs. Walker, Spaulding and Eels, and the release made by the American Board to the appellant in 1859, after Dalles City had entered and paid for the land, and the patent of the United States in 1875, which was a mere release, conveyed no rights to the appellant in the lands in controversy.

The decree of the Circuit Court was, therefore, right and must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH, *Appt.*,

v.

JAMES K. KELLY ET AL.

SAME, *Appt.*,

v.

JAMES K. KELLY ET AL.

(See S. C., 17 Otto, 347, *Note.*)

Case followed—decree affirmed.

1. This case is similar to Missionary Society v. Dalles, *ante*, and is governed by that.
2. The appellees having shown an equitable title in themselves, under the Donation Act of Sep. 27, 1850, the decree in their favor should be affirmed.

[Nos. 207, 208.]

Argued Mar. 22, 1883. Decided Apr. 16, 1883.

APPEALS from the Circuit Court of the United States for the District of Oregon.

For the history and facts of the case see the preceding case of *Missionary Society* v. *Dalles City*, *ante*, 545 *n*.

Mr. **E. L. Fancher**, for appellant.

Messrs. **John H. Mitchell** and *James K. Kelly*, for appellees.

Mr. Justice **Woods** delivered the opinion of the court:

These cases were in all respects similar to the case of *Missionary Society* v. *Dalles City* [*ante*, 545], except that the appellees claimed under a title different from that relied on by Dalles City. So far as the title of the appellant is concerned, they were tried upon the same evidence as case No. 206. It follows, that if the appellees in these cases show an equitable title in themselves, the decree should be affirmed. This they have done. They all claim title under one Winsor D. Bigelow. The title of Bigelow was derived under the Act of Congress of September 27, 1850, 9 Stat. at L., 496, commonly called the Donation Act. This Act gave, upon certain conditions, to every white settler upon the public lands, above the age of eighteen years and being a citizen of the United States, a half section of land, if he were a single man; and a whole section, if he were a married man. The record clearly shows a full compliance by Bigelow with the law, and establishes his right to the lands in controversy, which he afterwards conveyed to the appellees in these cases. *The decree of the Circuit Court in these cases, which was similar to the decree in case 206, was, therefore, right, and should be affirmed; and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CITY OF QUINCY, *Plff. in Err.*, [549]

v.

MARY COOKE, EXTX. of LYMAN COOKE.

(See S. C., 17 Otto, 549-556.)

Illinois Constitution—legalizing subscription to railroad.

1. The city council, and not the voters of an incorporated city, are its corporate authorities within the meaning of the Illinois Constitution of 1848.
2. Under the Illinois Constitution of 1848, the Legislature of that State could confirm and legalize a subscription of a city to the stock of a railroad company, which had been made without legislative authority, and confer upon the city power to issue bonds to the amount of the stock subscribed, and such bonds are valid in the hands of a *bona fide* holder.

[No. 1043.]

Submitted Jan. 19, 1883. Decided Apr. 16, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The history and facts of the case appear in the opinion of the court.

Mr. **Carl E. Epler**, for plaintiff in error.

Messrs. **James Grant, William McFadon**, *Whit M. Grant* and *William Marsh*, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

On the 7th day of August, 1868, the city council of Quincy, Illinois, in conformity with a vote of the people at an election held under the authority of a resolution adopted by that body on the 9th day of June previous, passed an ordinance empowering and directing the mayor to subscribe $100,000, payable in city bonds, to the capital stock of the Mississippi and Missouri River Air Line Railroad Company, a corporation created under the laws of Missouri. The object of the subscription was to aid in the construction of a railroad, lying wholly within the State of Missouri, from West Quincy northwesterly, connecting Quincy with the road of that company. The ordinance made it a condition of the issue and payment of the bonds, that there should be expended the sum of $50,000

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in grading, bridging and tieing the road, commencing at West Quincy, for a distance of twenty-five miles; further, that due guaranties be given, before the bonds were issued, that their [550] proceeds should be so expended, "the City of Quincy to determine on the compliance with said conditions and issue of bonds in payment of the subscription."

On the succeeding day, August 8, 1868, the City, by its mayor, made the subscription upon the required conditions.

Subsequently, March 27, 1869, the General Assembly of Illinois passed a statute declaring "That the acts of the city council of the City of Quincy, from June 2, 1868, to August 28, 1868, in ordering an election on the proposition to subscribe $100,000 to the capital stock of the Mississippi and Missouri River Air Line Railroad Company, and the subscription of said stock, and all other acts of said council in connection therewith, are hereby legalized and confirmed." 3 Pri. Laws Ill., 1869, p. 376.

On the first day of January, 1870, the city council issued to the company, in part payment of said subscription, fifty bonds of the City, of $500 each, numbered from one to fifty, inclusive; and, on May 18, 1870, in further payment, seventy-five additional bonds, numbered from fifty-one to one hundred and twenty-five, inclusive. The remainder, dated July 1, 1870, were issued on November 12, 1870, in further and full payment. Upon each delivery of bonds, the City received in exchange an equal amount at par value of the stock of the railroad company. The bonds, negotiable in form, were made payable to the railroad company or bearer at the National Bank of Commerce in New York. They purport to have been issued under and by virtue of the ordinance of August 7, 1868, and of the said Act of Assembly. The present action was brought to recover the amount of certain coupons of the bonds so issued.

The special finding shows that all of the coupons sued on, except one, were of the bonds issued and delivered January 1 and May 18, 1870; that the bonds from which the coupons sued on were taken, with all their coupons, were purchased by plaintiff for value, before maturity, in open market, in the usual course of business, and without notice of any infirmity therein; that the railroad company, from the commencement of the construction of its road, owned and ran its trains from West Quincy into and out of Quincy over the bridge connecting those two places; that the City, for six years after issuing the bonds, paid the successive annual installments of interest and, by an agent regularly ap- [551] pointed for that purpose, voted its stock at one or more meetings of stockholders held after July 2, 1870.

It is not necessary to consider separately the various questions of law upon which there occurred, at the trial, a difference of opinion between the Judges. They are all more or less involved in the general inquiry as to the existence of legislative authority for this issue of bonds.

1. Such authority cannot be found in the original charter of the City or in the Act of February 16, 1857. The former gives the city council power "to appropriate money and provide for the payment of the debt and expenses," of the City; the latter authorized that body "to issue city bonds to any amount not exceeding, at one time, in the aggregate, the sum of $75,000." These provisions manifestly relate to debts and expenses incurred for ordinary municipal purposes, and not to railroad subscriptions, the authority to make which must be expressly conferred by statute. These bonds upon their face show that they were executed in payment of a subscription of the latter character and, consequently, purchasers were charged with notice that they were not issued for ordinary municipal purposes under any power conferred by the charter of the City or by the Act of 1857.

2. The question of legislative authority is not determinable by that provision of the Illinois Constitution of 1870 which, saving municipal subscriptions made under existing laws by a popular vote prior to its adoption, declares that "No county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of such corporation; *Provided, however*, That the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions when the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption." This is quite clear in view of the 24th section of the schedule of that Constitution, which provides: "Nothing contained in this Constitution shall be so construed as to deprive the General Assembly of power to authorize the City of Quincy to create any indebtedness for railroad or municipal pur- [552] poses, for which the people of said City shall have voted, and to which they shall have given, by such vote, their assent, prior to the 13th day of December, in the year of our Lord 1869; *Provided*, That no such indebtedness so created shall, in any part thereof, be paid by the State, or from any state revenue, tax or fund, but the same shall be paid, if paid at all, by the said City of Quincy alone, and by taxes to be levied upon the taxable property thereof; *And provided further*, That the General Assembly shall have no power in the premises that it could not exercise under the present Constitution of this State."

The Supreme Court of Illinois, in *R. R. Co. v. Morris*, 84 Ill., 412, had occasion to consider the scope and effect of that section. In that case an election was held August 7, 1869, under the authority of a resolution of the city council, to take the sense of the people upon a subscription to the capital stock of the Quincy, Missouri and Pacific Railroad Company, also a Missouri corporation, whose road lay wholly within that State. That election was held without any law authorizing a vote on the question, or empowering the City to become a stockholder in that company. But by an Act passed July 1, 1871, after the Constitution of 1870 went into operation, the City of Quincy, subject to the terms and requirements embodied in the proposition submitted to the people, was authorized to make, upon such conditions as the city council deemed best, a subscription to the stock of that company, for which the people may have voted prior to the 13th day of December, 1869. The Act further provided: "Any election held in said City prior to said day, for the purpose of such vote being taken, and any contract or subscription made or to be made, by said City, to

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the capital stock of said railroad company in pursuance thereof, and any bonds or other evidences of such indebtedness issued or to be issued by said City, are hereby declared valid." Under that Act, the subscription was made and bonds issued; and the controlling question was as to their validity. The court, waiving any expression of opinion as to the validity of that part of the Act which in terms purported to legalize the election, decided: that the obvious effect and intent of the 24th section of the sched-
[553] ule of the Constitution was to leave the action of the City of Quincy, in assuming, by vote prior to December 13, 1869, to create indebtedness for a railroad subscription, and the power of the Legislature over it, "Unaffected by the Constitution of 1870; in other words, to leave the vote and the power of the Legislature to confer the right to take stock precisely as they would have been under the Constitution of 1848;" that the city council were the corporate authorities of Quincy, upon whom, within the meaning of the Constitution of 1848, the Legislature could confer, without the intervention of a popular vote, authority to make the subscription and issue the bonds; that section 24 of that schedule embraced a vote taken without authority of law, prior to December 13, 1869, because, had the vote been legal, the language, "for which the people of said City shall have voted, and to which they shall have given, by such vote, their assent," would have been unnecessary in view of the proviso in the general section forbidding municipal subscriptions in aid of railroad corporations; lastly, that the construction of the Quincy, Missouri and Pacific Railroad, although no part of it lay in Illinois, was a corporate purpose of the City of Quincy, because thereby its trade and commerce were increased, its property enhanced in value, and its welfare promoted.

3. It remains to inquire as to the authority of the City, under the Constitution of 1848, to issue the bonds in question. Its power to do so is denied upon these principal grounds: 1. That the election held under the sanction of the city council, and the action of that body in directing the subscription to be made, were of no legal effect, since the election was held without authority of law, and the subscription was made when there was no legislative authority to create such indebtedness. 2. That without such authority no subscription could be legally made. 3. That the curative Act of March 27, 1869, was invalid, because it assumed to impose indebtedness upon the City without the consent of its corporate authorities. The soundness of the first and second of these propositions cannot be disputed, whether reference be had to the decisions of this court or to those of the Supreme Court of Illinois.

But we are unable to concur in the suggestion that the corporate authorities of Quincy did not,
[554] after the passage of the Act of March 27, 1869, have authority to issue these bonds. In support of the position taken by the City, counsel refer to numerous decisions of the Supreme Court of Illinois construing the 5th section of the 9th article of the Constitution of 1848, which provides that "The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes." From those decisions the following propositions, among others, may be deduced: that the clause was intended to define as well the class of municipal officers upon whom the power of taxation, for local purposes, might be conferred, as the purposes for which such power could be constitutionally exercised; that by the phrase "corporate authorities" must be understood those municipal officers who were selected with some reference to the creation of municipal indebtedness, and who were either directly elected by the population to be taxed, or appointed in some mode to which they have given their assent; that the construction of a railroad, at least one within or near a county, township, town, village or city, was a corporate purpose of such municipality; and that a debt for a subscription to the stock of a railroad corporation, or for bonds in payment thereof, could not be imposed upon a municipal corporation without the consent or against the will of its corporate authorities. But it has been quite as distinctly ruled by the Supreme Court of Illinois, that the city council and not the voters of an incorporated city were its corporate authorities within the meaning of the Constitution of 1848 and if empowered by legislative enactment, could under that instrument subscribe to the stock of a railroad corporation and issue bonds in payment thereof, without submitting the matter to popular vote. Such was the decision in *R. R. Co.* v. *Morris*, where the court re-affirmed the ruling upon this point in *Keithsburg* v. *Frick*, 34 Ill., 421, 422. In the latter case, a subscription made by a town to the capital stock of a railroad corporation (without authority of law, as was alleged) was, by an Act passed after the town was incorporated under a special charter, declared to be legal, and bonds authorized to be issued therefor. The court said: "It is by no means a necessary element in these subscriptions that there should be a vote of the inhabitants of [555] the town or city authorizing them. It is competent for the Legislature to bestow the power directly on the corporation without any intermediary, as they did in this case." In *Marshall* v. *Silliman*, 61 Ill., 225, the right of the Legislature to grant such an authority to the trustees of an incorporated town was conceded. And in *Williams* v. *Roberts*, 88 Ill., 21, the court, speaking by *Chief Justice* Scholfield, said:

"County boards, such as boards of supervisors, county commissioners, and the municipal authorities of incorporated cities, towns and villages, may, when empowered so to do by proper legislation, subscribe to the capital stock of railroad corporations without first submitting the question to the electors of the municipality. They are elected as representatives of the electors, and theoretically, in appropriate cases, their acts are the acts of those they represent. Hence it has been held, where a vote of the electors has been required as a precedent condition to the making of a subscription for stock in a railroad company, and the law prescribing the mode of calling and holding the election has not been observed, inasmuch as the Legislature might have empowered the municipal authorities to make the subscription without first submitting the question to the electors, it may, by a subsequent enactment, declare the noncompliance with the law in the holding of the election of no consequence, and validate the

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subscription; in other words, validate the subscription without reference to the election. This, however, it will be observed, is upon the theory that power to make the subscription does not in any degree necessarily depend upon a vote of the electors of the municipality upon that question, but solely upon the will of the Legislature."

The authorities to which we have referred sustain the judgment against the City. This case is clearly distinguishable from those in which the Legislature has attempted to impose upon a municipal corporation, without the consent of its corporate authorities, an indebtedness for subscription to the capital stock of a railroad corporation.

The cases mainly relied on by counsel for the City are those in which certain officers of limited authority were, in terms or in effect, required by legislative enactment to issue bonds or incur indebtedness in the name of a municipality, without the consent, expressed in legal [556] form, of those who were, in the constitutional sense, its corporate authorities. Here, there can be no question but that the city council are the corporate authorities of Quincy. And there is no ground whatever upon which to rest the suggestion that the indebtedness was created without their consent. In no just sense were they compelled to issue bonds in exchange for stock in the railroad company. If, as claimed by the City, the Act of March 27, 1869, was inoperative in so far as it assumed to legalize and confirm what had been previously done without the sanction of law, nevertheless by that Act it was intended to confer upon the city council power, in execution of the expressed will of the voters, to issue bonds to the amount of $100,000 for stock in this railroad company. The vote of the electors, we have seen, was not essential to the validity of bonds issued, under legislative sanction, by the corporate authorities of the City. The city council was not required or directed, but only empowered to proceed as if they had been originally invested with authority to make the subscription. The Legislature, in substance, declared, as it might constitutionally have done, that the corporate authorities of the City had its consent to issue bonds to be exchanged for stock in the railroad company. If the corporate authorities could have been compelled by legal proceedings to issue the bonds, that is only another form of saying that the curative Act was constitutional and, consequently, that the bonds are valid. If, however, they could not have been so compelled, then the execution and delivery of the bonds, under the authority of the Act of March 27, 1869, was a voluntary creation of indebtedness for a corporate purpose by the corporate authorities of the City.

What has been said disposes of all the questions certified, including that one relating to the coupon of a bond delivered to the railroad company after the Constitution of 1870 went into effect. In *R.R. Co.* v. *Morris* [*supra*], all the bonds there involved were executed and issued under an Act passed in 1871. They were sustained upon the ground that the validity of that Act depended upon the power which the Legislature possessed under the Constitution of 1848. That decision, it would seem, determines the present case as to the coupon of the bond delivered in November, 1870.

The judgment is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—113 U. S., 235.

Ex Parte: [265]

J. B. WALL.

(See S. C., 17 Otto, 265-318.)

Disbarring an attorney—grounds for—criminal offense—jurisdiction of court—due process of law—mandamus.

*A rule was made by the Circuit Court of the United States for the Southern District of Florida which, after reciting that it had come to the knowledge of the court that W., an attorney of the court, did, on a day specified, engage in and with an unlawful, tumultuous and riotous gathering, he advising and encouraging thereto, take from the jail of Hillsborough County, and hang by the neck until he was dead, one John, otherwise unknown, thereby showing such an utter disregard and contempt for the law which, as a sworn attorney, he was bound to support, as shows him to be totally unfitted to occupy such position; thereupon cited him to appear at a certain time and show cause why his name should not be stricken from the roll. The attorney appeared and answered, denying the charge in mass and excepting to the jurisdiction of the court: (1) because there was no charge against him under oath, (2) because the offense charged was a crime by the laws of Florida for which he was liable to be indicted and convicted. The court overruled the exceptions, and called a witness who proved the charge, showing that the hanging took place before the court-house door, during a temporary recess of the court: thereupon, the court made an order striking W.'s name from the roll. On motion made in this court for a *mandamus* to compel the district court to reverse this order, and the judge having answered the rule, showing the special circumstances of the case; held,

1. That, although not strictly regular to grant a rule to show cause why an attorney should not be struck off the roll, without an affidavit making charges against him, yet that, under the special circumstances of this case, the want of such affidavit did not render the proceeding void as *coram non judice*.

2. That the Acts charged against the attorney constituted sufficient ground for striking his name from the roll.

3. That although, in ordinary cases, where an attorney commits an indictable offense, not in his character of attorney, and does not admit the charge, the courts will not strike his name from the roll until he has been regularly indicted and convicted, yet that the rule is not an inflexible one; that there may be cases in which it is proper for the court to proceed without such previous conviction; and that the present case, in view of its special circumstances, the evasive denial of the charge, the clearness of the proof, and the failure to offer any counter proof, was one in which the court might lawfully exercise its summary powers.

4. That the proceeding to strike an attorney from the roll is one within the proper jurisdiction of the court of which he is an attorney, and does not violate the constitutional provision which requires an indictment and trial by jury in criminal cases, that it is not a criminal proceeding and not intended for punishment, but to protect the court from the official ministration of persons unfit to practice as attorneys therein.

5. That such a proceeding is not an invasion of the constitutional provision that no person shall be deprived of life, liberty or property, without due process of law; but that the proceeding itself, when instituted in proper cases, is due process of law.

6. That, as the court below did not exceed its pow-

*Head notes by *Mr. Justice* BRADLEY.

NOTE.—*Disbarring an attorney.* See *note* to *Ex parte* Bradley, 74 U. S., XIX., 214.

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ers in taking cognizance of the case, no such irregularity occurred in the proceedings as to require this court to interpose by the writ of *mandamus*.

]No. 5, Orig.]

Argued Jan. 3, 1883. Decided Apr. 16, 1883.

PETITION for *mandamus*.

The history and facts of the case fully appear in the opinion of the court.

[266] *Mr.* **C. W. Jones,** for petitioner:

There is but one question involved in this application, that is: has this court jurisdiction to grant the relief prayed for? In England, the jurisdiction of the Court of King's Bench by *mandamus* to restore an attorney to his office, is of ancient origin.

In most of the States of the Union, the powers of courts over attorneys and their *status* as officers of the court are regulated by statute. And when an attorney is removed from the bar in conformity with the statute, it is a judicial act, performed in the execution of judicial discretion. This was the principle decided in the case of *Ex parte Secombe*, 19 How., 9 (60 U. S., XV., 565). The inferior court in that case had, beyond doubt, jurisdiction over the officer by virtue of the statute, and this court refused to control the judicial discretion exercised in the removal of the officer.

But there is a class of cases, and this application falls within it, in which relief will be granted by *mandamus* where the court has manifestly exceeded its authority and acted outside of its jurisdiction, as if it has disbarred an attorney for a contempt committed in another jurisdiction court.

Ex parte Bradley, 7 Wall., 364 (74 U. S., XIX., 214); *People* v. *Justices of Del. C. P.*, 1 Johns. Cas., 181.

We shall not go into the question of Mr. Wall's guilt or innocence with respect to the charges for which he was disbarred. He was never indicted or tried for the offense according to the law of the country. The Circuit Court of the United States had no jurisdiction to try him, even for the purpose of disbarring him. Had he committed murder himself, instead of having mingled with the lynching party, far away from the presence of the court, will any lawyer say that such an act would have given the court jurisdiction to disbar him of his rights as an attorney. This case, then, does not fall within the principle laid down in *Ex parte Secombe, supra*, but within the one applied in *Ex parte Bradley, supra*.

If the circuit court which disbarred the petitioner was without jurisdiction in the matter, then the writ of *mandamus* is the appropriate remedy.

7 Wall., 376 (74 U. S., XIX., 218); see, also, *Ex parte Robinson*, 19 Wall., 506 (86 U. S., XXII., 205); *People* v. *Turner*, 1 Cal., 144; *State* v. *Kirke*, 12 Fla., 278.

An attorney may be struck off the roll:

1. For breach of the rules of court.
2. For breach of any of his official duties.
3. For all such crimes and misdemeanors as affect his moral character.

But, in the 3d class of cases, courts cannot proceed in the ordinary way. There ought always to be a previous conviction before the courts can interfere.

Alderman v. *Diament*, 2 Halst. (N. J. L.), 199.

The Circuit and District Courts of the United States are empowered by Act of Congress, to punish any officer of said courts for "misbehavior in their official transactions." The Act limits the power of these courts to three classes of cases, specified in the Act, and the power of these courts in the punishment of contempts can only be exercised in these three classes of cases.

R. S., sec. 725.

Ex parte Robinson, 19 Wall., 511 (86 U. S., XXII., 208).

Chief Justice Sharswood delivering the opinion of the court in *Ex parte Steinman and Hensel*, 95 Pa., 237, says: "No question can be made of the power of a court to strike a member of the bar from the roll, for official misconduct in or out of court. * * * Thus, if he was proved to be a thief, a forger, a perjurer, or guilty of other offenses of the *crimen falsi*. But no one, we suppose, will contend that for such an offense he can be summarily convicted, and disbarred by the court without a formal indictment, trial and conviction by a jury or upon confession in open court.

The counsel for the petitioner also cited the following authorities:

Fields's Case, 1 Mart. & Y., 168; *Smith* v. *State*, 1 Yerg., 228; *Matter of Moore*, 63 N. C., 405; *Kane* v. *Haywood*, 66 N. C., 32; *Matter of Eldridge*, 82 N. Y., 161; *Ex parte Cole*, 1 McCrary, 407.

Mr. James W. Locke, District Judge, for respondent:

No court is bound to await the complaint of a third party before investigating any matter touching the misconduct of its officers, when information considered sufficient is received, and the circumstances, in its judgment demand its interposition. The court alone is to judge of the grounds upon which a rule may issue.

Randall v. *Brigham*, 7 Wall., 523 (74 U. S., XIX., 285).

Although English courts have declined to take summary action against attorneys because the offense charged has been an indictable one, all such cases seem to have been stated and considered as within the discretion of the court; *In re* ——, 3 Nev. & P., 389; *In matter of*——, 5 B. & Adol., 1088; *Ex parte*——, 2 Dowl, P. C., 110; *King* v. *Southerton*, 6 East, 127; and the practice of delaying proceedings in such cases until conviction has never been accepted by American courts, *Anon*, 2 Halst., 163, being the only case found where judgment has been refused on that ground.

In re Hirst. & Ingersoll, 9 Phila., 216; *Smith* v. *State*, 1 Yerg., 228; *Fields' Case*, 1 Mart. & Y.; *Delano's Case*, 58 N. H., 5.

The end to be attained is not punishment, but protection.

Austin's Case, 5 Rawle., 204.

Mr Justice **Bradley** delivered the opinion of the court:

A petition was filed in this case by J. B. Wall for an alternate writ of *mandamus* to be directed to James W. Locke, District Judge of the United States for the Southern District of Florida, to show cause why a peremptory writ should not issue to compel him to vacate an order made by him as such District Judge, prohibiting said Wall from practicing at the bar

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of said court, and to restore said Wall to the rights, privileges and immunities of an attorney and proctor thereof. The petition set forth the proceedings complained of and an order was made by this court, requiring the Judge to show cause why the prayer of the petition should not be granted. The rule to show cause has been answered, and we are now called upon to decide whether the writ ought to be granted.

The proceedings of the court below for disbarring the petitioner were substantially as follows:

On the 7th of March, 1882, during a Term of the said court, held at Tampa, Hillsborough County, Florida, the same court exercising both circuit and district court jurisdiction, J. W. Locke, the Judge then holding said court, issued, and caused to be served upon the petitioner, the following order:

"Circuit Court of the U. S., So. District of Florida. March Term, 1882.

Whereas, it has come to the knowledge of this court that one J. B. Wall, an attorney of this court, did, on the sixth day of this present month, engage in and with an unlawful, tumultuous and riotous gathering, he advising and encouraging thereto, take from the jail of Hillsborough County, and hang by the neck until he was dead, one John, otherwise unknown, thereby showing such an utter disregard and contempt for the law and its provisions, which, as a sworn attorney, he was bound to respect and support, as shows him to be totally unfitted to occupy such position:

It is hereby ordered that said J. B. Wall be cited to appear and show cause by eleven o'clock Wednesday, the eighth instant, why his [267] name should not be stricken from the roll of attorneys, and he be disbarred and prohibited from practicing herein.

(Signed) James W. Locke, *District Judge.*

Tampa, Florida, *March* 7, 1882."

Wall appeared in court at the return of this rule, and, on the following day, filed a written answer, as follows:

"This respondent, now and at all times hereafter saving and reserving to himself all and all manner of benefits of exception to the many errors, uncertainties and imperfections in the said rule contained, prays leave to object, as if he had demurred thereto, to the right, authority or jurisdiction of this court to issue said rule and require him to answer it:

1. Because said rule does not show that the matters therein charged took place in the presence of the court, or were brought to the knowledge of the court by petition or complaint in writing under oath; and,

2. Because respondent is charged in said rule with a high crime against the laws of Florida not cognizable in this court and for which, if proven, this respondent is liable to indictment and prosecution before the state court; but for answer to so much of said rule as this respondent is advised that it is material or proper for him to make answer to, answering, saith:

He denies counseling, advising, encouraging or assisting an unlawful, tumultuous and riotous gathering or mob, in taking one John from the jail of Hillsborough County and causing his death by hanging, in contempt and defiance of the law, or that he has been guilty of any unprofessional or immoral conduct which shows him to be unfitted for the position of an attorney and proctor of this court, as he is charged in the said rule.

Whereupon he prays to be hence dismissed, etc.

(Signed) J. B. Wall."

The court overruled the exceptions to its jurisdiction, and called to the stand Peter A. Williams, the marshal of the district, whose testimony, at the request of the respondent, was reduced to writing, and was as follows:

"Peter A. Williams, being duly sworn to testify, says:

I saw Mr. J. B. Wall and others come to Mr. Craft's house about two o'clock, March 6, and having already heard that a sheriff's *posse* had been summoned to protect the jail, I thought, by the orderly manner they came in, that it was [268] the sheriff's *posse* coming for instructions. I was sitting on the end of the piazza, and did not go in the house, but sat there till they came out, thinking they had come for instructions.

When they came out I heard one of the party remark, 'We have got all out of you we want.' Mr. Wall was one of the party.

I then thought something was wrong; they all went out of the gate, and Mr. Craft after them, and I followed after them rather slowly, and when I got to the corner I saw the party coming out of the jail with the criminal, the man who was afterwards hanged. They carried him over the steps to the oak tree in front of the steps to the court-house. The crowd gathered around him, and some one threw the man down. I saw him then put on a dray, and afterwards pulled up on the tree. There was a crowd of about a hundred persons there. I don't think I could name any man in that crowd except the sheriff, who was there protesting, as I had come away from the crowd and was on the upper piazza of the court-house. I heard the man hollowing. He was put on a dray with a rope around his neck. The dray went off and he fell to the ground about ten feet from a perpendicular; then the crowd pulled the rope and he went up. The crowd had their backs towards me. I suppose I could have identified some one if I had thought to, but I was excited and did not notice who they were. I saw Mr. Wall coming from the jail with the prisoner until they crossed the fence; then I did not see him any more until after it was over. I did not see him leave the crowd, though he might have done it without my seeing it. When going from the jail to the tree, Mr. Wall, I think, had hold of the prisoner; he was beside him.

I did not see him afterwards until the hanging was over, then the crowd had increased, perhaps, to 200 persons, and I went down to them to the plank walk.

This was Monday of this week, the 6th of this month, I think, in Tampa, Hillsboro' County.

I also saw Mr. Sparkham, the mayor of the city, protesting at the time of the hanging."

To cross questions he says:

"When the man fell from the dray, he fell his whole length to the ground; the rope was slack."

On the next day, the court, after argument by respondent's counsel, made an order in the case, "That J. B. Wall be prohibited from practicing [269] at the bar of this court, until a further order herein."

The answer of *Judge* Locke to the rule

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granted by this court to show cause why a *mandamus* should not issue, states: "That, during a session of the Circuit and District Courts of the United States at Tampa, in said Southern District of Florida, he, the said James W. Locke, presiding, on the 6th day of March, A. D. 1882, at the adjournment of said courts for dinner, at about one o'clock of said day, as he was passing from the court-house, a prisoner was being brought to the jail in the same yard by two officers; that, upon his return to the court-house, after dinner, in a little more than an hour, the dead body of the same prisoner hung from the limb of a tree directly in front of the court-house door; whereby he became personally informed of the commission of a most serious offense against the laws. The same afternoon he was informed of the active participation in said crime of one J. B. Wall, an attorney of said court, by an eye-witness in whom the most implicit confidence could be placed, but who declined to make any charge or affidavit of such fact, on account of a fear of said Wall's influence and the local feeling it would cause against him, the said witness.

That not only from the direct statements of eye-witnesses, but from numerous other sources, reliable information of like import was received; whereupon said J. B. Wall, your petitioner, was, on the said 7th day of March, during a session of the Circuit Court of the United States, in open court, charged in writing by the respondent herein, as judge, with having, with an unlawful, tumultuous and riotous gathering, he advising and encouraging thereto, taken from the jail of Hillsborough County, and hanged to a tree by the neck until he was dead, a man to the court known only as John: and cited by rule served upon him to show cause by eleven o'clock A. M. of the next day, the 8th day of said March, why his name should not be stricken from the roll of attorneys and he prohibited from practicing in the U. S. Courts of said district.

That, at said time of return, said J. B. Wall appeared, in person and by counsel, and moved that whereas said rule had charged him with a criminal offense, indictable by the grand jury of the courts of the State, the matter be continued until after the meeting of such grand jury; and the matter was held under advisement by the court and continued until next day.

That, at the opening of the court the next day, before any order had been made upon the pending motion, came said J. B. Wall and withdrew said motion for continuance, and filed answer demurring to the right of the court to issue the rule served upon him, because (stating the contents of Wall's answer) and demanded that proof be had of the matter charged. [270]

That, thereupon, Peter A. Williams, Esq., U. S. Marshal for said district, being duly sworn, testified as follows: (stating the testimony of Williams, as before given).

Whereupon J. B. Wall, being himself present and stating that he had no testimony to offer, and desiring to be heard by counsel, was so heard, and the court took the matter under consideration.

Afterwards, to wit: on the 10th day of March aforesaid, the matter having been fully and duly considered, it was ordered that J. B. Wall be prohibited from practicing at the bar of circuit or district courts of this district until further order therein.

All of which matters are true, and as far as relate to the action of the court therein shown and set forth in the records of said court and the papers therein.

And, further answering, he says that J. B. Wall at no time denied active participation in the hanging as charged, nor answered the spirit and substance of said charge.

That when the motion for continuance was withdrawn by him, and the demand made that proof be made of the charge, upon inquiry your respondent ascertained that both the sheriff and mayor, who had alone opposed the action of the mob, and the only parties present not active participants, were absent from the city, and could not be summoned to testify without unadvisable delay; of all of which said J. B. Wall had knowledge.

That on account of the excited state of feeling existing at the time, the timidity of many, from the influential position of some of those engaged in the hanging, and the sympathy of others with the lynchers, it was not advisable to attempt to compel any resident of said City of Tampa who was found to have personal knowledge of the matter, to testify against said J. B. Wall.

That said J. B. Wall had every opportunity to explain his presence and action in the matter as proven, if innocent, but made no attempt to do so.

That the evidence, although of but a single witness, for grounds already stated, was to your respondent positively conclusive beyond a reasonable doubt that said J. B. Wall had been guilty of active participation in a most immoral and criminal act, and a leader in a most atrocious murder, in defiance and contempt of all law and justice, and had thereby shown himself unfitted to longer retain the position of an attorney in any court over which your respondent might have the honor to preside. [271]

Wherefore and upon which showing your respondent would most humbly submit to your honors that said order prohibiting said J. B. Wall from practicing as attorney should not be revoked nor he restored to the rights and privileges of an attorney of said courts.

James W. Locke,
U. S. Dis. Judge, So. Dis. Fla.

Key West, Fla., *Dec'r* 2, 1882."

It will be perceived that the rule to show cause, which was served upon the petitioner, contained a definite charge of a very heinous offense, and that an opportunity was given to him to meet it and to exonerate himself if he could do so. It would, undoubtedly, have been more regular to have required the charge to be made by affidavit and to have had a copy thereof served, with the rule, upon the petitioner. But the circumstances of the case, as shown by the return of the Judge, seem to us to have been sufficient to authorize the issuing of the rule without such an affidavit. The transaction in which the petitioner was charged with participating, was virtually in the presence of the court. It took place in open day, in front of the court-house, and during a temporary recess of the actual session of the court; and the awful result of the lawless demonstration was exhibited to the Judge on his return to the court

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room. Under the intense excitement which prevailed, it is not wonderful that no person could be found willing to make a voluntary charge against the petitioner or anyone else; and yet, the fact that he was engaged as one of the perpetrators was so notorious, and was brought to the Judge's knowledge by information so reliable and positive that he justly felt it his duty to take official notice of it, and to give the petitioner an opportunity of repelling the charge. This was done in such a manner as not to deprive him of any substantial right. The charge was specific, due notice of it was given, a reasonable time was set for the hearing, and the petitioner was not required to criminate himself by answering under oath. In the case of *Ex parte Steinman*, 95 Pa., 220, where the county court on its own motion had cited the parties [272] before it for publishing a gross libel upon the court, and had struck their names from the roll, though, on appeal, the order was reversed on other grounds, as to the mode of initiating the proceedings, *Chief Justice* Sharswood, delivering the opinion of the court, said: "We entertain no doubt that a court has jurisdiction without any formal complaint or petition, upon its own motion, to strike the name of an attorney from the roll in a proper case, provided he has had reasonable notice, and been afforded an opportunity to be heard in his defense." In the case of *Randall* v. *Brigham*, 7 Wall., 539 [74 U. S., XIX., 293], which was an action for damages brought by an attorney against a Judge for striking his name from the roll unjustly and without authority, not having before him in making the order to show cause any charge of misconduct, except only a letter of a third person addressed to the grand jury; this court, speaking by *Mr. Justice* Field, said: "But the claim of the plaintiff is not correct. The information imparted by the letter was sufficient to put in motion the authority of the court; and the notice to the plaintiff was sufficient to bring him before it to explain the transaction to which the letter referred. The informality of the notice, or of the complaint by letter, did not touch the question of jurisdiction. The plaintiff understood from them the nature of the charge against him; and it is not pretended that the investigation which followed was not conducted with entire fairness. He was afforded ample opportunity to explain the transaction and vindicate his conduct."

Looking at all the circumstances of the present case, we are not prepared to say that the course which was pursued rendered the proceedings void, as being *coram non judice*. And since they were not void, though not strictly regular, and since no substantial right of the petitioner was invaded, we do not think that the mere form of the proceeding requires us to interpose by the extraordinary remedy of *mandamus*.

The next question to be considered is, whether the facts charged against the petitioner constitute a legitimate ground for striking his name from the roll. Of this we think there can be no doubt. It is not contended but that, if properly proven, the facts charged are good cause for removal from the bar. A moment's consideration will be sufficient to demonstrate this.

[273] It is laid down in all the books in which the subject is treated, that a court has power to exercise a summary jurisdiction over its attorneys to compel them to act honestly towards their clients, and to punish them by fine and imprisonment for misconduct and contempts and, in gross cases of misconduct, to strike their names from the roll. If regularly convicted of a felony, an attorney will be struck off the roll as of course, whatever the felony may be, because he is rendered infamous. If convicted of a misdemeanor which imports fraud or dishonesty, the same course will be taken. He will also be struck off the roll for gross malpractice or dishonesty in his profession, or for conduct gravely affecting his professional character. In Archbold's Practice, edition by Chitty, p. 148, it is said: "The court will, in general, interfere in this summary way, to strike an attorney off the roll or otherwise punish him, for gross misconduct, not only in cases where the misconduct has arisen in the course of a suit, or other regular and ordinary business of an attorney, but where it has arisen in any other matter so connected with his professional character as to afford a fair presumption that he was employed in or intrusted with it in consequence of that character." And it is laid down by Tidd that "Where an attorney has been fraudulently admitted, or convicted (after admission) of felony, or other offense which renders him unfit to be continued an attorney, or has knowingly suffered his name to be made use of by an unqualified person, or acted as agent for such person, or has signed a fictitious name to a demurrer, as and for the signature of a barrister, or otherwise grossly misbehaved himself, the court will order him to be struck off the roll." 1 Tidd, Pr., 89, ed. 9. Where an attorney was convicted of theft and the crime was condoned by burning in the hand, he was, nevertheless, struck from the roll. "The question is," said *Lord* Mansfield, "whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion. * * * It is not by way of punishment; but the court in such cases exercise their discretion, whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not."

Now what is the offense with which the petitioner stands charged? It is not a mere crime [274] against the law; it is much more than that. It is the prostration of all law and government; a defiance of the laws; a resort to the methods of vengeance of those who recognize no law, no society, no government. Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them under foot and to ignore the very bands of society, argues recreancy to his position and office and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve. Whatever excuse may ever exist for the execution of lynch law in savage or sparsely settled districts, in order to oppose the ruffian elements which the ordinary administration of law is powerless to control, it certainly has no excuse in a community where the laws are duly and regularly administered.

But, besides the character of the act itself, as

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denoting a gross want of fealty to the law and repudiation of legal government, the particular circumstances of place and time invest it with additional aggravations. The United States Court was in session; this enormity was perpetrated at its door; the victim was hanged on a tree, with audacious effrontery, in the virtual presence of the court! No respect for the dignity of the government as represented by its judicial department was even affected; the Judge of the court, in passing in and out of the place of justice, was insulted by the sight of the dangling corpse. What sentiments ought such a spectacle to arouse in the breast of any upright judge, when informed that one of the officers of his own court was a leader in the perpetration of such an outrage?

We have no hesitation as to the character of the act being sufficient to authorize the action of the court.

A question of greater difficulty is raised as to the legality of proceeding in a summary way on a charge of this nature. It is strenuously contended that when a crime is charged against an attorney for which he may be indicted, and the truth of the charge is denied or not admitted by [275] him, it cannot be made the ground of an application to strike his name from the roll until he has been regularly convicted by a jury in a criminal proceeding; or, at least, that this is true, when the act charged was not committed in his professional character.

As, in urging this argument, much stress is laid upon the fact that the petitioner, by his answer, denied the charge contained in the rule to show cause, it is proper to notice the manner in which this denial was made. The charge, as we have seen, was specific and particular: "That J. B. Wall, an attorney of this court, did, on the 6th day of this present month, engage in and with an unlawful, tumultuous and riotous gathering, he advising and encouraging thereto, take from the jail of Hillsborough County and hang by the neck until he was dead, one John, otherwise unknown, thereby showing an utter disregard and contempt for the law and its provisions," etc. The denial of this charge was a mere negative pregnant, amounting only to a denial of the attending circumstances and legal consequences ascribed to the act. The respondent denied "counseling, advising, encouraging or assisting an unlawful, tumultuous and riotous gathering or mob in taking one John from the jail of Hillsborough County and causing his death by hanging, in contempt and defiance of the law." He was not required to answer under oath; and did not do so. Yet, free from this restriction, he did not come out fully and fairly and deny that he was engaged in the transaction at all; but only that he did not engage in it with the attendant circumstances and legal consequences set out in the charge. Even the name of the victim is made a material part of the traverse.

Upon such a special plea as this, we think the court was justified in regarding the denial as unsatisfactory. It was really equivalent to an admission of the substantial matter of the charge.

Nevertheless, the marshal of the court was called as a witness and clearly proved the truth of the charge, and no evidence was offered in rebuttal. The case, as it stood before the court, was as clear of all doubt as if the petitioner had expressly admitted his participation in the transaction.

It is necessary, however, that we should examine the authorities on the question raised by the petitioner, as to the power of the court to [276] proceed against him without a previous conviction upon an indictment.

It has undoubtedly been held in some of the cases that where the offense is indictable, and the facts are not admitted, a regular conviction must be had before the court will exercise its summary jurisdiction to strike the name of the party off the roll. At first view this was supposed to be the purport of *Lord* Denman's judgment in the *Anonymous* case reported in 5 B. & Ad., 1088. That was a case of professional misconduct in pecuniary transactions. *Lord* Denman is reported as saying: "The facts stated amounted to an indictable offense. Is it not more satisfactory that the case should go to a trial? I have known applications of this kind, after conviction, upon charges involving professional misconduct; but we should be cautious of putting parties in a situation where, by answering, they might furnish a case against themselves, on an indictment to be afterwards preferred. On an application calling upon an attorney to answer the matters of an affidavit, it is not usual to grant the rule if an indictable offense is charged." And the Solicitor-General, Sir John Campbell, who made the application in that case, being requested to look at the authorities, afterwards stated that he could find no precedent for it. In that case, however, the rule applied for was one requiring the attorney to answer charges on oath. On a similar application in a subsequent case charging perjury and fraud, *Anon.*, 3 Nev. & P., 389, *Lord* Denman said: "Would not an indictment for perjury lie upon these facts? We are not in the habit of interfering in such a case, unless there is something amounting to an admission on the part of the attorney, which would render the intervention of a jury unnecessary."

In another *Anonymous* case in the Exchequer, 2 Dowl. Pr., 110, where an attorney had been sued in an action at law for an aggravated libel, and a verdict had been rendered against him with only one shilling damages; on an application being then made to strike him off the roll, *Lord* Lyndhurst said: "Have you any instance of such an application on a verdict for the same criminal act, but for which no criminal proceedings have been taken?" and intimated that if there was any such case, the rule would be granted, but added: "Here there was conflicting evidence at the trial, and it is doubt- [277] ful whether the publication was brought home to the defendant; and the jury seem to have so considered it;" and the rule was refused.

But this matter was carefully reviewed by the Court of Exchequer in the subsequent case of *Stephens* v. *Hill*, 10 Mees. & W., 28, where a motion was made against an attorney who had conspired with others to induce a witness for the opposite party to absent himself from a trial, giving him money, etc. It was objected that the application to strike from the roll could not be heard on these charges without a conviction, inasmuch as a conspiracy is an indictable offense. *Lord* Abinger took a distinction between a rule to show cause why an attorney should not be struck off the roll, and a rule

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calling on him to answer the matters of an affidavit with a view to strike him off the roll. The latter course he conceded would be improper, if the offense was indictable, because it would compel the attorney to criminate himself; but not so the former, for he might clear himself without answering under oath; and that this was all that *Lord* Denman meant in the case before him. *Lord* Abinger said that as long as he had known Westminster Hall, he had never heard of such a rule as that an attorney might not be struck off the roll for misconduct in a cause merely because the offense imputed to him was of such a nature that he might have been indicted for it; but he said that in the case of applications calling upon an attorney to answer the matters of an affidavit, he had known *Lord* Kenyon and *Lord* Ellenborough frequently say, you cannot have a rule for this purpose, because the misconduct you impute to the man is indictable; but you may have one to strike him off the roll. After noticing and explaining the language attributed to *Lord* Denman, as before stated, *Lord* Abinger adds: "If, indeed, a case should occur where an attorney has been guilty of some professional misconduct for which the court by its summary jurisdiction might compel him to do justice, and at the same time has been guilty of something indictable in itself, but not arising out of the cause, the court will not inquire into that with a view of striking him from the roll, but would leave the party aggrieved to his remedy by a criminal prosecution."

This expression, about leaving the party aggrieved to his remedy by a criminal prosecution, is frequently found in the English cases, and has reference to the practice in that country of regarding the party injured by the perpetration of a crime as the proper person to prosecute the offender; and one, indeed, upon whom a duty, in some sort, rested to institute such prosecution. The court would, therefore, hesitate to take any summary action against the offender which might remove the inducements the injured party would otherwise have for proceeding criminally against him, and thus interfere with the course of justice. In this country, the prosecution of criminal offenses is generally committed to the charge of a public officer, and sufficient emolument is attached to the duty of prosecution to secure its faithful performance. The same reason, therefore, does not exist here, as in England, for leaving it to the injured party to prosecute for the criminal offense. So far as the offender himself is concerned, it is true, the reason is equally strong against compelling him to answer under oath charges preferred against him, and in favor of giving him a trial by jury in all cases of doubt or of conflicting evidence. That a reluctance to interfere with the incentive to prosecute criminally in these cases operated strongly upon the judicial mind in England, is manifest from the fact, that after a prosecution had been made, and the duty of the injured party had been performed, the courts never hesitated to strike the accused from the roll, if found guilty by a jury, even though judgment against him had been arrested, or reversed, or the offense had been pardoned or condoned;* thus showing, that it is not a technical conviction which is required, but a fair effort on the part of the prosecutor to bring the offender to justice; coupled also with the fact, that a jury is the most suitable tribunal for passing upon a question of fact depending upon conflicting evidence.

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Some expressions in the cases cited, including the remarks made by *Lord* Abinger in *Stephens* v. *Hill*, seem to imply that the summary jurisdiction will not be exercised where the charges made against an attorney affect only his general character as such, and do not amount to malpractice in a particular cause. But subsequent decisions are to the effect that it is properly extended to cases affecting his general character also. Thus, in *Re Blake*, 3 El. & El., 84, an attorney was struck from the roll for having improperly collected the money due on a mortgage which he had pledged as collateral security for a loan, and which he borrowed from the pledgee on some false pretense. On a rule to show cause and reference to the master, the facts were found to be truly charged; and although he was not acting as attorney in the matter, the court suspended his certificate for two years, on the general ground, as stated by *Lord Ch. Just.* Cockburn, that where an attorney is shown to have been guilty of gross fraud, although not such as to render him liable to an indictment, nor committed by him while the relation of attorney and client was subsisting between him and the person defrauded, or in his character as an attorney, the court will not allow suitors to be exposed to gross fraud and dishonesty at the hands of one of its officers. And in a subsequent case, *In Re Hill*, L. R., 3 Q. B., 543, where an attorney acting, not as such, but as clerk to a firm of attorneys, appropriated to his own use money which came to his hands on the sale of an estate; on a motion to strike his name from the roll, it was objected that, as his offense was indictable, a conviction was necessary before this proceeding could be had. *Lord Chief Justice* Cockburn said: "No case has, so far as I am aware, come before the court under the precise circumstances under which this case presents itself, namely: of an act of delinquency committed by an attorney's clerk, who at the same time is an attorney, though at that time not acting as such; but still I think, on every principle of justice, we ought not the less to entertain the application. * * * If the delinquent had been proceeded against criminally upon the facts admitted by him, it is plain that he would have been convicted of embezzlement, and upon that conviction being brought before us, we should have been bound to act. If there had been a conflict of evidence upon the affidavits, that might be a very sufficient reason why the court should not interfere until the conviction had taken place; but here we have the person against whom the application is made admitting the facts." *Mr. Justice* Blackburn, in the same case, said: "I think when we are called upon, in the exercise of our equitable jurisdiction, to order an attorney to perform a contract to pay money, or to fulfill an undertaking, that we have jurisdiction only if the undertaking or the contract is made in his character of attorney, or so connected with his character of attorney as to bring it within the power of the court to require that their officer shall behave well as an officer. But where there is a matter

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*Rex v. Southerton, 6 East., 127; *In re* King, 8 Q. B., 129; *In re* Garbett, 18 C. B., 402.

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which would subject the person in question to a criminal proceeding, in my opinion, a different principle must be applied. We are to see that the officers of the court are proper persons to be trusted by the court with regard to the interests of suitors and we are to look to the character and position of the persons, and judge of the acts committed by them, upon the same principle as if we were considering whether or not a person is fit to become an attorney. * * * It should always be considered whether the particular wrong done is connected with the character of an attorney. The offense morally may not be greater; but still, if done in the character of an attorney, it is more dangerous to suitors, and should be more severely marked. I agree that where it is denied that a criminal offense has been committed, the court ought not to decide on affidavits a question which ought to be tried by a jury."

This case is important, as showing the latest consideration of the question by the English courts, and by the most eminent judges of those courts.

The rule to be deduced from all the English authorities seems to be this: that an attorney will be struck off the roll if convicted of felony or if convicted of a misdemeanor involving want of integrity, even though the judgment be arrested or reversed for error; and also, without a previous conviction, if he is guilty of gross misconduct in his profession or of acts which, though not done in his professional capacity, gravely affect his character as an attorney; but in the latter case, if the acts charged are indictable and are fairly denied, the court will not proceed against him until he has been convicted by a jury; and will in no case compel him to answer under oath to a charge for which he may be indicted.

This rule has, in the main, been adopted by the courts of this country; though special pro-
[281] ceedings are provided for by statute in some of the States, requiring a formal information under oath to be filed, with regular proceedings and a trial by jury. The cases are quite numerous in which attorneys, for malpractice or other misconduct in their official character, and for other acts which showed them to be unfit persons to practice as attorneys, have been struck from the roll upon a summary proceeding without any previous conviction of a criminal charge. See, amongst others, the case of *Niven*, 1 Wheel. Cr. Cas., 337, *note*; case of *Burr*, 1 *Id.*, 503; *S.C.*, 2 Cranch, C. C., 379; *In Re Peterson*, 3 Paige, 510; *Ex parte Brown*, 1 How. (Miss.), 303; *Ex parte Mills*, 1 Mich., 392; *Ex parte Secombe*, 19 How., 9 [60 U. S., XV., 565]; *In Re Percy*, 36 N. Y., 651; *Dickens Case*, 67 Pa. St., 169; *In Re Hirst*, 9 Phila. Rep., 216; *Baker* v. *Commonwealth*, 10 Bush. (Ky.), 592; *Penobscot Bar* v. *Kimball*, 64 Me. 140; *Matter of Wool*, 36 Mich., 299; *People* v. *Goodrich*, 79 Ill., 148; *Delano's Case*, 58 N. H., 5; *Ex parte Walls*, 64 Ind., 461; *Matter of Eldridge*, 82 N. Y., 161.

But where the acts charged against an attorney are not done in his official character and are indictable and not confessed, there has been a diversity of practice on the subject; in some cases it being laid down that there must be a regular indictment and conviction before the court will proceed to strike him from the roll; in others, such previous conviction being deemed unnecessary.

The former view is taken, or seems to be assumed, in the cases we will now cite.

In an *Anonymous* case, reported in 2 Halst. (N. J.), 162 (1824), where the charge was larceny, the court refused the rule to strike off the roll, because the offense was indictable, and there had been no conviction.

In *State* v. *Foreman*, 3 Mo., 412, the court refused to disbar an attorney for passing counterfeit money, knowing it to be counterfeit, and escaping from prison before being convicted therefor; the ground of refusal being that it was not a case within the Missouri Statute, which required a conviction. Of course, being governed by the statute, this case is not in point.

In *Fisher's Case*, 6 Leigh., 619 (1835), Fisher commented to a jury in a manner which the Judge deemed grossly unprofessional and disre- [282]
spectful to the court; and on the next day, after reciting the circumstances, made an order suspending his license for twelve months. This order was reversed by the Court of Appeals, on the ground that the party proceeded against must be regularly prosecuted by indictment or information, and found guilty by a jury. But as this decision was based upon a statute of Virginia, prescribing the course of proceeding, it is no authority on the point in question.

In *State* v. *Clapman*, 11 Ohio, 430, an attorney had been charged with theft and brought an action of slander therefor; the defendant pleaded the truth in justification, and obtained a verdict establishing his defense. Upon this, a rule was granted against the attorney to show cause why he should not be struck off the roll. He proved explanatory circumstances, and the court held that the verdict in the civil action was not sufficient to establish the charge of larceny, and discharged the rule.

In *Beene* v. *State*, 22 Ark., 149, where the defendant had made an unwarrantable and atrocious personal attack upon the Circuit Judge for his action as judge; on application of the county bar to strike his name from the roll, the rule was granted; but the Supreme Court of Arkansas reversed the order on the ground that the proceedings were irregular, and not in pursuance of the statute, which required regular charges to be exhibited, verified by affidavit, and a time fixed for hearing. The court also held that where the offense is indictable, there must be a regular conviction before the party can be struck off the roll; if not indictable, he was entitled to be tried by a jury. This case seems to have been decided upon the statutes of Arkansas.

In *Ex parte Steinman*, 95 Pa. St., 229, the respondents published a libel against the Judges of the Quarter Sessions of Lancaster County, Pennsylvania, accusing them of political motives in allowing a defendant to be acquitted. On being cited to show cause why they should not be struck off the roll, they took the ground, amongst other things, that they were charged with an indictable offense, and were entitled to a trial by jury. The court having made the rule absolute, they appealed and the Supreme Court of Pennsylvania reversed the order. *Chief Justice* Sharswood, in delivering the opinion of the court, said: "No question can be made of the [283]

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power of a court to strike a member of the bar from the roll for official misconduct. * * * We do not mean to say that there may not be cases of misconduct not strictly professional, which would clearly show a person not to be fit to be an attorney, nor fit to associate with honest men. Thus, if he was proved to be a thief, a forger, a perjurer, or guilty of other offenses of the *crimen falsi*. But no one, we suppose, will contend that for such an offense he can be summarily convicted and disbarred by the court without a formal indictment, trial, and conviction by a jury, or upon confession in open court." Reference was then made to a provision in the Bill of Rights of the Pennsylvania Constitution of 1874, that "No conviction shall be had, in any prosecution for the publication of papers relating to the official conduct of officers, etc., where the fact that such publication was not maliciously or negligently made, shall be established to the satisfaction of the jury;" and it was held that this provision, at all events, entitled the parties to a jury trial.

The cases now cited do undoubtedly hold, that where the offense charged is indictable and is committed outside of the attorney's professional employment or character, and is denied by him, a conviction by a jury should be had before the court will take action for striking his name from the roll.

There are other cases, however, in which it is held that a previous conviction is not necessary.

In the case of *Ex parte Burr*, 1 Wheel. Cr. Cas., 503, *S. C.*, 2 Cranch, C. C., 379, the Circuit Court of the District of Columbia struck Burr off the roll on charges made by Mr. Key, of various instances of malpractice, and also of dishonest conduct, in procuring deeds of property from persons in distress, etc. Burr, objected, amongst other things, that he was entitled to a trial by jury. The court examined witnesses, who were cross-examined by the defendant, and *Chief Justice* Cranch delivered an elaborate opinion, concluding by making the rule absolute for disbarring the accused, holding that proceedings by attachment, as for contempt and to purify the bar of unworthy members, are not within those provisions of the Constitution which guaranty a trial by jury. This case was [284] brought to the attention of this court on an application for a *mandamus* to compel the circuit court to restore Burr to the bar, and the writ was refused. The court, by *Chief Justice* Marshall, expressed a disinclination to interpose unless the conduct of the court below was irregular or flagrantly improper; as where it had exceeded its power or decided erroneously on the testimony; and upon the testimony, it would be unwilling to interpose where any doubt existed.

Fields v. *Tenn.*, Mart. & Y. (Tenn.), 168, was the case of a constable (but placed upon the same ground as that of attorneys), and the charge was, extortion. The Supreme Court of Tennessee, by Catron, *Justice*, held that a previous conviction was not necessary to enable the court below to suspend from office; that the constitutional privilege of trial by jury for crime, does not apply to prevent courts from punishing its officers for contempt, and to regulate them or remove them in particular cases; that removal from office for an indictable offense, is no bar to an indictment; that it is a proceeding in its nature civil, and collateral to any criminal prosecution by indictment; and that, even if acquitted by a jury, the party could be removed if the court discovered from the facts proved on the trial that he was guilty of corrupt practice.

In the subsequent case of *Smith* v. *State*, 1 Yerg., 228, the charge was that the attorney had accepted a challenge in Tennessee to fight a duel, and had fought with and killed his antagonist in Kentucky, where an indictment had been found against him. He demurred to the charge, and judgment was given against him on the demurrer, that his name be struck from the roll. The Supreme Court of Tennessee held the charge to be sufficient; but that, instead of receiving a demurrer, the circuit court should have proceeded to take the proofs to ascertain the truth of the charge. The court, by *Justice* Catron, said: "The principle is almost universal in all governments, that the power which confers an office has also the right to remove the officer for good cause; the county court, constables, etc.; the Senate, officers elected by the Legislature and people; in all these cases the tribunal removing is of necessity the judge of the law and fact, to ascertain which every species of evidence can be heard, legal in its [285] character, according to common law rules and consistent with our Constitution and laws. This court, the circuit court or the county court, on a motion to strike an attorney from the rolls, has the same right growing out of a similar necessity, to examine evidence of the facts, that the Senate of the State has when trying an impeachment. * * * The attorney may answer the charges in writing if he chooses, when evidence will be heard to support or to resist them; or, if he does not answer, still the charges must be proved, or confessed by the defendant, before he can be stricken out of the roll." The cause was thereupon remanded to the circuit court, to hear the proofs; and it was declared that if the facts were proved as charged, it would be amply sufficient to authorize that court to strike the defendant from the roll, even though there had been no law in Tennessee for the suppression of dueling.

Here, it will be observed, there was no conviction; nothing but an indictment found in another State; and yet the Supreme Court of Tennessee held that the court below might lawfully proceed with the case.

In *Perry* v. *Iowa*, 3 Greene (Ia.), 550, there were charges of misconduct as an attorney, and of perjury. The charge was dismissed for want of certainty; but as to the charge of false swearing, which it was contended could not be set up without a previous conviction, the court said that a conviction was not necessary.

In *In Re Percy*, 36 N. Y., 651, an attorney was struck off the roll on the ground that his general reputation was bad, that he had been several times indicted for perjury, one or two of the indictments being still pending, and that he was a common mover and maintainer of suits on slight and frivolous pretexts. The order was affirmed on appeal. Some of the offenses charged in this case were of an indictable character, and one point raised on the appeal was, that the court has no right to call upon an attorney to answer such charges, because it compels him to give evidence against himself. But to this the court answered that he is not compelled to be sworn, but may

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introduce evidence tending to show his innocence.

In *In Re Kimball*, 64 Me., 140, an attorney [286] was accused of misconduct, both in his professional character, and otherwise, obtaining money by false pretenses, and the like. He had also, many years before, been convicted of forgery of a deposition used in court, but had been pardoned. It was held that he was an unfit person to be an attorney, and he was struck from the roll. In this case indictable offenses of which the party had not been regularly convicted were embraced in the charges against him.

In *Delano's Case*, 58 N. H., 5, an attorney being collector of taxes for the town, appropriated the money to his own use, intending to return it; but failing to do so, he was struck from the roll. The offense in this case was clearly of an indictable character, and no conviction had been obtained against him in a criminal proceeding.

In *The Matter of Wool*, 36 Mich., 299, a bill in equity having been filed against an attorney charging him with procuring a deed to himself by forgery or substitution of a paper, and a decree having been made against him, the court entered an order to show cause why he should not be struck from the roll, allowing him to present affidavits in exculpation; but no sufficient cause being shown against the rule, it was made absolute. Here was an indictable offense, and no previous conviction; yet the court upon, the evidence it had before it, struck the party's name from the roll.

In *Ex parte Walls*, 64 Ind., 461, the charge was of forging an affidavit to obtain a change of venue in a cause pending in the court. Special proceedings were had under the Statute of Indiana, and the party was struck off the roll. On error brought, it was objected that he should have been first regularly convicted of the crime by a prosecution on the part of the State. The court held that this is only true when the object is to inflict punishment, but not when it is to disbar the party, any more than when forgery is proved as a defense in a civil suit; that whilst a conviction would have authorized a disbarment, the proceeding to disbar might precede the criminal prosecution. This case, it is true, was for malpractice as an attorney and, therefore, may not be strictly in point; but the ground taken by the court was general, and applicable to all cases for which an attorney may be disbarred.

[287] In the recent case of *People* v. *Appleton*, 15 Chicago Legal News, 241, where the charge against an attorney was for disposing of property held by him as a trustee, and appropriating the proceeds to his own use, but was not made out to the satisfaction of the court; it was observed, however, that whilst as a general rule, if an attorney is guilty of misconduct in his private character, and not in his official character, as attorney, relief can only be obtained by a prosecution in a proper court, at the suit of the party injured, yet that "It is not to be held that there are no exceptions; that there are not cases in which an attorney's misconduct in his private capacity merely, may be of so gross a character that the court will exercise the power of disbarment. There is too much of authority to the contrary to say that."

From this review of the authorities in this country, it is apparent, that whilst it may be the general rule, that a previous conviction should be had before striking an attorney off the roll for an indictable offense, committed by him when not acting in his character of an attorney, yet, that the rule is not an inflexible one. Cases may occur in which such a requirement would result in allowing persons to practice as attorneys, who ought, on every ground of propriety and respect for the administration of the law, to be excluded from such practice. A criminal prosecution may fail, by the absence of a witness or by reason of a flaw in the indictment, or some irregularity in the proceedings; and, in such cases, even in England, the proceeding to strike from the roll may be had. But other causes may operate to shield a gross offender from a conviction of crime, however clear and notorious his guilt may be: a prevailing, popular excitement; powerful influences brought to bear on the public mind or on the mind of the jury; and many other causes which might be suggested; and yet, all the time, the offender may be so covered with guilt, perhaps glorying in it, that it would be a disgrace to the court to be obliged to receive him as one of its officers, clothed with all the prestige of its confidence and authority. It seems to us, that the circumstances of the case and not any iron rule on the subject, must determine whether and when it is proper to dispense with a preliminary conviction. If, as *Lord Chief Justice* Cockburn said, the evidence is conflicting and [288] any doubt of the party's guilt exists, no court would assume to proceed summarily, but would leave the case to be determined by a jury. But where the case is clear and the denial is evasive, there is no fixed rule of law to prevent the court from exercising its authority.

The provisions of the Constitution, which declare that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury; and that the trial of all crimes, except in cases of impeachment, shall be by jury, have no relation to the subject in hand. As held by the Supreme Court of Tennessee in *Fields* v. *State* [*supra*], and the same view is expressed in other cases, the constitutional privilege of trial by for jury crimes does not apply to prevent the courts from punishing its officers for contempt or from removing them in proper cases. Removal from office for an indictable offense is no bar to an indictment. The proceeding is, in its nature, civil, and collateral to any criminal prosecution by indictment. The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them. Undoubtedly, the power is one that ought always to be exercised with great caution; and ought never to be exercised except in clear cases of misconduct, which affect the standing and character of the party as an attorney. But when such a case is shown to exist, the courts ought not to hesitate, from sympathy for the individual, to protect themselves from scandal and contempt and the public from prejudice, by removing grossly improper persons from participation in the administration of the laws. The power to do this is a rightful one; and, when exercised in proper cases, is no violation of any constitutional provision.

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It is contended, indeed, that a summary proceeding against an attorney to exclude him from the practice of his profession on account of acts for which he may be indicted and tried by a jury, is a violation of the 5th Amendment of the Constitution, which forbids the depriving of any person of life, liberty or property without due process of law. But the action of the court, in cases within its jurisdiction, is due process [289] of law. It is a regular and lawful method of proceeding, practiced from time immemorial. Conceding that an attorney's calling or profession is his property, within the true sense and meaning of the Constitution, it is certain, that in many cases, at least, he may be excluded from the pursuit of it by the summary action of the court of which he is an attorney. The extent of the jurisdiction is a subject of fair judicial consideration. That it embraces many cases in which the offense is indictable, is established by an overwhelming weight of authority. This being so, the question whether a particular class of cases of misconduct is within its scope, cannot involve any constitutional principle.

It is a mistaken idea that due process of law requires a plenary suit and a trial by jury, in all cases where property or personal rights are involved. The important right of personal liberty is generally determined by a single judge, on a writ of *habeas corpus*, using affidavits or depositions for proofs, where facts are to be established. Assessments for damages and benefits occasioned by public improvements are usually made by commissioners in a summary way. Conflicting claims of creditors, amounting to thousands of dollars, are often settled by the courts on affidavits or depositions alone. And the courts of chancery, bankruptcy, probate and admiralty administer immense fields of jurisdiction without trial by jury. In all cases, that kind of procedure is due process of law, which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts. "Perhaps no definition," says *Judge* Cooley, "is more often quoted than that given by Mr. Webster in the *Dartmouth College Case:* 'By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society.'" Cooley, Const. Lim., 353.

The question, what constitutes due process of law within the meaning of the Constitution, was much considered by this court in the case of *Davidson* v. *New Orleans*, 96 U. S., 97 [XXIV., [290] 616]; and *Mr. Justice* Miller, speaking for the court, said: "It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." And, referring to the case of *Murray* v. *Hoboken Land and Improvement Co.*, 18 How., 272 [59 U. S., XV., 372], he said: "An exhaustive judicial inquiry into the meaning of the words 'due process of law,' as found in the 5th Amendment, resulted in the unanimous decision of this court, that they do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts."

We have seen that, in the present case, due notice was given to the petitioner, and a trial and hearing was had before the court, in the manner in which proceedings against attorneys, when the question is whether they should be struck off the roll, are always conducted.

We think that the court below did not exceed its powers in taking cognizance of the case in a summary way, and that no such irregularity occurred in the proceeding as to require this court to interpose by the writ of mandamus. *The writ of* mandamus *is, therefore, refused, and the rule to show cause is discharged.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Field**, dissenting:

I am unable to concur with my associates in their disposition of this case, and I will briefly state the grounds of my dissent.

I appreciate, to the fullest extent, the indignation of the District Judge at the lawless proceedings of the mob in his district, in forcibly taking a prisoner from jail and putting him to death. There is no language of reprobation too severe for such conduct; for, however great the offense of the prisoner, the law prescribed its punishment and appointed the officers by whom it was to be executed. The usurpation of their duties, and the infliction of another punishment, were themselves the greatest of crimes, for which the actors should be held amenable to the violated laws of the State.

I join, also, with the learned Justice of this court who expresses the views of the majority, [291] in his denunciation of all forms of lawless violence; and I agree with him that the enormity of the offense is increased, when the violence is aided and encouraged by an attorney, bound by his oath of office to uphold the administration of justice in the established tribunals of the country. Nor can the offense be palliated by the statement of counsel, that the fury of the mob had been excited by the attempt, of the victim of its violence, to outrage the person of a young female.

The question here is, not what indignation may justly be expressed for the alleged offense of the victim, or for that of his assailants; nor what should be done with a person thus guilty of participating in and encouraging the lawless proceedings of the mob; but in what way is his guilt to be determined? When does the law declare him guilty, so that the court may upon such established guilt proceed to inflict punishment for the offense and remove him from the bar?

I do not think that the Circuit Court of the United States could declare the petitioner in this case, guilty of a crime against the laws of Florida, upon information communicated to its Judge on the streets, and thereupon cite him to show cause why he should not be stricken from the roll of attorneys of the court and be disbarred from practicing therein.

And, though the declaration of the court, upon what was assumed to have been the conduct of the petitioner, contained in the recital of the order directing the citation, be treated, contrary to its language, merely as a charge against him, and not as a judgment upon his

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conduct, I cannot think that the court had authority to formulate a charge against him of criminal conduct not connected with his professional duties, upon the verbal statements of others, made to its Judge outside of the court and without the sanction of an oath. And I cannot admit that upon a charge thus formulated the petitioner could be summarily tried. In no well ordered system of jurisprudence, by which justice is administered, can a person be tried for a criminal offense by a court, the judge of which is himself, the accuser.

The first proceeding disclosed by the record is the following order:

[292] "Circuit Court of the U. S., Southern District of Florida, March Term, 1882.

Whereas, it has come to the knowledge of this court that one J. B. Wall, an attorney of this court, did, on the 6th day of this present month, engage in and with an unlawful, tumultuous and riotous gathering, he advising and encouraging thereto, to take from the jail of Hillsborough County and hang by the neck, until he was dead, one John, otherwise unknown, thereby showing such an utter disregard and contempt for the law and its provisions, which as a sworn attorney he was bound to respect and support, as shows him to be totally unfitted to occupy such position: it is hereby ordered that said J. B. Wall be cited to appear and show cause, by eleven o'clock Wednesday, the 8th instant, why his name should not be stricken from the roll of attorneys, and he be disbarred and prohibited from practicing herein.

James W. Locke,
District Judge.

Tampa, Florida, March 7, 1882."

How these matters came to the knowledge of the court is not here disclosed, but in the return of the Judge to the alternative writ of *mandamus* from this court we are enlightened on this point. He states that on the 6th of March, 1882, on the adjournment of the court for dinner, in passing from the court-house he saw a person brought to the jail by two officers; that on his return to the court-house, a little over an hour afterwards, he saw the dead body of the prisoner hanging from a tree in front of the court-house door, whereby he became personally informed of the commission of a most serious offense against the laws. He also states that on the same afternoon "He was informed of the active participation in said crime of one J. B. Wall, an attorney of said court, by an eye-witness in whom the most implicit confidence could be placed, but who declined to make any charge or affidavit of such fact, on account of a fear of said Wall's influence and the local feeling it would cause against him, the said witness; that, not only from the direct statements of eye-witnesses, but from numerous other sources, reliable information of like import was received; whereupon, said J. B. Wall, the petitioner, was, on the said 7th day of March, during a session of the Circuit Court of the United States, in open court, charged in writing by the respondent [293] herein, as Judge, with having, with an unlawful, tumultuous and riotous gathering, he advising and encouraging thereto, taken from the jail of Hillsborough County and hanged to a tree by the neck, until he was dead, a man to the court known only as John."

Here we have the words of the Judge himself, that he acted upon the statements of parties, whose names are not given, nor is their language. His own conclusions, as to their import, credibility and weight, are all that is furnished. The statements thus made to him were not evidence before the court for any purpose whatever; and would not justify its action upon any subject over which it has jurisdiction. Suppose that he was called to the stand and asked why he had made the charge against the petitioner, and what his knowledge was on the subject. He could only have answered, "I can state nothing of my own knowledge; I can merely repeat what others have said to me; they decline to make any charge themselves; they will not confront the accused; but I have implicit confidence in their statements, though they will not verify them by oath." And yet, upon these outside, *ex parte*, unsworn sayings of others, who will not face the accused and whose words are not given, he directs an order to be entered in the circuit court reciting: not that the petitioner is charged by others, not that it appears by the sworn reports of eye-witnesses, but that "It has come to the knowledge of the court" that the petitioner had engaged in "an unlawful, tumultuous and riotous gathering, he advising and encouraging" the same, to take a person from the county jail and hang him by the neck until he was dead, thus showing an utter disregard and contempt for the law and its provisions and himself to be totally unfitted to occupy the position of an attorney of the court.

This is not a charge against the petitioner either in form or language, but a declaration of his guilt in advance of a hearing, founded upon what is termed "knowledge of the court." For this declared guilt he is summoned to show cause why he should not be disbarred. According to the return of the Judge, the recital in the order is not correct. No such matter as is there stated ever came, in any legal way, to the knowledge of the court. Information which he gathered in conversation with others, rumors on the [294] streets, statements communicated outside of the court room, secret whisperings of men who dare not or will not speak openly and verify their statements, do not constitute such "knowledge of the court" as to make it the basis of judicial proceedings affecting anyone's rights. Were not this the case, no man's rights would be safe against the wanton accusation of parties on the streets, whose stories might reach the ear of the Judge.

The petitioner appeared upon the citation and objected to the authority and jurisdiction of the court to issue the rule and require him to answer it, *first*, because the rule did not show that the matters there charged took place in the presence of the court, or were brought to its knowledge by petition or complaint in writing, under oath; and *second*, because he was charged in the rule with a high crime against the laws of Florida, not cognizable by the court, and for which, if proven, he was liable to indictment and prosecution before the state court.

The petitioner also denied counseling, advising, encouraging or assisting an unlawful, tumultuous and riotous gathering, or mob, in taking the person named from the jail of the county and causing his death by hanging, or that he had been guilty of any unprofessional

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or immoral conduct which showed him to be unfit for the position of an attorney of the court.

The court overruled the objections and called a witness to prove the participation of the prisoner in the crime alleged. The testimony of this witness, which was reduced to writing, is contained in the record. It is to the effect that he saw the petitioner and others go to the sheriff's house on the 6th of March, and, having heard that a sheriff's *posse* had been summoned to protect the jail, he thought, by their orderly manner, that they were the *posse* going for instructions; that when they came out he heard one of the party remark "we have got all of you we want"; that he then thought something was wrong, and followed them, and saw them coming out of the jail with the prisoner; that the petitioner was with the prisoner, walked beside him and, witness *thinks*, had hold of him until they crossed the fence; that after that he did not see the petitioner any more until the matter [295] was all over. The witness further testified that he could not name any man in the crowd, which numbered over a hundred, except the sheriff; that he was excited and did not notice who they were. He did not see the petitioner leave the crowd, though he might have done so without the witness seeing him. Upon this uncertain, insufficient and inconclusive testimony, which does not show a participation of the petitioner in "advising and encouraging" the lawless proceedings and is consistent with his opposition to them, the Judge was entirely satisfied. His language on the subject is:

"That the evidence, although of but a single witness, for grounds already stated, was to your respondent positively conclusive beyond a reasonable doubt that said J. B. Wall had been guilty of active participation in a most immoral and criminal act, and a leader in a most atrocious murder, in defiance and contempt of all law and justice, and thereby shown himself unfitted to longer retain the position of an attorney in any court over which your respondent might have the honor to preside."

Nothing could more plainly illustrate the wisdom of the rule that the accuser should not be the judge of the accusation. The Judge very naturally felt great indignation at the lawless proceedings of the mob in hanging the prisoner and, as he states, had heard reports inculpating the petitioner as a participant therein. His indignation, whether arising from such reported participation or otherwise, must have possessed him when he had the petitioner before him, for nothing else can explain the extraordinary conclusion he reached upon the testimony taken. That testimony shows merely a mingling of the petitioner with the crowd engaged in the unlawful purpose; it does not necessarily show his participation in the execution of that purpose. There was no evidence that he encouraged the proceedings. There was no evidence as to what he did say to the crowd. He may have advised against their action. The witness said nothing on the subject, nor did he see the petitioner after the crowd reached the fence. The petitioner was not seen at the execution, nor is there any evidence that he was present; and yet, the vague testimony of this excited witness, as to matters entirely consistent with innocence, is held by the Judge "to be positively conclusive, beyond a reasonable doubt" [296] that the petitioner was guilty of active participation in a criminal act and "a leader in a most atrocious murder."

There are some other things also in the return of the Judge which are outside of the record of proceedings in the circuit court and inconsistent with them; as, that the petitioner demanded that proof should be made of the matter charged. His main position was that the court had no jurisdiction to require him to answer at all, because charged in the rule with a crime against the laws of Florida, not cognizable in that court and for which, if proven, he was liable to indictment and conviction in the state court; a position inconsistent with a demand of proof of the charge.

Objection is taken here, though not taken in the court below, to the form of the petitioner's denial to what is termed the charge of the Judge, it being called by my brethren a negative pregnant. This is, indeed, a singular objection, in view of the fact that there was, in truth, as already said, no *formal* charge against the petitioner. The court assumed, and declared that it had come to its knowledge, that he was guilty of a public offense which unfitted him to be an attorney, and called upon him to show cause why he should not be disbarred for it. If the court had such knowledge, a denial by him was useless, and the taking of testimony on the subject an idle proceeding. He might have replied to the Judge who constituted the court: "Who made you a judge to affirm my guilt, in advance of hearing, upon street rumors? I decline to answer you at all, you having thus prejudged and condemned me." With what propriety could the court have then proceeded? What legal reason could it have given for its action? I am unable to perceive that I could have given any.

Treating, however, the pre-announced judgment of the court as a charge, the answer of the petitioner might have been more general than it was. It was sufficiently specific to meet all the rules of pleading in criminal cases; and I do not think that the nicety exacted in an answer to a bill of discovery in a chancery suit was required. It was enough that the answer was a denial of the offense alleged, and could in no way be tortured into any admission of guilt.

But apart from the consideration of the form [297] of the petitioner's answer, or the weight to be given to the evidence of the excited witness, I cannot assent to the doctrine that, by virtue of any power which a court possesses over attorneys, it can try one for a felony upon a proceeding to disbar him. The Constitution of the United States and of every State has made it a part of the fundamental law of the land that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger. A felony is an infamous crime. No person charged therewith can be held *to answer* therefor, that is, can, in any other form of proceeding, be required to explain his conduct or vindicate his action. This provision excludes an inquiry and, of course, any possible punishment for an imputed crime, except upon a conviction under such

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presentment or indictment. If a party is otherwise tried and punished, the constitutional guaranty is violated in his person.

If one court can, upon information communicated to its judge, in any other than a legal way, that a public offense has been committed by an attorney, call upon him to show satisfactorily that the charge is unfounded or be disbarred, so may all courts which have the power to admit attorneys and, of course, this court. And what a spectacle would be presented if, upon reports like those in this case, or even upon written charges, that attorneys in different parts of the country have committed murder, burglary, forgery, larceny, embezzlement or some other public offense, they could be cited here to answer summarily as to such charges without being confronted by their accusers, without previous indictment, without trial by jury and, of course, without the benefit of the presumptions of innocence which accompany everyone until legally convicted. With what curious and wondering eyes would such proceedings be watched, when A should be summoned from one part of the country on a charge of murder, B from another part of the country on a charge of burglary, C from another part on a charge of larceny, D from still another on a charge of having violated his marriage vows, and others on charges embracing different felonies! [298] Such proceedings would be scandalous and would shock everyone who regards with favor the guaranties of personal rights in the Constitution. They would not and ought not to be tolerated by the country; and yet how would they differ from the case before us? It is no excuse to say that the punishment inflicted upon the petitioner is not that prescribed by the law for the public offense charged, and that it is only the latter which requires previous presentment or indictment. The Constitution declares that "no person shall be held to answer" for any infamous offense; that is, to explain and justify his conduct upon such a charge, except when made by the presentment or indictment of a grand jury, without reference to the punishment that may follow on its being established. That instrument looks to the substance of things and not to mere forms. Its purpose is, to protect everyone against wanton complaints of the commission of a public offense. It, therefore, confides the power of accusation for such an offense to a specially constituted body; and interdicts all trial and, of course, all punishment, except upon its formal presentation. This interdict would be of little protection if it could be evaded by a mere change in the extent or nature of the punishment.

In the test oath case from Missouri [XVIII., 356], we have an illustration of an attempt to evade a constitutional inhibition and of its futility. That State had, in 1865, adopted a new Constitution which prescribed an oath to be taken by persons filling certain offices and trusts and pursuing various vocations within its limits. They were required to deny that they had done certain things, or by act or word had manifested certain desires and sympathies. The oath, divided into its separate parts, embraced thirty distinct affirmations respecting the past conduct of the affiant, extending even to his words, desires and sympathies.

Every person unable to take this oath was declared by the Constitution incapable of holding in the State "Any office of honor, trust or profit under its authority; or of being an officer, councilman, director or trustee or other manager of any corporation, public or private, now existing or hereafter established by its authority; or of acting as a professor or teacher in any educational institution, or in any common or other school; or of holding any real estate or other [299] property in trust for the use of any church, religious society or congregation."

And every person, at the time the Constitution took effect, holding any of the offices, trusts or positions mentioned, was required, within sixty days thereafter, to take the oath; and, if he failed to comply with this requirement, it was declared that his office, trust or position should, *ipso facto*, become vacant.

No person, after the expiration of the sixty days, was permitted, without taking the oath, "to practice as an attorney or counselor at law," nor after that period could "any person be competent, as a bishop, priest, deacon, minister, elder or other clergyman, of any religious persuasion, sect or denomination, to teach or preach, or solemnize marriages."

Fine and imprisonment were prescribed as a punishment for holding or exercising any of "the offices, positions, trusts, professions or functions" specified, without having taken the oath; and false swearing or affirmation in taking it was declared to be perjury, punishable by imprisonment in the penitentiary.

A priest of the Roman Catholic Church was indicted in a Circuit Court of Missouri and convicted of the crime of teaching and preaching as a priest and minister of that religious denomination, without having first taken the oath, and was sentenced to pay a fine of $500, and to be committed to jail until the same was paid. On appeal to the Supreme Court of the State the judgment was affirmed and the case was brought on error to this court. It was plain that, if the power existed in the State to exact from parties this oath respecting their past conduct, desires and sympathies, as a condition of their being permitted to continue in their vocations or to hold certain trusts, it might be used and, on occasions of excitement to which all communities are subject, would be used, to their oppression and even ruin. The State might require such oath for any period of their past lives; might call upon them to affirm whether they had observed the ten commandments or had discharged any particular civil or moral duty, or had entertained any particular sentiments or desires or sympathies, as a condition of their being allowed to engage in one of the ordinary pursuits of life, in a profession, trade or business. It might impose conditions which individuals and whole classes in the community would be unable to comply with, and thus deprive them of civil and political rights. Under [300] this form of legislation no oppression can be named which might not have been effected.

A large portion of the people of Missouri were unable to take the oath. It was, therefore, contended that the clauses of its Constitution which required priests and clergymen to take and subscribe the oath as a condition of their being allowed to continue in the exercise of their professions and preach and teach, operated upon those who could not take it as a bill

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of attainder within the meaning of the provision of the Federal Constitution prohibiting the States from passing bills of that character. With respect to them, the clauses amounted to a legislative deprivation of their rights.

It was also contended that in thus depriving priests and clergymen of the right to preach and teach, the clauses imposed a penalty for some acts which were innocent at the time they were committed, and increased the penalty for other acts which at the time constituted public offenses, and in both particulars violated the provision of the Federal Constitution prohibiting the passage by the States of an *ex post facto* law.

On the other hand, it was contended that the provisions of the Constitution of Missouri exacting the oath mentioned, merely prescribed conditions upon which members of the political body might exercise their various callings; that bills of pains and penalties, which are included under the head of bills of attainder, and *ex post facto* laws, are such as relate exclusively to crimes and their punishments; that they are in terms, acts, defining and punishing crimes and designating the persons to be affected by them, and do not bear any resemblance to the provisions of the Constitution of Missouri.

There was much force in the objections thus urged to the position that the clauses in the Missouri Constitution constituted a bill of attainder and an *ex post facto* law; and had the court looked to the form rather than to the substance of things, they must have prevailed. But the court did not thus limit its view. It regarded the constitutional guaranties as applying wherever private rights were to be protected against legislative deprivation, whatever the form of the legislation. And it could not perceive any [301] substantial difference between legislation imposing upon parties impossible conditions as to past conduct for the enjoyment of existing rights, and legislation in terms depriving them of such rights, or imposing as a punishment for past conduct the forfeiture of those rights. It, therefore, adjudged the clauses of the Missouri Constitution in question to be invalid, on both grounds urged, as a bill of attainder and an *ex post facto* law. They accomplished precisely what the most formal enactments of that nature would have done and were, therefore, in like manner prohibited. "The legal result," said the court, "must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

I have been thus particular in the statement of the *Cummings Case*, for it seems to me that the rule of construction there applied should be extended so as to protect the citizen from answering in any form, or being punished in any way for an infamous offense, except, as the Constitution prescribes, on a presentment or indictment of a grand jury. Here, under the form of a civil proceeding, a party is summoned to answer, and is punished for an alleged criminal offense, to try which this court has confessedly no jurisdiction, and which is in no way connected with his professional conduct. The protection of the Constitution should not be thus lost, though the punishment be not one prescribed by statute, but one resting in the discretion of the court. I know, of course, that this court has, with the exception of two of its members, been entirely changed in its *personnel* since the *Cummings Case* was decided. I am the only living member of the majority of the court which, sixteen years ago, gave that judgment. I would fain hope, however, that this change may not lead to a change in the construction of clauses in the Constitution, intended for the protection of personal rights, even though its present members, if then judges, might not have assented to [302] the decision, and however much they may be disposed to follow their own peculiar views where rights of property only are involved. I am of opinion that all the guaranties of the Constitution designed to secure private rights, whether of person or property, should be broadly and liberally interpreted so as to meet and protect against every form of oppression at which they were aimed, however disguised and in whatever shape presented. They ought not to be emasculated and their protective force and energy frittered away and lost by a construction which will leave only the dead letter for our regard when the living spirit is gone.

What, then, are the relations between attorneys and counselors at law and the courts? and what is the power which the latter possess over them? and under what circumstances can they be disbarred? There is much vagueness of thought on this subject in discussions of counsel and in opinions of courts. Doctrines are sometimes advanced upholding the most arbitrary power in the courts, utterly inconsistent with any manly independence of the bar The books, unfortunately, contain numerous instances where, for slight offenses, parties have been subjected to oppressive fines, or deprived of their offices and, consequently, of their means of livelihood, in the most arbitrary and tyrannical manner. The power to punish for contempt, a power necessarily incident to all courts for the preservation of order and decorum in their presence, was formerly so often abused for the purpose of gratifying personal dislikes, as to cause general complaint, and lead to legislation defining the power and designating the cases in which it might be exercised. The Act of Congress of March 2, 1831, ch. 99 [4 Stat. at L., 487], limits the power of the courts of the United States in this respect to three classes of cases: first, where there has been misbehavior of a person in the presence of the court, or so near thereto as to obstruct the administration of justice; second, where there has been misbehavior of any officer of the court in his official transactions; and third, where there has been disobedience or resistance by any officer, party, juror, witness or other person to any lawful writ, process, order, rule, decree or command of the court. The power, as thus seen (so far as the punishment of contempts is concerned), can only be exer- [303] cised by the courts of the United States to insure order and decorum in their presence; faithfulness on the part of their officers in their official transactions; and obedience to their lawful orders, judgments and process. *Ex parte Robinson*, 19 Wall., 511 [86 U. S., XXII., 208].

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The power to disbar attorneys in proper cases, though not, perhaps, affected by this law, is not to be exercised arbitrarily or tyrannically. Under our institutions, arbitrary power over another's lawful pursuits is not vested in any man nor in any tribunal. It is odious wherever exhibited, and nowhere does it appear more so than when exercised by a judicial officer toward a member of the bar practicing before him.

Attorneys and counselors at law, and the two characters are in this country generally united in the same person, are officers of the court, admitted to be such by its order upon evidence that they possess sufficient learning to advise as to the legal rights of parties, and to conduct proceedings in the courts for their prosecution or defense, and that they have such fair private characters as to insure fidelity to the interests intrusted to their care. The order of admission, as said in the *Garland Case*, is the judgment of the court that they possess the requisite qualifications of learning and character, and are entitled to appear as attorneys and counselors and to conduct causes therein. Thenceforth they are responsible to the court for professional misconduct and entitled to hold their offices during good behavior. 4 Wall., 387 [71 U. S., XVIII., 373].

Their office, as was also said in the same case, is not held as a matter of grace and favor. The right which it confers is something more than a mere license, revocable at the pleasure of the court. It is a right of which they can be deprived only by its judgment for moral or professional delinquency.

The oath which every attorney and counselor is required to take, on his admission, briefly expresses his duties. It is substantially this: that he will support the Constitution of the United States, and "Conduct himself as an attorney and counselor of the court uprightly and according to law." This implies not only obedience to the Constitution and laws, but that he will, to the best of his ability, advise his clients [304] as to their legal rights, and will discharge with scrupulous fidelity the duties intrusted to him; that he will at all times maintain the respect due to the courts and judicial officers; that he will conform to the rules prescribed by them for his conduct in the management of causes; that he will never attempt to mislead them by artifice or any false statement of fact or intentional misstatement of the law, and will never employ any means for the advancement of the causes confided to him except such as are consistent with truth and honor. So long as he carries out these requirements of his oath he will come within the rule of "good behavior," and no complaint of his professional standing can be made. The authority which the court holds over him and the exercise of his profession extends so far, and so far only, as to insure a compliance with these requirements. It is for a disregard of them, therefore, that is, for professional delinquency and the loss of character for integrity and trustworthiness, that is, for moral delinquency, which a disregard of them manifests, that the court will summarily act upon his office and disbar him. In other words, the summary jurisdiction of the court in this respect will only be exercised: *first*, for misconduct of the attorney in cases and matters in which he has been employed or consulted professionally, or matters in which, from their nature, it must be presumed he was employed by reason of his professional character; and, *second*, for such misconduct outside of his profession as shows the want of that integrity and trustworthiness which is essential to insure fidelity to interests intrusted to him professionally. The commission of a felony or a misdemeanor involving moral turpitude is of itself the strongest proof of such misconduct as will justify an expulsion from the bar; but the only evidence which the court can receive of the commission of the offense, when it is not admitted by the party, is a record of his conviction. Of this I shall presently speak.

When the charge against the attorney is of misconduct in his office, and that involves, as it sometimes may, the commission of a public offense, for which he may be prosecuted criminally, the inquiry should proceed only so far as to determine the question of professional delinquency, and he should be left to the proper tribunals for the punishment of the crime committed. And on such an inquiry no answer [305] will be required of him which would tend to his crimination. Thus, to illustrate if he has collected money for his client and has not paid it over, the court, upon appropriate complaint, will order him to be cited to show cause why he should not pay it. If, upon the citation, a sufficient reason is not given for the retention of the money, the court will enter an order directing him to pay it immediately or by a day designated. Should he still refuse, he may then be disbarred for disobedience to the order and for the professional delinquency thereby involved; but for the offense of embezzlement or other crime, committed in the retention of the money, he will be turned over to the criminal courts. Or, take the case suggested on the argument: should an attorney, in the course of a trial, get into a personal collision with the opposing counsel or with a witness, and assault him with a deadly weapon, or kill him, the court would undoubtedly require the offender to show cause why he should not be expelled from the bar for the violence, disturbance and breach of the peace committed in its presence. It would be sufficient to justify expulsion, that he had so far forgotten the proprieties of the place and the respect due to the court as to engage in a violent assault in its presence. But for the trial of the offense of committing a deadly assault, or for the homicide, he would be turned over to the criminal courts. Or, take another case mentioned on the argument: where an attorney has presented a false affidavit or represented as genuine, a fictitious paper. The use of such documents, knowing their character, is a fraud upon the court, an attempt to deceive it, and constitutes such professional misconduct as to justify the imposition of a heavy fine upon him, or his temporary suspension or expulsion from the bar, without reference to the materiality of the contents of the false affidavit or of the fictitious paper; but for the crimes involved in their use he should be sent to the proper tribunals, because he cannot be tried therefor, on a motion to punish him for a contempt or to disbar him.

It is because of this limitation upon the extent of judicial inquiry into such matters that a proceeding for purely professional misconduct

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against an attorney may be taken in any way which will sufficiently apprise him of the [306] grounds upon which it is founded, and afford him an opportunity to be heard. It is not as thus limited a criminal proceeding in any proper sense, requiring full and formal allegations with the precision of an indictment. As said in *Randall* v. *Brigham*, where a letter of a party defrauded, laid before a grand jury and communicated by its direction to the court, was the foundation of proceedings against an attorney: "Such proceedings are often instituted upon information developed in the progress of a cause, or from what the court learns of the conduct of the attorney from its own observation. Sometimes they are moved by third parties upon affidavit, and sometimes they are taken by the court upon its own motion. All that is requisite to their validity is, that when not taken for matters occurring in open court, in the presence of the judges, notice shall be given to the attorney of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation." 7 Wall., 540 [74 U. S., XIX., 293]. The objection here is, that this recognized limitation upon judicial inquiry in such cases is exceeded, and the civil proceeding is made the means of inflicting punishment for a criminal offense in no way connected with the party's professional conduct.

When the proceeding to disbar an attorney is taken for misconduct, outside of his profession, the inquiry should be confined to such matters, not constituting indictable offenses, as may show him unfit to be a member of the bar; that is, as not possessing that integrity and trustworthiness which will insure fidelity to the interests intrusted to him professionally, and to the inspection of any record of conviction against him for a felony or a misdemeanor involving moral turpitude. It is not for every moral offense which may leave a stain upon character, that courts can summon an attorney to account. Many persons, eminent at the bar, have been chargeable with moral delinquencies which were justly a cause of reproach to them; some have been frequenters of the gaming table; some have been dissolute in their habits; some have been indifferent to their pecuniary obligations; some have wasted estates in riotous living; some have been engaged in broils and quarrels disturbing the public peace; but for none of [307] these things could the court interfere and summon the attorney to answer, and if his conduct should not be satisfactorily explained, proceed to disbar him. It is only for that moral delinquency which consists in a want of integrity and trustworthiness, and renders him an unsafe person to manage the legal business of others, that the courts can interfere and summon him before them. He is disbarred in such case for the protection both of the court and of the public.

A conviction of a felony or a misdemeanor involving moral turpitude implies the absence of qualities which fit one for an office of trust, where the rights and property of others are concerned. The record of conviction is conclusive evidence on this point. Such conviction, as already said, can follow only a regular trial upon the presentment or indictment of a grand jury. It cannot follow from any proceeding of the court on a motion to disbar, for the reason already given, that no one can be required to answer for such an offense except in one way. If a party indicted is, upon trial, acquitted, the court cannot proceed to retry him for the offense upon such a motion. He may answer, after acquittal, that he never committed the offense, and that no tribunal can take any legal proceeding against him on the assumption that he had been wrongfully acquitted. And what the court cannot do after acquittal, it cannot do by such a proceeding before trial. If the court, after acquittal, can still proceed for the alleged offense, as a majority of my brethern declare it may, and call upon him to show that he is not guilty or be disbarred, there is a defect in our Constitution and laws which has, up to this day, remained undiscovered. Hitherto it has always been supposed that the record of acquittal of a public offense, after a trial by a jury, was conclusive evidence, at all time and in all places, of the party's innocence. This doctrine, until to-day, has been supposed to be immovably imbedded in our jurisprudence.

There are many cases in the books where the view I have taken of the authority of the court over attorneys and counselors at law is recognized and acted upon. In an *Anonymous Case* in the Supreme Court of New Jersey, given in the reports, without a name, out of respect to the friends of the party implicated, an application was made on behalf of members of the bar [308] for a rule that a certain attorney show cause why his name should not be stricken from the rolls, upon an allegation that he had been guilty of larceny. The moving party stated in his application that it was a matter of notoriety that the attorney had purloined books, to a considerable amount, from persons who were at the time in court and ready, when called upon, to substantiate the charge. The counsel, therefore, on behalf of members of the bar, called upon the court to relieve them from the reproach of having the man attached to their profession, and from the disgrace of being compelled, in their professional duties, to have intercourse with one with whom they would be ashamed to associate in private life; and that the court had undoubtedly the power to grant the rule, for, as it was essential to the admission of an attorney that he should be of good moral character, it must be equally essential that he should continue to be such. But the *Chief Justice* said: "The offense of which it is alleged this man has been guilty is neither a contempt of court nor does it fall within the denomination of malpractice. It would appear to me, therefore, that he must be first convicted of the crime by a jury of his countrymen before we can proceed against him for such an offense for, suppose he should be brought to the bar and should say he was not guilty, we could not try the fact."

The case was then taken under advisement, and at a subsequent day the court said, speaking by the *Chief Justice*: "We have reflected upon this case, and do not see how we can do anything in it, because the court seems to be confined to cases of malpractice or to crimes which are in the nature of *crimen falsi*, and of which there has been a conviction." *Justice* Ford, of the court, added: "An attorney may be struck off the roll, *first*, for a breach of the

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rules of the court; *second*, for breach of any of his official duties; *third*, for all such crimes and misdemeanors as affect his moral character. But in this third class of cases we cannot proceed in the ordinary way; there ought always to be a previous conviction before this court can interfere. All the cases cited sanction this distinction, except the case from the District of Columbia, which is anomalous." The rule was, therefore, refused. 2 Halst. L. Rep., 197.

[309] In *Ex parte Steinman*, 95 Pa. St., 237, the parties, members of the bar of Lancaster County, in Pennsylvania, were editors of a newspaper published in the county. In one of its numbers an article appeared, which charged that the Judge of the court of quarter sessions of the county had decided a case wrongfully, from motives of political partizanship. The court thereupon sent for the parties, and on their appearance they admitted that they were editors of the paper and that as such they were responsible for the publication. The court then entered a rule upon them to show cause why they should not be disbarred and their names stricken from the roll of attorneys for misbehavior in their offices. To this rule they answered, setting up, among other things, that if the charge was that they had published a libelous article, it was that they had committed an indictable offense, not in the presence of the court nor while acting as its officers and, therefore, could not be called upon to answer the rule until they should have been tried and convicted, according to law, for the offense; and that the court was not competent to determine in that form of proceeding that they did unlawfully and maliciously publish out of court, a libel upon the court, and to hear and determine disputed questions of fact involving the motives of the parties and the official conduct of the court. The rule, however, was made absolute, and the names of the parties were ordered to be stricken from the roll of attorneys. They then took the case on a writ of error to the Supreme Court of the State, where the judgment was reversed, and it was ordered that the parties be restored to the bar. *Chief Justice* Sharswood, in delivering the opinion of the court, said:

"No question can be made of the power of a court to strike a member of the bar from the roll for official misconduct in or out of court. By the 73d section of the Act of April 14, 1834, it is expressly enacted that if any attorney at law shall misbehave himself in his office of attorney, he shall be liable to suspension, removal from office, or to such other penalties as have heretofore been allowed in such cases by the laws of this Commonwealth. We do not mean to say (for the case does not call for such an opinion) that there may not be cases of misconduct not strictly professional which would clearly show [310] a person not to be fit to be an attorney, nor fit to associate with honest men. Thus, if he was proved to be a thief, a forger, a perjurer, or guilty of other offenses of the *crimen falsi*. But no one, we suppose, will contend that for such an offense he can be summarily convicted and disbarred by the court without a formal indictment, trial and conviction by a jury, or upon confession in open court. Whether a libel is an offense of such a character may be a question, but certain it is that if the libel in this case had been upon a private individual, or upon a public officer, such even as the district attorney, the court could not have summarily convicted the defendants and disbarred them."

A similar doctrine obtains in the courts of England. Thus, in a case in 5 B. & Ad., 1088, the Solicitor-General of England moved the Court of King's Bench for a rule calling on two attorneys of the court to show cause why they should not be struck off the roll, on affidavits charging them with professional misconduct in certain pecuniary transactions. *Lord* Denman, the *Chief Justice*, replied: "The facts stated amount to an indictable offense. Is it not more satisfactory that the case should go to a trial? I have known applications of this kind, after conviction, upon charges involving professional misconduct; but we should be cautious of putting parties in a situation where, by answering, they might furnish a case against themselves, on an indictment to be afterwards preferred. On an application calling upon an attorney to answer the matters of an affidavit, it is not usual to grant the rule if an indictable offense is charged." The court, however, desired the Solicitor-General to see if any precedent could be found of such an application having been granted. The Solicitor-General afterwards stated that he had been unable to find any, and the rule was discharged. My brethren are mistaken in supposing that in this case the attorneys were required to answer under oath the charges made.

And in a case in 3 Nev. & P., 389, a motion was made to the Court of Queen's Bench to strike an attorney off the roll on an affidavit alleging a distinct case of perjury by him. The attorney had sworn to the sum of £374 as the expenses of witnesses, which was reduced before the master to £47. It was contended that the court could exercise its summary jurisdiction on [311] the ground of the perjury. But the *Chief Justice* replied: "Would not an indictment for perjury lie upon these facts? We are not in the habit of interposing in such a case, unless there is something amounting to an admission on the part of the attorney which would render the interposition of a jury unnecessary." The moving counsel answered that there was enough in the affidavit to show a distinct case of perjury, but that there was no admission. The rule was, therefore, refused.

To the same purport are numerous other adjudications, and their force is not weakened by the circumstance that it is also held that it is no objection to the exercise of the summary jurisdiction of the court that the conduct constituting the delinquency, for which disbarment is moved, may subject the party to indictment. When such is the case, he is not required to answer the affidavits charging the official delinquency, for no one can be compelled to criminate himself, and the court confines its inquiry strictly to such acts as are inconsistent with the attorney's duty in his profession. It looks only to the professional conduct of the attorney, and acts upon that.

In *Stephens* v. *Hill*, which was before the Court of Exchequer, a distinction was drawn between the misconduct of an attorney, outside of a proceeding in court, which might subject him to an indictment, and such misconduct committed by him in a proceeding in court. For the former, no motion to disbar would be entertained; for the latter, the motion would be heard. There an attorney for the defendants

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had persuaded a material witness for the plaintiff to absent himself from the trial of the cause, and had undertaken to indemnify him for any damage he might sustain for so doing. Upon affidavits disclosing this matter, application was made to disbar the attorney. It was objected that the court would not exercise its summary jurisdiction when the misconduct charged amounts to an indictable offense, as was the conspiracy in which the attorney was engaged. But the Chief Baron, *Lord* Abinger, answered that he never understood that an attorney might not be struck off the roll for misconduct in *a cause in which he was an attorney* merely because the offense imputed to him was of such a nat-
[312] ure that he might have been indicted for it; that so long as he had been in Westminster Hall he had never heard of such a rule, though the court would not require the attorney to answer the affidavits. "If, indeed," said the Chief Baron, speaking for the court, "a case should occur where an attorney has been guilty of some professional misconduct, for which the court by its summary jurisdiction might compel him to do justice, and at the same time has been guilty of something indictable in itself, but not arising out of the cause, the court would not inquire into that with a view of striking him off the roll, but would leave the party aggrieved to his remedy by criminal prosecution." And again; "Where, indeed, the attorney is indicted for some matter not connected with the practice of his profession of an attorney, that also is a ground for striking him off the roll, although in that case it cannot be done until after conviction by a jury." 10 Mees. & W., 31, 32. The conduct of the attorney in that case tended to defeat the administration of justice, and was grossly dishonorable. He had employed for the success of his cause, means inconsistent with truth and honor. He was, therefore, rightly disbarred without reference to his liability to a criminal prosecution for his conduct.

There is no case I have been able to find, after a somewhat extended examination of the reports, where, for an indictable offense, wholly distinct from the attorney's professional conduct, the commission of which was not admitted, he has been compelled, in advance of trial and conviction, to show cause why he should not be disbarred, except one in Tennessee for accepting a challenge to fight a duel and killing his antagonist. *Smith* v. *Tennessee*, 1 Yerg., 228. This case is exceptional and finds no support in the decisions of the courts of other States. There is no case at all like the one at bar to be found in the reports of the courts of England or of any of the States of the Union.

In the numerous cases cited in the opinion of my brethern, the matter which was the subject of complaint, and the ground of the action of the court, related to the conduct of the party in his professional business or in business connected with or growing out of his profession. Thus,
[313] the advertisement of an attorney that he could procure divorces for causes not known to the law, without publicity, or reference to the parties' residence; colluding with a wife to manufacture evidence to procure a divorce; the misapplication by him of funds collected; his bribery of witnesses, hiring them to keep out of the way, or to disregard a subpœna; his falsely personating another in legal proceedings; instituting suits without authority; knowingly taking insufficient security; forging an affidavit to change a venue, substituting the name of his client for his own in an affidavit to procure alimony; altering a letter to a Judge in order to secure the allowance of bail; attempting to make an opposing attorney drunk, in order to obtain an advantage of him on the trial of the cause; obtaining money from a client by false representations respecting the latter's title to lands, and advances for taxes; and many other like matters, which operated as a fraud upon the court and tended to deceive it, and were inconsistent with professional honor and integrity, were very properly considered as sufficient grounds for temporary suspension or absolute expulsion from the bar. And in this class of cases we sometimes find objections were taken that the offenses charged subjected the attorney to liability for indictment, and for that reason should not be considered; and it was in answer to such objections that language was used which apparently conflicts with the views I have expressed, but not really so when read in connection with the facts. In those cases the conduct of the attorney, even when furnishing ground for indictment, was, independently of its criminal character, open to consideration on a motion to disbar, so far as it affected him professionally; and so it was said that it was no objection to such consideration that he might have been also indicted for the offense committed—language which can have no application where the offense as in this case, had no connection with the party's professional conduct.

In illustration of this statement I will make a brief reference to some of the cases cited by my brethren, and upon which they seem chiefly to rely. That of *Stephens* v. *Hill*, in the Court of Exchequer, already explained, confirms what I have said. There, while holding that the fact that the matter complained of might subject the attorney to an indictment would not prevent an inquiry into it, so far as it affected his profes- [314]
sional conduct, *Lord* Abinger takes particular pains to say, as appears from the quotation from his opinion which I have given, that where the matter is not connected with the practice of the attorney's profession, though it might be ground for striking him from the roll, "in that case it cannot be done until after conviction by a jury."

In the *Matter of Blake*, 3 El. & El., Q. B., 24, the court held that its summary jurisdiction over its attorneys is not limited to cases in which they have been guilty of misconduct, such as amounts to an indictable offense, or arises in the ordinary course of their professional practice, but extends to all cases of gross misconduct on their part, in any matter in which they may, from its nature be fairly presumed to have been employed in consequence of their professional character. In that case, money had been lent to an attorney, previously known and employed as such, upon his note and a deed of assignment of a mortgage on an estate in Ireland, by which a greater amount was secured to him. The estate getting into the Irish Encumbered Estates Court, the attorney borrowed the deed from his creditor for the purpose, as alleged, of supporting his claim in that court, but in reality in order to obtain the payment of the amount secured to him. Having established his right to that payment, he returned the deed to the cred-

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itor, and afterwards received the whole amount secured and appropriated it to his own use. It is with reference to these facts that *Chief Justice* Cockburn uses the language quoted by my brethren. He said that although Blake applied to the lender in the first instance, as an attorney, he thought the transaction had ultimately resolved itself into a mere loan between them as individuals. But the transaction had evidently grown out of their former relation as attorney and client. *Mr. Justice* Crampton, in concurring with the *Chief Justice*, said: "In the present case, I cannot say that Blake's fraud was not committed in a matter connected with his professional character. If he did not act in it as an attorney, he at all events took advantage of his professional position to deceive Beevirs" (the lender).

In *Re Hill*, L. R., 3 Q. B., 543, an attorney, [315] acting as a clerk to a firm of attorneys, in completing the sale of certain property, received the balance of the purchase money and appropriated it to his own use. On affidavits stating the facts, a motion was made to strike him off the rolls. He admitted the misappropriation and was accordingly suspended for twelve months. Said *Chief Justice* Cockburn: "In this case, if the delinquent had been proceeded against criminally upon the facts admitted by him, it is plain that he would have been convicted of embezzlement, and upon that conviction being brought before us, we should have been bound to act. If there had been a conflict of evidence upon the affidavits that might be a very sufficient reason why the court should not interfere until the conviction had taken place; but here we have the person, against whom the application is made, admitting the facts." It is difficult to see the pertinency of this decision to the position taken by my brethren. These two cases are, in the language used, the strongest to be found in the reports on that side; but their facts give it no strength whatever.

In *Penobscot Bar* v. *Kimball*, 64 Me., 140, the attorney had been convicted of forging a deposition used by him in a suit against his wife for a divorce and, though pardoned for the crime, the fraud upon the court remained; and for that and for other disreputable practices and professional misconduct, rendering him "unfit and unsafe to be entrusted with the powers, duties and responsibilities of the legal profession," he was disbarred.

In *Delano's Case*, 58 N. H., 5, where an attorney was disbarred by the Supreme Court of New Hampshire for wrongfully appropriating to his own use money of a town received by him as a collector of taxes, the commission of the offense was admitted. This is evident from the statement of the court in its opinion that "he and his wife and family did what they could to make good the loss to the town, but with only partial success."

In *Perry* v. *State*, 3 Greene (Ia.), 550, the false swearing charged as one of the grounds of complaint against the attorney was committed in a cause managed by him, in which he voluntarily appeared as a witness, thus practicing a fraud [316] upon the court by employing, to sustain his cause, means inconsistent with truth and honor.

In *Ex parte Walls*, 64 Ind., 461, the attorney had forged an affidavit to obtain a change of venue, and had thus grossly imposed upon the court. For this imposition, independently of the crime committed, he was properly disbarred.

In *Ex parte Burr*, 2 Cranch, C. C., 380, the charges against the attorney were for malpractice in his profession, in advising a person in jail, who was either a recognized witness or a defendant for whom some person was special bail, to run away, instituting suits against parties, and appearing for parties without authority; bringing vexatious and frivolous suits, many of them for persons utterly insolvent; purchasing a lot at a trustees' sale of an insolvent's estate under unfair circumstances; making fictitious claims and bringing suits with a view to extort money; and taking a bill of sale from one about to be distrained for rent to prevent such distress. These charges having been sustained, the attorney was rightly suspended from practice for one year.

In *In Re Percy*, 36 N. Y., 651, there were several charges against the attorney, such as that his general reputation was bad; that he had been several times indicted for perjury, one or more of which indictments were pending; that he was a common mover and maintainer of suits on slight and frivolous pretexts; and that his personal and professional reputation had been otherwise impeached in a trial at the circuit. But the court appears to have based its action upon the character of the attorney as a vexatious mover of suits on frivolous grounds. "He was crowding the calendar," said the court, "with vast numbers of libel suits in his own favor, and in the habit of indicating additional libel suits upon the answer to those previously brought by him. In one instance, at least, he had sued his client in a justice's court, and when beaten upon trial, instead of appealing from the judgment he commenced numerous other suits against him in different forms for the same cause, when he must have known that the demand was barred by the first judgment rendered. The only inquiry is, whether, in such a case, the court has the power to protect the public by preventing such persons from practicing as attorneys and counselors in the courts of the State, and by that means harass its citizens." [317] And the court held that it had the power under a special statute of the State authorizing the removal or suspension of attorneys and counselors, when guilty of any deceit, malpractice or misdemeanor; and that its power was not limited to cases where such deceit, malpractice or misdemeanor were practiced or committed in the exercise of the profession only, but under the statute extended to cases where there was general bad character and misconduct.

None of these cases, as is manifest from the statement I have made, covers that of an indictable offense, wholly distinct from the attorney's professional conduct. None of them countenances the extraordinary authority of the courts over attorneys and counselors asserted by my brethren. And, indeed, if the law be that a Circuit Court of the United States, upon whisperings in the ear of one of its judges on the streets, or upon information derived from rumor, or in some other irregular way, that an attorney has committed a public offense, having no relation to the discharge of his professional duties, can summon him to answer for the offense in advance of trial or conviction and summarily punish him, it is time the law was changed by statute.

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Such a power cannot be safely intrusted to any tribunal. It might be exercised under the excitement of passion and prejudice, as the records of courts abundantly show. Its maintenance would tend to repress all independence on the part of the bar. Men of high honor would hesitate to join a profession in which their conduct might be subjected to investigation, censure and punishment, from imputations and charges thus secretly made.

Seeing that this must be the inevitable result of such an unlimited power of the court over its attorneys, my brethren are careful to express the opinion that it should seldom be exercised, when the offense charged against the attorney is indictable, until after trial and conviction, unless its commission is admitted.

But the possession of the power being conceded, and its exercise being discretionary, there is in the hands of an unscrupulous, vindictive or passionate judge, means of oppression and cruelty which should not be allowed in any [318] free government. To disbar an attorney, is to inflict upon him a punishment of the severest character. He is admitted to the bar only after years of study. The profession may be to him the source of great emolument. If possessed of fair learning and ability, he may reasonably expect to receive from his practice an income of several thousand dollars a year; equal to that derived from a capital of one or more hundred thousand dollars. To disbar him having such a practice is equivalent to depriving him of this capital. It would often entail poverty upon himself and destitution upon his family. Surely, the tremendous power of inflicting such a punishment should never be permitted to be exercised, unless absolutely necessary to protect the court and the public from one shown by the clearest legal proof to be unfit to be a member of an honorable profession.

To disbar an attorney for an indictable offense not connected with his professional conduct, before trial and conviction, is also to inflict an additional wrong upon him. It is to give the moral weight of the court's judgment against him upon the trial on an indictment for that offense.

I am of opinion, therefore, that the prayer of the petitioner should be granted, and a peremptory *mandamus* directed to the circuit court to vacate the order of expulsion and restore him to the bar. The writ is the appropriate remedy in a case where the court below, in disbarring an attorney, has exceeded its jurisdiction. *Ex parte Bradley*, 7 Wall., 364 [74 U. S., XIX., 214]; *Ex parte Robinson*, 19 Id., 506 [86 U. S., XXII., 205].

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—110 U. S., 584.

RICHARD S. ALLEN, *Plff. in Err.*,
v.
WILLIAM N. McVEIGH.

(See S. C., 17 Otto, 433-437.)

Federal question, what is—liability of indorser.

1. A decision by a state court that, by the general principles of commercial law, if, during the late civil war, an indorser of a promissory note abandoned his residence in loyal territory, and went to reside permanently within the confederate lines before the note matured, a notice of protest left at his former residence in the loyal territory was not sufficient to charge him, if his change of residence was known, or by the exercise of reasonable diligence might have been known, to the holder of the note when it matured, presents no federal question giving this court jurisdiction.

2. The issue in such case is as to the fact of a change of residence by the indorser, not as to his power to make a change, and the Ordinance of Secession and the Proclamations of the President are in no way involved.

[No. 223.]

Argued Mar. 30, Apr. 2, 1883. Decided Apr. 16, 1883.

IN ERROR to the Supreme Court of Appeals of the State of Virginia.

This action was brought in the Corporation Court of Alexandria, Virginia, by the plaintiff in error, to recover from the maker of certain protested notes, the amount due thereon.

The first trial resulted in a verdict and judgment for the plaintiff. On a writ of error to the court below, this judgment was reversed and a *venire de novo* ordered. 29 Gratt., 588.

On the second trial, the verdict and judgment were for the defendant. A second writ of error having been denied by the court below, the plaintiff sued out this writ of error.

The facts of the case are stated by the court.

Mr. **H. O. Claughton**, for plaintiff in error:

This court has decided that this is a federal question.

Matthews v. *McStea*, 20 Wall., 646 (87 U. S., XXII., 448); *Bond* v. *Moore*, 93 U. S., 593 (XXIII., 983).

This court has frequently decided, not only that the defense is without the shadow of a foundation, but also that it presents federal questions.

Ludlow v. *Ramsey*, 11 Wall., 581 (78 U. S., XX., 216); *Mitchell* v. *U. S.*, 21 Wall., 350 (88 U. S., XXII., 584); *Williams* v. *Bruffy*, 96 U. S., 176 (XXIV., 716).

Messrs. **P. Phillips**, *W. A. Maury* and *W. H. Phillips*, for defendant in error:

We submit that the record does not show that any right, title, privilege or immunity, asserted by the plaintiff, under the Constitution, treaty, statute, commission or authority exercised under the United States, has been denied by the judgment complained of.

Bank v. *McVeigh*, 98 U. S., 333 (XXV., 111).

When the record shows, besides a federal question, other matters decided by the state court sufficient to sustain the judgment over which this court has no jurisdiction, the judgment will be affirmed, however erroneously the federal question may have been decided.

Murdock v. *Memphis*, 20 Wall., 635 (87 U. S., XXII., 444).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit against William N. McVeigh, as indorser of two promissory notes, and the matter in dispute is as to the sufficiency of the notices of dishonor. The notes fell due, one on

NOTE.—*Notice of demand, non-payment, protest, when and how given; New York Statute as to holidays; holidays as to grace.* See *note* to Bussard v. Levering, 19 U. S. (6 Wheat.), 102.

It is immaterial whether indorser receives notice if due diligence is used in sending it. See *note* to Harris v. Robinson, 45 U. S. (4 How.), 336.

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the 2d, and the other on the 23d of August, 1861, at the Exchange Bank of Virginia in Alexandria. The notary, in his certificate of protest, stated that he had delivered a notice of protest [434] to William N. McVeigh, by leaving it at his dwelling in the hands of his white servant, and the issue on the trial was as to whether the house at which the notice was left was, in fact, the dwelling of McVeigh at the time. Upon this point McVeigh testified, in substance, that at some time previous to the 24th of May, 1861, he sent his family to his farm in Culpeper County, Va.; that he remained at his home in Alexandria, until after the military forces of the United States took possession of the city, which was the 24th of May; that on the 30th of May, under a pass from the United States authorities, he left his home and went within the confederate lines to join his family, with the intention of not returning so long as the city remained in the possession of the United States, which he supposed would be but a short time; that he left in his house a white woman about seventy years of age, who had been for many years his servant, and three colored servants, who were slaves; that he did not discharge his white servant but advised her to go to the country; that, on leaving he had great doubts whether he would ever see his property in Alexandria again; that he remained with his family, in Culpeper, until the fall of 1861, when he removed to Richmond and engaged in business there, and that he remained in Richmond until 1874, when he returned with his family to Alexandria.

At the close of the testimony, the court, at the request of McVeigh, charged the jury that, "If on or about the 30th of May, 1861, and prior to the maturity of the notes sued on, William N. McVeigh, having previously sent his family, went himself within the confederate military lines with the intention of not returning to Alexandria during its occupation by the United States forces, and accordingly remained with his family continuously within the confederate military lines throughout the whole period of the war, and did not return to Alexandria with his family until the year 1874; that such absence at the maturity of said notes, respectively, was known or, by the exercise of reasonable diligence, must have been known to the Exchange Bank of Virginia, at Alexandria; that, at the time of said maturity, the armed forces of the United States and of the Confederate States confronted each other on lines immediately in- [435] tervening between the City of Alexandria and the said William N. McVeigh, so as to cut off and prevent actual intercourse between the two, and such intervention continued down to the end of the war, the notice of dishonor shown by the notarial certificates of protest is not sufficient to fix the liability of William N. McVeigh as indorser, and the jury must find for him."

This instruction is substantially the same as that considered in the *Bank* v. *McVeigh*, 98 U. S., 332 [XXV., 110], and which we held did not present a federal question. The only difference, even in language, between the instructions in the two cases consists in what is said in this about the establishment and maintenance of the opposing lines of military forces and the prevention of actual intercourse, which was not in the other. No importance was given in the argument, however, to this difference, and it may as well be said now, as it was before, that "All the court below decided was, that by the general principles of commercial law, if, during the late civil war, an indorser of a promissory note abandoned his residence in loyal territory, and went to reside permanently within the confederate lines before the note matured, a notice of protest left at his former residence in the loyal territory was not sufficient to charge him, if his change of residence was known, or by the exercise of reasonable diligence might have been known, to the holder of the note when it matured." Under the question raised by the charge as given, therefore, we have no jurisdiction.

But the plaintiff asked of the court certain instructions, which were not given, and error is assigned for this. The fourth of these requests presents all the questions relied on, and was as follows:

"If the jury believe, from the evidence, that the notes sued on were discounted by the Exchange Bank of Virginia at Alexandria, before their maturity, or that they were renewals of notes theretofore discounted; that at the time of discount the makers, indorser and indorsee were resident of said city; that, before the maturity of the said notes, the federal forces had taken permanent possession of said city; that, after such possession the indorser, William N. McVeigh, left his residence in said city, with the intention of returning thereto, and went within the confederate lines to join his family, at the time visiting in the County of Culpeper; [436] that the said indorser, at the time the said notes respectively became due, was within the confederate lines in adherence of the Southern Confederacy in obedience to the Virginia Ordinance of Secession, the court instructs the jury that the said Ordinance of Secession was of no binding force or obligation; that neither the Proclamations of the President of the United States, issued in April, 1861 [12 Stat. at L., 1258], and August 16, 1861 [12 Stat. at L., 1262], nor the existence of the war, nor the Ordinance of Secession of the State of Virginia, obliged the said indorser to be absent from his residence in Alexandria, nor relieved the holder of said notes from giving him notice of the dishonor and protest thereof; that such absence was voluntary, and did not affect the rights and duties of the parties to said notes. And if the jury believe from the evidence that, at the time the said notes respectively fell due, the said indorser had not abandoned his intention to return to Alexandria, and had not acquired a domicil elsewhere, and that the notes sued on were duly dishonored and protested, and on the day thereof, notice of such dishonor and protest was left at the residence of the indorser in Alexandria with his white servant in charge of the same, such notice was sufficient to bind the indorser, and the jury must find for the plaintiff, if they further believe from the evidence that he is the *bona fide* holder of said notes."

The only point presented by this request, not disposed of by the charge as actually given, is that which relates to the Ordinance of Secession and the Proclamations of the President. The plaintiff claimed no "title, right, privilege or immunity," either under the Ordinance or the Proclamations. Neither did the defendant.

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The issue in the case was as to the fact of a change of residence by the defendant, not as to his power to make a change. The plaintiff did not claim that by reason of the Ordinance, or the Proclamation, or even the existence of actual war, the defendant was prevented from abandoning his home in Alexandria, and taking up another inside the confederate lines. Neither did the defendant claim that the Ordinance, the Proclamation, or the war, of themselves, made the notice left at his former home insufficient. The ultimate fact to be determined was, whether, when the notice was left at the house formerly occupied by the defendant, it was left at his [437] place of residence. As the case stood upon the evidence, the Ordinance of Secession and the Proclamations were in no way involved. The plaintiff claimed nothing under them, neither did the defendant. The charge in respect to them, as requested, was therefore immaterial, and was properly refused. As this presented the only federal question in the case, and it was correctly disposed of, we cannot consider the other errors assigned. *Murdock* v. *Memphis*, 20 Wall., 590 [87 U. S., XXII., 429].

The judgment of the Supreme Court of Appeals of Virginia is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 769.

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[597] LEMUEL J. DAVIS ET AL., *Plffs. in Err.*,

v.

STATE OF SOUTH CAROLINA.

(See S. C., 17 Otto, 597-601.)

Removal of causes against U. S. Marshals, and their deputies and assistants—power of State Court.

1. Section 643, R. S., which provides for the removal of certain prosecutions from a State Court to a Federal Court, embraces the case of United States Marshals or their deputies or assistants, when they are engaged in the service of process issued for the arrest of parties accused of violation of the revenue laws of the United States.

2. The protection which the law thus furnishes to the marshal and his deputy, also shields all who lawfully assist him in the performance of his official duty.

3. Where the prosecution is removed, the jurisdiction of the Circuit Court completely vests, and that of the State Court ceases altogether and there can be, consequently, no breach of the bail bond in not appearing in the State Court, and proceedings to forfeit it and render judgment upon it against the sureties by that court were *coram non judice* and void.

[No. 215.]

Argued by plaintiffs in error Mar. 28, 1883. Leave to file brief granted to defendant in error Mar. 30, 1883. Decided Apr. 23, 1883.

IN ERROR to the Supreme Court of the State of South Carolina.

The history and facts of the case appear in the opinion of the court.

Mr. **S. F. Phillips**, *Solicitor-Gen.*, for plaintiffs in error.

Mr. C. R. Miles, Atty-Gen. of South Carolina, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

Lemuel Davis was indicted for the murder of one Hall in the Court of General Sessions for the County of Spartanburg, in South Carolina, in July, 1876; and, being in custody, it was ordered by the court that he be enlarged on giving bail for his appearance at the next term of the court, it being required that the bond should contain a condition that it should be forfeited in case the prisoner should be ordered beyond the limits of the State by the proper authority of the Army of the United States. He entered into a recognizance accordingly, the other plaintiffs in error being his sureties.

The prisoner thereafter presented to the Circuit Court of the United States for the District of South Carolina, a petition, which is set out in record, as follows:

"United States of America,
District of South Carolina, Fourth Circuit:

To the Judges of the Circuit Court:

The petition of Lemuel J. Davis, corporal of Company K, 18th U. S. Infantry, shows:

That some time in February, 1876, he was detailed to serve as one of a guard of United States soldiers to aid Deputy Marshal James Jarrett in making the arrest of one Brandy Hall under a warrant issued by a U. S. Commissioner [598] for violation of internal revenue laws as a distiller.

That said guard of U. S. soldiers consisted of two men under the command of First Lieutenant W. A. Miller, 18th U. S. Infantry. That said guard, under command of said Lieutenant Miller, proceeded with Deputy Marshal James Jarrett to the house of said Brandy Hall, for the purpose of arresting him. That, for the purpose of making the arrest, the house of said Hall was surrounded. This petitioner was sta-

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NOTE.—*Removal of actions; actions against officers; section 643 of R. S.*

A suit against an officer may be removed, although he is sued individually and sought to be held as a wrong-doer; as, a suit against a postmaster for wrongful refusal to deliver a letter, or to recover of a collector of internal revenue moneys illegally exacted, or an action of slander against a revenue officer. Butner v. Miller, 1 Woods, 620; Warner v. Fowler, 4 Blatchf., 311; Van Zandt v. Maxwell, 2 Blatchf., 421; Salt Co. v. Wilkinson, 8 Blatchf., 30; Phila. v. Diehl, 72 U. S., XVIII., 614.

The right to remove is given without regard to expense or inconvenience, or amount in controversy. Wood v. Matthews, 2 Blatchf., 370.

Criminal cases are removable where the defense arises under a law of the United States. State v. Davis, 12 S. C., 528; Findley v. Satterfield, 3 Woods, 504.

A criminal proceeding is commenced and may be removed as soon as warrant is issued, and the further proceedings had in United States court. State v. Port, 8 Fed. Rep., 117; State v. Bolton, 11 Fed. Rep., 217.

If a criminal case is removed, it must be determined according to the law of the State. Tennessee v. Davis, 100 U. S., XXV., 648; Georgia v. O'Grady, 3 Woods, 469.

A person indicted for maintaining a nuisance under the laws of a State cannot remove the case. Com. v. Casey, 94 Mass., 214.

A person indicted in a state court, for an act done under color of the revenue laws, may remove the case. Tennessee v. Davis, 100 U. S., XXV., 648; State v. Hoskins, 77 N. C., 530; Findley v. Satterfield, 3 Woods, 504; Georgia v. O'Grady, 3 Woods, 469.

Any law providing for the assessment and collection of a tax to pay the expenses of government is a revenue law. Warner v. Fowler, 4 Blatchf., 311; Peyton v. Bliss., Woolw., 170.

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tioned at the back door of the house for the purpose of guarding the same, and preventing the escape of said Hall. That the deputy marshal, Jarrett, went to the front of the house for the purpose of effecting an entrance and arresting said Hall. That, at the time he did so and while your petitioner was guarding the back door, said Hall made his escape through a hole in the side of the house near where petitioner was standing, sprang past him, frightening his horse, and accidently discharging his piece.

That by the discharge of his said piece the said Hall was shot and mortally wounded, and subsequently died of said wound. Your petitioner shows that at the time of said accident he was in the discharge of his duty, and that said shooting of said Hall was purely accidental, and your petitioner is in no way responsible therefor. Your petitioner shows that he has been arrested and bound over for trial in the Circuit Court of the State of South Carolina for Spartanburg County, for the murder of said Hall.

That an indictment by the grand jury of that county for murder was found at the August Term of said court against your petitioner, and your petitioner was put upon his trial theron. That the jury before whom he was tried found your petitioner guilty of manslaughter. That the court thereupon set aside said verdict and granted a new trial. Your petitioner shows that he is illegally and unlawfully held for trial under the order of said court, and prays your honor to grant a writ to remove said cause for trial in the Circuit Court of the United States for the District of South Carolina, now being held at Columbia in said State.

(Signed) Lemuel J. Davis.

Personally appears before me, Corporal Lemuel J. Davis, who, being duly sworn, deposes and says the above petition is true of his own knowledge. Lemuel J. Davis.

Sworn and subscribed before me the second day of December, A. D. 1876.

[Seal of Court.] J. E. Hagood,
C. C. C. U. S., Dist. of S. C."

[599] "United States of America,
District of South Carolina, Fourth Circuit:
Ex parte, Lemuel J. Davis, } Petition for
18th U. S. Infantry. } *habeas corpus.*

I certify that I have represented the petitioner upon his trial at Spartanburg; that I have examined the proceedings against him, and have carefully inquired into all the matters set forth in the petition of the said Davis, and believe them to be true. Wm. E. Earle."

On the hearing of this petition, December 4, 1876, it was ordered by the court that a writ of *habeas corpus cum causa* do issue, to be served according to law on the clerk of the Circuit Court for Spartanburg County, and that the marshal do take said Corporal Lemuel J. Davis into his custody, to be dealt with according to law.

On March 12, 1877, an order was made by the Circuit Judge for the County of Spartanburg in the Court of General Sessions, reciting that the said Lemuel J. Davis had failed to answer when called according to his recognizance, and directing process against him and his sureties to appear and show cause why judgment should not be confirmed against them and their recognizance adjudged to be forfeited.

The plaintiffs in error accordingly appeared and answered the rule, alleging the removal of the cause into the Circuit Court of the United States by the proceedings recited, by reason whereof the said Lemuel Davis was not bound to appear for trial in the Court of General Sessions for the County of Spartanburg and that, consequently, there had been no breach of the condition of the recognizance.

Upon this return to the rule to show cause, judgment was rendered against the plaintiffs in error, which on appeal to the Supreme Court of the State was affirmed. To reverse that judgment the present writ of error is prosecuted.

The learned Attorney-General of the State of South Carolina, who appears here on the part of the State, very properly waives all questions arising in this case which are covered by the decision of this court in *Tenn.* v. *Davis*, 100 U. S., 257 [XXV., 648].

He seeks to distinguish the present case, however, from that, upon its circumstances, and [600] claims that Davis was not entitled, by virtue of the capacity in which he was acting, to the benefit of section 643 R. S., and to that end maintains the proposition that, as that section applies only to officers appointed under or acting by authority of any revenue law of the United States, or any person acting under the authority of such officers, it cannot be extended to embrace the case of United States Marshals or their deputies or assistants, even when they are engaged in the service of process issued for the arrest of parties accused of violation of the revenue laws of the United States.

In our opinion, the distinction cannot be maintained. A Marshal or Deputy Marshal of the United States is, it is true, not an officer appointed under a revenue law; but when engaged officially in lawful attempts to enforce a revenue law, by the arrest of persons accused of offenses against it, he is an officer acting under the authority of that law; for it is that law under which is issued the process, which constitutes his authority for his official action. There is, indeed, the general law, prescribing the nature of his duties, which requires him faithfully to execute all lawful process placed in his hands for that purpose; but when process, issued under a particular law, is lawfully issued to him for service, in executing it, he is acting under the authority of that law, without which the process would not be valid. It is that law which he would be compelled to rely on as his justification if he was sued as a trespasser for executing the process issued for its enforcement. And the protection which the law thus furnishes to the marshal and his deputy, also shields all who lawfully assist him in the performance of his official duty. It is not questioned that Davis was acting in that capacity. It is true, he was a non-commissioned officer in the army, detailed as a guard in aid of the Marshal, and acting as one of his *posse comitatus;* but this was before such service became unlawful by the passage of the 15th section of the Army Appropriation Act of June 18, 1878. Supp. R. S., 361; 20 Stat. at L., 145.

The prosecution against Davis was removed into the Circuit Court in strict compliance with the statute. His petition set out the necessary facts showing that the homicide which was charged against him as a crime took place while [601]

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he was in discharge of his official duty; it was verified, and certified as required by law. The writ of *habeas corpus cum causa*, which was issued upon it, was the writ prescribed by the Act of Congress in cases of that description, a duplicate of which it requires shall be delivered to the clerk of the State Court; and thereupon the statute declares that it shall be the duty of the State Court to stay all further proceedings in the cause, and the prosecution, upon delivery of such process, shall be held to be removed to the Circuit Court, and any further proceedings, trial, or judgment therein in the State Court, shall be void.

When, by virtue of the writ of *habeas corpus*, the prisoner was taken into the custody of the Marshal, the jurisdiction of the Circuit Court of the United States of his person and of the indictment against him, was completely vested, and that of the State Courts ceased altogether, The recognizance was an incident and followed the principal case. The obligation to appear was transferred with the cause, and he was no longer bound to answer in the court of original jurisdiction. It would have been unlawful for his bail to have surrendered him to that tribunal. They were, consequently, discharged from the obligation of the recognizance, so far as it required them to do so, or to answer for the default. There was, consequently, no breach of the bail bond in not appearing in the State Court, and all proceedings to forfeit it and render judgment upon it against the sureties were *coram non judice* and void. The right to proceed upon it at all against him or them passed from the State Court with the transfer of its jurisdiction over the person of the prisoner and the indictment against him.

The judgment of the Supreme Court of South Carolina is accordingly reversed, and the cause is remanded, with instructions to enter a judgment reversing the judgment of the Circuit Court for the County of Spartanburg, and directing that court to dismiss the proceeding upon the recognizance for want of jurisdiction.

It is, accordingly, so ordered.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[649] JOHN B. SLAWSON, *Appt.*,

v.

GRAND STREET, PROSPECT PARK AND FLATBUSH RAILROAD COMPANY.

(See S. C., 17 Otto, 649-655.)

Dismissal of case on letters patent—void patents—judicial notice.

1. In an action for the infringement of letters patent, if they are void because the device or contrivance described therein is not patentable, it is the duty of the court to dismiss the cause on that ground, whether such defense is set up in the answer or not.

2. A patent which consists merely in putting an additional pane of glass in the fare box in a street car or omnibus opposite the side next the driver, so that the passengers can see the interior of the box through it, is void for want of invention.

3. A patent for simply the making of an aperture in the top of the fare box and turning the rays of the head-lamp through it into the box, by means of a reflector, does not involve invention and is void.

4. This court will take judicial notice that devices similar to this are as old as the use of the reflectors.

[No. 238.]

Argued Apr. 9, 1883. Decided Apr. 23, 1883.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

The history and facts appear in the

Statement of the case by *Mr. Justice* **Woods:**

This was a suit brought by John B. Slawson, the appellant, to restrain the infringement of two letters patent, one granted to him as inventor, and the other held and owned by him as assignee of the inventor.

The one first mentioned was a re-issue dated January 24, 1871. The invention therein described was an improvement in fare boxes for receiving the fares of passengers in omnibuses and street cars.

The specification described the ordinary fare box used in street cars and omnibuses, consisting of two apartments, the one directly above the other. This well known contrivance, the specification declared, was so arranged that the passenger deposited his fare in an aperture in the top of the upper apartment. It fell upon and was arrested by a movable platform, which constituted at the same time the bottom of the upper apartment and the top of the lower. This platform turned on an axis acted on by a lever. When turned, the fare fell into the lower apartment, which was a receptacle for holding the fares accumulated during the trip. Upon withdrawing the lever, the platform resumed its horizontal position, ready to arrest the next fare deposited. The upper apartment had a glass [650] panel on the side next the driver, so that he could see the fares as they were deposited by the passengers. This contrivance enabled the passenger to pay his own fare, and furnished a place of safe deposit for it, so that it could not be abstracted by the driver. It enabled the driver to scrutinize the fare after it was deposited by the passenger, and see that it was the proper amount and in genuine coin or tickets before it was passed into the general receiving box.

The improvement described in the patent consisted in the insertion of a glass panel on that side of the upper apartment of the box next to the inside of the car or omnibus, and opposite to the glass panel next the driver, so that when the fare was temporarily arrested in the upper apartment, the passenger could see and examine it before it was passed into the lower or receiving apartment. The specification declared: "By this means disputes and contentions are prevented, as to the sufficiency of the amount deposited to pay the fare, or as to the genuineness of the money or tickets used for that purpose. It also enables the passenger, when he has unintentionally deposited more than the amount of his fare, to call the attention of the driver to that fact, so that he, should the passenger require the difference to be paid back to him, may report the case to the proprietor or his agent on reaching the end of the route, who will then pay the difference to the passenger, who for this purpose must ride to the office at the end of the route."

The claim of the patent was thus stated:

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"A fare box having two compartments, into one of which the fare is first deposited and temporarily arrested previously to its being deposited in the other, when the former is provided with openings, covered or protected by transparent *media* or devices, so arranged that the passengers can see through one and the driver or conductor through the other, in the manner substantially as and for the purposes set forth."

The other patent set up in the bill of complaint was granted to Elijah C. Middleton, assignee of James F. Winchell, and by the former assigned to complainant. It bore date December 12, 1871. It also was for an improvement in fare boxes. The specification declared as follows: "This improvement relates to the mode of illuminating the interior of a fare box [651] in street railway cars or other vehicles when used during the night, and it consists in the construction of the fare box with suitable openings and reflectors, arranged and adapted to receive light from the ordinary head lamp placed above the fare box, instead of requiring a separate lamp to illuminate it as heretofore."

The specification then described the improvement substantially thus: the ordinary fare box, consisting of two apartments, one above the other, is constructed with an orifice in the top of the upper apartment, said top forming the floor of the lamp chamber. The orifice is closed with a sheet of glass, to prevent any access to the fare box by that way. Immediately above the orifice there is placed in the roof of the lamp chamber a reflector, in such an oblique position that it will cause the light which falls upon it to be thrown through the orifice into the upper apartment of the fare box, in which the fare is temporarily deposited. The claim was stated as follows: "Lighting the interior of a fare box at night by light obtained from the head lamp of the car thrown by a reflector, I, through an opening, H, in the head lamp box, into the chamber for the temporary detention of the fare for inspection, substantially in the manner and for the purpose set forth."

The answer denied infringement of either of the improvements described in the letters patent, denied that the persons therein named as the first inventors of said improvements were in fact the first inventors thereof, and averred that said improvements had been in public use and on sale in this country for more than two years before the applications for patents therefor were respectively made.

Upon final hearing, the circuit court dismissed the bill on the ground that the improvements described in the patents were void because they did not embody invention within the meaning of the patent laws. From this decree the complainant has appealed to this court.

Messrs. **Livingston Gifford** and *George Gifford*, for appellant.

Messrs. **David C. Van Cott** and *Albert G. McDonald*, for appellee.

[652] *Mr. Justice* **Woods** delivered the opinion of the court:

The appellant insists that the dismissal of a bill because the inventions described in the patents were not patentable, when no such defense was set up in the answer, is of doubtful propriety, and is a practice unfair to the complainants.

The practice was sanctioned by this court in the case of *Dunbar* v. *Myers*, 94 U. S., 187 [XXIV., 84]. In that case the defense set up in the answer was, want of utility in the patented invention; that the patentees were not the first inventors, etc. The circuit court rendered a decree for the complainant for a large sum. When the case came to this court the decree was reversed, with directions to the court below to dismiss the bill on the ground, not set up in the answer, that the improvement described in the patent sued on did not embody or require invention and was not patentable, and the patent was, therefore, void.

And in the case of *Brown* v. *Piper*, 91 U. S., 44 [XXIII., 202], this court, speaking by *Mr. Justice* Swayne, said: "We think this patent was void on its face," because the improvement described therein was not patentable, "and that the court might have stopped short at that instrument and, without looking beyond it into the answers and testimony, *sua sponte*, if the objection was not taken by counsel, well have adjudged in favor of defendant."

We think the practice thus sanctioned is not unfair or unjust to complainants in suits brought on letters patent. If letters patent are void because the device or contrivance described therein is not patentable, it is the duty of the court to dismiss the cause on that ground, whether the defense be made or not. It would ill become a court of equity to render money decrees in favor of a complainant for the infringement of a patent which the court could see was void on its face for want of invention. Every suitor in a cause founded on letters patent should, therefore, understand that the question whether his invention is patentable or not, is always open to the consideration of the court, whether the point is raised by the answer or not.

We have considered the alleged improvements described in letters patent set out in complainant's bill, and agree with the conclusion reached by the circuit court, that neither of them involves invention, and that both the let- [653] ters patent are, therefore, void.

A glance at the specification and claim of the patent granted to the complainant Slawson, shows that the invention described therein consists simply in the placing, in the ordinary fare box used on street cars and omnibuses, of a glass panel opposite to the glass panel next the driver, usually inserted in such boxes. The patent does not cover the fare box; it does not cover the insertion in the side of the fare box next the driver of a glass panel, nor a combination of these two elements. It consists merely in putting an additional pane of glass in the fare box opposite the side next the driver, so that the passengers can through it see the interior of the box. Such a contrivance does not embody or require invention. It requires no more invention than the placing of an additional pane of glass in a show case for the display of goods, or the putting of an additional window in a room opposite one already there. It would occur to any mechanic engaged in constructing fare boxes, that it might be advantageous to insert two glass panes, one next the driver and the other next the interior of the car. But this would not be invention within the meaning of the patent law. *Hotchkiss* v. *Greenwood*, 11 How., 248; *Phillips* v. *Page*, 24 How., 167 [65

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U. S., XVI., 640]; *Dunbar* v. *Myers, ubi supra.* It is not a combination of the fare box, having one glass panel with an additional glass panel, but is a mere duplication of the glass panel. Doubtless, a fare box with two glass panels, arranged as described in the patent, is better than a fare box with only one. But it is not every improvement that embodies a patentable invention. This rule was fairly illustrated in the case of *Stimpson* v. *Woodman*, 10 Wall., 117 [77 U. S., XIX., 866], in which it was held that where a roller, in a particular combination, had been used before without particular designs on it, and a roller with designs on it had been used in another combination, it was not a patentable invention to place designs on the roller in the first combination, and that such a change, with the existing knowledge in the art, involved simply mechanical skill, which is not patentable.

In *Brown* v. *Piper, ubi supra*, it was said, that when the invention was simply the application by the patentees of an old process to a new sub- [654] ject, without any exercise of the inventive faculty, and without the development of any idea which could be deemed new and original in the sense of the patent law, it was not patentable; and it was held that the application of a process for preserving meats and fruit, which had previously been used for preserving other perishable substances, was not patentable.

A case much in point was decided by this court at the present Term, *Atlantic Works* v. *Brady* [*ante*, 488], in which *Mr. Justice* Bradley said: "The design of the patent laws is to reward those who make some substantial discovery or invention which adds to our knowledge and makes a step in advance in useful arts. It was never their object to grant a monopoly for every trifling device, every shadow of a shade of an idea which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures." And it was held that the placing of a screw for dredging, at the stem of a screw propeller, when the dredging had been previously accomplished by turning the propeller stern foremost and dredging with the propelling screw, was not a patentable invention.

These authorities, and others that might be cited, are adverse to the appellant's case, and clearly show that the contrivance covered by the patent issued to him does not embody a patentable invention.

The same authorities apply with equal force to the patent for lighting the interior of the fare box at night by using the head light of the car for that purpose. The elements of the contrivance, namely: the fare box, the head light and the reflector, are all old. What is covered by the patent is simply the making of an aperture in the top of the fare box and turning the rays of the head lamp through it into the box, by means of a reflector. In other words, it is the turning of the rays of light to the spot where they are wanted by means of a reflector, and taking away an obstruction to their passage. The facts of general knowlege of which we take judicial notice (Taylor, Ev., sec. 4, *n.* 2; *Brown* v. *Piper, ubi supra*) teach us that devices similar to this are as old as the use of reflectors. The new application of them does not involve invention. We are of opinion that there was nothing patentable in the contrivance described [655] in the second patent.

The result of our views is, that the decree of the Circuit Court was right and must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 102; 111 U. S., 608; 112 U. S., 358; 114 U. S., 12, 156.

MILLS COUNTY, IOWA, *Plff. in Err.*, [557]
v.
BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY ET AL.

MILLS COUNTY, IOWA, *Plff. in Err.*,
v.
CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

(See S. C., 17 Otto, 557-567.)

Swamp land grant—trust as to proceeds—conveyances of to counties.

*1. The swamp and overflowed lands granted by Congress to the several States by the Act of September 28, 1850, are subject to the disposal of the Legislatures of said States respectively, in such manner as they may deem expedient, without any right on the part of any persons except the Government of the United States to question such disposal.

2. The proviso in the 2d section of the Act, that the proceeds of said lands shall be applied exclusively, as far as necessary, to the purpose of reclaiming the same by levees and drains, is a matter between the United States and the States, and the obligation it imposes rests upon the good faith of the latter, and is not a trust which attaches to the lands themselves, and does not affect the title thereto as derived from the States.

3. The State of Iowa having granted its swamp and overflowed lands to the counties respectively in which they lay, and the County of Mills having claimed that certain lands were of this character, and the B. & M. R. R. Co. having claimed the same lands under a railroad grant made by Congress in 1856, after suit instituted between the parties, and a decision in the state courts in favor of the County, and whilst the case was pending hereon a writ of error, a compromise agreement was made, by which the County was to make certain conveyances to the Railroad Company, and to pay a sum of $10,000 for lands previously disposed of; and conveyances were executed accordingly. Afterwards, Mills County instituted suit to have the compromise declared void; and the Railroad Company sued for the $10,000; the state courts sustained the compromise, and decided against the County in both suits, writs of error being brought to this court; held, that the County could not go back to the Act of Congress of 1850 for the purpose of showing that the lands were disposed of, contrary to the trust created by that Act, that being a matter only between the United States and the State.

4. Held, also; that although, after the compromise was made, the suit then pending was submitted to this court, and decided in favor of the County; yet, that this did not abrogate the compromise, as the parties continued to act under it; and that the decision of the state court in the present case was not repugnant to or in disaffirmance of the decision of this court.

[Nos. 191, 192.]

Submitted Mar. 20, 1883. Decided Apr. 23, 1883.

IN ERROR to the Supreme Court of the State of Iowa.

The history and facts of the case fully appear in the opinion of the court.

*Head notes by *Mr. Justice* BRADLEY.

NOTE.—*Compromise of a disputed claim binding; payment of less sum for greater.* See *note* to Oglesby v. Attrill, 105 U. S., XXVI., 1185.

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Messrs. **C. B. Lawrence, D. H. Solomon** and *W. F. Sapp*, for plaintiff in error.

Messrs. **S. Shellabarger, J. M. Wilson** and *W. W. Baldwin*, for defendants in error.

Mr. Justice **Bradley** delivered the opinion of the court:

These cases were consolidated and heard together in the state courts, both relating to the same subject-matter, *viz.*: the validity of a com-
[558] promise agreement made on the 27th of October, 1868, between Mills County, in the State of Iowa, and the Burlington and Missouri River Railroad Company, in reference to certain lands lying in said County, claimed by the County as swamp and overflowed lands, and claimed by the Railroad Company as railroad grant lands. The claim of the County was based on the Act of Congress approved September 28, 1850 [9 Stat. L., 519], entitled "An Act to Enable the State of Arkansas and Other States to Reclaim the Swamp Lands within their Limits;" and an Act of the General Assembly of the State of Iowa, entitled "An Act to Dispose of the Swamp and Overflowed Lands in the State of Iowa, and to Pay the Expenses of Selecting and Surveying the Same," approved January 13, 1853; and other Acts of the General Assembly of said State. The claim of the Railroad Company was based upon the Act of Congress of May 15, 1856 [11 Stat. at L., 9], granting to the State of Iowa certain lands for the purpose of aiding in the building of a railroad from Burlington, Iowa, to a point on the Missouri River, at or near the mouth of Platte River in Nebraska.

The Act of Congress first referred to, 9 Stat. at L., 519, declared, in effect, "That, to enable the State of Iowa to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this Act, shall be and the same are hereby granted to said State."

And, after providing for listing and patenting the lands, it was, by section 2, enacted that "The fee simple to said lands shall vest in the State of Iowa, subject to the disposal of the Legislature thereof; *Provided*, however, That the proceeds of said lands, whether from sale or direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands, by means of the levees and drains aforesaid."

The General Assembly of Iowa, by an Act passed January 13, 1853, declared "That all swamp and overflowed lands granted to the State of Iowa by the Act of Congress (September 28, 1850) be and the same are hereby grant-
[559] ed to the counties respectively in which the same may lie or be situated, for the purpose of constructing the necessary levees and drains to reclaim the same; and the balance of said lands, if any there be, after the same are reclaimed as aforesaid, shall be applied to the building of roads and bridges, when necessary, through or across said lands, and if not needed for this purpose, to be expended in building roads and bridges within the county."

On the 22d of March, 1858, the General Assembly passed another Act containing amongst others, the following provisions:

1. "Be it enacted by the General Assembly of the State of Iowa, That it shall be competent and lawful for the counties owning swamp and overflowed lands to devote the same or the proceeds thereof, either in whole or in part, to the erection of public buildings for the purpose of education, the building of bridges, roads and highways; for building institutions of learning, or for making railroads through the county or counties to whom such lands belong; *Provided*, That, before any of said land or the proceeds thereof shall be so devoted to any of the purposes aforesaid, the question whether the same shall be so done shall be submitted, at some general or special election, to the people of the county.

2. The proper officer or officers of any county may contract with any person or company for the transfer and conveyance of said swamp or overflowed lands or the proceeds thereof, or otherwise appropriate the same to such person or company, or to their use for the purpose of aiding or carrying out any of the objects mentioned in the 1st section of this Act, which said contract shall be reduced to writing and signed by the respective parties or their lawful authorized agents."

Another section prescribed the mode in which elections should be called and held, and without which any contract should be void, and concluded with the following proviso: *Provided*, That no sale, contract or other disposition of said swamp or overflowed lands shall be valid, unless the person or company to whom the same are sold, contracted or otherwise disposed of, shall take the same subject to all the provisions of the Acts of Congress of September 28, 1850, and shall expressly release the State of Iowa and the county in which the lands are situated, from all liability for reclaiming said land."

The Burlington and Missouri River Railroad [560]
Company was incorporated under the laws of the State of Iowa, January 23, 1852, for the purpose of constructing a railroad from Burlington to the most eligible point on the Missouri River. The Act of Congress, under which said company claimed the lands, passed May 15, 1856, 11 Stat. L., 9, granted to the State of Iowa, for the purpose of aiding in the construction of railroads from Burlington on the Mississippi River, to a point on the Missouri River, near the mouth of the Platte River, etc., every alternate section of land, designated by odd numbers, for six sections in width on each side of said roads, but it was provided that if any sections should be sold or become subject to preemption, before the lines of the roads should be definitely fixed, other lands might be selected in lieu thereof, nearest to the tiers designated, but not to exceed fifteen miles from the lines of the roads. It was further provided, that the lands thus granted to the State should be subject to the disposal of the Legislature thereof, for the purpose aforesaid and no other.

The General Assembly of Iowa by an Act dated June 3, 1856, accepted this grant, and enacted sec. 2, "That so much of the lands, interest, rights, powers and privileges as are or may be granted and conferred, in pursuance of the Act of Congress aforesaid, to aid in the construction of a railroad from Burlington on the Mississippi River, to a point on the Missouri,

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near the mouth of Platte River, are hereby disposed of, granted and conferred upon the Burlington and Missouri River Railroad Company, a body corporate, created and existing under the laws of the State of Iowa."

The Acts and clauses of Acts referred to are sufficient to show the general nature of the litigation which sprang up between the parties now before the court.

The Railroad Company having claimed the right to appropriate certain of the lands in Mills County which the county authorities claimed to be swamp and overflowed lands, the County, in December, 1868, commenced a suit in chancery against the Railroad Company to establish its title to the lands in question between them. The county court and the Supreme Court of the State decided in favor of the County, and the Railroad Company brought the case [561] to this court by writ of error, where it was pending when the compromise agreement in question was entered into. That agreement consisted of a proposition made by the county authorities to the Railroad Company, which was accepted by the latter. The following is a copy of the papers which passed between them:

Proposition of the County.

"In order to settle and finally adjust the lawsuit now pending in the Supreme Court of the United States, wherein Mills County, in the State of Iowa, is plaintiff, and the Burlington and Missouri River Railroad Company is defendant, and secure the completion of said road through Mills County, *via* Glenwood, in said County, we, the undersigned, agents of said County, submit the following proposition to the board of directors of said Railroad Company, to wit:

There are in dispute between the parties to the said lawsuit 23,316 acres. For the purpose of having our proposition understood, we acknowledge that we owe you acres of land to the amount of 23,316; to pay which we have and offer you odd sections, vacant (most of which is a part of the 23,316 acres, and even sections patented to the County and unsold, in the aggregate 9,080 acres; balance of the land due you, 14,236 acres. For further payment, we have and offer to you of the odd sections (about all of which is of the 23,316 claimed by you), subject to preemption made through the County, acres to the amount of (on which nothing has been paid to the County) 4,660. Of these preempted lands, we estimate that about one half of the preemptions are fraudulent and ought not to be recognized, but the County must ask that where *bona fide* improvements have been made on the same, the preemptors must be secured in their right to the same, and have the privilege of purchasing at $1.25 per acre of the County or Company, which amount shall, in any event, go to the Railroad Company. Now you will have land for land, subject only to the preemptor's claims, until there will be due you in acres 9,576.

The remainder, 9,576 acres, belong to *bona fide* settlers and purchasers, who, we must insist, shall be protected by the County. And as we have paid you all the land we have, we offer you for this balance $10,000 in money.

The Company should understand that the [562] balance of 9,576 acres is the land, portions of which it has been settling with our individual citizens for and there is included in the 9,576 acres all the lands the Company has sold to citizen settlers at $1.25 per acre. With this understanding, the $10,000 balance we offer you will be just as much less than 9,576 acres as the Company has thus sold and, therefore, our pay would perhaps amount to $1.50 or more.

It is understood that the said suit now pending shall be continued, by agreement of the parties, from term to term, until the conditions of this contract or proposition shall be complied with.

It is also further understood that the foregoing proposition shall not be binding on the County of Mills, unless said Railroad Company shall complete said railroad through Mills County *via* Glenwood and build a depot at Glenwood, in said County, and in case said Railroad Company shall fail or neglect to build said railroad through Mills County *via* Glenwood, and also to build and establish a depot at Glenwood, in said County, then, and in that event, the said lawsuit shall stand for final hearing in the Supreme Court of the United States, the same as if this proposition had never been made. In case the suit shall be settled on the basis of this proposition, each party shall pay their own costs. The manner of transferring the land, whether the County shall deal with the purchasers and preemptors, or whether the Railroad Company under the restrictions indicated, the County is not particular about, but will agree to what may seem most practicable.

The amount in acres, as stated above, may not be exactly correct and probably is not, but it is believed to be nearly so; but we wish it understood that the Company shall have all the swamp lands the County now hold or entitled to in Mills County, Iowa, subject only to the conditions indicated in the foregoing. Witness our hands this July 13, 1868. (Signed) Wm. Hale; E. C. Bosbyshell; D. H. Solomon; L. W. Tubbs: majority of the committee."

Acceptance.

"Burlington, Iowa, October 27, 1868.

This proposition is hereby accepted, and the terms and stipulations and conditions are agreed to by the Burlington and Missouri River Railroad Company. (Signed) Burlington and Missouri River Railroad Company. By C. E. Perkins, Supt."

This proposition and acceptance being reported by the committee to the board of supervisors of Mills County, the said board passed the following resolution:

"After giving the report due consideration, [563] it is resolved by the board of supervisors of Mills County, Iowa, at their regular session in November, 1868, that the proposition submitted to the B. & M. R. R. Co., by our special railroad committee, and the acceptance of the same by the said Company be and the same is hereby confirmed and ratified, and that the same be spread upon the records of this board.

The ayes and nays being called for, the vote stands as follows:

Ayes—Allis, Forrester, Haynie, Lamb, Utterback, Wing, Ward, Russell, Summers, and Mr. Chairman. Nays—none."

Several deeds of conveyance were executed by the Board of Supervisors of Mills County to the B. & M. R. R. Co. in the years 1869, 1870, and 1871, in pursuance of this compromise agree-

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ment, conveying altogether 13,720$\frac{11}{100}$ acres of land.

The suit of Mills County, one of the consolidated suits now before us, was brought in January, 1874, against the B. & M. R. R. Co., and others, in the Mills County District Court, by petition seeking to have the said compromise agreement and the said deeds of conveyance declared void, on the ground that the said agreement was not authorized by a vote of the people of the County, but was obtained by fraud; that it involved a diversion of a trust fund, and a surrender by agents of the whole subject-matter in controversy in a suit of their principal; that the judgment of the Supreme Court of Iowa, in the original suit, was duly affirmed by this court in February, 1870; and that, at an election held in October, 1871, for affirming or disaffirming said agreement, the people of Mills County disaffirmed the same by a vote of 1,031 against 357.

The suit of the Chicago, Burlington and Quincy Railroad Company, successor to the Burlington and Missouri River Railroad Company, against Mills County, the other of the consolidated suits now before us, was brought in May, 1875, to recover the sum of $10,000, which by the said compromise agreement was to be paid by Mills County to the Burlington and Missouri River Railroad Company; and as the answer of the County set up the matters alleged in the petition in the other suit, the two suits were consolidated.

The Mills County District Court decided [564] against the County in both suits, and the Supreme Court of Iowa affirmed the decrees of the district court. The decrees of the Supreme Court are brought here for review, upon the allegation that they are repugnant to the laws and authority of the United States.

The principal federal question which arises in these cases is, whether the compromise agreement made between Mills County and the Burlington and Missouri River Railroad Company was in violation of the Act of Congress by which the swamp and overflowed lands in the State of Iowa were granted to that State. It is alleged that this grant was made for a special purpose, and upon express trust, *viz.*: to be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of levees and drains, as declared in the Act of 1850. It is not our province, on these writs of error, to inquire whether the compromise in question was or was not in violation of the state laws. That question was for the state court to determine; and it has been determined in the negative. Nor is it our province to inquire whether any fraud or excess of authority was committed by the agents of the County in making the compromise. That was also a question for the state court to determine; and it has been determined in the negative. We are only to inquire whether the state laws themselves, by virtue of which the said transaction was allowed and sanctioned, were such a violation of the Act of Congress as to require a reversal of the decrees of the Supreme Court of Iowa.

The statutes in question have already received some consideration at the hands of this court in the cases of *Emigrant Co.* v. *Wright Co.*, 97 U.S., 339 [XXIV., 912], and *Emigrant Co.* v. *Adams Co.*, 100 U. S., 61 [XXV., 568]. Those cases came before us on appeal from the Circuit Court of the United States for the District of Iowa. In both of them, certain contracts for the purchase of swamp and overflowed lands from the County authorities were assailed by charges of fraud, and as not being in conformity with the statutes of Iowa; and those questions were necessarily discussed. It was also contended that the disposition of the lands operated as a diversion of the fund, in violation of the original grant. In the first case, the contract was declared to be void for actual fraud of the grossest character; and the other questions were not [565] fully considered. In the latter case, this court did not consider the evidence of fraud as sufficient to avoid the purchase; and this rendered it necessary to examine the question of repugnancy between the state laws and the Act of Congress with more care. On the first consideration of the case, we were disposed to think that the Act of Assembly of the State of Iowa, passed in 1858, by which the several counties owning swamp and overflowed lands were authorized to devote the lands or the proceeds thereof either in whole or in part, to the erection of public buildings for the purpose of education, the building of bridges, roads and highways, or for building institutions of learning, or for making railroads through the County, was repugnant to the provisions of the Act of Congress, as authorizing a diversion of the fund from its proper purposes; and that this repugnancy rendered such dispositions of the lands void. But, on a reconsideration of the subject, we were inclined to modify our first impressions. The following extract from the opinion then delivered will show the final view which we took of the subject: "The argument against the validity of the scheme (namely: that created by the Act of 1858) is, that it effects a diversion of the proceeds of the lands from the objects and purposes of the congressional grant. These were declared to be to enable the State to reclaim the lands by means of levees and drains. The proviso of the 2d section of the Act of Congress declared that the proceeds of the lands, whether from sale or direct appropriation in kind, should be applied exclusively, as far as necessary, to these purposes. This language implies that the State was to have full power of disposition of the lands; and only gives direction as to the application of the proceeds, and of this application, only 'as far as necessary' to secure the objects specified. It is very questionable whether the security for the application of the proceeds thus pointed out does not rest upon the good faith of the State, and whether the State may not exercise its discretio n in that behalf without being liable to be called to account, and without affecting the titles to the lands disposed of. At all events, it would seem that Congress alone has the power to enforce the conditions of the grant, either by a revocation thereof, or other suitable action, in a clear case of violation of the conditions And as the application of the proceeds to the [566] named objects is only prescribed 'as far as necessary,' room is left for the exercise by the State of a large discretion as to the extent of the necessity." P. 69.

Upon further consideration of the whole subject, we are convinced that the suggestion then made, that the application of the proceeds of

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these lands to the purposes of the grant rests upon the good faith of the State, and that the State may exercise its discretion as to the disposal of them is the only correct view. It is a matter between two sovereign powers; and one which private parties cannot bring into discussion. Swamp and overflowed lands are of little value to the Government of the United States, whose principal interest in them is to dispose of them for purposes of revenue; whereas, the state governments, being concerned in their settlement and improvement; in the opening up of roads and other public works through them; in the promotion of the public health by systems of drainage and embankment, are far more deeply interested in having the disposal and management of them. For these reasons, it was a wise measure on the part of Congress to cede these lands to the States in which they lay, subject to the disposal of their respective Legislatures; and although it is specially provided, that the proceeds of such lands shall be applied, "as far as necessary," to their reclamation by means of levees and drains, this is a duty which was imposed upon and assumed by the States alone, when they accepted the grant; and whether faithfully performed or not, is a question between the United States and the States; and is neither a trust following the lands, nor a duty which private parties can enforce as against the State.

We are, therefore, of opinion, that the Act of Congress cannot be invoked by the County of Mills for the purpose of showing that its provisions have been violated by the state laws, under which alone the County itself can set up any title to the lands, and by virtue of which, as decided by the state court, it has disposed of them for railroad purposes.

But it is contended that the decision of this court, rendered in February, 1870, affirming the decree in the original suit, and adjudging the title of the lands to be in Mills County, and [567] not in the Burlington and Missouri River Railroad Company, is rendered null and ineffective by the decrees of the Supreme Court of Iowa in these cases; and, hence, that these decrees are against the right of Mills County as established by authority of the Supreme Court of the United States, and ought for that cause to be reversed. We do not think that this result necessarily follows. The compromise agreement of 1868 was made whilst the writ of error in that original suit was pending in this court, and before the cause was heard. That compromise settled the matters in difference between the parties. There may have been reasons, independent of the controversy relating to the particular lands in question in that suit, why it was desirable to have the legal questions involved therein settled by the judgment of this court. The County of Mills and the Railroad Company may have been respectively interested in other lands similarly situated in respect to title as the lands involved in that suit. But if this were not so, the result would only be that the litigation was continued here after the parties had adjusted their rights by agreement; an improper proceeding, undoubtedly, but one which would not abrogate or render null the agreement itself, unless the parties voluntarily waived and abandoned it. That they did not waive or abandon it is manifest from the fact, that deeds of conveyance were executed by the county to the Railroad Company in pursuance of the compromise agreement after the decision of this court was rendered; namely, one deed dated September 6, 1870, for 3,560 acres; and another deed dated June 19, 1871, for 240 acres.

We are, therefore, of opinion, that the decrees made by the Supreme Court of Iowa in these cases do not violate any Act of Congress, nor disaffirm the judgment of this court, nor impair any right, title or immunity which the County of Mills has a right to claim under any authority of the United States. *The said decrees must, therefore, be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 713.

S. V. TREDWAY ET AL., *Appts.*, *v.* CHARLES W. SANGER.

(See S. C., 17 Otto, 323-325.)

Indorsee of note secured by mortgage, when may sue.

If a promissory note, negotiable by the law merchant, is made by a citizen of one State to a citizen of the same State, and secured by a mortgage from the maker to the payee, an indorsee of the note who is a citizen of another State can, since the Act of 1875, sue in the courts of the United States to foreclose the mortgage, and obtain a sale of the mortgaged property.

[No. 249.]

Submitted Apr. 13, 1883. Decided Apr. 23, 1883.

APPEAL from the Circuit Court of the United States for the District of California.

The bill in this case was filed in the court below, by the appellee, to foreclose a mortgage, given to secure two notes made by appellants, residents of California, to Chas. McLaughlin, resident also of California which notes the petition alleges were assigned to one Dillon, and by Dillon assigned to Sanger, the complainant, who was at the time of the commencement of this action a resident of Pennsylvania.

The defendants filed their plea in abatement, claiming that the assignments were made solely to give the court jurisdiction of this action, and showing that the original payee of the notes was a resident of California.

The court below found the plea not true and insufficient, and entered a decree in favor of the complainant for $6,982.52, and ordered a sale of the mortgaged premises. Whereupon, the defendants appealed to this court.

The question involved herein, is the jurisdiction of the Circuit Court to hear and determine this action.

Mr. **A. Chester**, for appellants.

Messrs. **Henry Beard** and **C. H. Arnes**, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

There is but a single question presented by this appeal, to wit: whether, if a promissory note, negotiable by the law merchant, is made by a citizen of one State to a citizen of the same

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State, and secured by a mortgage from the maker to the payee, an indorsee of the note can, since the Act of March 3, 1875, ch. 137 [18 Stat. at L., 470], 1 Supp. R. S., 173, sue in the courts of the United States to foreclose the mortgage, and obtain a sale of the mortgaged property.

It was held in *Sheldon* v. *Sill*, 8 How., 441, that such a suit could not be maintained under the 11th section of the Judiciary Act of 1789 [1 Stat. at L., 73], because in equity the mortgage was but an incident of the debt, and as the indorsee could not sue on the note, he could not sue to enforce the mortgage. The language of *Mr. Justice* Grier, speaking for the court in that case, is this (p. 450): "The complainant in this case is the purchaser and assignee of a sum of money, a debt, a chose in action, not of a tract of land. He seeks to recover by this action a debt assigned to him. He is, therefore, the 'assignee of a chose in action,' within the letter and spirit of the Act of Congress under considera-
[325] tion, and cannot support this action in the Circuit Court of the United States, where his assignor could not." This clearly implies that if a suit could be brought on the note, it could for the foreclosure of the mortgage, should there be no other objection to the jurisdiction than the citizenship of the payee and maker.

In the Judiciary Act of 1789 it was expressly provided that the circuit courts could not take cognizance of a suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the contents, if no assignment had been made, except in cases of foreign bills of exchange. The Act of 1875, however, removes this restriction in suits on "promissory notes negotiable by the law merchant;" and now the jurisdiction in such suits is made to depend on the citizenship of the parties as in other cases.

Since, therefore, the indorsee could have sued in the circuit court on the note now in question, it follows that, as there is no objection to the jurisdiction other than the citizenship of the original payee, the suit to foreclose the mortgage was properly brought.

The decree is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 143.

MARY E. MYERS ET AL., *Plffs. in Error*,
v.
FREDERICK J. SWANN ET AL.

(See S. C., 17 Otto, 546-548.)

Removal of cause—local prjeudice Act.

1. An application for the removal of a cause from a State to a Federal Court under the Act of 1875 in a suit begun before the Act was passed must be made at or before the term at which the cause could be first tried after that Act went into operation.

2. Under the local prejudice Act there can be no removal unless all the necessary parties on one side of the suit are citizens of different States from those on the other.

[No. 252.]

Submitted Apr. 12, 13, 1883. Decided Apr. 23, 1883.

NOTE.—*Removal of causes to U. S. Courts under Act of March 2, 1867, for local prejudice.* See *note* to Gaines v. Fuentes, 92 U. S., XXIII., 524.

IN ERROR to the Circuit Court of the United States for the Eastern District of North Carolina.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **Franklin H. Mackey**, *T. T. Crittenden* and *W. S. Mason*, for plaintiffs in error:

The real controversy is between citizens of different States, and the case is within the constitutional grant of federal judicial power, notwithstanding some of the adversary parties may happen to be citizens of the same State.

Donohoe v. *Mariposa Land Co.*, 5 Sawy., 170; Dillon, Rem. Causes, 30; *Wood* v. *Davis*, 18 How., 467 (59 U. S., XV., 460); *Removal Cases*, 100 U. S., 457 (XXV., 593); *Barney* v. *Latham*, 103 U. S., 205 (XXVI., 514). (The decision in this case rendered in October Term, 1880, disposes, we think, of all the questions involved in the case at bar; *Hewitt* v. *Phelps*, 105 U. S., 393 (XXVI., 1072).

Mr. **Samuel F. Phillips**, for defendant in error:

This application to remove, which was made in March, 1878, after the cause had been removed for trial to another county in North Carolina, and also after it had been tried and such trial had been set aside in the State Supreme Court, can in no event rest upon the removal Act of 1875. The latest opportunity for removal under the Act of 1875, was at March Term, 1875, of New Hanover Court.

Removal Cases, 100 U. S., 457 (XXV., 593); *Bible Society* v. *Grove*, 101 U. S., 610 (XXV., 847); *Babbitt* v. *Clark*, 103 U. S., 606 (XXVI., 507).

The action was not removable under the 3d clause of section 639.

That clause does not warrant a question as to how many and who of the parties to a cause are merely formal.

In this case, the State Court assumed to say that so many of the defendants as are citizens of North Carolina are merely formal parties, and thereupon to hold that, for the purpose of removal, Myers alone is defendant. *Swann* v. *Myers*, 79 N. C., 101.

Considering the scope of the plaintiffs' action (and that is the proper test to be applied), the citizens of North Carolina who are defendants, are necessary parties.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a writ of error brought under the Act of March 3, 1875, ch. 137 [18 Stat. at L., 470], to reverse an order of the Circuit Court remanding a cause removed from a State Court under the third subdivision of section 639 of the Revised Statutes, on account of prejudice and local influence. At the time the application for removal was made in the State Court, the suit was being prosecuted by citizens of North Caro- [547]
lina, as plaintiffs, against George Myers, then in life, a citizen of New York, and certain other persons, all citizens of North Carolina, to recover the possession of a lot in Wilmington, occupied by Myers, and to obtain a conveyance of the legal title held by the other defendants. The suit was originally begun on the 19th of May, 1873, against Myers alone, to recover the possession and damages for the detention; but, on the 29th of May, 1877, an amended complaint

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was filed, not changing the action as against Myers but bringing in the other defendants, who, it was alleged, held the legal title, and asking for a conveyance from them. Myers alone answered the amended complaint on the 8th of September, 1877, and on the 12th of March, 1878, petitioned for a removal, filing an affidavit to the effect that he had reason to believe and did believe that, from prejudice or local influence he would not be able to obtain justice in the State Court. The State Court of original jurisdiction refused to allow a removal, but on appeal to the Supreme Court this was overruled, on the ground that the new defendants were merely nominal parties as trustees, and thereupon the cause was docketed in the Circuit Court of the United States on the 18th of November, 1878. In November, 1879, the Circuit Court, "Being of opinion that the action in its present form" could not be maintained in that court, remanded the suit to the State Court, and from that order this writ of error was taken.

As the suit was pending in the State Court against Myers from 1873 to 1878, his application for removal was too late to secure the benefit of the separable controversy provision in the Act of 1875. Such an application should have been made at or before the Term at which the cause could be first tried, or rather, as this suit was begun before the Act of 1875 was passed, it should have been at or before the Term at which the cause could be first tried after that Act went into operation. *Removal Cases*, 100 U. S., 473 [XXV. 599]

Under the local prejudice Act there can be no removal unless all the necessary parties on one side of the suit are citizens of different States from those on the other. This was decided in *Vannevar* v. *Bryant*, 21 Wall., 41 [88 U. S., XXII., 476]. It is not enough that there be a separable controversy between parties having [548] the necessary citizenship, nor that the principal controversy is between citizens of different States. If there are necessary parties on one side of the suit, citizens of the same State with those on the other, the Circuit Court cannot take jurisdiction.

There is no doubt that in this case the principal controversy is between Myers and the plaintiffs, but the relief that is asked cannot be granted without the presence of all the defendants. The possession of the land is in Myers or his heirs, but the legal title is thought to be in the other defendants. It is true that the other defendants are mere trustees, who may be compelled to convey if they do have the title, but one of the objects of the suit is to get such a conveyance. This part of the relief asked for cannot be had unless the trustee defendants are parties. The record shows that they refused to join as plaintiffs. This implies that they deny the trust and leave the plaintiffs to their remedies. In effect they have put themselves on the record as contending that the conveyance made by their ancestor passed the title to Myers and discharged the trust. This also is claimed by Myers. Consequently it appears that, under the ruling in *Gardner* v. *Brown*, 21 Wall., 41 [88 U. S., XXII., 527], the plaintiffs required the presence of the trustee defendants in order to get Myers out of possession even. Without the legal title they could not recover in ejectment against him. The trustee defendants were unwilling to join with the plaintiffs. Therefore the plaintiffs had to make them defendants in order to recover at all. It follows that the trustee defendants were not only not nominal parties, but, if they actually did hold the legal title, as is assumed, necessary parties.

The order remanding the cause was right, and it is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

PARKERSBURG AND OHIO RIVER TRANSPORTATION COMPANY, *Appl.*,

v.

CITY OF PARKERSBURG ET AL.

(See S. C., 17 Otto, 691-711.)

City ordinance prescribing wharf charges—duty of tonnage—question of fact—state jurisdiction of wharves—exorbitant wharfage—remedy.

*The City of Parkersburg, in West Virginia, built a wharf and established certain rates of wharfage which the P. & O. Transportation Co. complained of as extortionate, and as being merely a pretext for levying a duty of tonnage; the Company thereupon filed a bill in the Circuit Court of the United States to restrain proceedings in a suit brought in the State Court to collect the wharfage, and prayed that the wharfage ordinance might be declared void, and for other relief; held:

1. That, as the ordinance on its face imposed charges of wharfage only, though these charges might be unreasonable and exorbitant, the court will not entertain an averment that they were not intended as wharfage, but as a duty of tonnage. An inquiry into the secret intent of the body imposing the charge, is inadmissible; whether it is one thing or the other must be determined by the ordinance or regulation itself.

2. The ordinance in this case imposed certain rates of wharfage on vessels "That may discharge or receive freight, or land on or anchor at or in front of any public landing or wharf belonging to the City, for the purpose of discharging or receiving freight;" held, that the ordinance only intended to charge for the use of a wharf, and not for entering the port, or lying at anchor in the river.

3. Wharfage is a charge for the use of a wharf, made by the owner therefor by way of rent, or compensation; a duty of tonnage is a tax or duty charged for the privilege of entering, or loading or lying in, a port or harbor, and can only be imposed by the government.

4. Whether a charge is wharfage or a duty of tonnage, is a question, not of intent, but of fact and law; of fact, whether it is imposed for the use of a wharf, or for the privilege of entering a port; of law, whether, according as the fact is, it is wharfage or a duty of tonnage.

5. That, although wharves are related to commerce and navigation as aids and conveniences, yet being local in their nature, and requiring special regulations for particular places, in the absence of Congressional legislation on the subject, the regulation thereof properly belongs to the States in which they are situated.

6. That a suit will not lie in the Circuit Court of the United States for relief against exorbitant wharfage, as a case arising under the Constitution or laws of the United States, even though it be alleged that the wharfage was intended as a duty of tonnage; the alleged intent not being traversable.

[No. 172.]

Argued Feb. 2, 1883. Decided Apr. 30, 1883.

*Head notes by *Mr. Justice* BRADLEY.

NOTE.—*Right to construct wharves; right to charge wharfage; lien for.* See *note* to *Ex parte* Easton, 95 U. S., XXIV., 373.

Tonnage tax. See *note* to Steamship Co. v. Tinker, 94 U. S., XXIV., 118.

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APPEAL from the Circuit Court of the United States for the District of West Virginia.

The history and facts of the case appear in the opinion of the court.

Messrs. **C. W. Moulton,** *M. I. Southard* and *T. W. Bailey*, for appellants:

The terms of this ordinance are within the definition of a tax upon commerce, as given by this court in *Cannon* v. *N. O.*, 20 Wall., 577 (87 U. S., XXII., 417); see, also, *Packet Co.* v. *Keokuk*, 95 U. S., 80 (XXIV., 377).

An ordinance violates the Constitution of the United States if it amounts to an assessment for arriving at and departing from a town, without reference to the use of wharves.

Packet Co. v. *St. Paul*, 3 Dill., 454.

The illegality or unreasonableness of such charges is open to judicial inquiry and determination, and when found to be illegal or excessive, and to have been paid under protest, they may be recovered back.

Tonnage Tax Cases, 12 Wall., 209 (79 U. S., XX., 372); *Packet Co.* v. *St. Paul*, 3 Dill., 454.

Messrs. **W. A. Cook** and *C. C. Cole*, for appellees:

These Acts and the ordinance of the City of Parkersburg, passed in pursuance thereof, are not in conflict with the Constitution or any law of the United States, and are, therefore, valid.

Packet Co. v. *Catlettsburg*, 105 U. S., 559 (XXVI., 1169); *Packet Co.* v. *Keokuk* (*supra*); *Packet Co.* v. *St. Louis*, 100 U. S., 423 (XXV., 688).

If there were any just ground of complaint on account of unreasonableness of charges, the remedy is at law and not in equity.

Packet Co. v. *Catlettsburg* (*supra*); High, Injunc., sec. 97, *et seq.*

Mr. Justice **Bradley** delivered the opinion of the court:

This is an appeal from a decree dismissing a bill in chancery on demurrer. The complainant below, who is appellant here, according to the statements of the bill, is a Corporation of West Virginia, organized for the purpose of carrying on a transportation business on the Ohio River, together with a general wharf and commission business, its principal office being located at the City of Parkersburg. It is the owner of several steamboats, duly enrolled and licensed under the Acts of Congress, and plying between Pittsburg, Wheeling, Parkersburg, Cincinnati and Covington. The bill was filed against the City of Parkersburg and its recorder and wharfmaster, to restrain the collection of certain demands for wharfage, and to recover back money previously paid on that account. It is contended that the city ordinance, under which the wharfage was demanded, is in conflict with the Constitution of the United States; and this is the ground on which the jurisdiction of the Circuit Court of the United States was invoked. The bill alleges that many years ago the City of Parkersburg caused to be constructed on the banks of the Ohio River at that place, a wharf or public landing, to be used by the various steamboats trading on the river and landing at said City; and that said wharf is still controlled by the City under a certain ordinance passed by the mayor and common council in March, 1865, a copy of [693] which was filed with the bill. By this ordinance it is ordained that every steamboat, keelboat, barge, flatboat and flat, except ferry-boats, that may discharge or receive freight, or land on or anchor at or in front of any public landing or wharf belonging to the City, or at which the City may lawfully charge and receive wharfage, for the purpose of discharging or receiving freight, shall pay the City for wharfage the following sums or rates for each respectively, to wit: on steamboats of less than one hundred tons burden, $3 for the first twenty-four hours or any part thereof, and $1.50 for every subsequent twenty-four hours or any part thereof. On steamboats of one hundred and less than one hundred fifty tons, $3.75 for the first, and $2 for every subsequent twenty-four hours or any part thereof; and so on, regulating the charges according to the tonnage, and reducing them where only a small quantity of freight is discharged or received. Provision is then made for recovering the wharfage by bringing the parties before the recorder or a justice of the peace.

The bill alleges that, under and by virtue of this ordinance, the City of Parkersburg has, ever since the organization of the complainant, required it and its agents to pay the charges provided in the ordinance for all the steamboats owned or controlled by it, that have discharged or received freight or passengers, or landed at the said wharf, which payments have been made under protest.

The bill then makes the following charge:

"Your orator further alleges that, as it is advised and believes, the said ordinance is wholly null and void, and is in conflict with those provisions of the Constitution of the United States relating to the regulations of interstate commerce and prohibiting any State, without the consent of Congress, from laying any duty of tonnage; and that the operation of the same tends to and does abridge the free use of the Ohio River by your orator, to which it is legally entitled by virtue of the enrollment and license of its steamboats under the laws of the United States as aforesaid. As by reference to said ordinance will appear, the rates of charges made by said City of Parkersburg upon steamboats landing at or in front of the wharf of said City are based upon and regulated solely by the 'tons [694] burden' of said boats, and said charges are made indiscriminately, whether the boat lands or anchors at or in front of any public landing or wharf of said City. And your orator further avers that the Congress of the United States has never given its consent to the passage or enforcement of said ordinance, but, on the contrary, tonnage duties are expressly prohibited by section 4220 of the Revised Statutes of the United States to be levied upon enrolled or licensed vessels trading from one port in the United States to another port within the same."

The bill further alleges that the rates charged by the ordinance are unreasonable, extortionate and oppressive, and are made and levied as a tax upon commerce for the express purpose, under the assumed pretense of wharfagedues, of replenishing its treasury and increasing its revenue; that the cost of the wharf has been collected over and over again; that it is allowed to remain in bad repair; and that the wharfage dues collected have been used for other city purposes, paying its debts, etc.; that, in the year 1876 over $2,700 was collected from various boats and vessels, less than $50 of which

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was spent on the wharf; and the same thing in other years. These facts are stated for the purpose of showing the extortionate character of the ordinance, and that it is used for the purpose of laying duties and imposts on imports and exports.

The bill further shows that, for the recent refusal of the complainant to pay these wharfage charges, the City of Parkersburg has instituted suits against it before the recorder under said ordinance; wherefore it prays a decree to restrain all further proceedings against the complainant by said suits or otherwise, from enforcing any judgment recovered by the City for the violation of said ordinance, or otherwise interfering with the rights of the complainant to the free use of the Ohio River by means of its steamboats; and for the recovery of moneys already exacted from it under said ordinance, amounting to over $2,000; and that the ordinance may be declared null and void.

To this bill the defendants demurred, and upon argument of the demurrer the bill was dismissed. From that decree, the present appeal is taken.

[695] If the 720th section of the Revised Statutes, which declares that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State," applies to suits originally brought in the circuit courts by virtue of the Act of March 3, 1875 [18 Stat. at L., 470], in cases arising under the Constitution or laws of the United States, it is clear that so much of the bill in this case as prays for an injunction to restrain legal proceedings already instituted before the recorder of Parkersburg before it was filed, cannot be maintained. But that portion of the bill which seeks to have the wharfage ordinance declared void, and to restrain any further collections under it, and any further interference with the right of the complainant to the free navigation of the Ohio River, is not open to this objection; and perhaps the demand for a return of the wharfage already paid, although itself of a legal nature, may come in as incidental to the other relief. The main question to be solved is, whether, as contended by the complainant, the ordinance is void as being in violation of the Constitution or any law of the United States.

It is conceded by the bill that the wharf for the use of which the charges are made, though public in the sense of being open to the use of the public, belongs to the City of Parkersburg; that it was built and is maintained by the City as its property; and the ordinance on its face shows that the charges imposed for landing at or using it are imposed as and for wharfage and nothing else. It may be extortionate in amount but it is wharfage. The allegations of the bill, that it is not real wharfage but a duty of tonnage, in the name and under the pretext of wharfage, cannot be received against the terms of the ordinance itself. This would open the door to an inquiry, in every case of wharfage alleged to be unreasonable, which would lead to great inconvenience and confusion. Neither courts nor juries would have any practicable criterion by which to judge of the secret intent with which the charge was made, whether as wharfage or as a duty of tonnage. Such an inquiry, if allowed, would bring into question not only the intent of municipal, but of legislative bodies. When the question is one of reasonable or unreasonable wharfage, we know what to do with it. It is a question known to the laws; and the modes of redress for unreasonable wharf- [696] age, are fixed and settled. But whether a charge imposed is a charge of wharfage or a duty of tonnage must be determined by the terms of the ordinance or regulation which imposes it. They are not the same thing; a duty of tonnage is a charge for the privilege of entering or trading or lying in a port or harbor; wharfage is a charge for the use of a wharf. Exorbitant wharfage may have a similar effect as a burden on commerce as a duty of tonnage has; but it is exorbitant wharfage and not a duty of tonnage; and the remedy for the one is different from the remedy for the other. The question whether it is the one or the other is not one of intent, but one of fact and law; of fact, as whether the charge is made for the use of a wharf, or for entering the port; of law, as whether, according as the fact is shown to exist, it is wharfage or a duty of tonnage. The intent is not material, and is not traversable. It is not like the case of a deed absolute on its face, but intended as a mortgage; there, the intent is the result of an agreement between the parties, which may be proved, and which it would operate as a fraud on one of the parties not to allow to be proved. Nor is it like the case of a mistake in an instrument, by which the intent of the parties is contravened; in that case, also, the actual agreement between them may be shown for the purpose of correcting the instrument. Nor is it like the case of an intent to deceive or defraud or to commit a crime; there, the intent is a material part of the offense charged; whilst in the present case a supposed intent is suggested for the purpose of making of one act, another and a different act. It is, in truth, more like the case of an averment to contradict the express terms of a written instrument by parol.

It is contended, indeed, that the terms of the ordinance in question show that it was intended to exact a duty of tonnage and is not confined to the prescription of charges for wharfage; and the words "anchor at *or in front of* any public landing or wharf," as describing vessels to be charged, are relied on as sustaining this view, since, as contended, they embrace vessels not using the wharf. But we do not understand this to be the meaning and effect of the words. The whole phrase should be taken together, and thus read, it is evidently confined to vessels using or intending to use the wharf. [697] The passage consists of two distinct clauses: 1, "Every steamboat that may discharge or receive freight at any public landing or wharf;" 2, "Or that may land on or anchor at or in front of any public landing or wharf for the purpose of discharging or receiving freight." The last clause as well as the first evidently points to those vessels only which land or anchor at or before a wharf for the purpose of using it. Sometimes it may happen that the depth of water in the river, or intervening vessels lying at the wharf, will not allow a vessel to get close alongside of the wharf, and yet she may desire to connect with it in some manner, by planks or by the deck of an intervening boat, barge or float, so as to discharge or receive freight and passengers upon or from the wharf. Such cases are properly described by the language used;

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and we have no evidence that any other construction has been given to it. The complainant does not allege that the supposed obnoxious application of the ordinance has ever been made against any of its vessels, or against any vessels. The charge of the bill is only "That, under and by virtue of said ordinance, the City of Parkersburg has, ever since the time of organization of your orator, required your orator, its agents and servants, to pay to it the charges provided in said ordinance for all steamboats owned or controlled by your orator that have discharged or received freight or passengers, or landed at its said wharf." There is no complaint that wharfage has been exacted when the complainant's vessels have merely anchored in the stream, or have moored at any other place than the city's wharf; or when they have stopped at or in front of the wharf itself for any other purpose than that of discharging or receiving freight and passengers. This makes the case a very different one from that which was presented in *Cannon* v. *New Orleans*, 20 Wall., 577 [87 U. S., XXII., 417]. There the ordinance objected to imposed levee duties "on all steamboats which shall moor or land in any part of the Port of New Orleans;" and this court could do no otherwise than hold that such an ordinance had the effect of laying a duty of tonnage, against the express prohibition of the Constitution. The same view had previously been taken of an Act of the Legislature of Louisiana, authorizing the port wardens of New Orleans to demand and receive $5 from every vessel arriving in that port, whether called on to [698] perform any service or not. *Steamship Co.* v. *Port Wardens*, 6 Wall., 31 [73 U. S., XVIII., 749]; and of a law of Texas, which required every vessel arriving at the quarantine station of any town on the coast of Texas, to pay $5 for the first hundred tons, and one and a half cents for each additional ton. *Peete* v. *Morgan*, 19 Wall., 581 [86 U. S., XXII., 201]. So, when a law of New York required all vessels of a certain class, which should enter the Port of New York, or load or unload, or make fast to any wharf therein, to pay a certain rate per ton, this was held to be an unconstitutional imposition, because it applied to all vessels whether they used a wharf or not. *Steamship Co.* v. *Tinker*, 94 U. S., 238 [XXIV., 118]. All these were clear cases of duty on tonnage as distinguished from wharfage; and the terms of the ordinances and laws in question were very different from those of the ordinance now under consideration. We think it very clear that the ordinance in question cannot be regarded as imposing any other charge than that of wharfage. The fact that the rates charged are graduated by the size or tonnage of the vessel, is of no consequence in this connection. This does not make it a duty of tonnage in the sense of the Constitution and the Acts of Congress. So we have expressly decided in several recent cases. *Cannon* v. *New Orleans* [*supra*]; *Packet Co.* v. *Keokuk*, 95 U.S., 80 [XXIV., 377]; *Packet Co.* v. *St. Louis*, 100 U.S., 423 [XXV., 688]; *Guy* v. *Baltimore*, 100 U. S., 434 [XXV., 743]; *Packet Co.* v. *Catlettsburg*, 105 U.S., 559 [XXVI., 1169]. When the Constitution declares that "No State shall, without the consent of Congress, lay any duty of tonnage;" and when Congress, in section 4220 of the Revised Statutes, declares that "No vessel belonging to any citizen of the United States, trading from one port within the United States to another port within the United States, or employed in the bank, whale or other fisheries, shall be subject to tonnage, tax or duty, if such vessel be licensed, registered or enrolled;" they mean by the phrases, "duty of tonnage," and "tonnage tax or duty," a charge, tax or duty on a vessel for the privilege of entering a port; and although usually levied according to tonnage, and so acquiring its name, it is not confined to that method of rating the charge. It has nothing to do with wharfage, which is a charge against a vessel for using or lying at a wharf or landing. The one is im- [699] posed by the government, the other by the owner of the wharf or landing. The one is a commercial regulation, dictated by the general policy of the country upon considerations having reference to its commerce or revenue; the other is a rent charged by the owner of the property for its temporary use. It is obvious that the mode of rating the charge in either case, whether according to the size or capacity of the vessel or otherwise, has nothing to do with its essential nature. It is also obvious that, since a wharf is property and wharfage is a charge or rent, for its temporary use, the question whether the owner derives more or less revenue from it, or whether more or less than the cost of building and maintaining it, or what disposition he makes of such revenue, can in no way concern those who make use of the wharf and are required to pay the regular charges therefor; provided, always, that the charges are reasonable and not exorbitant.

It is, undoubtedly, a general rule of law, in reference to all public wharves, that wharfage must be reasonable. A private wharf, that is, a wharf which the owner has constructed and reserves for his private use, is not subject to this rule; for, if any other person wishes to make use of it for a temporary purpose, the parties are at liberty to make their own bargain. That such wharves may be had and owned, even on a navigable river, is not open to controversy. It was so decided by this court in the case of *Dutton* v. *Strong*, 1 Black, 23 [66 U. S., XVII., 29], and in *Yates* v. *Milwaukee*, 10 Wall., 497 [77 U. S., XIX., 984]. Whether a private wharf may be maintained as such, where it is the only facility of the kind in a particular port or harbor, may be questioned. Sir Matthew Hale says, "If the King or subject have a public wharf unto which all persons that come to that port must come and unlade or lade their goods as for the purpose because they are the wharves only licensed by the King, according to the Statutes of 1 Eliz., cap. 11, or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc.; neither can they be inhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the King's license or charter." Hargrave, L. T., 77.

Be this, however, as it may, it is an undoubted rule of universal application that wharf- [700] age for the use of all public wharves must be reasonable. But then the question arises: by what law is this rule established and by what law can it be enforced? By what law is it to be decided whether the charges imposed are, or

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are not, extortionate? There can be but one answer to these questions. Clearly, it must be by the local municipal law, at least until some superior or paramount law has been prescribed. At Parkersburg, it is the law of West Virginia. The rule referred to is a rule of the common law undoubtedly; but it has force in West Virginia because the common law is the law of that State, and not because it is the law of the United States. The courts of the United States do not enforce the common law in municipal matters in the States because it is federal law, but because it is the law of the State.

We have said that the reasonableness of wharfage must be determined by the local law until some paramount law has been prescribed. By this we mean that, until the local law is displaced or overruled by paramount legislation adopted by Congress, the courts have no other guide, no other law to administer on the subject than the local or state law. Our system of government is of a dual character, state and federal. The States retain general sovereignty and jurisdiction over all local matters within their limits; but the United States, through Congress, is invested with supreme and paramount authority in the regulation of commerce with foreign Nations and among the several States. This has been held to embrace the regulation of the navigable waters of the United States, of which the Ohio River is one. In the exercise of this authority over navigable waters, Congress has, from the commencement of the government, erected light-houses, break-waters and piers, not only on the sea coast but in the navigable rivers of the country; and has improved the navigation of rivers by dredging and cleaning them, and making new channels and jetties, and adopting every other means of making them more capable of meeting the growing and extending demands of commerce. It has extended its supervision in an especial manner to the Ohio River. Amongst other things, it has overcome the obstacle presented by the falls at Louisville [701] by the construction of an expensive canal. It has created ports of delivery along the river, of which the City of Parkersburg itself is one, and others are at Pittsburgh, Wheeling, Cincinnati, Louisville, Madison, Jeffersonville, New Albany, Evansville, Paducah and Cairo. It has regulated the bridges which have been thrown across the river by authority of the States. It authorized the Wheeling Bridge to stand, after this court had declared it to be a nuisance, requiring the officers of all vessels to regulate their pipes and chimneys so as not to interfere with the bridge, 10 Stat. at L., 112; thus extending its common protection to commerce by land and commerce by water. It required the Newport and Cincinnati Bridge to be removed or placed at a greater height above the water, after having been constructed in accordance with the laws of the States and of the United States. 16 Stat. at L., 572.

Now wharves, levees and landing places are essential to commerce by water, no less than a navigable channel and a clear river. But they are attached to the land; they are private property, real estate; and they are primarily, at least, subject to the local state laws. Congress has never yet interposed to supervise their administration; it has hitherto left this exclusively to the States. There is little doubt, however, that Congress, if it saw fit, in case of prevailing abuses in the management of wharf property, abuses materially interfering with the prosecution of commerce, might interpose and make regulations to prevent such abuses. When it shall have done so, it will be time enough for the courts to carry its regulations into effect by judicial proceedings properly instituted. But until Congress has acted, the courts of the United States cannot assume control over the subject as a matter of federal cognizance. It is the Congress, and not the judicial department, to which the Constitution has given the power to regulate commerce with foreign Nations, and among the several States. The courts can never take the initiative on this subject.

There are cases, it is true, which are so national in their character and in which it is so essential that a general or national rule should exist, that any interference by the State Legislatures therewith are justly deemed to be an invasion of the power and authority of the General Government; and in such cases the courts will interpose to prevent or redress the commission of acts done or attempted to be done under [702] the authority of such unconstitutional laws. In such cases, the non-action or silence of Congress, will be deemed to be an indication of its will, that no exaction or restraint shall be imposed. Such is the import of the various passenger cases in which this court has pronounced unconstitutional, any tax, duty or other exaction imposed by the States upon emigrants landing in the country. Such is also the import of those cases in which it has been held that state laws imposing discriminating burdens upon the persons or products of other States, are unconstitutional; it being deemed the intent of Congress, that interstate commerce shall be free, where it has not itself imposed any restrictions thereon. See, *Passenger Cases*, 7 How., 283, 462; *Cooley* v. *Bd. of Wardens*, 12 How., 319; *Gilman* v. *Philadelphia*, 3 Wall., 713 [70 U. S., XVIII., 96]; *Crandall* v. *Nev.*, 6 Wall., 42 [73 U. S., XVIII., 747]; *Ward* v. *Maryland*, 12 Wall., 418, 432 [79 U. S., XX., 449, 453]; *State Freight Tax Case*, 15 Wall., 232, 279 [82 U. S., XXI., 146, 162]; *Welton* v. *Mo.*, 91 U. S., 275 [XXIII., 347]; *Henderson* v. *Mayor of N. Y.*, 92 U. S., 259, 272 [XXIII., 543, 549]; *People* v. *Compagnie Générale Transatlantique* [*ante*, 383].

But the case before us is not one of the kind referred to. Though the use of public wharves may be regulated by Congress as a part of the commercial power, it certainly does not belong to that class of subjects which are in their nature national, requiring a single uniform rule; but to that class which are in their nature local, requiring a diversity of rules and regulations. To quote the words of *Mr. Justice* Curtis in *Cooley* v. *Port Wardens*, 12 How., 319, "The power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question (which was pilotage), as imperatively demanding that diversity which alone can meet the local necessities of navigation. * * * Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan

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of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws [703] for the regulation of pilots and pilotage is plain. The Act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits."

No words could be more fitly applied to the subject of the regulation of wharves than are here used by the court in reference to pilotage. It is true no Act of Congress has relegated the subject of wharfage to the States, as was done in the case of pilotage; but this was not necessary; the regulation of wharves belongs *prima facie* and in the first instance to the States, and would only be assumed by Congress when its exercise by the States is incompatible with the interests of commerce; and Congress has never yet assumed to take that regulation into its own hands, or to interfere with the regulation of the States.

The power of the States to legislate in matters of a local character, where Congress has not by its own action covered the subject, is quite fully discussed by *Mr. Justice* Field in delivering the opinion of this court in *Mobile Co.* v. *Kimball*, 102 U. S., 691 [XXVI., 238], where the distinction taken in *Cooley* v. *Port Wardens*, between those subjects which are national in their character and require uniformity of regulation, and those which are local and peculiar to particular places, is commented upon and enforced. Amongst other things, it is there said: "Where, from the nature of the subject or the sphere of its operation the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress: for when that acts, the state authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that [704] nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by state authority." See, also, the remarks of the *Chief Justice* in *Hall* v. *DeCuir*, 95 U. S., 488 [XXIV., 548].

It is not necessary to cite other cases. The principle laid down in *Cooley* v. *Port Wardens* has become fully recognized and established in our jurisprudence; and it is manifest that no subject can be more properly classified as local in its nature, and as requiring the application of local regulations, than that of wharves and wharfage.

From this view, it is plain that the courts of the United States have no authority to ignore the state laws and regulations on the subject of wharves and wharfage, and to declare them invalid by reason of any supposed repugnancy to the Constitution or laws of the United States. As already remarked, the courts cannot take the initiative in this matter. Congress must first legislate before the courts can proceed upon any such ground of paramount jurisdiction. If the rates of wharfage exacted are deemed extortionate or unreasonable, the courts of the United States, in cases within their ordinary jurisdiction, as well as the courts of the States, must apply and administer the state laws relating to the subject; and these laws will probably, in most cases, be found to be sufficient for the suppression of any glaring evils. At all events, there is not, at present, any federal law on the subject by which relief can be obtained.

In the various bridge cases that have come before the courts of the United States, where bridges, or dams, have been erected by state authority across navigable streams, the refusal to interfere with their erection has always been based upon the absence of prohibitory legislation by Congress, and the power of the States over the subject in the absence of such legislation. Where the regulation of such streams by Congress has been only of a general character, such as the establishment of ports and collection districts thereon, it has been held that the erection of bridges, furnished with convenient draws, so as not materially to interfere with navigation, is within the power of the States and not repugnant to such general regulation. The former cases on this subject were reviewed in [705] *Trans. Co.* v. *Chicago* [*ante*, 442], decided at the present Term of this court, and reported in 2 Sup. Ct. Rep., 185.

It is believed that no case can be found in which state laws, or regulations under state authority, on subjects of a local nature, have been set aside on the ground of repugnance to the power of regulating commerce given to Congress, unless it has appeared that they were contrary to some express provision of the Constitution, or to some Act of Congress, or that they amounted to an assumption of power exclusively conferred upon Congress.

In the case of *Gibbons* v. *Ogden* [9 Wheat., 1], it was held that, as the navigation of all public waters of the United States is subject to the regulation of Congress, a license granted under the laws and by the authority of the United States to a steamboat to carry on the coasting trade, entitled such boat to navigate all such waters, notwithstanding the existence of a state law granting to certain individuals the exclusive right to navigate a portion of said waters lying within the State; and that such exclusive grant was void as being repugnant to the regulation made by Congress. *Chief Justice* Marshall, delivering the opinion of the court in that case, said: "The court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an Act of Congress, and deprived a citizen of a right to which the Act entitles him."

Subsequent cases are to the same effect, amongst which, in addition to those already cited in this opinion, we may refer to *Crandall* v. *Nevada*, 6 Wall., 35 [73 U. S., XVIII., 745]; *Ward* v. *Maryland*, 12 Wall., 482 [79 U. S., XX., 453]; *Welton* v. *Mo.* [*supra*]; *Henderson* v. *Mayor of N. Y.* [*supra*]; and *People* v. *Compagnie Générale Transatlantique*, [*supra*].

The case of *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How., 518, was a peculiar one. The

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Wheeling Bridge, as originally constructed, presented a complete obstacle to the passage of steamboats with high chimneys, such as navigated the Ohio River to and from Pittsburgh; and hence presented a case of interference with navigation analogous to that of the exclusive monopoly granted to Fulton and Livingston by the State of New York, which was the ground of [706] complaint in the case of *Gibbons* v. *Ogden*. But, besides this, it was a case in which this court exercised its original jurisdiction by reason of the character of the parties, a State being the complainant in the suit; and having jurisdiction on this ground, it was competent for the court to decide upon the lawfulness or unlawfulness of the structure in reference, not only to the laws of the United States, but also to the local municipal law, and to the general law relating to the mutual rights of the States. The charter granted to the Wheeling Bridge Company by the State of Virginia, had expressly provided "That, if the said bridge shall be so constructed as to injure the navigation of said river, the said bridge shall be treated as a public nuisance, and shall be liable to abatement upon the same principles and in the same manner that other public nuisances are." In addition to this, in 1789, an Act was passed by the State of Virginia, consenting to the erection of the State of Kentucky out of its territory on certain conditions, among which was one, "That the use and navigation of the River Ohio, so far as the territory of the proposed State, or the territory that shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States," and to this Act the assent of Congress was given. 1 Stat. at L., 189. "This compact," the court said, "by the sanction of Congress, has become a law of the Union." Upon all these grounds, it was held that the State of Pennsylvania, having large interests which were affected by the erection of the bridge, was entitled to a decree for its prostration as a nuisance, unless such alterations should be made in its construction as to leave the navigation of the river unimpaired.

This case, therefore, cannot be relied on, any more than the other cases referred to, to show that the courts of the United States have any peculiar jurisdiction as such, to vindicate the supposed rights of commerce and navigation against the laws of the States, in matters of a local nature, such as the regulation of wharfage is, where no express provision of the Constitution is violated, and no Act of Congress has been passed to regulate the subject. As no Act of Congress has been passed for the regulation of wharfage, and as there is nothing in the Constitution to prevent the States from regulating it, [707] so long as Congress sees fit to abstain from action on the subject, our conclusion is, that it is entirely within the domain and subject to the operation of the state laws.

The effect of this conclusion upon the present case is obvious. The *gravamen* of the bill is really nothing but a complaint against exorbitant rates of wharfage. These rates are established by a municipal body, itself the proprietor of the wharves, and professing to act under the authority of state law. It cannot be supposed that the law authorizes exorbitant charges to be made; but whether the charges exacted are exorbitant or not can only be determined by that law. It is clear, therefore, that the complainant in filing its bill in the United States Court on the ground that the wharfage complained of is in violation of the Constitution or laws of the United States, has totally misconceived its rights, and the proper means of obtaining redress. Unless it has some other ground for coming into the Federal Court, it must seek redress in the state courts; and whether the question of reasonableness of wharfage is submitted to the determination of the one forum, or the other, it is only determinable by the laws of the State within whose jurisdiction the wharf is situated. Since the parties are all citizens of West Virginia, and since the case cannot be sustained as one "arising under the Constitution or laws of the United States," *there was no error in the decree dismissing the bill of complaint. The decree of the Circuit Court is, therefore, affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Harlan**, dissenting:

The City of Parkersburg, which has been created a port of delivery in conformity with the laws of the United States, exacts and collects for the use of its wharf by boats engaged in commerce on the Ohio River, certain fees or dues, called wharfage charges, which, as shown by the ordinance of May 17, 1865, are, in every case, measured by the tonnage or capacity of the boat so using the wharf.

It is conceded by the demurrer to the bill that, from these fees, the City has long since been re-imbursed for the actual cost of constructing the wharf; that the amount, annually collected for its use by boats, is largely in ex- [708] cess of any expense incurred in its maintenance and repair; that the wharf has been permitted to become and remain in bad repair, at times almost unfit for use; that nearly all the money so raised is applied by the City to increase its general revenue, and to payment of its indebtedness; lastly, that the wharfage charges are *unreasonable in amount and oppressive.*

The opinion of the court, if I do not wholly misapprehend it, proceeds upon the broad ground that municipal wharfage charges, even where measured by the tonnage of the boat, and however much in excess of fair and reasonable compensation, are not duties of tonnage within the meaning of the Federal Constitution, nor does their exaction infringe any right given or secured by the Constitution or the existing statutes of the United States. If such charges are, in the case supposed, duties of tonnage, or if their collection violates any right, so given or secured, plainly, then, this is a case arising under the Constitution or laws of the United States and, therefore, one of which the circuit court, under the Act of 1875, could take original jurisdiction, without reference to the citizenship of the parties.

I had supposed, and am still of opinion, that a vessel or boat, duly enrolled and licensed under the laws of the United States, as those of plaintiff in error are conceded to be, and engaged in commerce upon the Ohio River, a public navigable water, is entitled, in virtue of the Constitution and laws of the United States, to enter any port on that stream and, also, to land at any wharf established for public use, without being subjected, apart from mere

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police regulations, to any burden, tax or duty therefor, beyond reasonable compensation to the owner of the wharf for its use. Such I have understood to be the doctrine of this court as announced in *Cannon* v. *N. O.*, 20 Wall., 577 [87 U. S., XXII., 417]; *Packet Co.* v. *Keokuk*, 95 U. S., 80]XXIV., 377]; *Packet Co.* v. *St. Louis*, 100 U. S., 428 [XXV., 690]; *Vicksburg* v. *Tobin*, Id., 430 [XXV., 690].

The court holds that Congress, under the power to regulate commerce with foreign Nations and among the several States may, by statute, provide for the protection, through the courts, of those engaged in commerce upon the public navigable waters of the United States against unreasonable charges for the use of [709] wharves by boats. But without further legislation, specifically directed to that end, the courts, I submit, should adjudge that local regulations, such as those adopted by the City of Parkersburg, come within the prohibition upon the States to levy duties of tonnage and are, besides, inconsistent with the compact between Virginia and Kentucky which this court, in the *Wheeling Bridge Case*, 18 How., 564, declared had become, by the sanction of Congress, a law of the Union. In that compact, it is declared that "The use and navigation of the River Ohio, so far as the territory of the proposed State, or the territory that shall remain within the limits of this Commonwealth (Virginia) lies thereon, shall be free and common to the citizens of the United States."

In the opinion of the court, a duty of tonnage is defined to be a charge, tax or duty on a vessel for the mere privilege of entering or lying in a port. The City of Parkersburg cannot, therefore, constitutionally impose a charge, tax or duty upon or for the exercise of that privilege. Now, do the Constitution and the existing laws of the United States extend their protection no further than to secure the bare, naked right of entering a port free from local burdens or duties upon its exercise? May not the boat, in virtue of the Constitution and existing laws, also land at any wharf, at least at any public wharf, on the Ohio River for the purpose of discharging and receiving freight and passengers? Of what value would be the right to enter the port without the privilege of landing its passengers and freight? Is not the substantial privilege of landing passengers and freight necessarily involved in the right of entering the port? If so, it would seem that the right to land a boat at a public wharf on a navigable water of the United States, is as fully protected by the Constitution and the existing laws of the United States, as that of entering the port. A charge, tax or duty imposed upon the exercise of the right to land is, consequently, for every practical purpose, as much a duty of tonnage as a charge, tax or duty upon the privilege of entering the port. The constitutional prohibition upon the levy, by the States, without the consent of Congress, of duties of tonnage; the power given Congress to regulate commerce among the States; the statutes of the United States, in the exercise of that power, providing [710] for licensing vessels, establishing ports of entry and imposing duties and inflicting penalties upon officers of boats engaged in navigation; and the sanction by Congress of the compact between Virginia and Kentucky, declaring that the use and navigation of the Ohio River shall be free to all citizens of the United States, give to the boats of the plaintiff in error the right to enter the Port of Parkersburg and land at the wharf provided for the use of boats engaged in navigation. It is a right given and secured by the Constitution and the existing laws of the United States and, therefore, one which the courts of the Union may protect against invasion or violation. For its protection additional legislation does not seem to be necessary, since original jurisdiction is given to the Circuit Courts of the United States of all suits arising under the Constitution and laws of the United States when the matter in dispute exceeds a prescribed amount.

These principles are entirely consistent with the City's ownership of the wharf or with the right to demand fair compensation for its use. As decided in the before mentioned cases, the City may require all who use its wharf, by landing thereat or in any other way, to pay what such use is reasonably worth. It cannot, as the court states, rightfully demand more. Reasonable compensation for the use by boats of the additional facilities furnished to commerce by means of wharves, even when such compensation is measured by the capacity of the boats, is not, within the meaning of the Constitution and the laws of the United States, an infringement of the right of free commerce upon the public navigable waters of the United States. Upon this ground, the wharfage charges imposed by the cities of St. Louis, Vicksburg and Keokuk were sustained. [*Packet Co.* v. *St. Louis*] 100 U. S., 428 [XXV., 690]; [*Vicksburg* v. *Tobin*] Id., 430 [XXV., 690]; [*Packet Co.* v. *Keokuk*] 95 Id., 80 [XXIV., 377]. But it is an entirely different matter when a municipal corporation assumes in effect, if not in terms, to burden the constitutional privilege of entering the port of any city, situated on a public navigable stream, with the condition that if the boat lands at the public wharf of that City, it must submit to the payment of larger compensation for the use of that wharf than the corporation has the legal authority to demand. It requires no further legislation by Congress to enable the courts of the Union to protect the rights of free commerce against exactions of that kind. It is, I [711] think, their duty to adjudge all such local regulations to be in conflict with the supreme law of the land. To burden the exercise of a constitutional right with conditions which materially impair its value, or which, practically, compel the abandonment of the right rather than to submit to the conditions, is, in law, an infringement of that right. The opinion of the court, I repeat, rests necessarily upon the ground that the enforced exaction and collection by a municipal corporation of unreasonable compensation for the use of its wharf by a boat, duly enrolled and licensed under the laws of the United States, and engaged in commerce upon the Ohio River, does not infringe or impair any right given or secured either by the Constitution or the existing laws of the United States. To that proposition I am unable to give my assent.

For the reasons stated, I dissent from the opinion and judgment.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—114 U. S., 217, 316, 631.

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FIRST NATIONAL BANK OF XENIA, OHIO, *Plf. in Err.*,

v.

DANIEL M. STEWART AND MARTHA N. McMILLAN, Admrs. of the Estate of DANIEL McMILLAN, Deceased.

(See S. C., 17 Otto, 676-678.)

National bank—lending by it on its stock.

1. Section 5201 of the Revised Statutes imposes no penalty, either upon a national bank or a borrower, for a loan by it on the security of its own stock.

2. When the contract has been executed, the security sold and the proceeds applied to the payment of the debt, the courts will not interfere with the matter.

[No. 243.]

Submitted Apr. 12, 1883. Decided Apr. 30, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio.

The history and facts appear in the

Statement of the case by *Mr. Justice* **Field**:

The plaintiffs are administrators of the estate of Daniel McMillan, deceased, and the defendant is the First National Bank of Xenia, Ohio, a Corporation formed under the National Bank Act of the United States. The action is brought to recover the sum of $4,200, with interest; the complaint alleging that in October, 1876, the Bank was in possession of thirty shares of its capital stock belonging to the deceased; that it then unlawfully converted them to its own use and sold them, receiving therefor the sum mentioned, which it refuses to account for or deliver to the plaintiffs, although a demand for it has been made.

The Bank, in answer to the complaint, avers that in April, 1876, the deceased was owing to it a debt previously contracted, greater in amount than the value of the shares of capital stock; that it being necessary to secure the Bank from loss, he delivered to it certificates of the shares with other property, as collateral security for the debt; that in October, 1876, the debt being unsatisfied and overdue, the Bank sold the shares at their full market value and applied the proceeds as a credit upon it; and that after such application a large amount remained due to the Bank, which is still unpaid.

The evidence produced at the trial tended to show that the shares of stock were delivered by the deceased to the Bank as collateral security for money loaned to him *at the time*, and continued to be thus held until they were sold.

The court charged the jury that if they found from the evidence that the Bank stock was delivered by the deceased to the Bank as a pledge or collateral security for a loan of money *made by him at the time*, the plaintiffs were entitled to recover the amount of the proceeds, with interest from the time of sale; as the defendant was prohibited by the Currency Act from thus receiving its own stock.

To this charge the defendant excepted. The plaintiffs recovered a verdict, and to review the judgment entered thereon the case was brought to this court on a writ of error.

Messrs. **John Little**, *Alphonso Taft* and *H. P. Lloyd*, for plaintiff in error.

Messrs. **E. M. Johnson**, *George Hoadley* and *Edward Colston*, for defendants in error.

Mr. Justice **Field** delivered the opinion of the court:

Section 5201 of the Revised Statutes declares that "No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale, or, in default thereof, a receiver may be appointed to close up the business of the association."

While this section, in terms, prohibits a banking association from making a loan upon the security of shares of its own stock, it imposes no penalty, either upon the bank or borrower, if a loan upon such security be made. If, therefore, the prohibition can be urged against the validity of the transaction by anyone except the government, it can only be done before the contract is executed, while the security is still subsisting in the hands of the bank. It can then, if at all, be invoked to restrain or defeat the enforcement of the security. When the contract has been executed, the security sold, and the proceeds applied to the payment of the debt, the courts will not interfere with the matter. Both bank and borrower are in such case equally the subjects of legal censure, and they will be left by the courts where they have placed themselves. [678]

There is another view of this case. The deceased authorized the Bank, in a certain contingency, to sell his shares. Supposing it was unlawful for the Bank to take those shares as security for a loan, it was not unlawful to authorize the Bank to sell them when the contingency occurred. The shares being sold pursuant to the authority, the proceeds would be in the Bank as his property. The administrators, indeed, affirm the validity of that sale by suing for the proceeds. As against the deceased, however, the money loaned was an offset to the proceeds. In either view the administrators cannot recover.

The judgment of the court, therefore, must be reversed and the cause remanded for a new trial; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

GEORGE W. CAMPBELL AND GEORGE A. THAYER, Survivors of LUDLOW D. CAMPBELL, Deceased, *Appts.*, [407]

v.

UNITED STATES.

(See S. C., 17 Otto, 407-413.)

Drawback on goods imported.

A person who, under section 4 of the Act of 1861, is entitled to an allowance of drawback may maintain an action therefor in the court of claims if payment thereof is refused, and the rights which the law thus gives to him cannot be defeated by the refusal of the Secretary of the Treasury or the officers

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of customs, to act, nor by their decision that no drawback was due.

[No. 232.]

Argued Apr. 5, 1883. Decided Apr. 30, 1883.

APPEAL from the Court of Claims.

The history and facts of the case appear in the opinion of the court.

Messrs. **J. H. Choate,** *William M. Evarts* and *C. F. Southmayd,* for appellants:

The denial of jurisdiction by the Court of Claims rested upon two misconceptions:

I. It gave to the judgment of this court in *Nichols* v. *U. S.*, 7 Wall., 122 (74 U. S., XIX., 125), the effect of an authority upon the question presented in this case, when its whole subject-matter and its whole reasoning refers to the wholly distinguishable case of recovering back duties illegally exacted.

II. The second misconception of the Court of Claims in disposing of this case below, was in treating the process and verification provided by the Government, for and in the payment of drawbacks, as being a provision of a mode, and a tribunal or *quasi* tribunal, for determining, measuring and enforcing a right.

But the Secretary of the Treasury, in case of drawback upon merchandise exported in the condition in which it was imported, had no function whatever to perform, except to pay back the duty, less one per cent.

The following cases in the Court of Claims, sustain the jurisdiction of that court in the present case, when freed from these misconceptions: *Patton* v. *U. S.*, 7 Ct. Claims, 362; *Daily* v. *U. S.*, 7 Ct. Claims, 383; *Broulatour* v. *U. S.*, 7 Ct. Claims, 564; *Shelton* v. *U. S.*, 8 Ct. Claims, 487; *Kaufman* v. *U. S.*, 11 Ct. Claims, 659.

Mr. **William A. Maury,** *Asst. Atty-Gen.*, for appellee:

Did Congress intend that the Court of Claims should administer the revenue laws without any regard to the rules and safeguards which are deemed necessary in the ordinary administration of those laws?

A stronger case than this, to show the wisdom of this court in laying down, in *Nichols* v. *U. S.*, 7 Wall., 122 (74 U. S., XIX., 125), that "Cases arising under the revenue laws are not within the jurisdiction of the Court of Claims," could hardly be imagined.

The decision of the revenue department on the question of drawback should be final, leaving the claimant no other recourse than an application to Congress.

Mr. Justice **Miller** delivered the opinion of the court:

The 4th section of the Act to provide increased revenue from imports to pay interest on the public debt, and for other purposes, approved August 5, 1861, reads as follows:

"That, from and after the passage of this Act, there shall be allowed, on all articles wholly manufactured of materials imported, on which duties have been paid, when exported, a drawback equal in amount to the duty paid on such materials, and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury; *Provided*, That ten per centum on the amount of all drawbacks, so allowed shall be retained for the use of the United States by the collectors paying such drawbacks respectively." 12 Stat. at L., 292.

On the 22d of January, 1862, the Secretary established such regulations as he deemed appropriate, the first of which is this:

1. "To entitle the exporter to such allowance of drawback, he must, at least six hours previous to the putting or lading any of the articles intended to be exported by him for benefit of drawback on board any vessel or other conveyance for exportation, lodge with the Collector of Customs for the district from which such exportation is to be made, an entry setting forth his intention to export such articles, and the marks, numbers and a particular description of the same, with their quantity and value, and designating the manufacturer thereof, the place where deposited, the name of the vessel or other conveyance in or by which, and the port or place to which the same is intended to be exported; and also describing in such entry the material or materials severally from which he claims the articles to have been manufactured, [408] designating when, where, whence, by whom and in what vessel or other conveyance the same was or were imported, and specifying the quantity and value thereof used in the manufacture. This entry shall, upon presentation, be verified by the oath or affirmation of the proprietor and the foreman of the manufactory in which such articles were made."

Other regulations require the collector and the surveyor to make the necessary examination to ascertain if the articles described in this entry be as stated, and to mark and designate them accordingly, and to verify the weight, gauge, measure or amount, and to superintend the lading for export, etc., etc.

All this having been done, and the oath of the exporter and his bond, with condition prescribed by the rules, being given, the collector is to give a certificate of the amount to which the party is entitled as drawback, on which he is to receive the money.

The appellants in this case sued in the Court of Claims for a drawback, on account of large amounts of linseed cake made by them out of linseed imported from a foreign country, and which cake they exported to London.

Their petition was dismissed by that court, on the ground, as stated in their opinion, that it was not a case of which they had jurisdiction.

The court, however, did entertain jurisdiction of the case; an answer was filed on behalf of the United States denying the allegations of the petition; testimony was taken and a full and elaborate finding of facts was made, and on this the court, as a conclusion of law, find that for want of jurisdiction of the subject-matter the petition is dismissed.

This finding of facts shows that in the months of September, October, November and December, 1870, claimants imported from Calcutta large quantities of linseed, for which they paid the duty of sixteen cents per hundred pounds according to law, which was by them, without intermixture with any other linseed or other material, manufactured into linseed oil and linseed cake, of the latter of which article there was produced therefrom 5,156,585 pounds.

It was for the exportation of part of this lat- [409] ter product that the drawback is claimed in this suit. As, however, this was done by several shipments at different times, and as the finding

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of facts is precisely the same in the case of each shipment, except as to date, quantity, and the name of the vessel, we give here *verbatim* the finding as to the first:

"On the 19th day of January, 1871, the claimants and said Ludlow D. Campbell were the owners of and had in their possession, 447,712 pounds of Lindseed cake, being parcel of the aforesaid 5,156,585 pounds, and desiring and intending to export the same from New York to London for the benefit of the drawback authorized by the 4th section of the "Act to provide increased revenue from imports to pay interest on the public debt, and for other purposes," approved August 5, 1861, duly presented to and lodged with the Collector of Customs for the Port of New York, before putting or lading any of the said cake on board any vessel for exportation, an entry of said linseed cake for export by the ship Sterling Castle, which was accompanied with the certificate and oath required by and was in all respects in conformity with the regulations prescribed by the Secretary of the Treasury, in pursuance of the requirement of the 4th section of said Act, and the said claimants and said Ludlow D. Campbell in all respects conformed to such regulations in respect to drawback, which allowance had been by said regulations fixed at seventeen cents per one hundred pounds, and made payable by the United States thirty days after clearance of the vessel by which exportation was made; but the said collector, acting under instructions from the Secretary of the Treasury, given on the 5th day of December, 1870, wholly refused to perform or cause to be performed in any manner any other act than the receipt of said entry prescribed by said regulations to be done, or caused to be done, by a Collector of Customs under the 4th section of said Act.

Thereafter, in the month of January, 1871, the said 447,712 pounds of linseed cake were shipped by the claimants and said Ludlow D. Campbell, on the said ship Sterling Castle, which vessel, with said linseed cake on board, cleared at the custom-house at the Port of New York for London, on the 30th day of January, 1871, and said cake was thereupon exported and carried [410] by said vessel from New York to the Port of London, in England, and there discharged and delivered, and no part thereof has been at any time relanded in any port or place within the limits of the United States."

The argument of counsel for the United States and the opinion of the Court of Claims is, that, until the officers of the customs comply with all the regulations of the Secretary of the Treasury, and the collector issues the drawback certificate, the law imposes upon the United States no obligation to pay anything for such drawback. That the law conferred upon the Secretary the right to make the regulations and the collector the power to make the certificate for payment of drawback, and that the refusal of the collector to perform the duties imposed upon him preliminary to making his certificate, and then refusing the certificate, totally defeats the claim of the party, who, by the law, is guarantied a right to his drawback, and who has complied with all that the law requires of him to secure and enforce it.

It would be a curious thing to hold that Congress, after clearly defining the right of the importer to receive drawback upon subsequent exportation of the imported article on which he had paid duty, had empowered the Secretary by regulations, which might be proper to secure the government against fraud, to defeat totally the right which Congress had granted. If the regulations of themselves worked such a result, no court would hesitate to hold them invalid as being altogether unreasonable.

But the regulations in this case are not unreasonable. Nor do they interpose any obstacle to the full assertion and adjustment of plaintiffs' right. It is the order of the Secretary of the Treasury forbidding the collector to proceed under these regulations or in any other mode, which is the real obstacle. Is that order a defense to this action? Can the Secretary, by this order, do what he could not do by regulations, repeal or annul the law? Can he thus defeat the law he was appointed to execute, by making regulations and then, by ordering his officers not to act under them, and not to act at all, place himself above the law and defy it?

We think the Court of Claims has jurisdiction of such a claim: 1. Because it is founded on a law of Congress; and 2. Because the facts [411] found in this case raise an implied contract that the United States will refund to the importer the amount he paid to the Government.

The finding of the court is that, by the regulations, this allowance of drawback had been fixed at seventeen cents per hundred pounds.

The Act of Congress having declared that on exportation there shall be allowed a drawback equal in amount to the duty paid on such material, and the Secretary having established by a regulation that, as regarded the cake resulting from the manufacture of the linseed into oil and cake, the latter represents at seventeen cents per hundred pounds the duty on the imported seed so converted into cake, there resulted a contract that when exported the Government would refund, repay, pay back, this amount as a drawback to the importer. If this be not so, it is because it is impossible to make a contract when the details of its *execution* or *performance* are left to officers who refuse to carry them out.

So it is equally clear that this claim is founded on the law allowing drawback.

The Court of Claims makes the mistake of supposing that the claim is founded on the regulations of the Secretary of the Treasury. This view cannot be sustained. It is the *law* which gives the right, and the fact that the customs officers refuse to obey these regulations cannot defeat a right which the Act of Congress gives.

The 2d section of the Act of September 20, 1850, granting all the overflowed and swamp lands to the States, in which they lie, declares:

"That it shall be the duty of the Secretary of the Interior, as soon as may be practicable, after the passage of this Act, to make out an accurate list and plats of the lands granted as aforesaid and transmit the same to the Governor of the State and, at the request of said Governor, cause a patent to be issued to the State therefor; and on that patent the fee to the lands shall vest in the State." 9 Stat. at L., 519.

This duty was almost wholly neglected by the Secretary.

In the case of *R. R. Co.* v. *Smith*, 9 Wall., 95 [76 U. S., XIX., 599], it was insisted that the failure of the Secretary to act made these lands

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[412] subject to a grant for railroad purposes of a date subsequent to the Swamp Land Act.

This proposition was thus answered by this court:

"Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the State did not depend on his action, but on the Act of Congress, and though the State might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the State to them could not be defeated by this delay."

"Any other rule results in this, that because the Secretary of the Interior has failed to discharge his duty in certifying these lands to the State, they therefore pass under a grant from which they are excepted beyond doubt, and this when it can be proved by testimony capable of producing the fullest conviction, that they were of the class excluded from plaintiff's grant," that is, was granted to the State as swamp lands.

And in *French* v. *Fyan*, 93 U. S., 173 [XXIII., 814], the court, re-affirming *R. R. Co.* v. *Smith*, said:

"There was no means, as this court has decided, to compel him (the Secretary) to act, and if the party claiming under the State in that case could not be permitted to prove that the land conveyed to him by the State as swamp land was in fact such, a total failure of justice would occur, and the entire grant to the State might be defeated by this neglect or refusal of the Secretary to perform his duty."

The application of this reasoning to the present case is too clear to need illustration.

It is an error to suppose that the officers of customs, including the Secretary, are in regard to this law created a special tribunal to ascertain and decide conclusively upon the right to drawback. Their function is entirely ministerial. They are authorized to pass upon no question essential to the claimant's right so as to conclude him in a court of competent jurisdiction. From the moment he presents his sworn entry, they simply ascertain quantities, identify and mark packages, accept bonds and sureties, see that the exported article leaves the port in the ship. These and like duties being discharged, it is the collector's duty, a mere ministerial function, to give the certificate of drawback. [413] The amount of it is fixed at seventeen cents per hundred pounds by the regulation; he has nothing to do but to calculate the amount at that rate on the number of pounds shipped. He exercises no judicial or *quasi* judicial function. He concludes nobody's rights, and has no power to do so. The rights which the law gives cannot be defeated by his refusal to act, nor by his decision that no drawback was due.

Neither the Act of Congress, nor any rule of construction known to us, makes the claimant's right, when the facts on which it depends are clearly established, to turn upon the view which the collector or the Secretary or both combined, may entertain of the law upon that subject, and much less upon their arbitrary refusal to perform the services which the law imposes on them.

A suggestion is made that the right to enforce the drawback in the court is affected by the fact that it is a gratuity.

It has never been supposed that there was a gratuity in all the cases where imports are free of duty. The purpose of the drawback provision is to make duty free, imports which are manufactured here and then returned whence they came or to some other foreign country, articles which are not sold or consumed in the United States. The linseed in this case was bought abroad and imported for the purpose of being manufactured, and the product immediately sent out of the country. The drawback provision was simply a mode of making the linseed so imported and exported without distribution in the country duty free, and we see no gratuity in the case.

But if it were a free gift, it is not for the officers of the Government to defeat the will of Congress on this subject by refusing to execute the law.

We are of opinion that the facts found by the Court of Claims establish the right of appellants to recover a judgment for the exported cake at the rate of seventeen cents per hundred pounds; and the case is remanded with directions to enter such a judgment.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 94.

BANK OF ST. THOMAS, *Appt.*, [413]
v.
THE BRITISH BRIGANTINE JULIA BLAKE, HER CARGO AND THE FREIGHT DUE THEREON; WILLIAM T. CUNNINGHAM, GRAHAM CUNNINGHAM AND WINTHROP R. CUNNINGHAM, Claimants of Said Cargo.

(See S. C., "*The Julia Blake*," 17 Otto, 418-433.)

Authority of master to hypothecate the cargo—notice to lender—burden of proof—consent of owner.

1. The master can neither sell nor hypothecate the cargo, except in case of urgent necessity; and what he does must be directly or indirectly for the benefit of the cargo, considering the situation in which it has been placed by the accidents of the voyage.

2. A lender, upon the hypothecation of the cargo by a master of the vessel under his implied authority, is chargeable with notice of the facts on which the master appears to rely as a justification for what he is doing, and he must make his own inquiries and judge for himself, and at his own risk.

3. Before there can be a recovery against the owner, it must be shown that the circumstances were such as to make it apparently proper for the master to do what he has done. To this extent, the burden of proof is clearly on the lender.

4. Where the vessel put into port for repairs, and such repairs could not be effected without an expense to the cargo owner of very much more than it would cost to reclaim his property, pay all charges upon it and send it forward by some other conveyance, the master had no authority to pledge the cargo for them without the consent of the owner or consignees.

[No. 189.]

Argued Mar. 19, 1883. Decided Apr. 30, 1883.

NOTE.—*Power of the master to sell the vessel.* See *note* to Post v. Jones, 60 U. S., XV., 618.

Bottomry and respondentia *bonds and loans.* See *note* to Blaine v. The Charles Carter, 8 U. S. (4 Cranch), 328; and *note* to Conard v. Atl. Ins. Co., 26 U. S. (1 Pet.), 386.

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APPEAL from the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **George De Forest Lord,** *D. D. Lord* and *Henry Day*, for appellant.

Mr. **Everett P. Wheeler,** for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit instituted by the Bank of St. Thomas, as the holder of a bottomry bond, against the British brigantine Julia Blake, her cargo and freight. The decree of the district court condemned the vessel and freight, but acquitted the cargo and its claimants. No appeal was taken on behalf of the vessel and freight, but the libelant carried the case to the circuit court for a review of the decree as to the cargo. [419] The bond was for $11,600, with 14 per cent marine premium, and the net proceeds of the vessel and freight were about $3,500. On the hearing in the circuit court the libel was again dismissed as to the cargo, and from a decree to that effect this appeal was taken.

The facts found by the circuit court, on which, in our opinion, the rights of the parties depend, may be stated as follows:

The Julia Blake, a British vessel, owned by Peter Blake, of Nova Scotia, left Rio de Janeiro on or about the 31st of March, 1876, for New York, having on board a cargo consisting of 582 logs of rosewood. The bills of lading were three in number, and were drawn to the order of James Philip Mee, of Rio de Janeiro, the shipper, for 253, 139 and 190 logs respectively. About 200 of the logs belonged to Mee, but the claimants had made advances on them to him. All the rest belonged to the claimants. The charter-party was dated March 16, 1876, and named Mee as the charterer. The stipulated freight was £220, of which £110 was paid in advance.

Mee gave the master of the vessel on sailing a letter of instructions, directing him to proceed to New York and there consign his vessel and cargo to Winthrop Cunningham & Sons, Philadelphia, the claimants, or their agents, and if compelled, by stress of weather or other accident, to put into St. Thomas, to consign the vessel to Lamb & Co. The voyage was prosecuted with safety until the 3d or 4th of May, on one of which days the rigging of the vessel parted, and her masts fell, the mainmast breaking at the saddle, about six feet above the deck, the foremast at the head. The fallen spars and wreck remained for sometime alongside and thumping before they could be cleared away. This rendered it imprudent to prosecute the voyage, and the master properly made for St. Thomas as a port of distress, where he arrived on the 27th of May. On his arrival, he applied to the acting British Consul, who appointed a survey, consisting of the harbor-master, the principal shipwright at the port, and the master of a vessel. The survey properly recommended a discharge of the cargo, and it was necessary to [420] strip the vessel of her copper to stop the leak. The cargo was discharged, and on the 8th of June a second survey ordered by the consul on the application of the master. A copy of the second survey, although in evidence, is not incorporated into the findings, nor are its contents stated, further than that the vessel was making as much water as at the time of the first survey, and that her metal had been much broken and was torn away and ragged.

When the master arrived at St. Thomas he went to several mercantile houses and seemed to be seeking a proper party to whom to consign the vessel. He finally went to Lamb & Co. and engaged them to attend to the business of the vessel and the repairs. He did not show them his charter-party or letter of instructions, but told them he had lost those papers.

Upon the arrival of the vessel at St. Thomas the master wrote his owner as follows:

"S. S. Beta, *via* Halifax.

Saint Thomas, 27th May, 1876.

Peter Blake, Esq., *Parsboro, Nova Scotia:*

Dear Sir: I regret to have to report that the brigantine Julia Blake, on her voyage from Rio de Janeiro, encountered heavy weather on the 4th inst., and for the safety of lives, vessel and cargo, I was compelled to cut away to righten the vessel, and to put into this port, as we were in a too disabled condition to go north. A survey will be held on Monday, and I will supplement this letter by a telegram acquainting you what the surveyors recommend to be done in her present leaky and damaged state; it will likely be necessary to discharge to ascertain damage, and for new masts, etc. This mail closes at once, so I must defer giving you full particulars until next steamer.

I remain, sir, your obedient servant,

(Signed) Abram Knowlton."

On the 29th of May he sent the following telegram to the owner:

"Julia Blake, St. Thomas, dismasted, leaky; consigned Lamb; sending survey by mail."

Afterwards Lamb & Co., on the 18th of June, and the 22d of June, wrote the owner. Copies [421] of their letters are as follows:

"French frigate Minerve, *via*. Philadelphia.

St. Thomas, *13 June, 1876.*

Peter Blake, Esq., *Parsboro, Nova Scotia:*

Sir: We have to confirm Captain Knowlton's letter to you, dated 27th *ult.*, acquainting you that the dismasted brig Julia Blake had put in here in a leaky and disabled condition.

By surveyor's recommendation the vessel has been discharged, and is to-day on the marine repairing slip, for shipping and caulking etc.; masts, sails, etc., are being made, and in the course of another month The Julia Blake will probably be ready for sea in a seaworthy state.

Captain Knowlton dispatched you a telegram thus:

'Julia Blake, Saint Thomas, dismasted, leaky; consigned Lamb; sending survey mail,' on the 29th *ult.*, which no doubt reached you promptly and correctly. From his not receiving any reply from you, he concluded that you wished him to follow the customary routine with documents etc. Meantime, we hand, herein, certified copy of extended protest from the 'British consulate,' which may interest you. No doubt your letters will state in what manner accounts here are to be paid. We remain, sir, yours faithfully,

(Signed) Lamb & Co."

"Alpha *via* Halifax.

St. Thomas, *22d June, 1876.*

Peter Blake, Esq., *Parsboro, Nova Scotia*:

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Sir: We last wrote you on the 18th instant, *via* Philadelphia, with certified copy of extended protest per Julia Blake, which we trust has reached you safely.

The S. S. Alpha arrived here to-day from Halifax, without bringing us any letter from you, but Captain Knowlton tells us that he had a communication, and we therefore refer you to him or his advices for particulars, in connection with the repairing and refitting of the brigatine Julia Blake.

We suppose that your next will furnish instructions regarding funds for expenses here, if you don't provide the needful, same will [422] likely be raised by bottomry and respondentia loan, payable on arrival at New York.

The Julia Blake should be ready for sea about 15th *proximo*, and

We remain, sir, your obedient servants,
(Signed) Lamb & Co."

To these letters of Lamb & Co., Blake the owner, replied thus:

"Parsboro, *July 4th, 1876.*

James Donald Lamb & Co., Esqrs., *St. Thomas:*

Dear Sir: I received your favor yesterday, as likewise of the 18th June, by way of Philadelphia, on the 29th day of June. My dear sirs, I did not know who to wright to until lately, as Mr. J. F. Whitney was righting and getting me to right to G. R. Smith, Saint Thomas. I don't know any person there; please excuse me, as I could not answer your letter before this time; as for the 'Julia Blake' and the funds for repairing, I think it will be all right. I hope it won't be too much. I think J. F. Whitney will see it all paid after she comes to N. York. please give all the time you can, and I garantee you will have the pay, as I pay every one. My dear sir, this is a thing I never had to do before, you, or any person acting for The Julia Blake will be sure of your pay; the vessel is worth all expenses. I depend on you to do what is right and just; after a justment and everything, the whole of the repairs won't come out of me. I think I will be able to pay my share, as the Captain Noltin will tell you. I want you to make sure of yourself *by bottomry* until you see how this will gow in N. York; you will please let me know by return of steamer from St. Thomas, all the particulars, as also the amount of repairs, and by so doing you will much oblige your humble servant,
(Signed) Peter Blake."

On receipt of this, Lamb & Co. wrote the following letter:

"Copy pr. S. S. Alpha.
St. Thomas, *20 July, 1876.*

Peter Blake, Esq., *Parsboro, N. S.*

Dear Sir: We have to acknowledge the receipt of your valued favor of 4th instant, the contents of which claim our best attention.

The Julia Blake is progressing with her repairs, and will soon be ready to take in cargo; we cannot, at present, give you any precise estimate of the expenses, as a good deal remains to [423] be done yet, but Captain Knowlton is putting the vessel in first rate order, having at the same time regard to every practicable economy.

The case being one of 'general average,' the cargo will of course, contribute its proper proportion towards expenses, and we think the documents which Captain Knowlton will take with him, will render the adjustment speedy and satisfactory to all the interests and parties concerned.

We are, dear sir, yours faithfully,
(Signed) Lamb & Co."

Under date of June 1, 1876, Lamb & Co. wrote the shipper of the cargo at Rio de Janeiro as follows:

"Star Ball steamer from Porto Rico.

Rio Janeiro. St. Thomas, *1st June, 1876.*

Dear Sir: We have to advise that the brigantine Julia Blake put in here on the 27th *ult.*, dismasted and leaky. A survey has been held, and for effecting repairs, etc., the cargo is being discharged.

Captain Knowlton tells us that he has cabled the 'casualty' to the United States. As the cargo is consigned 'to order,' we have been unable to acquaint the New York consignees of the misfortune.

We remain yours, faithfully,
(Signed) Lamb & Co."

During all the time the vessel was at St. Thomas there was facility for telegraphic communication with New York, and until the 21st of July with Rio de Janeiro, by way of New York, London, Lisbon and Pernambuco. On this last date, a break occurred in the cable between Bahia and Rio de Janeiro, but the Western Union Telegraph Company continued to transmit telegrams to Bahia, from whence they were forwarded to Rio de Janeiro, the time required for transmission from New York to Rio de Janeiro being about five days. These lines of telegraph were often employed by merchants and men of business at St. Thomas, and that from St. Thomas to New York was known to and used by the claimants. From the findings it does not appear that the telegraph was used by any of the parties after the telegram was sent the owner of the vessel on the 29th of May, and no other letters appear to have passed between the parties until after the vessel had completed her repairs and sailed with her cargo for New York.

Immediately after the second survey was [424] completed the repairs on the vessel were commenced. The bills for the repairs and supplies were paid by Lamb & Co., after the master had certified to their correctness. The repairs were completed on the 22d of July, and thereupon the master advertised for a loan on bottomry and respondentia of ship, freight and cargo, to the amount of $7,500, or thereabouts. The Bank of St. Thomas alone made a proposal, and for the whole amount, at a maritime interest of 14 per cent. Lamb & Co. made no inquiries as to the necessity of the repairs and supplies, but relied wholly on the statement of the master. The only inquiry made by the Bank was as to the sufficiency of the security and the regularity of the papers in their form of execution.

The discharge of the cargo was necessary in order to stop the leaks and make the vessel seaworthy. The repairs and supplies furnished, as well as the re-metalling, were necessary to put the vessel in a seaworthy condition for a voyage to New York.

When the loan came to be closed, the master told Lamb & Co. that a large amount of expenses had been incurred of which they had no previous information, and that the amount required to defray the expenses and pay their commissions and charges was $11,600. This

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amount the Bank advanced and took the bond. The vessel left St. Thomas on the 5th of August. On her arrival in New York the payment of the bond was refused and she, with her freight and cargo, was libeled.

The cargo was not perishable and would not have been injured by being stored under cover at St. Thomas for three or four months, and was worth in New York about $18,000. St. Thomas is a central port where vessels go seeking business, and to which parties requiring vessels also go. Vessels for the shipment of merchandise are always available there. The cargo could have been forwarded from there by vessels other than The Julia Blake for from $1,000 to $1,500, and it was for the interest of er than hypothecated to pay for repairs to The the owners that it should be so forwarded, rath- Julia Blake.

On the 28th of September, after the vessel [425] had sailed for New York, Lamb & Co. wrote the shipper of the cargo as follows:

"Per S. S. Nile, *via* Southampton.

Rio de Janeiro.

St. Thomas, 28th September, 1876.

Dear Sir: Your favor of the 13th July last reached us recently *via* Porto Rico, and only after The Julia Blake had sailed from this port. The letter of instructions which you mention having given to Captain Knowlton on sailing from Rio has never been laid before us, nor did he produce the charter-party, although we repeatedly asked for it; he alleged that it had been mislaid or lost at the time of the disaster at sea, and, on being questioned, denied having any instructions from you as to the consignment of vessel in case of average. The bills of lading being 'to order' left us no clue as to the consignees of cargo. The casualty was, however, at once cabled to the New York Board of Underwriters.

While we regret that you should have felt any doubt as to our compliance with your wishes, it will now be clear to you how blameless we are in the matter.

Whether Captain Knowlton purposely withheld information from us, or if he actually did lose the documents referred to, remains at present open for conjecture only, but the control intended to have been placed with us remained, in part at least, in hands of the captain, as master of the vessel.

We would suggest that you advise us by mail of the despatch of all vessels conveying instructions from you to our firm, in the event of their putting into this port in distress—would thus, if necessary, be able at once to take up a position with the master, and the protection of your interests at our hands can thus not be disputed or ignored.

The adoption of such a course on your part is, we think, more advisable under present circumstantial means of mail communication between Rio and St. Thomas.

We are, dear sir, yours, very truly,

Lamb & Co."

The letter from the shipper referred to is not included in the findings, and it nowhere appears that it was in evidence.

The case depends entirely on the authority of the master of the vessel to give the bottomry bond on the cargo. It is now the settled law of the English courts that a master "Cannot bottomry a ship without communication with his owner, if communication be practicable, and, *a fortiori*, cannot hypothecate the cargo without [426] communicating with the owner of it, if communication with such owner be practicable." *The Cassa Marittima*, L. R., 2 App. Cas., 157. This doctrine was first announced in *The Bonaparte*, 8 Moore, P. C., 459, decided in 1853, and has been steadily adhered to since, not however, without decided opposition by Dr. Lushington. *The Hamburg*, 2 Moore, P. C. (N. S.), 319; *The Cargo ex Sultan*, 1 Swab., 511. Whether the rule, to the extent it has been carried in England, is in accordance with the general maritime law, as understood in this country and the maritime nations of Europe, other than Great Britain, or whether, since The Julia Blake was a British vessel, the authority of her master in a Danish port is to be determined by the English law, instead of the general maritime law, or the law of Denmark, are questions we deem it unnecessary to consider, for, in our opinion, even under the most liberal construction of any recognized rule which can be invoked for the authority of the master over the cargo, this bond cannot be sustained.

The master can neither sell nor hypothecate the cargo, except in case of urgent necessity, and his authority for that purpose is no more than may reasonably be implied from the circumstances in which he is placed. He acts for the owner of the cargo because there is a necessity for some one to do so, and like every agent whose authority arises by implication of law, he can only do what the owner, if present, ought to do. Necessity develops his authority and limits his powers. What he does must be directly or indirectly for the benefit of the cargo, considering the situation in which it has been placed by the accidents of the voyage. As was said by Sir William Scott, in *The Gratitudine*, 3 C. Rob., 261, by which the power of the master, under proper circumstances, to hypothecate the cargo to pay the expenses of repairs on the ship was incontrovertibly established: "In all cases it is the prospect of the benefit to the proprietor, that is at the foundation of the authority of the master. It is therefore true, that if the repairs of the ship produce no benefit or prospect of benefit to the cargo, the master cannot bind the cargo for such repairs; but it appears to me that the fallacy of the argument, that the master cannot bind the cargo for the repairs of [427] the ship, lies in supposing that whatever is done for the repairs of the ship is in no degree and under no circumstances done for the benefit, or with the prospect of benefit to the cargo; whereas, the fact is, that though the prospect of benefit may be more direct and more immediate to the ship, it may still be for the preservation and conveyance of the cargo, and is justly to be considered as done for the common benefit of both ship and cargo." To the same effect is what was said by *Chief Baron* Pollock, in *Duncan* v. *Benson*, 1 Exch., 557: "But this agency for the freighter is confined to cases affecting his interest, and where the sale or pledge is directly or indirectly for his benefit. It is directly beneficial where goods are damaged by perils of the sea, and sold; it is indirectly so where there is damage to the ship, and the repairs become necessary for the benefit of the whole adventure." Sir Robert Phillimore was even more explicit in

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the case of *The Onward*, L. R., 4 Adm. & Ecc., 57, where he used this language: "The next consequence from the doctrine of agency is that the master must sustain, to the best of his power, the interest of the absent owner. This is a principle of general maritime law, and not * * * of English law only. Boulay-Paty observes: * * * he must do that which there is fair reason to suppose the owner, if present, would do. * * * The master is to remember the foundation of his authority to give a bottomry bond on cargo is the prospect of benefit, direct or indirect, to the proprietor of it. This principle limits the authority of the master in this matter." So, in this country, *Mr. Justice* Washington said, in *Ross* v. *The Active*, 2 Wash. (C. C.), 237; "But at all events the necessity must be such as to connect the act with the success of the voyage; and not for the exclusive interest of the shipowner." Undoubtedly in all such cases much is left to the master's discretion, but, to use the language of *Mr. Justice* Story in *The Packet*, 3 Mas., 259, "he must exercise it conscientiously for the general interest." This court said, in *Ins. Co.* v. *The Sarah Ann*, 13 Pet., 400, speaking of the analogous authority of the master to sell the ship: "All will agree that the master must act in good faith, exercise his best discretion for the benefit of all concerned, and that it can only be done upon the [428] compulsion of necessity, to be determined in each case by the actual and impending peril to which the vessel is exposed." And in *The Amelie*, 6 Wall., 27 [78 U. S., XVIII., 808], it was said: "And this necessity is a question of fact, to be determined in each case by the circumstances in which the master is placed and the perils to which the property is exposed. If the master can within a reasonable time consult the owners, he is required to do it, because they should have an opportunity to decide whether, in their judgment, a sale is necessary." When the master is dealing with the cargo for the benefit of the voyage, he must endeavor to hold the balance evenly between his two principals; he must not sacrifice the ship to the cargo or the cargo to the ship. *The Onward, supra*, p. 58.

It is equally well settled that a lender, upon the hypothecation of the cargo by a master of the vessel under his implied authority, is chargeable with notice of the facts on which the master appears to rely as a justification for what he is doing. Such a lender is presumed to know that the power of the master is to be determined by the necessities of the case in their legal operation on the owner of the cargo. As necessity creates the agency, and that only can be authorized which, under the circumstances, is reasonable and just, he must make his own inquiries and judge for himself, and at his own risk, whether, if the owner were present, he would do or ought to do that, or something equivalent, which the master is undertaking to do for him in his absence. A lender cannot shut his eyes to existing facts as they appear, or by reasonable inquiry could be made to appear, and treat with the master as a general agent, having authority to do not only what the owner ought to do, but what he might do if he chose. Before there can be a recovery against the owner it must be shown that the circumstances were such as to make it apparently proper for the master to do what he has done. To this extent, the burden of proof is clearly on the lender. *The Aurora*, 1 Wheat, 102; *Thomas* v. *Osborn*, 19 How., 30 [60 U. S., XV., 537]; *The Amelie*, 6 Wall., 27 [78 U. S., XVIII., 808]; *The Grapeshot*, 9 Wall., 141 [76 U. S., XIX., 656]; *The Lulu*, 10 Wall., 203 [77 U. S., XIX., 909]. In these cases the rule was applied to the hypothecation of the ship by the master, where less strictness will ordinarily be required than in the hypothecation of the cargo, because the master is the appointed agent of the owner of the ship, but the involuntary agent [429] of the owner of the cargo.

It remains only to apply these well settled rules to the facts of the present case.

When the loan was advertised for and put on the market, the cargo was out of the vessel and in store. It was not perishable and could be sent forward to its place of destination in another vessel, without any considerable delay, at a cost of from $1,000 to $1,500. The vessel had been two months in port. Her cargo was consigned to New York. The bills of lading were drawn to the order of the shipper, but accompanying them was a letter to the master instructing him to whom to report at the end of his voyage. If this letter had been lost, as the master claimed it was, the fact that it had been given was not forgotten by him, for when he first went to Lamb & Co. he told them of its loss. From that time, for nearly two months and until the day before the loan was advertised for, telegraphic communication between St. Thomas and Rio de Janeiro was practicable and reasonably direct. The necessity for unloading the cargo and making extensive and costly repairs on the vessel to fit her for the further prosecution of the voyage, was known as soon as the surveys were completed, and yet, neither the master nor Lamb & Co. made any attempt to ascertain from the shipper, by telegraph, his wishes about the disposition to be made of the cargo under the circumstances, or even to get information as to the names of the consignees in New York, with whom there could be communication, both by mail and telegraph. Lamb & Co. did, indeed, on the first of June, write the shipper by mail that the vessel had put into St. Thomas dismasted and leaky; that a survey had been held, and that, for effecting repairs, the cargo was being discharged; but even this meager information did not probably reach its destination until about the 13th of July, only a few days before the loan was advertised for.

Although Lamb & Co. were engaged by the master to attend to the business of the vessel and her repairs, they made no inquiry as to the propriety of what was done, but relied entirely on the statements of the master, and apparently allowed him to do what he pleased, for it was not until a loan of $7,500 had been applied for and taken, that they knew it would require [430] $11,600 to defray expenses and their charges and commissions, and then only when it was told them by the master.

The findings show that when the vessel had been out from Rio de Janeiro a little more than thirty days, her rigging parted and her masts fell, the mainmast breaking at the saddle and her foremast at the head. On her arrival at St. Thomas, her cargo had to be discharged to stop the leaks; her metal was much broken and torn

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away and ragged, and had to be replaced with new to make her seaworthy for a voyage to New York, and although she sold when she got to New York for but $4,500, leaving only $3,500 produced from the vessel and freight to apply on the loan, the aggregate of her expenditures in St. Thomas was $11,600.

From these facts it is, to our minds, apparent that when the vessel arrived at St. Thomas, she ought not to have been repaired at the risk of expense to the owner of the cargo without his consent, and that this could easily have been ascertained by an inquiry into the facts. She came in dismasted and leaky for a general equipment and refit, with a cargo substantially imperishable, which might be forwarded in another vessel at comparatively small expense, and it must have been easy to see that to repair the vessel at the risk of the owner of the cargo would be to place his interests in jeopardy without any urgent necessity on his account. No master, who held the balance evenly between his two principals, could have believed himself justified, under the circumstances, in hypothecating the cargo for any such purpose, without notice to the owner. But when the repairs were completed and the hypothecation was tendered, the impropriety of what the master proposed to do was even more apparent. Then the offer was to pledge vessel, freight and cargo for $13,324, when the most casual observer must have seen that the vessel and freight would actually secure only a comparatively small part of the amount required. Of all this the lender, who made no inquiries whatever, is chargeable in law with notice. Had he inquired and been deceived through no fault of his own, the case might have been different. But having failed to inquire at all, he is presumed to know all that the master [431] knew. His case presents itself, therefore, as that of a lender upon the hypothecation of a cargo by the master, without communication with the consignee or owner, to pay the expenses of permanent repairs to the vessel, when it was manifest that the owner of the cargo could not be benefited by what was done, to anything like the amount with which he was to be charged.

It is contended, however, that the owner of the cargo has no right to demand his property at an intermediate port unless the voyage has been actually abandoned or the necessary repairs on the vessel cannot be effected. The cargo owner is not bound to help the vessel through with her voyage under all circumstances. It is the duty of the vessel owner, and of the master as his appointed agent, to do all that in good faith ought to be done to carry the cargo to its place of destination, and for that purpose the cargo owner should contribute to the expense as far as his interests may apparently require, but he is under no obligation to sacrifice his cargo, or to allow it to be sacrificed, for the benefit of the vessel alone. He ought to do what good faith towards the vessel demands, but need not do more. If he would lose no more by helping the vessel in her distress than he would by taking his property and disposing of it in some other way, he should, if the vessel owner or the master requires it, furnish the help or allow the cargo to be used for that purpose. To that extent, he is bound to the vessel in her distress, but no further. When, therefore, a cargo owner finds a vessel, with his cargo on board, at a port of refuge needing repairs which cannot be effected without a cost to him of more than he would lose by taking his property at that place and paying the vessel all her lawful charges against him, we do not doubt that he may pay the charges and reclaim the property. Otherwise he would be compelled to submit to a sacrifice of his own interests for the benefit of others, and that the law does not require. What charges must be paid will depend on the circumstances of the case. Sometimes they may include full freight, expenses at the port of refuge, general average charges, and possibly more and sometimes less; but upon full payment of such as are in law demandable, the cargo must be surrendered.

In the present case, it is not only found as a [432] fact that it was for the interest of the shipper that his property should be forwarded by some other vessel rather than that it should be hypothecated to pay for the repairs, but everything else in the findings points unmistakably to the conclusion that such repairs could not have been effected without an expense to him of very much more than it would cost to reclaim his property, pay all lawful charges upon it, and send it forward by some other conveyance. Under such circumstances, we have no hesitation in saying that the master had no authority to pledge the cargo as he did, without the consent of the shipper or consignees. The notice given the shipper was entirely insufficient and furnished no such information as would require him to act otherwise than he appears to have done. He did not get the letter until nearly six weeks after it was written, and from its contents he was justified in supposing that before his property was incumbered to any considerable amount he would be notified by telegraph. Certainly, so long as the mail only was used to communicate with him, he need not have supposed it was necessary at the end of six weeks to employ the telegraph for a response to such information as he got. It must have been apparent from the outset, at St. Thomas, that it would be necessary to hypothecate the cargo to pay for the repairs if they were made, and there was no excuse for not communicating that fact either to the shipper or the consignees before it was too late for them to object or provide against it. All this the lender of the money could have known if inquiry had been made, and there was abundance of evidence in all directions to show that no prudent cargo owner would voluntarily do what the master was doing for him. Clearly, therefore, the hypothecation of the cargo was unauthorized and void.

It is insisted, however, that if the bottomry bond cannot be enforced, the cargo may be held in this suit for such charges as it was liable for to the vessel. No such claim is made in the libel. Full freight has been paid and there is nothing in the case as it comes to us to show that anything more was demandable. If the vessel was unseaworthy when she left Rio de Janeiro, all the extraordinary expenses she incurred on the voyage were probably through her own fault, and not chargeable on the cargo. At any rate, there is nothing in the record as it now [433]

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stands to make it proper for us to remand the cause for further proceedings under this new claim.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[629] AUGUSTUS SCHELL, Late Collector, *Plff. in Err.*,
v.
WILLIAM E. DODGE ET AL.

HIRAM BARNEY, Late Collector, *Plff. in Err.*,
v.
JAMES ISLER ET AL.

HIRAM BARNEY, Late Collector, *Plff. in Err.*,
v.
JOHN W. COX.

HIRAM BARNEY, Late Collector, *Plff. in Err.*,
v.
ARNOLD FRIEDMAN ET AL.

(See S. C., 17 Otto, 629, 630.)

Power of court to alter its judgment.

*This court has no power, after the term has passed and a cause has been finally disposed of here, by a judgment of dismissal of a writ of error, to alter its judgment to one of affirmance, although, if there had been a judgment of affirmance, interest would have been allowed to the defendant in error, on the amount of the judgment below, during the pendency of the writ, and in the judgment of dismissal no such interest was allowed.

[Nos. 109, 122, 134, 136.]

Dismissed Nov. 21, 1881. Motion to recall mandate. Submitted Apr. 16, 1883. Decided May 7, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

On motion to recall mandates.

The case is stated by the court.

Messrs. **George Bliss**, *John E. Parsons*, *A. W. Griswold* and *R. G. Ingersoll*, for defendants in error, in support of the motion.

No opposing counsel.

Mr. Justice **Blatchford** delivered the opinion of the court:

These are all suits in each of which a judgment was rendered against a late Collector of Customs for the recovery of money paid as duties. There has been a certificate of probable cause in each. Writs of error to this court were brought by direction of the government in each case. When the cases were reached in order on the docket of this court at October Term, 1881, the Solicitor-General, on the part of the government, moved that the writs of error be dismissed, as presenting no question which he desired to argue. This was done. There was no affirmance of the judgments below, and the judgments and mandates of this court contained no direction as to interest on the judgments below during the time the writs of error were pending. Those judgments were rendered in 1878, and suspended by the writs of error for over three years. In the *Dodge Case* the mandate was issued, but has never been presented to the court below. In the other cases, the mandates were issued and presented to the court below, [630] and orders for judgment were entered thereon. Counsel for the defendants in error in the *Dodge Case* were present in this court when that case was so dismissed, but in the other cases no counsel for the defendants in error was present, and the motions to dismiss were made without their knowledge, and the mandates were not issued till after the close of the Term.

The defendants in error now apply to this court to correct the judgments and mandates in these cases so as to award to them interest as such, or as damages for delay. There is no doubt that, if the defendants in error in these cases had in season asked for judgments of affirmance, their applications would have been granted, and interest would have been allowed, in accordance with the decision just announced in *Schell* v. *Cochran* [*ante*, 543]. But the difficulty now is that we have no power to vary the judgments or the mandates, after the close of the Term, no especial right to do so in these cases having been reserved. It has always been held by this court that it has no power, after the Term has passed, and a cause has been dismissed or otherwise finally disposed of here, to alter its judgment in such a particular as that now asked for, the change of a dismissal of a writ of error, with its legal consequences, to an affirmance of the judgment below, with its legal consequences, and not an error of mere form, or a clerical error, or a misprision of the clerk, or the like. *Jackson* v. *Ashton*, 10 Pet., 480; *Bank* v. *Moss*, 6 How., 31, 38.

The applications are denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WILLIAM G. GAGE ET AL., *Appts.*, [640]
v.
JAMES W. HERRING ET AL.

(See S. C., 17 Otto, 640-648.)

Re-issued letters patent, validity of—combination—infringement.

*1. If a patent, containing a single claim for a combination of several elements, is, within four months before its expiration, re-issued and extended, with the same description as before, but with two claims, the one a repetition of the original claim, and the other for a combination of some of the elements only, the re-issue is invalid as to the new claim, and valid as to the other.

2. A patent for a combination of several elements is not infringed by using less than all the elements of the combination.

3. In a patent for an improvement in cooling and drying meal during its passage from the millstones to the bolts, the claim was for the arrangement and combination of a fan, producing a suction blast; the meal chest; a spout forming a communication between the fan and the meal chest; a dust room above, to catch the lighter part of the meal thrown upwards by the current of air; a rotating spirally-flanched shaft in the meal chest, conveying the meal to the elevator; a similar shaft in the dust room,

*Head note by *Mr. Justice* BLATCHFORD.

*Head notes by *Mr. Justice* GRAY.

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conveying the meal dust to the elevator; and the elevator taking the meal to the bolts. Within four months before the expiration of the patent, it was re-issued and extended, with two claims, the one a repetition of the original claim, and the other for the combination of the fan, the communicating spout, the meal chest with the conveying shaft in it, and the elevator, but omitting the dust room with its conveying shaft. Held, that the re-issue was valid for the old claim only; and was not infringed by the use of the fan, spout, meal chest with its conveying shaft, elevator and dust room, without any conveying shaft in the dust room, or other mechanism performing the same function.

[No. 216.]

Argued Mar. 28, 29, 1883. Decided May 7, 1883.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

The bill in this case was filed in the court below, by the appellees, to recover damages alleged to have resulted from the infringement of certain letters patent, and for an injunction.

The court below having found for the complainants and entered a decree in their favor, the defendants appealed to this court.

The facts of the case are fully stated by the court.

Messrs. **George. Harding** and *John R. Bennett*, for appellants.

Messrs. **Benjamin F. Thurston** and *Edwin S. Jenney*, for appellees.

Mr. Justice **Gray** delivered the opinion of the court:

This is a bill in equity for the infringement of letters patent for an improvement in means for cooling and drying meal, re-issued to John Denchfield, and duly assigned to the plaintiffs. The original letters patent to Denchfield were dated 20th April, 1858. The re-issued letters patent were dated 16th January, 1872, and extended for a period of seven years from 20th April, 1872. The circuit court held that the first [641] claim of the re-issued patent was valid and had been infringed, and entered a decree for the plaintiffs. See [*Herring* v. *Gape*], 14 Blatchf., 293. The defendants appealed to this court.

The original patent begins by stating that Denchfield has invented a new and improved arrangement of means for cooling and drying meal, during its passage from the grinding stones to the bolts. The re-issued patent omits, in this connection, the words "during its passage from the grinding stones to the bolts." But both the original and the re-issue, after referring to the same accompanying drawings, proceed as follows, the words in brackets being inserted in the re-issue only:

"This invention consists in the peculiar arrangement of a suction fan, [conveyor or] conveyors, and elevators, as hereinafter described whereby the meal, during its passage from the grinding stones to the bolts, is thoroughly dried and cooled within a limited space, the whole forming a simple and economical device."

Then follows a description, which is the same in the original patent and in the re-issue, and is in substance as follows:

The millstones, A, and curbs, are arranged in the ordinary way on the bed, B. Spouts, C, carry the meal from the stones down into a chest, D, which is placed horizontally on the flooring of the mill. This chest is equal in length to the bed, so that all the spouts of the several stones may communicate with it; and it is divided horizontally lengthwise by a zigzag partition having openings in it. Within and at the bottom of this chest is placed a longitudinal shaft, F, having a spiral flanch on it. With one end of this shaft an elevator, F', communicates, which discharges its contents at *e*. A fan, G, is placed in a suitable box, H. This box communicates with a spout, I, the lower end of which communicates with the chest, D, and the upper end with one end of a chest, J, in the uppermost part of the mill. Within that chest a series of vertical partitions, *i*, is so placed as to form a winding passage from its communication with the spout I to an opening at the opposite end of the chest. That chest also contains a longitudinal shaft, K, having a spiral flanch on it. Both shafts, F, K, are rotated by any proper means.

The rest of the specification, and the claim, [642] both in the original patent and in the re-issue, differing only by inserting in the re-issue the parts printed below in brackets, are as follows:

"The operation is as follows: the meal passes from the stones A down the spouts C and into the lower part of the chest D, and is conveyed by the spirally-flanched shaft F into the elevators F', the shaft F, which is a conveyor, moving the meal in the direction indicated by the arrows 3. The meal is carried up by the elevators and discharged at *e* directly into the bolts or into troughs, and may be conveyed by hopper-boys or any suitable conveying device into the bolts. While the meal is thus passed through the stones A, spouts C, and the chest D, a suction blast is produced by the fan G, said blast absorbing the moisture or vapor which the meal contains, and which is heated or warmed by the friction of the stones A. The meal, therefore, is dried and cooled and, in consequence of the time consumed during its passage through the spouts C and chest D, will be perfectly acted upon by the blast, so that all free moisture will be absorbed. A portion of the finer and lighter particles of flour will follow the blast, and will be ejected up through the spout I and through the serpentine or winding passage formed by the parts *i*, and will settle in the outer end of the chest J, and be conveyed by the conveyor or flanched shaft K to a spout, *j*, through which it falls into the elevators F' and unites with the meal which is received by the elevators direct from the chest D. [This compound arrangement for operating on the meal while passing through the chest D, and on the escaped flour in the chest J, returning the latter to the elevators, while it is extremely well adapted for large flouring mills running at high speeds and with a strong suction blast, may not be either necessary or even practicable in all cases. When the grinding friction evolves only a moderate degree of heat, the chest J and its apparatus may be dispensed with, for, the blast being moderated to correspond, so small a quantity of the fine flour will be drawn through the spout I, that such flour may be ejected on the mill floor, and be disposed of in any convenient way so as to enter the bolts.]

I do not claim forcing a current of air between [643] a pair of millstones, while the same is in operation, for the purpose of keeping the stones in a cool state and preventing the heating of the grain; for such means, although not very efficient, have been previously used. But I am not aware that parts arranged as herein shown, so as

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to allow the meal to be subjected to the blast during its entire or nearly entire passage from the stones to the bolts, and insure the perfect drying and cooling of the meal, have been previously used.

I claim, therefore, as new, and desire to secure by letters patent:

1. [The arrangement and combination of the suction fan G and spout I with the meal chest D, receiving the meal from the grinding stones, and provided with a conveyor shaft F and elevator F', substantially as and for the purpose set forth.]

2. The arrangement and combination of the chest[s]D J, shafts F K, elevators F', fan G, and spout I, substantially as and for the purpose herein shown and described."

No new device was invented by Denchfield, but his improvement consisted in a new combination of old means and devices. That combination, as described in the specification of his original patent, includes seven elements, namely: 1. The meal chest D at the bottom of the mill, into which the meal falls through the spouts C from the millstones. 2. The conveying shaft F, which takes the meal from this chest into the elevator F'. 3. The elevator F', which carries up the meal and discharges it into the bolts or hopper-boys. 4. The fan G, creating a suction blast, which cools and dries the meal during its passage through the millstones, the spouts C and the chest D. 5. The spout I, communicating with the fan, and through which the meal dust, following the blast of air, is thrown upwards into the chest J at the top of the mill. 6. The chest J, in which the meal dust settles. 7. The conveying shaft K, by which the meal dust is carried from this chest into the elevator.

The only devices, indeed, which take part in cooling and drying the meal, are the meal chest at the bottom of the mill with the rotating shaft in it, the spout by which that chest communi- [644] cates with the fan, and the fan itself. The other chest or dust room at the top of the mill collects and saves the lighter part of the meal thrown upwards by the fan. The rotating shafts in each chest convey all the meal, after it has been cooled, dried and collected, to the elevator, and the elevator takes it to the bolts.

But the fan, with its communicating spout and meal chest, the dust room, the two conveyors and the elevator, tend to one result, the cooling and drying of the meal, without waste or loss, "on its passage from the grinding stones to the bolts," "the whole," as stated at the beginning of the specification, "forming a simple and economical device;" and the single claim in the original patent is for the arrangement and combination of the seven elements, designating them all with equal distinctness by appropriate letters.

The re-issue was granted more than thirteen years and eight months after the date of the original patent, and less than four months before that patent would have expired; and contains two claims, the second of which is a repetition of the claim in the original patent.

The first claim in the re-issue is for a combination of the fan G and spout I with the meal chest D, receiving the meal from the grinding stones, and provided with a conveyor shaft F and elevator F'; and omits all mention of the dust room J and its conveyor shaft K. This claim, then, is for a combination of five of the seven elements of the combination for which the patent was originally granted. The effect is, to enlarge the claim; for, while the original claim was only for these five elements in combination with the other two elements, and would not have been infringed by the use of a combination of the five without the other two, the new claim covers a combination of the five elements, whether used with or without the two others. *Prouty* v. *Ruggles*, 16 Pet., 336; *Vance* v. *Campbell*, 1 Black, 427 [66 U. S., XVII., 168]; *Gould* v. *Rees*, 15 Wall., 187 [82 U. S., XXI., 39].

The statute in force at the time of the issue of the original patent authorized a surrender and re-issue whenever any patent was "Inoperative or invalid, by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification as his own invention more than he had a right to claim as new." The statute in force at the time [645] of the re-issue made no change in this, except by striking out the words "description or." Stat. 4th July, 1836, ch. 357, sec. 13 [5 Stat. at L., 117]; Rev. Stat. sec. 4916.

The plaintiffs do not contend that in the original specification the patentee claimed as his own invention more than he had a right to claim as new; or that there is any defect or insufficiency in any part of the description or specification, other than the final claim. The descriptive part is, word for word, the same in the original and in the re-issue. It is argued that the claim in the original patent was too much restricted by including in the combination elements which were no part of the real invention, and that this mistake might properly be corrected in the re-issue. But there being no error in the descriptive part of the specification, any mistake in the claim, which is the more important part, and upon which other inventors and the public have the right to rely, as defining the limits of the invention patented, would be apparent on the face of the patent and could not escape the notice of any person reading it with the least care and attention.

It is plausibly suggested that "The claim could be made perfect in form, and consistent with the description of all that portion of the apparatus which relates to the invention, by simply striking out the letter of designation for the upper chest, J, and the letter of designation for the conveyor shaft of that chest, K." But that the inventor did not and does not intend so to amend his claim is conclusively shown by his having repeated the same claim, including these very letters of designation, in the second claim of the re-issued patent. His attempt is, while he retains and asserts the original claim in all particulars, to add to it another claim which he did not make, or suggest the possibility of, in the original patent, nor until that patent was about to expire.

To uphold such a claim, made so late, would be to disregard the principles governing re-issued patents, stated upon great consideration by this court at the last Term in the case of *Miller* v. *Brass Co.*, 104 U. S., 350 [XXVI., 783], and since affirmed in many other cases. *James* v. *Campbell*, 104 U. S., 356 [XXVI., 786]; *Heald* v. *Rice*, 104 U. S., 737 [XXVI., 910]; *Matthews*

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v. *Machine Co.*, 105 U. S., 54 [XXVI., 1022]; [646] *Bantz* v. *Frantz*, 105 U. S., 160 [XXVI., 1018]; *Johnson* v. *Railroad Co.*, 105 U. S., 539 [XXVI., 1162]; *Moffitt* v. *Rogers* [*ante*, 76].

The invalidity of the new claim in the re-issue does not indeed impair the validity of the original claim which is repeated and separately stated in the re-issued patent. Under the provisions of the Patent Act, whenever through inadvertence, accident or mistake, and without any willful default or intent to defraud or mislead the public, a patentee in his specification has claimed more than that of which he was the original and first inventor or discoverer, his patent is valid for all that part which is truly and justly his own, provided the same is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right; and the patentee, upon seasonably recording in the Patent Office a disclaimer in writing of the parts which he did not invent, or to which he has no valid claim, may maintain a suit upon that part which he is entitled to hold, although in a suit brought before the disclaimer he cannot recover costs. R. S. secs. 4917, 4922; *O'Reilly* v. *Morse*, 15 How., 62, 120, 121; *Vance* v. *Campbell*, above cited. A re-issued patent is within the letter and the spirit of these provisions.

The decree of the circuit court proceeds upon the ground that the first or new claim of the re-issue has been infringed; but the plaintiffs' bill is not so restricted, and alleges generally that the defendants have infringed the re-issued patent. If the defendants have infringed the second or old claim, the plaintiffs, upon filing a disclaimer of the new one, are entitled to a decree, without costs, for the infringement of the old and valid claim. Considering that the question of the validity of the new claim in the re-issue is a question of law upon the face of the patent, and that its validity has been sanctioned by the Commissioner of Patents in granting the re-issue, and upheld by the circuit court, there has been no unreasonable delay in entering a disclaimer; for the plaintiffs were not bound to disclaim until after a judgment of this court upon the question. *O'Reilly* v. *Morse*, above cited; *Seymour* v. *McCormick*, 19 How., 96 [60 U. S., XV., 557].

The question then remains to be considered, whether the evidence before us shows an infringement by the defendants of the entire combination.

[647] It is proved and not denied that the apparatus in the defendants' mill is substantially like that described in the plaintiffs' patent, so far as regards the first meal chest, the fan and the spout connecting with the fan; and also so far as regards the elevator and the conveying shaft from the first meal chest to the elevator; in short, so far as regards the cooling and drying apparatus proper, and the devices for collecting and conveying the greater part of the meal, after being cooled and dried, to the bolts.

The defendants are also proved to have a dust room, by which the light meal dust thrown upwards by the fan through the spout is collected and saved. This part of their apparatus is not, indeed, in form exactly like that of the plaintiffs'. The plaintiffs' patent, with the accompanying drawings, describes a single dust room with vertical partitions attached alternately to the floor and to the ceiling, and extending part way of the height, against which partitions the meal dust, as it passes in a serpentine course over one partition and under the next, strikes and falls to the floor; with an opening at the further end of the room to carry off the air after the meal dust has been deposited. The defendants' dust room consists of two or three successive chambers, communicating by spouts or conductors, against the walls or ceilings of which chambers the meal dust, as it is carried along by the current of air, strikes, and to the floors of which it falls; with a ventilator at the top of the uppermost chamber, through which the current of air passes out, after depositing the meal dust. The defendants' dust room of several chambers, with a ventilator at the top of the uppermost one, performs the same function in substantially the same way, and produces substantially the same result, as the plaintiffs' dust room with the partitions across it. In short, the defendants' dust room, or contrivance for collecting and saving the light meal dust thrown upwards by the fan, is a substantial equivalent for that of the plaintiffs. The defendants have, therefore, infringed this part also of the plaintiffs' combination. *Gould* v. *Rees*, above cited; *Ives* v. *Hamilton*, 92 U. S., 426 [XXIII., 494]; *Machine Co.* v. *Murphy*, 97 U. S., 120 [XXIV. 935].

The remaining part of the plaintiffs' combination is the conveyor shaft in the dust room by which the fine meal dust, after it has been collected and saved in that room, is transferred [648] to the elevator and reunited with the rest of the meal. This conveyor performs indeed a subordinate function, analogous to that which the other conveying shaft and the elevator perform in regard to the principal part of the meal. But the patentee, in his specification and in his only valid claim, has made each of the conveyors, as well as the elevator, a material part of the combination invented and patented by him. He describes the conveyor shaft in the dust room with the same particularity as the other parts of his combination, and he claims it with equal distinctness.

As was said by *Mr. Justice* Bradley in *Water-Meter Co.* v. *Desper*, 101 U. S., 332, 337 [XXV., 1024, 1026], "The courts of this country cannot always indulge the same latitude which is exercised by English judges in determining what parts of a machine are or are not material. Our law requires the patentee to specify particularly what he claims to be new, and if he claims a combination of certain elements or parts, we cannot declare that any one of these elements is immaterial. The patentee makes them all material by the restricted form of his claim. We can only decide whether any part omitted by an alleged infringer is supplied by some other device or instrumentality which is its equivalent."

The defendants' mill contains no conveyor shaft in the dust room, and no mechanism which performs the same function of removing the meal there collected. So far as the evidence shows, the meal deposited upon the floor of that room remains there until it is shoveled or swept up by manual labor. Its removal by such means affords no equivalent, in the sense of the patent law, for the automatic action described in the plaintiffs' patent. *Eames* v. *Godfrey*, 1 Wall.,

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78 [68 U. S., XVII., 547]; *Murray* v. *Clayton*, L. R., 10 Ch., 675, *note*; *Clark* v. *Adie*, L.R., 10 Ch., 667, 675, 676, and 2 App. Cas., 315.

The new claim in the re-issue being invalid, and the defendants not having infringed the entire combination set forth in the repetition of the old claim, the decree below can neither be upheld upon the new claim, nor modified so as to apply it to the other claim, but must be reversed and the case remanded, with directions to dismiss the bill.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—114 U. S., 86, 98.

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[454] WABASH RAILWAY COMPANY, *Plff. in Err.*,

v.

JOHN McDANIELS.

(See S. C., 17 Otto, 454–463.)

Setting aside verdict for excessive damages—liability of railroad company for incompetent employés,

*1. A judgment cannot be reviewed in this court upon the ground that the damages found by the jury are excessive.

2. The same degree of care required of a railroad corporation in providing and maintaining machinery for use by its *employés* must be observed in the appointment and retention of the *employés* themselves, including telegraphic operators. Ordinary care on the part of such corporation implies, as between it and its *employés*, not simply the degree of diligence which is customary among those intrusted with the management of railroad property, but such as, having respect to the exigencies of the particular service, ought reasonably to be observed. It is such care as, in view of the consequences that may result from negligence on the part of *employés* is fairly commensurate with the perils or dangers likely to be encountered.

[No. 286.]

Argued Apr. 26, 1883. Decided May 7, 1883.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

The history and facts fully appear in the

Statement of the case by *Mr. Justice* **Harlan**:

This was an action to recover damages for injuries sustained by the plaintiff, the defendant in error here, from a collision between two freight trains belonging to the Wabash Railway Company, a Corporation engaged in the business of carrying freight and passengers for hire. The collision took place on the night of August 17, 1877, near Wabash, Indiana.

The jury returned a verdict in favor of the plaintiff for $15,000. A motion for new trial having been made and overruled, the case has been brought to this court for review.

The action proceeded mainly upon the ground that McHenry, a telegraphic operator in the service of the Company, was incompetent for the work in which he was engaged, and that his incapacity to meet the responsibilities of his position could, by reasonable care, have been ascertained and, in fact, was known to the Company at, before and during the time of his employment.

The essential facts bearing upon the question of the Company's negligence in employing McHenry are summarized in one of the paragraphs of the charge to the jury, to which, so far as the facts which the evidence tended to establish are stated, there seems to have been no exception. They are:

"The tenth night after McHenry went on duty as night operator he went to sleep at his post of duty with the result already stated: He was seventeen years old but a few weeks before this employment. In June, 1876, he went into the service of the defendant, at Wabash, as a messenger boy, and continued in that service some twelve months, during which time he was instructed by Waldo, the day operator, in the art of telegraphy. For this instruction Waldo exacted and received, as compensation, McHenry's wages, $10 per month. For a month or more before McHenry's employment as night operator he worked in the country, harvesting. The only knowledge that he had of telegraphy was what he acquired under Waldo, and before taking charge as night operator he had never been employed anywhere or in any capacity as operator. He was not competent, as he told you, to take press reports, but was competent, as he thought, and as Waldo and Wade (the latter his predecessor as night operator) thought, to do ordinary business, and to discharge the duty of night operator at Wabash; his habits were good, and he was bright and industrious. Waldo had recommended McHenry to Simp-

*Head notes by *Mr. Justice* HARLAN.

NOTE.—*Negligence; responsibility of master to servant for carefulness and competency of co-servants.*

The master must exercise such degree of care in selecting servants as a reasonably prudent man would, in view of the hazards incident to the employment of careless or incompetent servants. Kroy v. Chic., etc., R. R. Co., 32 Iowa, 357; Strahlendorf v. Rosenthal, 30 Wis., 674; Rohback v. Pac. R. R. Co., 43 Mo., 187; Farwell v. B. & W. R. R. Corp., 4 Met., 49; S. C., 38 Am. Dec., 339.

The obligation of the master does not extend beyond the use of ordinary care and diligence. Wiggett v. Fox, 36 Eng. L. & E., 486; King v. B. & W. R. R. Co., 9 Cush., 112; Ponton v. R. R. Co., 6 Jones, 245; Caldwell v. Brown, 53 Pa. St., 453; Manville v. Cleveland & T. R. R. Co., 11 Ohio St., 417.

It is the duty of the master to exercise reasonable care in the selection of servants. Haskin v. R. R. Co., 65 Barb., 129; Faulkner v. Erie R. R. Co., 49 Barb., 324; Thayer v. St. Louis, etc., R. R. Co., 22 Ind., 26; Chic., etc., R. R. Co. v. Harvey, 28 Ind., 23; Curley v. Harris, 11 Allen, 112; Gilman v. Eastern R. R. Co., 10 Allen, 233; Ill. Cent. R. R. Co. v. Jewell, 46 Ill., 99; Witle v. Hague, 2 Dow. & Ry., 33.

It is presumed that the master did exercise such care, and the burden of showing that he did not is upon the injured fellow servant. Davis v. R. R. Co., 20 Mich., 105; Brothers v. Carter, 52 Mo., 372; S. C., 14 Am. Rep., 424; Davis v. Detroit, etc., R. R. Co., 20 Mich., 105.

Where the injured servant remained in the master's employment with knowledge of his co-servant's incompetency, he cannot recover for injuries resulting therefrom, unless he shows that he had reason to believe he would be discharged or placed where his negligence would not injure complainant. Wiggins Ferry Co. v. Blakeman, 54 Ill., 201; Haskins v. R. R. Co., 65 Barb., 129; Laning v. R. R. Co., 49 N. Y., 521; Kroy v. Chic., etc., R. R. Co., 32 Iowa, 357; Frazier v. Pa. R. R. Co., 38 Pa. St., 104; Davis v. Detroit, etc., R. R. Co., 20 Mich., 105.

If the officers of a railway company have made careful inquiry into the habits and competency of the *employés* and, upon such inquiry, believe them sober, competent and careful, the company is not liable for injuries resulting from the negligence of a *co-employé*. O'Donnell v. Allegheny Val. R. R. Co., 59 Pa. St., 239; Un. Pac. R. R. Co. v. Milliken, 8

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son, the chief train despatcher at Ft. Wayne, as capable and faithful and, without knowing McHenry personally or even seeing him, and on Waldo's recommendation and what Simpson knew of McHenry's skill from having occasionally noticed at Ft. Wayne his fingering the key at Wabash, Simpson directed Waldo to employ McHenry at $50 a month; or, according to Waldo's testimony, he was directed by Mr. Simpson to put McHenry in charge of the office. McHenry's father told Waldo, before the son entered on the discharge of his duties, that Waldo should have $10 a month of the son's wages if Waldo would continue to give the son attention, to which Waldo assented. This is the father's testimony. Waldo admits that the father made the proposition to him as stated, but says he replied that the son was competent to take charge of the office and run it without assistance. Boys no older than McHenry had successfully discharged the duties of day and night despatcher on this and other roads, and it seems to have been the custom of the Company to educate its telegraph operators while serving as messenger boys. Other railroad companies, it seems from the evidence, have pursued the same course with satisfactory results."

Messrs. **Wager Swayne**, *Charles B. Stuart, T. A. Hendricks* and *Conrad Baker*, for plaintiff in error:

The court erred in charging the jury that "proper and great care" and not "ordinary care" was the duty owing by a railroad company to its *employés* in selecting their fellows.

Owen v. *R. R. Co.*, 1 Lans., 106; *Muldowney* v. *Ill. R. R. Co.*, 39 Iowa, 615; *Way* v. *R. R. Co.*, Iowa, 341; *Lumley* v. *Caswell*, 47 Iowa, 159; 40 *Williams* v. *Clough*, 3 Hurl. & N., 258; *Crutchfield* v. *R. R. Co.*, 78 N. C., 300; *Stone* v. *Oregon Co.*, 4 Oreg., 52; *Senior* v. *Ward*, 102 E. C. L., 384; *Beaulieu* v. *Portland Co.*, 48 Me., 291; *Rohback* v. *R. R. Co.*, 43 Mo., 187; *Murphy* v. *R. R. Co.*, 71 Mo., 202; *McDermott* v. *R. R. Co.*, 30 Mo., 115; *Dillon* v. *R. Co.*, 3 Dill., 319; *Baulec* v. *R. R. Co.*, 59 N. Y., 356; *R. Co.* v. *McCormick*, 74 Ind., 440; *Gilman* v. *R. R. Co.*, 10 Allen, 233; *R. R. Co.* v. *Sentmeyer*, 92 Pa., 276; *Slater* v. *Jewett*, 85 N. Y., 61; *Manville* v. *R. R. Co.*, 11 Ohio St., 417.

The night operator through whose fault the plaintiff suffered was his fellow-servant.

Pierce R. R.; *Slater* v. *Jewett*, 85 N. Y., 61; *R. Farwell* v. *R. R. Co.*, 4 Metc., 49; *Robertson* v. *R. Co.*, 78 Ind., 77; *Chapman* v. *R. R. Co.*, 55 N. Y., 579; *Dana* v. *R. R. Co.*, 23 Hun, 473.

Messrs. **E. E. McKay**, *Wm. Stone Abert* and *Gordon & Shepard*, for defendant in error:

The diligence required must be in proportion to the danger of the service; and if the master be negligent in making the appointment he is liable to the injured servant.

See, *R. R. Co.* v. *Collarn*, 73 Ind., 271; *R. R. Co.* v. *Waller*, 48 Ala. Rep., 459; Whart. Ev., sec. 48; *Potter* v. *Faulkner*, 31 L. J. Q. B., 30; *Gilman* v. *R. R. Co.*, 10 Allen, 236; *Baulec* v. *R. R.*, 59 N. Y., 356; *R. R. Co.* v. *Decker*, 82 Pa. St., 119; *Wager* v. *R. R. Co.*, 55 Pa. St., 460; *O'Connell* v. *R. R. Co.*, 20 Md., 212; *Wheelan* v. *R. R. Co.*, 8 Ohio St., 249; *Thayer* v. *R. R. Co.*, 22 Ind., 26; *R. R. Co.* v. *Taft*, 28 Mich., 289; *Lee* v. *Detroit Iron Works*, 62 Mo., 565; Whart. Neg., secs. 48, 785; *Ford* v. *R. R. Co.*, 110 Mass., 240.

The law does not exact a warranty of a co-servant's fitness and competency, but it does exact due care and diligence in their selection; and carries these words as far as they may fairly go.

Coombs v *N. Bedford Co.*, 102 Mass., 572; *Cayzer* v. *Taylor*, 10 Gray, 274; *Seaver* v. *R. R. Co.*, 14 Gray, 466; *Snow* v. *R. R. Co.*, 8 Allen, 441; *Gilman* v. *R. R. Co.*, 10 Allen, 233; *Gilman* v. *R. R. Co.*, 13 Allen, 433; *Ford* v. *R. R. Co.*, 110 Mass., 240.

Mr. Justice **Harlan** delivered the opinion of the court:

That we are without authority to disturb the judgment, upon the ground that the damages are excessive, cannot be doubted. Whether the order overruling the motion for new trial based upon that ground, was erroneous or not, our power is restricted to the determination of questions of law arising upon the record. *R. R. Co.* v. *Fraloff*, 100 U. S., 31 [XXV., 584].

We also remark, before entering upon the consideration of the matters properly presented for determination, that it is unnecessary to express any opinion upon the question whether the plaintiff and McHenry were fellow-servants, within the meaning of the general rule, that the servant takes the risks of dangers ordinarily attending or incident to the business in which he voluntarily engages for compensation, including the carelessness of his fellow-servants. The plaintiff took no exception to the instructions, which proceeded upon the ground that plaintiff and McHenry were fellow-servants and that, in accepting employment from the Company, they risked the negligence of each other

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Kan., 647; Sizer v. Sy., etc., R. R. Co., 7 Lans., 67; Moss v. Pac. R. R. Co., 49 Mo., 167.

Permission by the company to allow an incompetent fireman to run an engine renders the company liable. Harper v. I. & St. L. R. R. Co., 47 Mo., 567.

Specific acts of want of skill known to the officers may be shown. P., Ft. W. & Chic. R. R. Co. v. Ruby, 38 Ind., 294; S. C., 10 Am. Rep., 111; *contra:* Frazier v. Pa. R. R. Co., 38 Pa. St., 104.

Where the duty of selecting servants must be delegated, as in the case of corporations, the master is nevertheless liable to its servants for injuries resulting from a negligent performance of the delegated duty. Mann v. Pres., etc., of D. & H. C. Co., 91 N. Y., 495; S. C., 16 Week. Dig., 483.

The master does not guaranty nor warrant the competency or fitness of his servants. I. & Cin. R. R. Co. v. Love, 10 Ind., 554; Moss v. Pac. R. R. Co., 49 Mo., 167; S. C., 8 Am. Rep., 126; C. C. & I. C. Ry. Co. v. Troesch, 68 Ill., 545; S. C., 18 Am. Rep., 578; Beaulieu v. Portland Co., 48 Me., 291; Faulkner v. Erie R. R. Co., 49 Barb., 324; Ormond v. Holland, El. B. & El., 102; Tarrant v. Webb, 18 C. B., 797.

The master need not have actual knowledge of his incompetency to render him liable to a servant for the negligence of an incompetent fellow servant. It is sufficient if he would have ascertained it by the use of reasonable care and diligence. Brickner v. N. Y. C., etc., R. R. Co., 2 Lans., 508; Harper v. I. & St. L. R. R. Co., 47 Mo., 567; S. C., 4 Am. Rep., 353; Byron v. N. Y. State Printing Tel. Co., 26 Barb., 39.

Where the *employé* is so grossly and notoriously unfit for his position that not to know his unfitness is negligence, the law will presume notice. C., R. I. & P. R. R. Co. v. Doyle, 18 Kan., 58.

Where the master has used due diligence in the selection of fellow-servants, he is not liable to a servant for the negligence of his fellow servants. Brown v. Maxwell, 6 Hill, 592; S. C., 41 Am. Dec., 771; Farwell v. B. & W. R. R. Co., 4 Met., 49; S. C., 38 Am. Dec., 339; Toledo, W. & W. R. R. Co. v. Durkin, 76 Ill., 397; King v. B. & W. R. R. Co., 9 Cush., 114; Coon v. Sy. & U. R. R. Co., 5 N. Y., 494; Brand v. T. & S. R. R. Co., 8 Barb., 383.

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in the discharge of their respective duties. As no such question can arise upon the present writ of error, we pass to the examination, as well of the instructions to which the defendant excepted, as of those asked by it which the court refused to give.

At and before the time of the accident, the plaintiff was a brakeman in the service of the defendant. When injured, he was at his post of duty on one of the colliding trains. The collision, it is conceded, was the direct result of negligence on the part of McHenry, one of defendant's telegraphic night operators, who was assigned to duty at a station on the line of its road. He was asleep when one of the trains passed his station, and ignorant, for that reason, that it had passed, he misled the train despatcher at Fort Wayne as to its locality, at a particular hour of the night. In consequence of the erroneous information thus conveyed to the train despatcher, the trains were brought into collision, whereby the plaintiff lost his leg and was otherwise seriously and permanently injured.

The court charged the jury, in substance, "That the position of a telegraphic night operator upon the line of a railroad was one of great responsibility, the lives of passengers and *employés* on trains depending upon his skill and fidelity; that the Company 'was bound to exercise proper and great care to get a person in all [457] respects fit for the place;' that while the defendant did not guaranty to its servants the skill and faithfulness of their fellow-servants, its duty was 'to use all proper diligence in the selection and employment of a night operator,' and to discharge him, after being employed, if it learned or had reason to believe he was incompetent or negligent; that the plaintiff had a right to suppose that the Company 'would use proper diligence in the selection of its telegraphic operators and all other *employés* whose incapacity or negligence might expose him to dangers, in addition to those which were natually incident to his employment;' that 'what will amount to proper diligence on the part of the master in the selection of a servant for a particular duty will in part depend on the character and responsibility of that duty;' that 'the same degree of diligence which is required in the employment of a locomotive engineer would not be required in the employment of a fireman;' that 'sound sense and public policy require that railroad companies should not be exempt from liability to their *employés* for injuries resulting from the incompetency or negligence of *co-employés*, when, by the exercise of proper diligence, such injuries might be avoided;' that the presumption is that the defendant 'exercised proper diligence in the employment of McHenry, and the burden of proof of showing the contrary is upon the plaintiff;' but, 'if from any cause McHenry was not a fit person to be entrusted with the responsible duties of night operator, and the defendant knew that fact, or by reasonable diligence might have known it, it is liable, for it is admitted that the plaintiff's injuries were the direct result of McHenry's negligence, and there is no proof that the plaintiff contributed to the accident by his own negligence."

To each of these instructions the defendant excepted at the time and in proper form.

Among those asked by the Company, and for the refusal to give which error is assigned, is one which presents the distinction between the propositions of law presented to the jury for its guidance, and those which the Railroad Company requested to be given.

It is as follows:

"Although McHenry may have been and was guilty of negligence, and that negligence may have caused and did cause the collision which resulted in the injury to the plaintiff complained of, still the plaintiff cannot recover in this action unless it appears from the evidence that the defendant was guilty of negligence ei- [458] ther in the appointment of said McHenry or in retaining him in his position; and to establish such negligence on the part of the defendant, not only the incompetency of said McHenry must be shown, but it must be shown that defendant failed to exercise ordinary care or diligence to ascertain his qualifications and competency prior to his appointment, or failed to remove him after his incompetency had come to the notice of the defendant or to some agent or officer of defendant having power to remove said McHenry."

The court modified this instruction by striking out the word "ordinary" in the only place where it occurred, and inserting in lieu thereof the word "proper." Thus modified the instruction was granted, the defendant excepting, at the time, to the refusal to give the instruction in the form presented.

The main contention of the defendant is, that the jury were instructed that the duty of the Company was to observe "proper and great care," when they should have been instructed that only ordinary care was required in the appointment and retention of its *employés*. The former degree of care, it is contended, is matter of opinion upon a question of law, while the latter is a question of fact. And the argument of counsel is, that the question of ordinary care is to be determined by the usages or custom which obtain in railroad management and, therefore, the proper inquiry is: not what ought to be, but what is, the general practice in that business; that what the servant is presumed to know, and to have accepted as the basis of his employment, is the practice or custom as it is when, in hiring his services, he risks the dangers incident to his employment; that the law presumes that master and servant alike contract with reference to that which is equally within their observation and inquiry; consequently, the Company was required in the selection of plaintiff's fellow-servants, whose negligence might endanger his personal safety, not to observe "proper and great," which counsel insists mean peculiar, care, but only that degree of diligence which the general practice and [45 usage of railroad management sanctioned as sufficient.

In *Hough* v. *R. Co.*, 100 U. S., 213 [XXV., 612] it was decided that among the established exceptions to the general rule as to the nonliability of the common employer to one *employé* for the negligence of a *co-employé* in the same service, is one which arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of

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the master; that the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter; and that it is implied in the contract between the master and the servant, that in selecting physical means and agencies for the conduct of the business, the master shall not be wanting in proper care. It was further said that the obligation of a railroad company, in providing and maintaining, in suitable condition, machinery and apparatus to be used by its *employés*, is the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered; and that "its duty in that respect to its *employés* is discharged when, but only when, its agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by *employés*."

These observations, as to the degree of care to be exercised by a railroad corporation in providing and maintaining machinery for use by *employés*, apply with equal force to the appointment and retention of the *employés* themselves. The discussion in the adjudged cases discloses no serious conflict in the courts as to the general rule, but only as to the words to be used in defining the precise nature and degree of care to be observed by the employer. The decisions, with few exceptions, not important to be mentioned, are to the effect that the corporation must exercise ordinary care. But according to the best considered adjudications, and upon the clearest grounds of necessity and good faith, ordinary care, in the selection and retention of [460] servants and agents, implies that degree of diligence and precaution which the exigencies of the particular service reasonably require. It is such care as, in view of the consequences that may result from negligence on the part of *employés*, is fairly commensurate with the perils or dangers likely to be encountered. In substance, though not in words, the jury were so instructed in the present case. That the court did not use the word "ordinary" in its charge is of no consequence, since the jury were rightly instructed as to the degree of diligence which the Company was bound to exercise in the employment of telegraphic night operators. The court correctly said that that was a position of great responsibility and, in view of the consequences which might result to *employés* from the carelessness of telegraphic operators, upon whose reports depended the movement of trains, the defendant was under a duty to exercise "proper and great care" to select competent persons for that branch of its service. But that there might be no misapprehension as to what was in law such care, as applicable to this case, the court proceeded, in the same connection, to say that the law presumed the exercise by the Company of proper diligence, and unless it was affirmatively shown that the incapacity of McHenry when employed, or after his employment and before the collision, was known to it, or by reasonable diligence could have been ascertained, the plaintiff was not entitled to recover. Ordinary care, then, and the jury were, in effect, so informed, implies the exercise of reasonable diligence, and reasonable diligence implies, as between the employer and *employé*, such watchfulness, caution and foresight as, under all the circumstances of the particular service, a corporation controlled by careful, prudent officers, ought to exercise.

These observations meet, in part, the suggestion made by counsel, that ordinary care in the employment and retention of railroad *employés* means only that degree of diligence which is customary, or is sanctioned by the general practice and usage, which obtains among those intrusted with the management and control of railroad property and railroad *employés*. To this view we cannot give our assent. There are general expressions in adjudged cases, which [461] apparently sustain the position taken by counsel. But the reasoning upon which those cases are based is not satisfactory, nor, as we think, consistent with that good faith which, at all times, should characterize the intercourse between officers of railroad corporations and their *employés*. It should not be presumed that the *employé* sought or accepted service upon the implied understanding that they would exercise less care than that which prudent and humane managers of railroads ought to observe. To charge a brakeman, when entering the service of a railroad company, with knowledge of the degree of care generally or usually observed by agents of railroad corporations in the selection and retention of telegraphic operators along the line traversed by trains of cars, a branch of the company's service of which he can have little knowledge, and with the *employés* specially engaged therein he can ordinarily have little intercourse, is unwarranted by common experience. And to say, as matter of law, that a railroad corporation discharged its obligation to an *employé*—in respect of the fitness of *co-employés* whose negligence has caused him to be injured—by exercising, not that degree of care which ought to have been observed, but only such as like corporations are accustomed to observe, would go far towards relieving them of all responsibility whatever for negligence in the selection and retention of incompetent servants. If the general practice of such corporations in the appointment of servants is evidence which a jury may consider in determining whether, in the particular case, the requisite degree of care was observed, such practice cannot be taken as conclusive upon the inquiry as to the care which ought to have been exercised. A degree of care ordinarily exercised in such matters, may not be due or reasonable or proper care and, therefore, not ordinary care, within the meaning of the law.

It is further objected to the charge, that the court below confounded the degree of care owed as a duty to passengers with the degree of care to be observed in the case of *employés*. This objection necessarily rests upon the assumption that the instruction as to the exercise of "proper and great care" in the selection of telegraphic night operators accurately stated the degree of [462] diligence to be observed as between the Railroad Company and passengers. But clearly the statement in the charge that the lives of both passengers and *employés* depended upon the skill and fidelity of telegraphic operators, employed by the Corporation in connection with the movement of its trains, was not for the purpose of in-

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dicating, with legal precision, the degree of care upon which passengers could rely in all matters affecting their safety. They, at least, have the right to expect the highest or utmost, not simply a great degree of diligence on the part of passenger carriers and all persons employed by them. The reference, therefore, to passengers, in the instructions alluded to, was not calculated to make the impression that *employés* could count upon the same degree of care that is required by law towards passengers. Whether in the selection and retention of telegraphic operators, upon whose capacity and watchfulness largely depends the personal safety of *employés* on trains, a corporation should or not exercise the same degree of care which must be observed in the case of passengers, it is not necessary now to consider or determine. It is sufficient to say that the corporation was bound, in the appointment and retention of such operators, to observe, as between it and its *employés*, at least the degree of care indicated in the charge to the jury.

Among the instructions asked in behalf of the Company, the refusal to give which is the basis of one of the assignments of error, is the following:

"To render the carelessness of said McHenry the carelessness of the defendant, or to render the defendant liable for the same, it is incumbent on the plaintiff to prove that said McHenry was appointed to or retained in his position as telegraph operator with knowledge on the part of the Company, or some officer or agent of the Company having the power of appointment or removal, that he was incompetent, or that such knowledge might have been obtained by the use of reasonable diligence on the part of the defendant, or of such officer or agent of the defendant."

It is now complained that the refusal to give this instruction was practically a declaration to the jury that the Company was responsible for knowledge which it had through any of its agents or through its agents generally; whereas, it was liable only for the negligence or omission of those of its agents who were charged with the duty of selecting and controlling its *employés* and its general business. It is sufficient to say that this point, assuming the instruction in question to be correct, was covered by the last clause of the instruction to which our attention was first directed, and in terms quite as favorable to defendant as it was entitled to under the law. The court, in that instruction, expressly said that to establish the alleged negligence, not only the incompetency must be shown, "but it must be shown that the defendant failed to exercise proper care or diligence to ascertain his qualifications and competency prior to his appointment, or failed to remove him after his incompetency had come to the notice of defendant or to some agent or officer of defendant having power to remove said McHenry."

[463]

It is not necessary to further extend the discussion of the questions pressed upon our consideration. We are of opinion that the case, in all of its aspects, was fairly placed before the jury in the instructions given by the court. *No substantial error of law was committed to the prejudice of the Company and the judgment must be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 385, 483.

See 17 OTTO.

OMAHA HOTEL COMPANY, SMITH S. CALDWELL ET AL., *Plffs. in Err.*,

v.

AUGUSTUS KOUNTZE ET AL.

AUGUSTUS KOUNTZE, THOMAS WARDELL AND JAMES W. BOSLER, *Plffs. in Err.*,

v.

OMAHA HOTEL COMPANY, SMITH S. CALDWELL, CHARLES W. HAMILTON, GEORGE E. BARKER, E. D. PRATT AND SYLVANUS WRIGHT.

(See S. C., "*Kountze* v. *Omaha Hotel Company*," 17 Otto, 378-402.)

Appeal bond, effect of—additional condition—when ineffectual.

*1. An appeal bond in an ordinary foreclosure suit in the courts of the United States, does not operate as security for the amount of the original decree; nor for the interest accruing thereon pending the appeal; nor for the balance due after applying the proceeds of the mortgaged premises; nor for the rents and profits, or use and detention of the property pending the appeal; but only for the costs of the appeal; and the deterioration or waste of the property, and perhaps burdens accruing upon it by non-payment of taxes, and loss by fire if not properly insured. It is very doubtful, whether mere depreciation in market value is any cause of recovery on the bond.

2. Where an appeal bond, instead of following the words of the statute "That the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and if he fails to make his plea good, shall answer all damages and costs," superadds that he shall also "pay for the use and detention of the property covered by the mortgage in controversy during the pendency of the appeal" these words will be rejected, and the bond will be construed as having its ordinary and proper legal effect; the judge taking the bond having no right to require such an addition to the condition of an appeal and *supersedeas*.

3. This case distinguished from those in which official bonds and bonds given to the government for the purpose of enjoying some office or privilege have been sustained as contracts at common law.

[Nos. 244, 247.]

Argued Apr. 12, 13, 1883. Decided May 7, 1883.

IN ERROR to the Circuit Court of the United States for the District of Nebraska.

The history and facts of the case appear in the opinion of the court.

Mr. **J. M. Woolworth**, for Kountze *et al.*, plaintiffs below:

This undertaking possesses all the elements of a valid and binding contract:

1. The parties were competent to contract.

2. The obligors entered into the contract voluntarily.

U. S. v. *Tingey*, 5 Pet., 115; *U. S.* v. *Bradley*, 10 Pet., 343; *U. S.* v. *Linn*, 15 Pet., 290; *U. S.* v. *Hodson*, 10 Wall., 395 (77 U. S., XIX., 937).

The undertaking of the defendants was supported by a good consideration, namely: that the plaintiffs in the decree would forbear execution of the decree.

U. S. v. *Linn*, 15 Pet., 290, 314; *Montville* v. *Haughton*, 7 Conn., 543, 549; *Giddings* v. *Barney*, 31 Ohio St., 80; *Rynearson* v. *Fredenburg*, 42 Mich., 412; *State* v. *Cannon*, 34 Iowa, 322.

The contract contravened no provision of law.

U. S. v. *Tingey*, 5 Pet., 114; *U. S.* v. *Brad-*

*Head notes by *Mr. Justice* BRADLEY.

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ley, 10 Pet., 343; *U. S.* v. *Linn*, 15 Pet., 290; *U. S.* v. *Hodson* (*supra*), 10 Wall., 395.

The conditions of this bond, which are within the statute, give us damages equal to the penal sum.

The defendant, by the terms of the bond in which he agreed to pay all damages in case he did not prosecute his writ of error, undertook to pay the whole judgment.

Catlett v. *Brodie*, 9 Wheat., 553; *Stafford* v. *Bank*, 16 How., 139; *S. C.*, 17 How., 275 (58 U. S., XV., 101); *Ives* v. *Bank*, 12 How., 159; *Many* v. *Sizer*, 6 Gray, 141; *Ex parte French*, 100 U. S., 4 (XXV., 530).

Messrs. **Jeremiah S. Black, J. I. Redick,** *Clinton Briggs* and *Geo. E. Pritchett*, for the Omaha Hotel Company *et al.*, defendants below:

It is very plain what the intention of the parties was in giving this bond, and how it should be construed. As this court said, in the case in 3 Cranch, 235: "There are many cases on the construction of bonds where the letter of the condition has been departed from to carry into effect the intention of the parties."

And to the same effect are the cases of *Swain* v. *Graves*, 8 Cal., 549, and the case of *Ward* v. *Buell*, 18 Ind., 104, where the court says: "Any instrument in writing, however defective, which the parties execute for the purpose of staying execution on an appeal, and the officer accepts for such purpose, will have the force and effect of an appeal bond."

Any obligations of an appeal bond, which are additional to those required by statute are void.

Tomlin v. *Green*, 39 Ill., 225.

It would seem as though this court had pretty well settled the question as to what the loss of a mortgagee could be by reason of superseding his decree of foreclosure, in the cases of *Supervisors* v. *Kennicott*, 103 U. S., 555 (XXVI., 487), and *Jerome* v. *McCarter*, 21 Wall., 17 (88 U. S., XXII., 515), and shown that such loss depends upon the facts.

The Statutes of Nebraska provide that "In the absence of stipulations to the contrary, the mortgagor retains the legal title and right of possession" until sale is confirmed. See, Compiled Statutes of Nebraska, p. 394, sec. 55.

Webb v. *Hoselton*, 4 Neb., 318; *Ins. Co.* v. *Lovitt*, 10 Neb., 301.

If the mortgagees never were entitled to the possession of the premises, how can it be claimed that they are entitled to recover for rents and profits which go with the possession.

Mr. Justice **Bradley** delivered the opinion of the court:

This is an action on an appeal bond given for *supersedeas* of execution on a decree of foreclosure rendered by the Circuit Court for the [379] District of Nebraska, and appealed to this court and affirmed; and the question is as to the measure of damages to be recovered on said bond.

The foreclosure suit was brought to raise the amount due on certain bonds of the Omaha Hotel Company out of certain lands and premises situated in the City of Omaha, which had been mortgaged by the Company to secure the payment thereof. A decree was made on the 8th of May, 1875, by which it was ordered that the mortgaged premises be sold and the proceeds applied to pay the debt, after paying costs of sale and insurance and taxes accruing in the mean time. The defendants appealed and, to obtain *supersedeas* of execution, gave the appeal bond which is the subject of the present controversy. The bond was in the penalty of $50,500, and after reciting the decree and appeal was conditioned as follows:

"Now, the condition of the said obligation is such that if the said Omaha Hotel Company shall duly prosecute said appeal to effect, and pay said Jeptha H. Wade, James W. Bosler, Thomas Wardell, John A. Creighton, administrator of the estate of Edward Creighton, deceased, Andrew J. Poppleton, Augustus Kountze, Herman Kountze and Henry W. Yates, their executors, administrators or assigns, for the use and detention of the property covered by the mortgage in controversy in this suit, during the pendency of said appeal, and the costs of the suit, and just damages for delay, and costs and interest on said appeal, if it fails to make good its plea, this obligation shall be void; otherwise to remain in full force and virtue."

The decree being affirmed and the premises sold, the proceeds were found to be insufficient to satisfy the debt, to the amount of $88,460.85; and for this deficiency a decree was rendered against the Omaha Hotel Company, and an execution issued, which was returned unsatisfied.

Thereupon the present suit was brought on the appeal bond, and the plaintiffs by their petition claimed the entire penalty and interest on the facts above stated and on the ground that the Company was insolvent, that, pending the appeal, the property had depreciated in value $30,000, and that the use and detention of it was worth $30,000 more. The defendants, in their answer, averred that they had kept the property in good repair at a large expense, had [380] paid all the taxes upon it, and had kept it insured for the benefit of the bondholders to the amount of $100,000; and that instead of depreciating, it was worth much more when the sale was made, than it was at the time of the original decree. The jury, by a special verdict, found that the rental value of the property, pending the appeal, with interest to the time of trial, was $44,838.67, and that the expenses paid by the defendants for taxes, insurance and repairs, with interest thereon, was $26,082.71; that the value of the property in May, 1875, was $92,500, and in April, 1878, $139,000; that in May, 1875, it would have sold at master's sale for $62,000 (whereas, it sold in 1878 for $120,000); that the interest on the decree pending the appeal was $58,870.25; and that the penalty of the bond, with interest from July 11, 1878, to the time of the trial, amounted to $57,750; and that the costs of the original suit unpaid by the defendants was $530.

The court rendered judgment in favor of the plaintiffs for $19,785.98, being the difference between the rental value of the property pending the appeal, and the sums expended by the defendants for taxes, insurance and repairs, allowing interest on both sides; with the addition of the item of $530 costs unpaid by the defendants, and interest from the time of trial to the date of the judgment.

Both parties brought writs of error.

The plaintiffs now contend that they ought to have had judgment for the entire penalty of

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the bond, because, first, the bond expressly provides that the Omaha Hotel Company shall pay for the use and detention of the property pending the appeal, as well as costs and just damages for delay, which greatly exceeds the penalty; secondly, if the bond is to be limited in effect to the terms of the statute prescribing a bond, the damages are still greater than the penalty, its legal effect being to secure, to the extent of the penalty; (1), payment of the whole decree beyond what may be produced by the sale of the property; (2), the interest accruing pending the appeal, which alone exceeds the penalty; (3), the value of the use and detention of the property pending the appeal.

[381] The defendants contend that judgment should have been given for them.

The appeal bond sued on in this case was given under the requirement of section 1000 of the Revised Statutes, which declares that every justice or judge signing a citation or any writ of error shall, except in cases brought up by the United States, etc., take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a *supersedeas* and stays execution, or all costs only where it is not a *supersedeas* as aforesaid. Section 1007 gives the effect of a *supersedeas* to a writ of error where such a bond as above described is given, and the writ is sued out and filed in proper time. Section 1010 declares that where judgment is affirmed, the court shall adjudge to the respondent in error just damages for his delay, and single or double costs, at its discretion. Section 1012 declares that appeals from the circuit courts, etc., shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error.

These enactments are substantially a reproduction of like clauses in the Judiciary Act of 1789 [1 Stat. at L., 73], as regards writs of error, and of the Act of 1803 [2 Stat. at L., 244], as regards appeals. The material words are the clause in the bond which declares "*That the plaintiff in error (or appellant) shall prosecute his writ to effect, and if he fail to make his plea good, he shall answer all damages and costs.*" The scope and effect of this phrase, as applied to cases like the present, are the principal point in controversy. The bond sued on has an additional phrase, not required by the law, the effect of which will be separately considered.

By the common law a writ of error, without any security, was of itself a *supersedeas* of execution from the time of its allowance or recognition by the court to which it was directed; and even before, if the defendant in error had notice of it; or, in the common pleas, from the time of its delivery to the clerk of the errors of that court, whose business it was, amongst other things, to prepare the returns. 1 Tidd, Pr., 530, 1145; Impey, Pr., C. P. 16; Petersd. Abr., tit. Error, I. (H, *a*.) The presentation of the [382] writ issuing from the Superior Court, stopped all further proceedings except such as were incidental to a compliance with its command to certify the record. But as writs of error came to be sued out for the purpose of delay, various Acts of Parliament were passed, requiring security in certain cases, in order that the writ might operate as a *supersedeas*. First, without referring to a statute in the time of Elizabeth, the Statute of 3 James I., ch. 8, declared that no execution should be stayed or delayed, upon or by any writ of error, or *supersedeas* thereon, for the reversing of any judgment in debt upon a single bond, or a bond with condition for the payment of money only, or in debt for rent, or upon any contract, unless the plaintiff in error with two sufficient sureties, should first be bound to the plaintiff in the judgment, "By recognizance, in double the sum recovered by the former judgment, to prosecute the writ of error with effect, and also to satisfy and pay, if the said judgment should be affirmed, or the writ of error *non-prossed*, all and singular the debts, damages and costs, adjudged upon the former judgment; and all costs and damages to be awarded for the delaying of execution." This statute was specific as to the cases in which bail in error (as it was called) was required, and it was frequently held, that it could not be required in any other cases. 2 Sellon, Pr., 367-374; 2 Tidd, 1150. Subsequently by the Statute of 13 Car., 2, ch. 2, as enlarged by 16 and 17 Car., 2, ch. 8, the same recognizance was required to stay execution in all personal actions in which a judgment was rendered upon a verdict, and in most cases double costs were given in case the judgment was affirmed; and in writs of error upon judgment after verdict in dower and ejectment, it was provided that execution should not be stayed unless the plaintiff in error should be bound to the plaintiff, in such reasonable sum as the court below should think fit, with condition, that if the judgment should be affirmed, or the writ of error discontinued, in default of the plaintiff in error, or he should be non-suited therein, that then he should pay such costs, damages and sum or sums of money as should be awarded upon or after such judgment affirmed, discontinuance or non-suit; and to ascertain the sum and damages to be awarded, it was provided, that the court should issue a writ of inquiry as well of the *mesne* profits, as of the damages by any waste committed after the first [383] judgment in dower or ejectment, and give judgment therefor and for costs. This was the form in which the law stood for more than a century prior to our Revolution, and is believed to have generally prevailed in this country either by force of the English Statutes, or similar statutes adopted by the Colonies themselves down to the time of the passage of the Judiciary Act by Congress in 1789. See, 1 Rev. Laws of N. Y. (1813), p. 148, Act of 1801; Acts of New Jersey, Feb. 1, 1799, and Feb. 28, 1820, Elmer's Dig., 159, 160; Act of Maryland, 1713, ch. IV., 1 Kilty's Laws; and Alexander's British Statutes in force in Maryland, 16 and 17 Car. 2, ch. 8. In Virginia, by the Act of 1788, it was provided that before granting any appeal from a county to a district court, or issuing any writ of error or *supersedeas*, the party praying the same should enter into bond with sufficient security, in a penalty to be fixed by the court or judge, with condition to pay the amount of the recovery, and all costs and damages awarded, in case the judgment or sentence should be affirmed; and the damages were fixed at ten per cent *per annum* upon the principal sum and costs recovered in the inferior court; and the same provisions were applied to appeals and writs of error

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to the Court of Appeals. By the Act of 1794, on appeal from a decree in equity to the High Court of Chancery, the condition of the appeal bond required was, to satisfy and pay the amount recovered in the county court, and all costs, and to perform in all things the decree, if the same should be affirmed. Laws of Virginia, ed. 1814, pp. 87, 115, 448. In Massachusetts, as appears by an early case (1804), a *supersedeas* was granted upon the plaintiff in error giving bond to respond all damages and costs in case the judgment should be affirmed. *Bailey* v. *Baxter*, 1 Mass., 156. In Pennsylvania, where the judgment was affirmed upon a writ of error, the execution included the interest from the date of the original judgment. *Respublica* v. *Nicholson*, 2 Dall., 256.

It is thus seen that, in the case of money judgments, bail in error was required, to secure: 1, the amount of the original judgment; 2, the costs and damages occasioned by the delay of execution; and, in the case of dower and ejectment, the only other cases in which bail was required and where the main thing in controversy [384] was land, bail was required to secure only such costs, damages and money as should be awarded after affirmance of judgment, for *mesne* profits and waste pending the appeal.

In relation to money judgments, a long train of decisions in England shows that the damages for delay, for which the bail in error were to respond, were the interest on the sum recovered below from the day of signing final judgment to the time of affirmance, and costs in the writ of error, and in some cases double costs. In the Exchequer Chamber, when double costs were recoverable, the court exercised its discretion whether to allow interest or not, it not being allowed as a matter of course; but interest was only allowed where the original demand was one that drew interest, and not in cases of mere tort or unliquidated damages. Tidd, 1182, 1183. In the House of Lords, they gave large or small costs in their discretion, according to the nature of the case and the reasonableness or unreasonableness of litigating the judgment of the court below. Tidd, 1184.

We have no reason to believe that the rule of damages for delay on a recognizance, or bond in error, was materially different in this country, in 1789, from that which prevailed in England. The statutes being substantially the same, undoubtedly the same rule prevailed in administering them.

On appeals in chancery the practice in England, in case of an appeal from the Master of the Rolls to the Lord Chancellor was, for the party appealing to deposit £10, to be paid to the other party if the decree was not materially varied, and he was also required to pay the costs of the appeal; and on appeal from the court of chancery to the House of Lords, the appellant was obliged to make a deposit of £20, and give security by recognizance in the sum of £200, to pay such costs to the defendant in the appeal, as the court should appoint, in case the decree should be affirmed. Harr. Pr. in Chancery, ed. Newland, pp. 342, 349. In 1810 these amounts were doubled. Smith, Ch. Pr., 27, 44. If a party wished to file a bill of review, the general rule was, that he must perform the decree before filing his bill.

[385] Such being the rules prevailing on the subject when the Act of 1789 was passed, which required the plaintiff in error to give security "to prosecute the writ of error to effect, and to answer all damages and costs if he failed to make his plea good," the extremely general terms of the law are noticeable. According to the English law, the terms "all damages and costs," would only cover the damages for delay, security for the original judgment being expressly provided for by separate words; but the Act of Congress does not say "damages for delay," but generally "all damages and costs," without any specific provision for the original judgment; and the bond is required in all cases, and not merely on error to money judgments and judgments in dower and ejectment; and not merely in cases at law, but in cases of equity also; for the writ of error was the process of review prescribed by the Judiciary Act, both at law and in equity; and when appeals were allowed in the latter by the Act of 1803, they were subjected to the same rules and conditions as writs of error. The only guide, or hint of guidance, given by the Judiciary Act as to what damages were to be awarded on a bond in error, other than what might be deduced by analogy from the English and state laws, is an expression contained in the 23d section, where it is said that if, upon a writ of error, the supreme or circuit court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error *just damages* for his delay, and single or double costs at their discretion. So that, as the result of the whole, the matter was left very much at large, and subject to the regulation of the courts, and such analogies as existing laws afforded.

By an Act passed December 12, 1794, 1 Stat. at L., 404, it was declared that the security to be required on signing a citation on a writ of error which shall not be a *supersedeas* and stay execution, shall be only to such an amount as, in the opinion of the judge taking the same, shall be sufficient to answer all such costs as, upon an affirmance of the judgment or decree, may be adjudged or decreed to the defendant in error. The substance of this Act is reproduced in the Revised Statutes; but it sheds no light on the question of damages as distinguished from mere costs.

The Supreme Court at an early day (February Term, 1803), adopted the two following rules: [386]

(1) In all cases where a writ of error shall delay the proceedings on the judgment of the circuit court, and shall appear to have been sued out merely for delay, damages shall be awarded at the rate of ten per centum per annum on the amount of the judgment.

(2) In such cases where there exists a real controversy, the damages shall be only at the rate of six per centum per annum. In both cases the interest is to be computed as part of the damages.

The latter rule was changed in 1852, when by an amended rule, still in force, on affirmance of a judgment, interest was directed to be calculated and levied from the date of the judgment below until paid, at the same rate that similar judgments bear interest in the courts of the State where the judgment was rendered. 13 How., v. [For Rules of 1884, see, Book XX., 901.]

The other rule was amended in 1871, giving ten per cent damages in addition to interest,

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when the writ of error appears to be sued out merely for delay. 11 Wall., x.

And both rules were extended to appeals from decrees in chancery for the payment of money in 1852. 13 How., v.

These rules may undoubtedly be regarded as prescribing the measure of damages for delay in the cases in which they apply; that is, in the case of money judgments and decrees. But whether the bond in error covered the original debt was not distinctly decided until the case of *Catlett* v. *Brodie*, 9 Wheat., 553, came before the court. In that case, judgment was rendered for the plaintiff below for a large sum, but the Judge who signed the citation took a bond in a small amount to respond the damages and costs. On a motion to dismiss the writ of error for insufficiency of the bond, it was contended for the plaintiff in error, that the Act meant only to provide for such damages and costs as the court should adjudge for the delay. But the court held that the word "damages" covered whatever losses the plaintiff might sustain by the judgments not being satisfied and paid after the affirmance; in other words, that the bond in error had the same effect as the recognizance required by the English statutes, and was in- [387] tended to secure payment of the original judgment, as well as the damages for delay. Hence, the bond should have been taken in an amount sufficient to secure the whole debt; and it was ordered that the writ of error should be dismissed unless, within thirty days from the rising of the court, the plaintiff in error should give a bond sufficient in amount to secure the whole judgment.

In *Stafford* v. *Bank*, 16 How., 185, though no decision was made, because the case was not properly before the court, an opinion was delivered by *Justice* McLean, as for the court, that the same rule would apply in case of an appeal from a decree in equity for the sale and foreclosure of certain negroes who had been delivered to a receiver *pendente lite*; and that the bond should have been to secure the whole mortgage debt. *Justice* Catron dissented from this view, holding that where there was a fund in the possession of the court, no security to cover its contingent loss should be required; and that to construe the Act as if this were a simple judgment at law would operate most harshly.

In accordance with the suggestion made by the court, application was made for a *mandamus* to the Judge below, to compel him to cause the decree to be carried into execution notwithstanding the appeal. On a rule to show cause, the Judge returned the facts as above stated, and that he had no power to take further order in the case. But the court, deeming the appeal bond insufficient to operate as a *supersedeas*, granted the *mandamus*. 17 How., 275 [58 U. S., XV., 101].

Subsequent decisions have undoubtedly modified the rule followed in this case and, indeed, have overruled it, and are more in accordance with the views expressed by *Justice* Catron.

In *Roberts* v. *Cooper*, 19 How., 373 [60 U. S., XV., 687], which was an action of ejectment for the recovery of mining lands, the plaintiff having recovered the land with only nominal damages, a writ of error was brought by the defendant, who was required to give a bond for only $1,000. The plaintiff applied to this court for an order requiring additional security, producing affidavits to show that the damages which he would sustain by the delay in working the mine, caused by the *supersedeas*, would exceed $25,000. The court refused the motion; and said that if it were a money demand, on [388] which a sum certain had been given by a judgment, it would have been the duty of the Judge to take care that good security was given; but that in ejectment, where only nominal damages are recovered, the court cannot interfere to enlarge the security to recover damages which a plaintiff may recover in an action for *mesne* profits, or other losses he will sustain by being kept out of possession. The court held that the case was not provided for by any legislation of Congress, as had been done in England by the Statute of 16 and 17 Car., 2, ch. 8.

In *Rubber Co.* v. *Goodyear*, 6 Wall., 153 [73 U. S. XVIII., 762], the subject again came before this court on a question as to the amount of security required upon appeal from a personal decree in equity, where a portion of the amount had been secured by a deposit in court. The decree was for over $300,000, and the Judge following the usual practice required a bond in double the amount of the decree. The defendants, as security for the claim, had deposited in the court below, government bonds to the amount of $200,000. On a motion in this court to reduce the amount of the bond, the court reduced it to $225,000. *Chief Justice* Chase, delivering the opinion of the court, said: "It is not required that the security shall be in any fixed proportion to the decree. What is necessary is, that it be sufficient."

From the amount involved in this case, and the eminence of the counsel engaged in it, it was no doubt carefully considered. After its determination, the court made a general rule as to the amount of indemnity required in *supersedeas* bonds, which now stands as the 29th Rule of the court [XX., 907]. This rule declares that "Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages; or where the property is in the custody of the marshal, under admiralty process, as in case of capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered [389] for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal."

Since the adoption of this rule, the matter has come up for consideration in several cases. In *French* v. *Shoemaker*, 12 Wall., 86 [79 U. S., XX., 270], where the matter in controversy was the possession of a railroad, the interest of the defendant in which had been pledged as security for $5,000, and which was in the hands of a receiver, upon a decree for the complainant, and an appeal, the bond taken for a *supersedeas* was in the penalty of $500, and this court, after reciting the rule, held that nothing appeared to show that the bond was insufficient.

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In *Jerome* v. *McCarter*, 21 Wall., 17 [88 U. S., XXII., 515], an appeal was taken from a decree of over $1,000,000 for the foreclosure and sale of a canal, subject to a prior lien of over $1,500,000. The canal company had become bankrupt, and the assignees in bankruptcy brought the appeal. The appeal bond required of them was $10,000; and motion was made in this court to have the amount of security increased. The court after reviewing the previous cases, and adverting to the 29th Rule, refused the motion, holding that the amount of security in such a case was in the discretion of the Judge who took the bond, and that this court would not interfere with that discretion, unless there had been a change of circumstances requiring additional security. The *Chief Justice* said: "This is a suit on a mortgage and, therefore, under this Rule, a case in which the Judge who signs the citation is called upon to determine what amount of security will be sufficient to secure the amount to be recovered for the use and detention of the property, and the costs of the suit, and just damages for the delay, and costs and interest on the appeal. All this, by the Rule, is left to his discretion." It being contended that the Judge had disregarded the established rule, to require security for the interest accruing pending the appeal, which in that case would amount on the debt due to the complainant and on the prior liens, to more than $500,000; the court held that this is not the requirement of the rule; that the object is to provide indemnity for the loss by the accumulation of interest consequent upon the appeal, not for the payment of the interest: and that, as to this, the Judge must determine. It was added, that the decree did not interfere with an action at law against the company, if it were not bankrupt; nor with proving the claim in bankruptcy, and obtaining a dividend, since it was bankrupt.

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So far as the point decided in this case goes, it determines that on an appeal from a decree for the foreclosure of a mortgage, the appeal bond is not intended as security for either the amount of the decree or the interest accruing pending the appeal, but for such damage as may arise from the delay incident to the appeal; and although it is intimated that this damage may depend upon the use and detention of the mortgaged property, yet that was not the point in judgment.

In *Ex parte French*, 100 U. S., 1 [XXV., 529], an ejectment case, the bond being amply sufficient to cover the damages, or *mesne* profits, recovered in the court below, this court refused to interfere by a *mandamus*, to compel the court below to proceed to execution. The *Chief Justice* said: "In this view of the case, the bonds are sufficient in amount and form. So far as the money parts of the judgment are concerned, they are far in excess in each instance of the amount recovered against the several defendants who seek the stay; and as to the damages on account of the detention of the property, we decided in *Jerome* v. *McCarter*, that the amount of the bond rested in the discretion of the judge or justice who signed the citation, or allowed the *supersedeas*, and would not be reconsidered here."

In this case the court did look to see whether the bond was sufficient to cover the *mesne* profits or damages recovered below; but declined to examine into its sufficiency to secure the *mesne* profits accruing pending the proceedings in error, leaving that to the discretion of the Judge. The case decides nothing as to whether such *mesne* profits would be recoverable under the bond or not. By the English Statute of 16 and 17 Car. 2, ch. 8, as we have seen, they would be so recoverable; but in *Roberts* v. *Cooper*, before cited, it was held that our statute does not provide for the case.

The last case to which we shall refer is that of *Supervisors* v. *Kennicott*, 103 U. S., 554 [XXVI., 486]. There the county had given a mortgage upon its swamp lands to secure an issue of bonds by the Mount Vernon Railroad Company. This mortgage was foreclosed, and the lands were decreed to be sold to raise the amount due, which was ascertained by the decree. The county appealed, and a *supersedeas* bond of $40,000 was required to be given. The decree being affirmed by this court, a suit was brought on the appeal bond, and judgment was given against the county for the whole penalty. The judgment was brought here by writ of error, and reversed on the ground that no damages had been shown which could be recovered on the bond. The damages set up by the plaintiffs were: 1, the interest on the debt which accrued pending the appeal, which exceeded the penalty of the bond; 2, the balance of the debt which remained unsatisfied after the lands were sold, which largely exceeded the bond. We held that neither of these items could properly be assigned as damages within the meaning of the condition of the appeal bond. In that case, as was observed by the court, no claim was made for the use and detention of the lands pending the appeal, except in the way above stated. The debt was not the debt of Wayne County, and no damage could have resulted from the stay of execution except the delay in the sale, as no personal judgment could have been rendered against the county for the debt, and of course no execution could have been issued against it.

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This case does not decide the precise question now before us, because there was no party before the court who was personally liable for the debt, and no claim was made for intermediate rents and profits, or for use and detention of the land.

In view of the authorities, therefore, as far as they go, if the bond in the present case is to be regarded as importing nothing more than the bond prescribed by the statute, it is clear that it did not operate as security for the original decree, nor for the interest which accrued pending the appeal, nor, by consequence, for the balance of these amounts, or either of them, after applying the proceeds of the mortgaged property. The item of $530 costs unpaid by the defendants in the original foreclosure suit, came under the same head, being part of the original decree, to pay which the lands were ordered to be sold. The only ground of recovery upon the bond could be: 1, the depreciation of the property in market value pending the appeal; or 2, its deterioration by waste, or want of repair, or the accumulation of taxes or other burdens; or 3, the use and detention of the property pending the appeal, that is, the rents and profits; or

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4, the non-payment of the costs of the appeal, which accrued in this court; but the special verdict does not find that these costs were unpaid.

If depreciation in market value can ever be laid as cause of legal damages on a bond in error, which we greatly doubt, it cannot be done in this case, because it is found by the special verdict that the property considerably increased in value pending the appeal. Deterioration by waste, etc., is a very different matter; but that is equally out of question in this case, as no deterioration is shown. The defendants paid the taxes and insurance, and kept the property in repair. The principal question for consideration, therefore, is, whether the plaintiffs were entitled to recover the rents and profits, or damages for the use and detention, as it is otherwise called.

We have seen that even in ejectment, it has at least been questioned by this court whether the bond in error covers rents and profits accruing pending the writ. And yet there is a material difference between the case of ejectment and a suit for the foreclosure of a mortgage.

The difference is this: in ejectment, the property of the land is in question, and if the plaintiff has the right, he is entitled to immediate possession and to the perception of the rents and profits, which belong to him, and for which the defendant in possession is accountable to him. Every dollar, or dollar's worth, is so much of the plaintiff's property of which he is deprived. And the same is true in dower. But in the case of a mortgage, the land is in the nature of a pledge; and it is only the land itself, the specific thing, which is pledged. The rents and profits are not pledged; they belong to the tenant in possession, whether the mortgagor or a third person claiming under him. This is not only the common law, but it is the express statute law of Nebraska, which declares that "In the absence of stipulations to the contrary, the mortgagor retains the legal title and right of possession." The plaintiff, in this case, was [393] not entitled to possession, nor to the rents and profits. His foreclosure suit did not seek possession, but sought a sale of the specific thing, the land. In such a case, until the litigation is ended, it doth not appear that there must be a sale, or even that the plaintiff is entitled to a sale. The defendant in possession is entitled to redeem the land until a sale is made, and until then he is entitled to the rents and profits, which belong to him, as of right. The taking of the rents and profits prior to the sale does not injure the mortgagee, for the simple reason that they do not belong to him. Waste, that is, destruction or injury to the land itself, as before stated, is an injury to the mortgagee. It diminishes the value of the pledge; and for such injury no doubt he might recover on the appeal bond. Other deteriorations, such as occur by want of repairs, accumulation of taxes, fires not covered by reasonable insurance, and the like, probably might also be fairly covered by the bond. But perception of rents and profits is the mortgagor's right until a final determination of the right to sell, and a sale made accordingly.

The mere delay of the sale for the purposes of an appeal does not operate to the legal injury of the mortgagee. It does not suspend execution for the debt; he has no right to such an execution by the decree of foreclosure and sale. It is not a decree against the person, and cannot be enforced by an execution against goods and lands generally. It is simply a decree for the sale of the land mortgaged, in order that the proceeds may be applied to the debt. The amount due is ascertained by the decree, it is true, but only for the purpose of determining the amount of charge on the land. The debt may be prosecuted by a personal action against the debtor, and this may be the defendants in the suit or some other person The rule of court by which a personal decree may, in some cases, be entered up against the mortgagor for the residue of the debt, after the proceeds arising from the sale of the land have been applied, is a recent rule intended to obviate the necessity of a separate action. It has not changed the essential nature of the decree for foreclosure and sale.

It often happens that the debt is not fully ascertained when a decree for sale and foreclosure is made; as where there are many outstanding [394] bonds which have to be called in and verified. The sale, in such cases, is frequently made in advance, and the proceeds brought into court for distribution amongst those who may appear to be entitled thereto; all which shows that a decree of foreclosure is a very different thing from a personal decree or judgment for the debt.

As it is the specific thing, the land itself, and not the rents and profits, that constitutes the pledge, the delay of sale caused by the appeal, as before said, deprives the mortgagee of no legal right. It may be an incidental disadvantage or inconvenience, but in our judgment it is not a legal damage contemplated by the appeal bond. We are aware that a contrary view has sometimes been taken at the circuit; but upon a full consideration of the subject, we have come to the conclusion now expressed. The chances of actual deterioration and waste in certain classes of property are so great, that a bond in considerable amount may well be required; and if actual deterioration and waste supervenes, the amount may properly be recovered.

In addition to these general considerations, a careful examination of the 29th Rule will show that in cases like the present, it does not, in terms at least, contemplate security for the use and detention of the property pending the appeal. The words are "Indemnity in all such cases (where the property in controversy necessarily follows the event of the suit) is only required in an amount sufficient to secure the sum *recovered* for the use and detention of the property, and the costs of the suit, and just damages for delay, etc." "The sum recovered for use and detention," here referred to, means the sum recovered in the original judgment or decree, such as damages and *mesne* profits in ejectment, damages in dower, and replevin, etc., and the phrase "just damages for delay" refers to those damages arising from the delay occasioned by the proceedings in error or appeal, which are properly a legal damage to the party delayed. We are thrown back, therefore, to a consideration of the nature of the particular case, to ascertain what those legal damages properly are. The words "use and detention" do not assist us, as they relate to a cause of recovery in the original judgment.

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[395] There is another consideration which relieves the conclusion which we have reached from any supposed hardship or injustice to mortgagees. Courts of equity always have the power, where the debtor is insolvent, and the mortgaged property is an insufficient security for the debt, and there is good cause to believe that it will be wasted or deteriorated in the hands of the mortgagor, as by cutting of timber, suffering dilapidation, etc., to take charge of the property by means of a receiver, and preserve not only the *corpus*, but the rents and profits for the satisfaction of the debt. When justice requires this course to be pursued, and it is resorted to by the mortgagee, it will give him ample protection. There is no necessity, therefore, in order to protect him from injury, that a party, in order to have the benefit of an appeal, should be obliged to give security to account for the intermediate rents and profits of his own property.

We have devoted so much space to a consideration of the principal question, that we must dismiss the other point in a few words. The plaintiffs contend that the bond in terms requires the defendant to respond for the use and detention of the property covered by the mortgage during the pendency of the appeal. As the Judge had no authority to require such a condition to be inserted in the bonds, and probably was not aware of its insertion in this case, and as a party ought not to be deprived of his right of appeal upon the terms which the law prescribes, we should be very reluctant to hold that this was a voluntary bond, knowingly entered into beyond the requirements of the statute. We should rather hold that it was drawn by attempting to copy the words of the 29th Rule, instead of following the statute, and inadvertently omitting the connecting words. As an appeal bond, or bond in error, is a formal instrument required by the law, and governed by the law, and has, by nearly a century's use, become a formula in legal proceedings, with a fixed and definite meaning, and as the important right of appeal is greatly affected by it, we think that it is not allowable, in practice, by a change in its phraseology, to give to it an effect contrary to what the statute intended. It would be against the policy of the law to allow such deviations and irregularities to creep in. We [396] think the rule followed in some of the States is a sound one, that if the condition of an appeal bond, or bond in error, substantially conforms to the requisitions of the statute, it is sufficient to sustain it, though it contain variations of language, and that if further conditions be superadded, the bond is not, therefore, invalid, so far as it is supported by the statute, but only as to the superadded conditions. See, *Sanders* v. *Rives*, 3 Stew. (Ala.), 109; *Gardener* v. *Woodyear*, 1 Ohio, 170.

We are aware, as shown by the citations on the plaintiffs' brief, that official bonds, and bonds given to the government for the purpose of enjoying certain offices or privileges, and perhaps some others subject to like reason, have often been sustained as contracts at common law, voluntarily entered into, where they have not conformed to the statutory requirements, and would have been insufficient and ineffectual for the purposes of a recovery, if those requirements had been applied to them. We do not think that this case fairly belongs to that class of cases. Had the bond now under consideration so entirely departed and varied from the statute that it could not have been sustained with the effect of an ordinary appeal bond, the question would then more properly have arisen, whether on the one hand, it might not be sustained as a bond at common law, or on the other, declared utterly void.

Our conclusion is, that, as no damage or cause of action appeared by the verdict of the jury, which could authorize a judgment for the plaintiffs, the judgment of the Circuit Court must be reversed and the cause remanded, with instructions to render judgment for the defendants below.

True copy. Test:
James H. McKenney. Clerk, Sup. Court, U. S.

Mr. Justice **Miller**, dissenting:

The decision of the court, with the grounds on which it is based in this case, is so wide a departure from the former practice in similar cases, and is likely to work so much injustice in future, that I feel it to be my duty to dissent and to give the reasons for it.

I am at a loss to see the value of the learned search into the practices and precedents of the English law in writs of error and appeals, and deem it only necessary to say that in our system the right to a writ of error and to an appeal de- [397] pends wholly upon statutes granting that right, and not upon any principle of the common law, nor upon any power in any court to review the decisions of any other court which is not also the creation of positive statute and which in the courts of the United States must necessarily depend upon an Act of Congress. So, also, the mode of exercising this right, the conditions on which the writ of error or appeal may be had, and the effect of the writ on the progress of the case, are all prescribed by statute.

A striking illustration of this is in the fact that every writ of error or appeal, once allowed, transferred the case itself, its record, and all proceedings under it, in the English courts, into the reviewing tribunal, and left nothing in the inferior court on which it could act. The Acts of Congress proceed upon a wholly different principle. They allow a party to take an appeal or writ of error, which does not remove the record of the case into the appellate court, but which may be heard there upon the *transcript* of the record, the original remaining in the inferior court.

Unless the plaintiff in error takes other steps which the law prescribes, the court which rendered the judgment complained of can proceed to execute its judgment and enforce its decree in favor of the successful party, though the case be pending in the appellate court. In fact, unless the other steps mentioned be taken, a valid sale of the property of plaintiff in error may be made in the very moment in which the appellate court is deciding to reverse the judgment on which it is sold.

It is this other step, then, which the party appearing may take, and which totally suspends the power of the inferior court to proceed, that is wholly and absolutely statutory, which is no part of the common law and which is here for consideration in this case, and which should be decided alone on the language and meaning of the statute.

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That step is the giving of a bond which, because it has the effect of suspending the action of the inferior court, is called a *supersedeas* bond, in analogy to the effect of a writ of *supersedeas* in the English law from the superior to the inferior court.

The law of this subject is found in section 1000 of the Revised Statutes:

"Every justice or judge signing a citation or [398] any writ of error shall, except in cases brought up by the United States, or by direction of any department of the government, take good and sufficient security that the plaintiff in error, or the appellant, shall prosecute his writ or appeal to effect, and if he fail to make good his plea, shall answer all damages and costs where the writ is a *supersedeas* and stays execution, or all costs only where it is not a *supersedeas* as aforesaid." As thus stated in the Revision, the law is the result of the Act of September 24, 1789, sec. 22 [1 Stat. at L., 78], and the amendment to that section by the Act of December 12, 1794. 1 Stat. at L., pages 84 and 404.

It has never been doubted under these statutes that the appealing party could have his election to make his writ of error operate as a *supersedeas* or not, and that the amount of security to be given would depend very much on this choice. If he did not wish to stay execution he was only required to secure payment of the cost of the appeal. If he did wish to stay execution, he must give bond to answer *all* damages as well as costs, so that both the condition of the bond to be given and the amount of it must depend on the effect it had on further proceedings in the inferior court.

The decisions of this court, and the practice of the judges under it, are given with reasonable accuracy in the opinion of the majority, from the date of the last of these statutes until the adoption of Rule 29 of this court in 1867. The case of *Rubber Co.* v. *Goodyear*, decided in that year 6 Wall., 156 [73 U. S., XVIII., 763], and some decided previously, had shown great oppression in exacting security in an excessive amount to stay execution in cases where but little damage could accrue to the appellee, because, as in case of proceedings *in rem*, where there was no personal liability, and there could be no loss except from the delay, and in cases of mortgage foreclosures, where there could be no other decree but for a sale of the property. The result was the adoption of the 29th Rule, in which the court undertook to define what damages were allowable in the various classes of cases where the plaintiff in error or appellant obtained a stay of execution or *supersedeas* pending the appeal. This rule was intended for the guidance of the judges whose duty it was to approve bonds in appeals or writs of error. It was the construction of the members of the court of that day as to the damages which, in [399] the various kinds of cases mentioned in it, the party who had obtained a *supersedeas*, and had failed in his appeal, was liable under the Act of Congress, to pay for his false clamor to the party whom he had unjustly delayed after final judgment against him, for only final judgments can be reviewed in this court.

But two of the Justices, who participated in framing that rule in which all concurred, remain; and neither of them concur in the construction now given to it by the majority of the court, nor in the construction of the statute under which it was framed.

In the case before us, the bond sued on was given to suspend an order of sale in a suit to foreclose a mortgage, and the question is, whether the bond, which is substantially conformable to the rule of the court, covers the rental value of the mortgaged property during the three years of delay while the case was pending in this court, the mortgaged property having been sold for a sum much below the amount of the debt, for the payment of which it was decreed to be sold during which time the mortgagor was in possession of the property, which was a public hotel, and the jury find the rent was worth $38,241.75.

The opinion of the court is based upon two propositions: 1. That the mortgagor had a right to the use and occupation, even after condition broken, until judicial sale, and was not bound to the mortgagee for their value. 2. That the rule does not make any provision for rent pending the appeal.

I do not agree to either proposition. The mortgagor, after condition broken, has no right in law or equity to the possession of the mortgaged property, unless it be so expressed in the mortgage. If it be personal property, it is everyday practice for the mortgagee, after condition broken, to seize the goods and chattels and hold them until the debt be paid, or to sell in satisfaction of the debt. If the mortgagor refuse to deliver possession on demand, the mortgagee can recover it by replevin, and this is often done. How could this be so if the mortgagor's right to possession remained after condition broken?

If the mortgaged property be real estate the common law allowed the mortgagor an action of ejectment after condition broken, and this was formerly the usual mode of foreclosure, and is retained in many States to this day. How can [400] there be any right in the mortgagor to possession when this right to recover by an action of ejectment belongs to the mortgagee? The two rights are inconsistent and cannot co-exist. It is conceded that in such case as the present one, where the mortgaged property is insufficient to pay the debt, the mortgagee has the additional equitable right to have a receiver appointed to take possession, and in the end, if necessary, the rents and profits will be appropriated to pay the deficiency. How can all this be done if the mortgagor has the right to continue in possession after he has broken the condition of his mortgage?

The truth is, the idea has obtained footing in practice because it is easier to get a decree and sell the property than to dispossess the mortgagor, and hence attempts to do so are rare. But when the mortgagee has pursued the former course and obtained his order of sale—a decree which is final, for no other decree can be appealed from—this right of the defaulting mortgagor to further possession of the property, while he transfers the litigation to another court and protracts it for three years, is an inequitable abstraction, founded neither in the common law rights of the parties nor in any principle of equitable jurisprudence. The whole error is founded on the idea that so long as the mortgagor is *permitted* to retain possession he is not accountable for rent, and not upon the existence of any *right* to retain possession.

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And so the Act of Congress says: if you wish to appeal this case to another court and go through another trial, instead of appointing a receiver to take possession, we will require of you a bond to secure all damages suffered by the appellee by reason of the delay; and as he is entitled to have the land sold at once for his debt, or to have possession delivered so that rents and profits may be appropriated where they ought to go, you can only suspend the operation of the decree by giving such a bond.

If this be not so, the grossest injustice must result in many cases. In all cases of insolvent mortgagors the Rule, as construed by the court, offers a strong inducement to keep the mortgagee out of his money as long as possible, without interest, or any other compensation for the [401] delay. An insolvent corporation, a railroad company, for instance, makes default in its mortgage bonds which amount to twice the value of the property mortgaged. A decree is obtained for its sale, and before a receiver can be appointed, the directors take an appeal, give a small bond, little more than the probable costs, and then use the road for three years, making millions of dollars out of it with which to pay debts subsequent to the mortgage, or distribute among interested parties. No more striking instance of its injustice is needed than the case before us, where an utterly insolvent Corporation, with a decree for money largely in excess of the value of the hotel mortgage, is stayed by a bond for $50,000, under which the Corporation receives rent, or uses the property to the value of $88,000, while they litigate, without a shadow of right, in this court for three years, and appropriate this $88,000 to their own use, and are not held responsible for this, though the bond expressly mentions *"the use and detention"* of the property as one of their liabilities if they fail to make good their plea.

But, it is said, the Rule only provides for the use and detention of the property, before the decree, which is appealed from. The language of the Rule is, that in such cases, mentioning mortgage foreclosure suits specifically, "Indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and occupation of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal." That the use and detention here spoken of, like all the other class of damages there mentioned, is such as may thereafter be recovered, is as plain as that the delay and the costs and interest are such as follow, and not such as precede, the decree. It is senseless, without it meant this, and such has been the practical construction since its adoption.

Not only is this true, in practice, but in the leading case, construing this rule, for the first time, of *Jerome* v. *McCarter*, 21 Wall., 30 [88 U. S., XXII., 516], the *Chief Justice* expressly held that the rent, mentioned in the Rule, is that accruing after the appeal.

That was an appeal from a foreclosure decree and a motion for additional security in this court. Mr. Phillips, for appellant, in support of the sufficiency of the bond cited *Roberts* v. *Cooper*, to show that nothing could be recovered [402] for the use and detention of the property. But the *Chief Justice*, after citing the Rule *verbatim*, said: "This is a suit on a mortgage, and, therefore, under this Rule, a case in which the judge who signs the citation is called upon to determine what amount of security will be sufficient to secure the amount *to be recovered* for the use and detention of the property, and the costs of the suit, and just damages for the delay and costs and interest on the appeal."

Here is a construction of the Rule by a unanimous court in a case where the precise question was presented.

The decision of the court in this case overrules it, and establishes in its place a Rule which, in many cases, must work injustice, and in no case is equitable; for, in the language of that Rule, leaving out the words use and detention, this is a necessary part of the other words, "just damages for the delay."

Mr. Justice **Field** concurs with me in this dissent.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 250.

DISTRICT OF COLUMBIA *Plf. in Err.*,

v.

CHARLES H. ARMES, Admr. of E. W. Du BOSE, Deceased.

(See S. C., 17 Otto, 519-528.)

Lunatic, when may be a witness—question for court—question for jury—defective sidewalk, evidence as to.

1. A lunatic or a person affected with insanity is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matter which he has seen or heard in reference to the questions at issue.
2. Whether a lunatic or insane person has sufficient understanding to be admissible as a witness, is a question to be determined by the court upon examination of the party himself, and of any competent witnesses who can speak to the nature and extent of his insanity.
3. It is for the jury to decide what amount of credit they will give to his testimony.
4. The frequency of accidents at a particular place is good evidence of its dangerous character; and in an action against a municipal corporation to recover damages for injuries received from a fall caused by a defective sidewalk, proof that other accidents of the same character have been frequent there, is admissible.

[No. 273.]

Argued Apr. 24, 25, 1883. Decided May 7, 1883.

IN ERROR to the Supreme Court of the District of Columbia.

This action was brought in the court below, by Du Bose, since deceased, to recover damages for injuries received from a fall caused by a defective sidewalk in the City of Washington. The trial below having resulted in a verdict and judgment in favor of the plaintiff for $10,000, with costs, the defendant sued out this writ of error.

The facts of the case are fully stated by the court.

Messrs. **A. G. Riddle** and **Francis Miller**, for plaintiff in error.

Messrs. **S. Shellabarger**, *J. M. Wilson*, *William Birney*, **A. A. Birney** and *C. H. Armes*, for defendant in error.

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Mr. Justice **Field** delivered the opinion of the court:

This was an action to recover damages for injuries received by the plaintiff's intestate, Du Bose, from a fall caused by a defective sidewalk in the City of Washington. In 1878, the board of public works of the city caused the grade of the carriageway of Thirteenth Street, between F and G Streets, to be lowered several feet. The distance between the curbstone of the carriageway and the line of the adjacent buildings was thirty-six feet. At the time the accident to the deceased occurred, this portion of the street—sidewalk it may be termed to designate it from the carriageway, although only a part of it is given up to foot passengers—was, for forty-eight feet north of F. Street, lowered in its whole width to the same grade as the carriageway. But, for some distance beyond that point, only twelve feet of the sidewalk was cut down, thus leaving an abrupt descent of about two feet at a distance of twelve feet from the curb. At this descent, from the elevated to the lowered part of the sidewalk, there were three steps; but the place was not guarded either at its side or end. Nothing was placed to warn foot passengers of the danger. [520]

On the night of February 21, 1877, Du Bose, a contract surgeon of the United States Army, while walking down Thirteenth Street, towards F Street, fell down this descent and, striking upon his knees, received a concussion which injured his spine and produced partial paralysis, resulting in the impairment of his mind and ultimately in his death, which occurred since the trial below.

The present action was for the injury thus sustained. He was himself a witness, and it appeared from his testimony that his mind was feeble. His statement was not always as direct and clear as would be expected from a man in the full vigor of his mind. Still it was not incoherent nor unintelligible, but evinced a full knowledge of the matters in relation to which he was testifying. A physician of the Government Hospital for the Insane, to which the deceased was taken two years afterwards, testified that he was affected with acute melancholy; that sometimes it was impossible to get a word from him; that his memory was impaired, but that he was able to make a substantially correct statement of facts which transpired before the injury took place, though, from the impairment of his memory, he might leave out some important part, that there would be some confusion of ideas in his mind, and that he should not be held responsible for any criminal act. A physician of the Freedmen's Hospital, in which the deceased was at one time a patient after his injuries, testified to a more deranged condition of his mind, and that he was, when there in June, 1879, insane. He had attempted to commit suicide, and had stuck a fork into his neck several times. Upon this, and other testimony of similar import, and the feebleness exhibited by the deceased on the stand, the counsel for the city requested the court to withdraw his testimony from the jury, on the ground that his mental faculties were so far impaired as to render him incompetent to testify as a witness. This the court refused to do, but instructed the jury that his testimony must be taken with some allowance, considering his condition of mind and his incapacity to remember all the circumstances which might throw some light on his present condition. This refusal and ruling of the court constitute the first error assigned. [521]

The ruling of the court and its instruction to the jury were entirely correct. It is undoubtedly true that a lunatic or insane person may, from the condition of his mind, not be a competent witness. His incompetency on that ground, like incompetency for any other cause, must be passed upon by the court, and to aid its judgment, evidence of his condition is admissible. But lunacy or insanity assumes so many forms, and is so often partial in its extent, being frequently confined to particular subjects, whilst there is full intelligence on others, that the power of the court is to be exercised with the greatest caution. The books are full of cases where persons showing mental derangement on some subjects evince a high degree of intelligence and wisdom on others. The existence of partial insanity does not unfit individuals so affected for the transaction of business on all subjects, nor from giving a perfectly accurate and lucid statement of what they have seen or heard. In a case in the Prerogative Court of Canterbury, counsel stated that partial insanity was unknown to the law of England; but the court replied that if by this was meant that the law never deems a person both sane and insane at one and the same time upon one and the same subject, the assertion was a truism; and added: "If by that position, it be meant and intended that the law of England never deems a party both sane and insane at different times upon the same subject, and both sane and insane at the same time upon different subjects, there can scarcely be a position more destitute of legal foundation, or rather there can scarcely be one more adverse to the stream and current of legal authority." *Dew* v. *Clark*, 3 Addams, Eccl., 79, 94.

The general rule, therefore, is, that a lunatic or a person affected with insanity is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and whether he have that understanding is a question to be determined by the court, upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity. Such was the decision of the Court of Criminal Appeal in England, in the case of *Regina* v. *Hill*, 5 Cox, Cr. Cas., 259. There the prisoner had been convicted of manslaughter; and on the trial a witness had been admitted whose incompetency was urged on the ground of alleged insanity. He was a patient in a lunatic asylum, under the delusion that he had a number of spirits about him which were continually talking to him, but the medical superintendent testified that he was capable of giving an account of any transaction that happened before his eyes; that he had always found him so; and that it was solely with reference to the delusion about the spirits that he considered him a lunatic. The witness himself was called, and he testified as follows: "I am fully aware I have a spirit, and twenty thousand of them. They are not all mine. I must inquire. I can where [522]

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I am. I know which are mine. Those that ascend from my stomach and my head, and also those in my ears. I don't know how many they are. The flesh creates spirits by the palpitation of the nerves and the rheumatics. All are now in my body and around my head. They speak to me incessantly, particularly at night. That spirits are immortal, I am taught by my religion from my childhood. No matter how faith goes, all live after my death, those that belong to me and those that do not." After much more of this kind of talk he added: "They speak to me instantly; they are speaking to me now; they are not separate from me; they are around me speaking to me now; but I can't be a spirit, for I am flesh and blood. They can go in and out through walls and places which I cannot." He also stated his opinion of what it was to take an oath: "When I swear" he said "I appeal to the Almighty. It is perjury, the breaking of a lawful oath, or taking an unlawful one; he that does it will go to hell for all eternity." He was then sworn, and gave a perfectly collected and rational account of a transaction which he declared that he had witnessed. He [523] was in some doubt as to the day of the week on which it took place, and on cross-examination said: "These creatures insist upon it, it was Tuesday night, and I think it was Monday;" whereupon he was asked: "Is what you have told us what the spirits told you, or what you recollected without the spirits?" And he said: "No; the spirits assist me in speaking of the date, I thought it was Monday and they told me it was Christmas eve, Tuesday; but I was an eye-witness, an ocular witness to the fall to the ground." The question was reserved for the opinion of the court whether this witness was competent, and after a very elaborate discussion of the subject, it was held that he was. *Chief Justice* Campbell said that he entertained no doubt that the rule laid down by *Baron* Parke, in an unreported case which had been referred to, was correct, that wherever a delusion of an insane character exists in any person who is called as a witness, it is for the judge to determine whether the person so called has a sufficient sense of religion in his mind and a sufficient understanding of the nature of an oath, and it is for the jury to decide what amount of credit they will give to his testimony.

"Various authorities" said the *Chief Justice* "have been referred to, which lay down the law that a person *non compos mentis* is not an admissible witness; but in what sense is the expression *non compos mentis* employed? If a person be so to such an extent as not to understand the nature of an oath, he is not admissible. But a person subject to a considerable amount of insane delusion may yet be under the sanction of an oath and capable of giving very material evidence upon the subject-matter under consideration." And the *Chief Justice* added: "The proper test must always be—does the lunatic understand what he is saying; and does he understand the obligation of an oath? The lunatic may be examined himself, that his state of mind may be discovered, and witnesses may be adduced to show in what state of sanity or insanity he actually is; still, if he can stand the test proposed, the jury must determine all the rest." He also observed that in a lunatic asylum the patients are often the only witnesses of outrages upon themselves and others, and there would be impunity for offenses committed in such places if the only persons who can give information are not to be heard. *Baron* [524] Alderson, *Justice* Coleridge, *Baron* Platt and *Justice* Talfourd agreed with the *Chief Justice*, the latter observing that, "If the proposition that a person suffering under an insane delusion cannot be a witness were maintained to the fullest extent, every man subject to the most innocent, unreal fancy would be excluded. Martin Luther believed that he had a personal conflict with the devil. Dr. Johnson was persuaded that he had heard his mother speak to him after death. In every case, the judge must determine according to the circumstances and extent of the delusion. Unless judgment and discrimination be applied to each particular case there may be the most disastrous consequences." This case is also found in the 2d of Denison and Pearce's Crown Cases, 254, where *Lord* Campbell is reported to have said that the rule contended for would have excluded the testimony of Socrates, for he had one spirit always prompting him. The doctrine of this decision has not been overruled, that we are aware of, and it entirely disposes of the question raised here.

On the trial, a member of the Metropolitan police, who saw the deceased fall on the sidewalk and went to his assistance, was asked, after testifying to the accident, whether, while he was on his beat, other accidents had happened at that place. The court allowed the question against the objection of the city's counsel, for the purpose of showing the condition of the street, and the liability of other persons to fall there. The witness answered that he had seen persons stumble over there. He remembered sending home in a hack a woman who had fallen there, and had seen as many as five persons fall there.

The admission of this testimony is now urged as error; the point of the objection being that it tended to introduce collateral issues and thus mislead the jury from the matter directly in controversy. Were such the case, the objection would be tenable; but no dispute was made as to these accidents, no question was raised as to the extent of the injuries received; no point was made upon them; no recovery was sought by reason of them; nor any increase of damages. They were proved simply as circumstances which, with other evidence, tended to show the dangerous character of the sidewalk in its unguarded condition. The frequency of [525] accidents at a particular place would seem to be good evidence of its dangerous character; at least, it is some evidence to that effect. Persons are not wont to seek such places, and do not willingly fall into them. Here the character of the place was one of the subjects of inquiry to which attention was called by the nature of the action and the pleadings, and the defendant should have been prepared to show its real character in the face of any proof bearing on that subject.

Besides this, as publicity was necessarily given to the accidents, they also tended to show that the dangerous character of the locality was brought to the attention of the city authorities.

In *Quinlan* v. *Utica*, 11 Hun [217], which

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was before the Supreme Court of New York, in an action to recover damages for injuries sustained by the plaintiff through the neglect of the city to repair its sidewalk, he was allowed to show that while it was out of repair other persons had slipped and fallen on the walk where he was injured. It was objected that the testimony presented new issues which the defendant could not be prepared to meet, but the court said: "In one sense, every item of testimony, material to the main issue, introduces a new issue; that is to say, it calls for a reply. In no other sense did the testimony in question make a new issue. Its only importance was that it bore upon the main issue, and all legitimate testimony bearing upon that issue, the defendant was required to be prepared for." This case was affirmed by the Court of Appeals of New York, all the Judges concurring, except one, who was absent. 74 N. Y., 603.

In an action against the City of Chicago, to recover damages resulting from the death of a person who in the night stepped off an approach to a bridge, while it was swinging around to enable a vessel to pass, and was drowned—it being alleged that the accident happened by reason of the neglect of the city to supply sufficient lights to enable persons to avoid such dangers—the Supreme Court of Illinois held that it was competent for the plaintiff to prove that another person had, under the same circumstances, met with a similar accident. *Chicago* v. *Powers*, 42 Ill., 169. To the objection that the evidence was inadmissible, the court said: "The action was based upon the negligence of the city in failing to [526] keep the bridge properly lighted. If another person had met with a similar fate at the same place and from a like cause, it would tend to show a knowledge on the part of the city that there was inattention on the part of their agents having charge of the bridge, and that they had failed to provide proper means for the protection of persons crossing on the bridge. As it tended to prove this fact, it was admissible; and if the appellants had desired to guard against its improper application by the jury they should have asked an instruction limiting it to its legitimate purpose."

Other cases to the same general purport might be cited. See, *Augusta* v. *Hafers*, 61 Ga., 48; *House* v. *Metcalf*, 27 Conn., 631; *Calkins* v. *Hartford*, 33 Id., 57; *Darling* v. *Westmoreland*, 52 N. H., 401; *Hill* v. *R. R. Co.*, 55 Me., 438; *Kent* v. *Lincoln*, 32 Vt., 591; *Delphi* v. *Lowery*, 74 Ind., 520. The above, however, are sufficient to sustain the action of the court below in admitting the testimony to which objection was taken.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

WESTERN PACIFIC R. R. CO. AND CHARLES McLAUGHLIN

v.

UNITED STATES.

(See S. C., 17 Otto, 526–529.)

Decided May 7, 1883.

Opinion by **Miller**, *J.*

See our report of case, 108 U. S., 510–513, *post.*

END OF VOL. 107.

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ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1882.

In the Matter of AMENDMENTS TO RULES 1 AND 10.

(See S. C., Reporter's ed., 1-4.)

Rule amended.

The second clause of Rule 1 amended, requiring the record to be printed under the supervision of the clerk and fixing his fees therefor, and regulating their taxation.

Promulgated Nov. 13, 1882.

Mr. Chief Justice **Waite:**

Our attention has been called to the practice which prevails in the clerk's office of sending original records to the printer to be printed, and of taxing in the bills of costs a fee for one manuscript copy of the record, when no such copy is in fact made.

On investigation we find that the statute regulating the fees of the clerk was passed in 1799, and that under this statute a table of fees was prepared, many years ago, by or under the direction of the court, which has been followed by the clerk in the taxation of costs ever since. No provision was made, by rule or otherwise, for printing the records, until January Term, 1831. Before that time, the practice was, as we are informed, for the court to use the original record, and the clerk made two manuscript copies for the use of the parties. For these copies he charged the parties according to the established table of fees. At January Term, 1831, the Attorney-General, in behalf of the United States, applied to the court for leave to take [2] the original records in certain cases from the clerk's office to be printed; at the same time remarking that he had been informed that in such cases it had been the habit of the clerk to charge half fees. *Chief Justice* Marshall, speaking for the court, stated "That the clerk of this court had certain rights and fees of office (of which a fee for a copy of the record was one), which this court was not disposed to violate; and that the party could not withdraw the records without paying for the copies, but that any arrangement which the clerk saw proper to make would be satisfactory to the court." The original records in these cases were afterwards taken to the printer and printed, and the clerk charged and was paid full fees for one manuscript copy.

At the same Term the first Rule for printing the records was adopted, which provided for the taxation of the fees for one manuscript copy of the record in the bill of costs. When this rule was promulgated, the court consisted of *Chief Justice* Marshall and *Associate Justices* Johnson, Story, Thompson, McLean and Baldwin. *Mr. Justice* Baldwin dissented on this provision of the rule, for the reason, among others, that it allowed the clerk a fee for a copy whether one was made or not.

Under the rule thus adopted, the printing of records began, and from the first the original records were sent to the printer, and a fee for one manuscript copy was charged in the costs, when in fact no copies were made. There is abundant evidence that at the outset this practice was directly or indirectly approved by the court. In 1889 the House of Representatives instructed the Judiciary Committee to "Inquire what costs are charged against the United States for printed copies of records of suits pending in the Supreme Court which have been printed at the expense of the United States, * * * and whether any legislation is necessary in relation to costs of suits in said court." The committee reported, submitting a statement of the clerk on the subject, and were discharged. From this statement of the clerk, and from other evidence on file, we are satisfied the committee, or some of its members, visited the office during the progress of their inquiries, and possessed themselves fully of the mode of doing the busi- [3] ness and of the compensation therefor.

In 1859 the Rules were revised by *Chief Justice* Taney under the direction of the court, and the provision for printing the records was put into the form in which it now appears in paragraphs 2, 3, 4 and 5 of Rule 10. We are advised that, prior to the death of *Chief Justice* Taney, no manuscript copies of the records were ever made, and that the fee for one copy was always charged in the costs. Since the death of *Chief Justice* Taney copies have in some cases been made. The present clerk has followed the practice of his predecessors.

We are entirely satisfied that the practice, as it now exists, is in all material respects what it has been for more than fifty years, and that at the beginning it received the approval of the court. No one now on the bench ever heard of any complaint, or of any application for a retaxation of costs, on account of what was done, until late in the last Term, when a motion for

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re-taxation was made in the case of *James* v. *Campbell* [XXVI., 786].

There is an apparent conflict between the Rules and the practice under them which ought not to exist. It is also evident that what was fifty years ago no more than a reasonable compensation for the important services of the clerk is now, under the operation of the Rules as then construed and the practice then inaugurated, larger than it ought to be. To prevent misunderstandings in the future and to reduce the expenses of litigants without doing injustice to the clerk, it is ordered:

I. That the second clause of Rule 1 be amended so that it will read as follows:

The clerk shall not permit any original record or paper to be taken from the court room, or from the office, without an order from the court; but records on appeals and writs of error, exclusive of original papers sent up therewith, may be taken to a printer to be printed, under the requirements of Rule 10.

II. That paragraphs 3, 4, 5 and 6 of Rule 10, be rescinded, and the following adopted in lieu thereof:

3. The clerk shall take to the printer the original record in the office, except in cases prohib-
[4] ited by the rules. When the original cannot be taken, he shall furnish the printer with a manuscript copy. He shall supervise the printing, and see that the printed copy is properly indexed. He shall take care of and distribute the printed copies to the judges, the reporter, and the parties, from time to time, as required.

4. In cases where a manuscript copy of the record is not furnished the printer, the fee of the clerk for his service under the last preceding paragraph shall be one half the rates now allowed by law for making a manuscript copy, and that shall be charged to the party bringing the cause into court, unless the court shall otherwise direct. When a manuscript copy is required to be made, full fees for a copy may be charged, but nothing in addition for the other services required.

5. In all cases, the clerk shall deliver a copy of the printed record to each party without extra charge. In cases of dismissal, reversal, or affirmance, with costs, the fee allowed in the last paragraph shall be taxed against the party against whom the costs are given. In cases of dismissal for want of jurisdiction, such fees shall be taxed against the party bringing the cause into court, unless the court shall otherwise direct.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MATTHEW F. JOHNSON, EXR. etc., ET AL., *Appts.*,
v.
STEPHENSON WATERS, Admr., etc.

(See S. C., Reporter's ed., 4, 5.)

Security on appeal.

A motion for additional security on a *supersedeas* bond will be denied, in a suit where no personal decree for money can be given, and the circumstances of the parties have not changed since the security was taken.

[No. 297.]

Submitted Oct. 9, 1882. Decided Oct. 16, 1882.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is sufficiently stated by the court.

On motion for additional security on bond.

Messrs. **Julius Aroni**, *Henry B. Kelly* and *H. L. Lazarus*, for appellee, in support of motion.

Mr. **John A. Campbell**, for appellants, in opposition to motion.

Mr. Chief Justice **Waite** delivered the opin- [5]
ion of the court:

This motion is denied. It does not appear from the motion papers that the decree appealed from is collectible under ordinary execution. The fair inference from the statements in the papers is, that the suit was instituted to subject the lands in dispute to the payment of a debt, and that no personal decree for money can be given against the appellants. The controversy seems to be as to the rights of the appellee in the lands. The present bond is sufficient in amount to protect him against loss pending the suit from sales for taxes if he avails himself of the remedies by redemption and subrogation which the law affords. At any rate the circumstances of the parties do not appear to have changed in this particular since the security was taken originally.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CRANE IRON COMPANY, *Plf. in Err.*,
v.
AMOS HOAGLAND ET AL.

CHARLES STUART WURTS ET AL., *Plfs. in Err.*,
v.
SAME.

(See S. C., Reporter's ed., 5, 6.)

Motion to dismiss.

Motions to dismiss a writ of error, to affirm a decision below, to strike out assignments of error, and to advance the causes, denied, where the records have not been printed and the assignment of errors in the brief for the defendants, presents questions of which this court has jurisdiction.

[Nos. 818, 819.]

Motions submitted Oct. 16, 1882. Decided Oct. 23, 1882.

IN ERROR to the Supreme Court of the State of New Jersey.

On motions to dismiss, to affirm, to strike out assignment of errors, and to advance.

Mr. **Theo. Little**, for defendants in error, in support of motions.

Mr. **J. G. Shipman**, for plaintiffs in error, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

These are writs of error to the Supreme Court of New Jersey, and the motions to dismiss are

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[6] made because, as is claimed, no federal question is involved. The records have not been printed, and on these motions we can look only to the statements of counsel as they appear in the briefs. The assignment of errors has been printed in the brief for the defendants, and the second and fifth assignments clearly present questions of which we have jurisdiction. Whether the errors thus assigned appear in the records we cannot on these motions, as they are now presented, finally determine, but in the absence of any showing to the contrary, we will presume they do. The motions to dismiss must, therefore, be overruled.

The questions involved are not of a character that we are inclined to consider on a motion to affirm, especially before the record is printed.

It will be time enough to consider the objections to the assignment of errors when the cases come on for hearing.

The motions to advance the cases cannot be granted upon the showing made.

All the motions are, consequently, denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[10]

OTIS BIGELOW, *Appt.*,
v.
GEORGE A. ARMES.

(See S. C., Reporter's ed., 10-12.)

Specific performance, when decreed.

Although, under the Statute of Frauds, the memorandum signed by both parties is not sufficient to support a bill for specific performance of a contract, yet, when the terms of the contract have been otherwise clearly established by the evidence, and there has been full performance by plaintiff and substantial part performance by defendant, specific performance will be decreed.

[No. 41.]

Argued Oct. 23, 1882. Decided Nov. 6, 1882.

APPEAL from the Supreme Court of the District of Columbia.

The bill in this case was filed in the Supreme Court of the District of Columbia, holding an equity court for said District by the appellee, to compel the specific performance of a certain agreement for the conveyance of land.

The hearing and a subsequent rehearing of the case resulted in the entry of a decree dismissing the bill. The complainant having appealed to the court below in General Term, this decree was reversed and a decree entered requiring the specific performance of said agreement; whereupon the defendant appealed to this court.

A further statement of the case appears in the opinion of the court.

Mr. **S. S. Henkle**, for appellant:

"Unless the essential terms of the sale can be ascertained from the writing itself, or by reference in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute was intended to prevent," says this court, in *Williams* v. *Morris*, 95 U. S., 456 (XXIV., 362).

First Bap. Ch. v. *Bigelow*, 16 Wend., 28; *Bailey* v. *Ogdens*, 3 Johns., 419; *Hinds* v. *Whitehouse*, 7 East, 570; *Morton* v. *Deane*, 13 Met., 385; *Brodie* v. *St. Paul*, 1 Ves., Jr., 326; Blackf. Sales, 49-56; *Davis* v. *Shields*, 26 Wend., 341; *Wright* v. *Weeks*, 25 N. Y., 153.

The writing must so describe the land that it can be identified.

Browne, Stat. Frauds, 3d ed., 406, sec. 385, and authorities cited; *Ferguson* v. *Staver*, 33 Pa., 411; *Soles* v. *Hickman*, 20 Pa., 180; *Ch. of Advent* v. *Farrow*, 7 Rich. Eq. (S. C.), 378; *Grafton* v. *Cummings*, 99 U. S., 100 (XXV., 366); *Barry* v. *Coombe*, 1 Pet., 640.

Part performance will not justify the introduction of parol proof to support a defective writing.

Boydell v. *Drummond*, 11 East, 142; *Clinan* v. *Cooke*, 1 Sch. & L., 22.

In this District it is not necessary to plead the Statute of Frauds, unless the answer admits the agreement.

Aris v. *Grove*, 21 Md., 470; *Winn* v. *Albert*, 2 Md. Ch. 42-169; *Wiley* v. *Walling*, 1 H. & G., 268.

Mr. **C. H. Armes**, for appellee:

As to the admissibility of parol evidence, see Waterman, sec. 288; *Barry* v. *Coombe*, 1 Pet., 652, 653; *Williams* v. *Morris*, 95 U. S., 444 (XXIV., 360); *Meade* v. *Parker*, 115 Mass., 415.

Part performance of parol agreement to convey; *Caldwell* v. *Carrington*, 9 Pet., 86.

"A party, by actively affirming a contract or purchase * * * is estopped thereafter to deny its force and effect."

Big. Estop., 511, citing *Smith* v. *Sheeley*, 12 Wall., 358 (79 U. S., XX., 430); *Morris* v. *Hall*, 41 Ala., 510.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The evidence in this case establishes to our entire satisfaction the following facts:

On the 22d of November, 1876, the parties to this suit made and signed the following memorandum in pencil:

"November 22d, 1876.

I propose to give my house on 8th Street, subject to $2,000, for one house on Delaware Avenue, and one farm in Fairfax Co., Va., and $525 cash. Geo. Armes.

Accepted: Otis Bigelow."

Both parties fully understood at the time that the property referred to was that described in the bill, and that an exchange was to be made on the terms stated in the memorandum. As the wife of Bigelow was absent, the contract entered into could not be consummated by an interchange of deeds until her return, which was not expected until some time in January following. Armes, however, was in need of the money which was to be paid him, or a part of it, and so on the 24th of November, two days after the memorandum was signed, he and his wife executed a deed, in accordance with the terms of the contract, conveying the house and lot on Eighth Street to Bigelow. This deed Armes took to Bigelow and asked for $400 on account of the money he was to have, offering to deliver the deed if the payment was made. Bigelow accepted the offer, paid the money, and took [11]

NOTE.—*What is sufficient note or memorandum under the Statute of Frauds.* See *note* to Barry v. Coombe, 26 U. S. (1 Pet.), 640.

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the deed, agreeing, however, on the request of Armes, not to have the deed recorded until the contract was otherwise performed. Notwithstanding this agreement he did have it recorded at once. At the same time with the delivery of the deed, Armes put Bigelow in possession of the property, and thus fully executed the contract on his part. Bigelow afterwards paid Armes $105 more on the cash payment he was to make, and delivered him the possession of the property on Delaware Avenue. All this was done in part performance of the contract on his part, and it was so understood by both parties. Armes, after he got possession of the Delaware Avenue property, made some repairs on the house with the knowledge of Bigelow. Afterwards Bigelow refused to carry out the contract on his part by delivering deeds for the Delaware Avenue and Virginia property, and having the memorandum which had been signed in his possession, undertook to destroy it by tearing it in pieces and throwing the pieces into a waste-basket.

[12] Upon these facts, in our opinion, it was the duty of the court below to enter the decree it did, requiring a completion of the performance of the contract by Bigelow. Whether, in view of the requirements of the Statute of Frauds, the memorandum signed by both parties was of itself sufficient to support the bill, is a question we do not think it important to discuss, because, if the memorandum is not enough, the terms of the contract have been otherwise clearly established by the evidence, and there has been full performance by Armes and substantial part performance by Bigelow.

The decree is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

RUFUS WAPLES, *Plff. in Errr.*,

v.

MRS. ELIZABETH C. HAYS, Natural Tutrix of Her Minor Children, ET AL.

(See S. C., Reporter's ed., 6-9.)

Confiscation Act—title of purchaser—practice.

1. The estate acquired by a purchaser of real property condemned and sold under the Confiscation Act of July 17th, 1862, terminates with the life of the person for whose act it was seized.

2. The purchaser does not occupy a different position because the proceeds of the sale were applied to the extinguishment of a mortgage, that would otherwise have rested upon that estate, so that he got an unincumbered right to the use and enjoyment of the property during such life.

3. In Louisiana, if the defendant goes to trial on a petition defective in not setting forth the deed under which plaintiff claims, he waives the objection.

[No. 48.]

Argued Oct. 24, 1882. Decided Nov. 6, 1882.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

This action was brought in the Fifth District Court for the Parish of Orleans, by the defendant in error, to recover possession of three lots of ground which had been condemned and sold under the Act of July 12, 1862.

Upon petition of the defendant, the cause was subsequently removed into the court below. The trial having resulted in a verdict and judgment in favor of the plaintiff, the defendant sued out this writ of error:

The facts of the case are stated by the court.

Messrs. **Charles W. Hornor** and *J. P. Hornor*, for plaintiff in error:

The judgment creditor, Bradford, was bound to look to the proceeds only; his right was that of being paid out of the proceeds.

Alexander v. *Jacob*, 5 Mart., 634; *Crum* v. *Laidlaw*, 10 Mart., 468; *Chiapella* v. *Lanusse*, 10 Mart., 448; *Conrad* v. *Prieur*, 5 Rob., 55; *Tyler* v. *Creditors*, 9 Rob., 373; *Florance* v. *Orleans Nav. Co.*, 1 Rob., 224; *Fulton* v. *Fulton*, 7 Rob., 73; *City Bank of N. O.* v. *McIntyre*, 8 Rob., 467; *Bloodworth* v. *Hunter*, 9 Rob., 256; *Joyce* v. *Poydras de La Lande*, 6 La., 283; *Herbert* v. *Babin*, 6 Mart. (N. S.) 614; *Cusson* v. *La. St. Bank*, 7 Mart. (N. S.), 281; *Rowley* v. *Kemp*, 2 La Ann., 360; Code of Pr., arts. 401, 402, 403.

It was the duty of the United States to exhaust the property to pay the mortgage.

U. S. v. *Hawkins*, 4 Mart. (N. S.) 317; *Thelusson* v. *Smith*, 2 Wheat., 426; *Parsons* v. *Welles*, 17 Mass., 425; *Pepper* v. *Dunlap*, 16 La., 163, 169; Civil Code, 3249; *Florance* v. *Orleans Nav. Co.*, 1 Rob., 224; *Moore* v. *Allain*, 10 La., 496; *Elwyn* v. *Jackson*, 14 La., 411; *Adams* v. *Lear*, 3 La. Ann., 144.

The decree of condemnation left nothing in Hays.

Wallach v. *Van Riswick*, 92 U. S., 202 (XXIII., 473); *Pike* v. *Wassell*, 94 U. S., 711 (XXIV., 307); *French* v. *Wade*, 102 U. S., 132 (XXVI., 44).

Hays lost nothing by the payment of his debt out of the mortgaged premises; and since he could not have both land and price, his heirs at law can derive from him no better position. Since he would have been obliged to return his borrowed money before he could get his land free, his children must do so.

Elliott v. *Labarre*, 3 La., 541; *Barelli* v. *Gauche*, 24 La. Ann., 324; *Gormley* v. *Palmes*, 13 La. Ann., 213; *Dearmond* v. *Courtney*, 12 La. Ann., 251; *Brown* v. *Bouny*, 30 La. Ann., 174; *Coulson* v. *Wells*, 21 La. Ann., 383-5; *Latham* v. *Hicky*, 21 La. Ann., 425; *Blake* v. *Nelson*, 29 La. Ann., 245, 255; *Donaldson* v. *Rouzan*, 8 Mart., N. S., 162, 181; *Andrews* v. *Ackerson*, 8 Mart., N. S., 205; *Gay* v. *Alter*, 102 U. S., 79 (XXVI., 48); *Pelts* v. *Clarke*, 5 Pet., 481; *Valle* v. *Fleming*, 29 Mo., 152; *Schroyer* v. *Nickell*, 55 Mo., 269; *Evans* v. *Snyder*, 64 Mo., 516; *Howard* v. *North*, 5 Tex., 315.

The purchaser was not bound to look beyond the decree and sale thereunder.

Voorhees v. *Bank U. S.*, 10 Pet., 449; *Grignon* v. *Astor*, 2 How., 341; *Foulke* v. *Zimmerman*, 14 Wall., 111 (81 U. S., XX., 786); *McNitt* v. *Turner*, 16 Wall., 365 (83 U. S., XXI., 348).

The decree was *res judicata*.

Messrs. **R. T. Merrick** and *R. F. Jonas*, for defendant in error:

The order of sale was made at the instance of the United States, in virtue of a judgment in favor of the United States, and one month before the decree, recognizing Bradford's right as a mortgage creditor, was rendered.

The sale, therefore, at which the plaintiff in error was the purchaser, was a sale in which the right and interest of the United States alone was adjudicated. He bought that right and interest, and possessed and enjoyed them until their lease of life expired.

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It does not concern the plaintiff in error who got the purchase money, so that the vendor and creditors were satisfied, and so that he received the thing which he had purchased.

When he paid his purchase money, the United States was the sole recognized claimant for it. If that money had gone into the Treasury; if no prior liens had been recognized, would he have been entitled to demand that it should be refunded, when, by the death of Hays, his life estate ended?

All the issues in this case have been passed upon by the Supreme Court of Louisiana, in the case of *Pendegast* v. *Schawtz*, 30 La. Ann., 590.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The questions presented in this case arise on the following facts:

[7] On the 7th of August, 1863, proceedings were begun in the District Court of Louisiana for the condemnation of three lots of ground in New Orleans seized under the Act of July 17, 1862, ch. 195, 12 Stat. at L., 589, as the property of Harry T. Hays. The property, when seized, was incumbered by a mortgage from Hays to E. A. Bradford. On the 27th of November, 1863, Bradford appeared in the suit in response to the monition and filed a petition of intervention, in which, after setting up his mortgage, he asked to have his rights recognized as superior to the United States, and that the property confiscated might be sold and the proceeds applied to the payment of what was due to him. On the 23d of January, 1865, a sentence of condemnation was entered and a sale ordered, "The proceeds to be distributed according to law, the legal rights of the interveners being reserved for further action hereafter." An order of sale was issued to the marshal on the same day the sentence of condemnation was granted. On the 23d of February, a judgment was entered on the intervention of Bradford, in which it was "Ordered, adjudged and decreed that there be a judgment in his favor for the sum of $6,000 * * * with special mortgage upon the three lots." After this judgment was entered, the marshal sold the property under the sentence of condemnation to Waples, the plaintiff in error, for $6,000, and on the 27th of March all the proceeds, except what were required for the costs, charges and taxes, were paid over to Bradford "in part satisfaction of his judgment and mortgage." The United States realized nothing from the condemnation. Harry T. Hays having died, the present suit was brought on behalf of his children to recover the possession of the property from Waples. Upon the trial, the foregoing facts appearing, the court charged the jury that the plaintiffs were entitled to a verdict. The verdict having been rendered, in accordance with the charge and a judgment given thereon against Waples, he brought this writ of error.

It was settled in *Bigelow* v. *Forest*, 9 Wall., 350 [76 U. S., XIX., 700], and *Wallach* v. *Van Riswick*, 92 U. S., 202 [XXIII., 473], that, ordinarily, the estate acquired by a purchaser of real property condemned and sold under the confiscation Act of July 17, 1862, terminates with the life of the person for whose act it was seized. The only question in the present case is whether Waples, the purchaser, occupies a different position because of what was done with reference to the Bradford mortgage. We think he does not. The sale was made on the sentence of condemnation alone. The only suit ever begun was that by the United States to secure a condemnation under the law. Bradford intervened, for the protection of his interest in what was to be condemned. He could not in that suit foreclose his mortgage on the property. All he could get and all he sought to get was payment out of the proceeds of any sale ordered in consequence of the condemnation. His mortgage covered the fee, but the suit in which he intervened was in its legal effect only to subject the property for the life of the mortgagor. He was interested as well in what was to be condemned, as in what remained after the condemnation was exhausted. As his lien was not condemned, his rights under it would have been superior to the title acquired by Waples but for his application to be paid from the proceeds. Having made his application and got the proceeds, the interest in the land bought by Waples was relieved from his lien, but in no other respect was it enlarged. The only effect of the intervention was to give Waples the title to his tenancy for the life of Hays, free of the lien of the mortgage. Whether Bradford can proceed against the property in the hands of the heirs for the recovery of the balance that remained due to him after the application of the proceeds of this sale, is a question we need not consider. [9]

Neither are the United States or Waples subrogated to the rights of Bradford under his mortgage. To the extent of the proceeds actually received by Bradford, his debt has been *paid* out of the mortgaged property. He got what he did because of the lien given him by Hays on the fee before the cause of forfeiture arose. This lien, it was adjudged in the condemnation suit, could not be condemned under the seizure that had been made; and so to secure to the purchaser a title to the property for the life of Hays, the proceeds of the sale were applied to the extinguishment of the incumbrance that would otherwise have rested upon that estate for life. In this way, Waples got all the title the United States undertook to convey; that is to say, an unincumbered right to the use and enjoyment of the property during the life of Hays. It is true that the United States realized no money from the sale for its own use, but that does not alter the rights of Waples. He bought the property for the life of Hays, and that was all he bought. His position was that of a tenant for the life of another. The death of Hays terminated his tenancy.

On the trial, the plaintiffs offered in evidence the deed under which Hays took his title. This was objected to because it had not been set forth in the petition, and was not attached thereto, and the lots were not described in the petition as required by section 174 of the Code of Practice of Louisiana. This objection was properly overruled. It is well established in Louisiana that if the defendant goes to trial on a petition defective in this particular he waives the objection. *Smith* v. *Blunt*, 2 La., 133; *Maillon* v. *Boyce*, 14 La. Ann., 631.

The judgment is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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MOSES FEIBELMAN, *Plff. in Err.*,

v.

STEPHEN B. PACKARD ET AL.

(See S. C., Reporter's ed., 14-15.)

Writ of error by one joint defendant.

Where a judgment has been rendered against partners whose interests in the suit were joint, and the judgment affects them jointly and not separately, one alone cannot bring a writ of error, where there has been no summons and severance, or other equivalent proceeding.

[No. 61.

Submitted Oct. 31, 1882. Decided Nov. 13, 1882.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The case is sufficiently stated by the court.

Messrs. **John Ray** and *R. G. Cobb*, for plaintiff in error.

Mr. **J. R. Beckwith**, for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

Moses Feibelman and George Voelker, as partners, sued the defendants in error to recover damages for the seizure of their partnership goods by Packard, Marshal of the United States for the District of Louisiana. A judgment was rendered against them. Their interests in the suit were joint, and the judgment affects them jointly and not separately. Feibelman alone has brought this writ of error, and there has [15] been no summons and severance or other equivalent proceeding. *It follows that the writ must be dismissed on the authority of Williams* v. *Bank*, 11 Wheat., 414; *Masterson* v. *Herndon*, 10 Wall., 416 [77 U. S., XIX., 953]; *Simpson* v. *Greeley*, 20 Wall., 152 [87 U. S., XXII., 388]; and *it is so ordered.*

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

JOHN GRAY, *Appt.*,

v.

AMOS HOWE AND ANN SMITH.

(See S. C., Reporter's ed., 12-14.)

Review of territorial judgment.

Where the Supreme Court of a Territory reversed the judgment of a territorial district court, and made no statement of the facts of the case in the nature of a special verdict, as required by the Act of April 7, 1874, ch. 80, and set aside the findings of the district court, there is nothing here which this court can re-examine.

[No. 62.]

Submitted Oct. 31, 1882. Decided Nov. 13, 1882.

APPEAL from the Supreme Court of the Territory of Utah.

The history and a sufficient statement of the case appear in the opinion of the court.

Mr. **R. N. Baskin**, for appellant.

Mr. **Z. Snow**, for appellees.

Mr Chief Justice **Waite** delivered the opinion of the court:

This is an appeal from the judgment of the Supreme Court of Utah, in a special statutory proceeding, to settle a controversy between the parties as to their respective rights in the E. ½ of lot 3, block 104, plat A, Salt Lake City, under the trust created through the purchase, by the mayor of the city from the United States, of the lands on which the city stands, in accordance with the provisions of the Town Site Act of March 2, 1867, ch. 177, 14 Stat. at L., 541. Gray, the appellant, claims the whole of the property. The appellees contest his title and set up occupancy by themselves at the time of [13] the purchase. The proceeding was begun in the Probate Court, where, after a hearing, the facts were found and a judgment entered in favor of the appellees, each for the part of the lot claimed by them respectively. Gray thereupon appealed to the district court of the Territory. This, it was held, in *Cannon* v. *Pratt*, 99 U. S., 619 [XXV., 446], might be done. Afterwards, the district court heard the cause and found the facts and stated its conclusions of law thereon, as required by the Practice Act of the Territory. After the findings and conclusions were filed in the district court, the present appellees excepted, on the ground that the facts as found were contrary to the evidence, and also because the court refused to find facts as requested by them. A motion was also made to set aside the findings and grant a new trial. This motion was overruled and judgment entered in favor of the claim of Gray. Thereupon the present appellees appealed to the Supreme Court, both from the refusal to grant a new trial and from the judgment. This was allowable under the Practice Act of the Territory. The Supreme Court heard the case, reversed the judgment of the district court and remanded the cause, with instructions to enter a judgment rejecting the claim of Gray and allowing the claims of the appellees. From this judgment of the Supreme Court Gray took the present appeal. The Supreme Court made no "statement of the facts of the case in the nature of a special verdict," as required by the Act of April 7, 1874, ch. 80, 1 Supp. R. S., 13; and as that court must have set aside the findings of the district court in order to render the judgment it gave, there is nothing here which we can re-examine. Since the Act of 1874, *supra*, the evidence at large is not to be transmitted here from the courts of the Territories, but in lieu of the evidence "a statement of the facts of the case in the nature of a special verdict." In *Stringfellow* v. *Cain*, 99 U. S., 610 [XXV., 421], it was held, if the findings of the district court were sustained and a general judgment of affirmance rendered in the Supreme Court, the findings of the district court, thus approved by the Supreme Court, would furnish a sufficient statement of facts for the purposes of an appeal to this court. So, too, if there is a reversal and another judgment rendered on the facts as found. But here the only exceptions to the [14] findings below were that they were contrary to the evidence, and a judgment has been rendered by the Supreme Court in every way inconsistent with those findings. The necessary inference, therefore, is, that the findings sent up to that court were set aside and the case disposed of on the evidence. This, it was also said in *Stringfellow* v. *Cain*, might be done in this class of cases.

As the only exceptions taken to the rulings

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of the district court were by Howe, in whose favor judgment has finally been rendered in the Supreme Court, they need not be considered here.

It follows that the judgment of the Supreme Court of the Territory must be affirmed; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ISAAC WOOLF, *Plff. in Err.*,
v.
CLAUD HAMILTON AND JOHN ELLIOTT, Trustees, etc.

(See S. C., Reporter's ed., 15.)

Review of cases tried by jury.

A case which was not tried in a territorial court by a jury, must be brought here for review, by appeal and not by writ of error.

[No. 150.]

Submitted Nov. 1, 1882. Decided Nov. 13, 1882.

IN ERROR to the Supreme Court of the Territory of Utah.

Mr. **J. R. McBride**, for plaintiff in error.

Mr. **Samuel A. Merritt**, for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This writ of error is dismissed on the authority of *Hecht* v. *Boughton*, 105 U. S., [XXVI., 1018]. The case was not tried in the court below by a jury. This, under the Act of April 7, 1874, ch. 80 [18 Stat. at L., 27], 1 Supp. R. S., 13, made it necessary to bring the judgment here for review by appeal and not by writ of error.

Dismissed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—114 U. S., 35.

Samuel Kahn and Emanuel Kahn, Plffs. in Err., v. *Claud Hamilton and John Elliott, Trustees, etc.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

This writ of error is dismissed upon the authority of *Hecht* v. *Boughton*, 105 U. S., [XXVI., 1018]. The case is in all respects like that of *Woolf* v. *Hamilton* [*supra*], just decided.

Dismissed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CITY OF NEW ORLEANS, *Appt.*,
v.
NEW ORLEANS, MOBILE AND TEXAS RAILROAD COMPANY.

(See S. C., Reporter's ed., 15, 16.)

Motion to dismiss.

Where the appellee presents a stipulation for the dismissal of the appeal, signed by the city attorney pursuant to the terms of a compromise of the matter in dispute made with the city council, and the board of liquidation of the city resists the dismissal, on the ground that authority over the controversy has been transferred from the city council to that board; the dispute as to the authority of the council presents questions too important to be settled summarily on a motion to dismiss, and the court will continue the cause to give the board opportunity to set aside the compromise.

[No. 17.]

Argued Nov. 14, 15, 1882. Decided Nov. 20, 1882.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

On motion to dismiss.

The case is stated by the court.

See, also, the report of its final disposition at the next Term, by this court, on the merits, *post*.

Messrs. **T. L. Bayne** and **John L. Cadwallader**, for appellee, in support of motion.

Mr. C. F. Buck, City Attorney, for appellant, *contra*.

Messrs. **R. T. Merrick** and **Henry C. Miller**, for Board of Liquidation, *contra*.

Mr. Chief Justice **Waite** delivered the opinion of the court: [16]

This case was continued at the request of the parties on the 10th of October. The appellee now presents a stipulation for the dismissal of the appeal, signed by the city attorney of New Orleans, pursuant to the terms of a compromise of the matter in dispute made with the city council, and asks to have the appropriate order entered upon that stipulation. The Board of Liquidation of the City Debt of New Orleans comes to resist the entry of any such order, on the ground that, during the pendency of the appeal in this court, authority over the subject-matter of the controversy has been transferred from the city council to that board, and that the compromise which has been effected is not binding. The board also asks permission to prosecute the appeal in the name of the City.

It is conceded that the city council made the compromise which is claimed, and that the appellee is entitled to a dismissal of the appeal if the council had authority to do what it has done and the compromise was fairly made. The dispute as to the authority of the council presents questions too important to be settled summarily on these motions.

It is, therefore, ordered that the cause and pending motions be continued until the next Term, and *that the appeal be then dismissed*, in accordance with the stipulation on file, unless the board of liquidation begin and prosecute, without unnecessary delay, in some court of competent jurisdiction, an appropriate proceeding to set aside the compromise which has been made with the city council.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN D. MAYER ET AL., *Appts.*, [17]
v.
WILLIAM WALSH.

(See S. C., Reporter's ed., 17.)

Motion to dismiss.

A motion to dismiss a cross appeal will not be granted when the record has not been printed and

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the case is here on the original appeal, and it appears from the motion papers that the present appellant pleaded prescription; and if his other defenses in the original appeal are overruled, it may be important to him to insist on the defense of prescription.

[No. 813.]

Motion submitted Dec. 11, 1882. Decided Dec. 18, 1882.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

On motion to dismiss.

Messrs. **P. Phillips** and **W. H. Phillips**, for appellee, in support of motion.

Mr. **C. W. Hornor**, for appellants, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a cross appeal and the record has not been printed. As the case is here on the original appeal by the present appellee, we are not inclined to grant this motion in the absence of the printed record. It appears from the motion papers that the present appellant pleaded prescription, and we infer that this plea was not sustained. By his other defenses, he defeated the claim in part. To review the decree so far as it is affected by these defenses, the present appellee appealed. If, on that appeal, these defenses are overruled, it may be important to the present appellant, to insist on his defense of prescription against a claim that will then amount to more than $5,000. Had not the other side appealed, the present appellant could not, because the decree against him is less than $5,000. Under these circumstances, it may be that this appeal was well taken. *Without, however, deciding that question, we postpone the further consideration of the motion until the hearing on the merits.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[18] CHICAGO & ALTON RAILROAD COMPANY, *Plff. in Err.*,

v.

WIGGINS FERRY COMPANY.

(See S. C., Reporter's ed., 18-24.)

Removal of cause—insufficient grounds for—state judgment, when conclusive.

1. If the courts of one State gave a wrong construction to the laws of another State in a judgment set up as an estoppel, in a suit in a State Court, that error cannot be corrected by means of a transfer of the suit from the State Court to the Circuit Court of the United States; the judgment can only be reviewed here on a writ of error.

2. A state judgment cannot be impeached collaterally in the courts of the United States, any more than in those of the State, by showing that if due effect had been given to the laws it would have been the other way. The courts of the United States must give it the same effect as a judgment that it has in the courts of the State.

3. The presumption in all cases is, that the courts of the States will do what the Constitution and laws of the United States require, and removals to the courts of the United States cannot be effected because of fear that they will not so do.

[No. 888.]

Advanced and submitted under 32d Rule Jan. 8, 1883. Decided Jan. 29, 1883.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The history and facts of the case appear in the opinion of the court.

On motions to advance and affirm.

Messrs. **S. T. Glover** and **J. R. Shepley**, for defendant in error, in support of motions:

As the plaintiff and the defendant are both citizens of the State of Illinois, no right to remove exists, by reason of the citizenship of the parties.

In order to entitle the party to remove the cause from the State Court to the Federal Court, under the 2d section of the Act of March 3, 1875, on the ground that a question has arisen under the Constitution or law of the United States, it is necessary not only that the petition for removal should aver that a question had arisen in the case under the Constitution or law of the United States, but that it should appear (either from the petition or pleadings in the case or both) distinctly what the question is, and how, where and out of what facts the question arises, which gives the court jurisdiction, so that the court can determine for itself from these facts, whether the suit does substantially involve a dispute or controversy within its jurisdiction.

Gold Washing, etc., Co. v. *Keyes*, 96 U. S., 199 (XXIV., 656); *Ins. Co.* v. *Pechner*, 95 U. S., 183 (XXVI., 427); *Dowell* v. *Griswold*, 5 Sawy., 39; *R. R. Co.* v. *Miss.*, 102 U. S., 135 (XXVI., 96); *Houser* v. *Clayton*, 3 Woods., 275.

The only conflict apparent from the record is this: the Railroad Company is not satisfied with the decision of the Missouri court. It has claimed for its charter an effect which the Missouri court will not concede to it; and hence its supposed right to remove the suit into the Federal Court. The decision complained of is "*Wiggins Ferry Co.* v. *C. & A. R. R. Co.*," 73 Mo., 389.

If this proposition is sustained, it will extend the jurisdiction of this court into a vast field of matter never before imagined possible.

Messrs. **Chester H. Krum** and **C. Beckwith**, for plaintiff in error, *contra:*

There is no provision in the Rules of this court for the motions made by the defendant in error.

Rule 32 provides for an advance of such cases, but the advance is made and heard under the rules applicable to motions to dismiss.

The defendant in error moves to advance and affirm the judgments.

"To say that there is no error in this judgment and affirm it for that reason, would be to decide the whole legal merits of the case, and this we cannot do on a motion to remand, or to quash the writ."

Hecker v. *Fowler*, 1 Black, 95 (66 U. S., XVII., 45).

The record presents a case which arises under the Constitution of the United States.

R. R. Co. v. *Miss.*, 102 U. S., 141 (XXVI., 98).

The plaintiff in error having undertaken to limit itself to one mode of crossing the river at St. Louis, whatsoever might be the requirements

NOTE.—*Estoppel by judgment.* See *note* to Aspden v. Nixon, 45 U. S. (4 How.), 467.

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of the railroad transportation and whatever the instructions or the interests of shippers and passengers, brought itself at once within the prohibition of the policy of the State, as expressed not only in the statute, but in the declarations of its court of last resort.

Act of February 25, 1867; *C. & N. W. R. R. Co.* v. *People*, 56 Ill., 378; *Peoria & R. I. R. R. Co.* v. *Coal Co.*, 68 Ill., 489; *Thomas* v. *R. R. Co.*, 101 U. S., 71 (XXV., 950).

The plaintiff in error insists upon its right to have full faith and credit given in the State of Missouri to these public Acts of the State of Illinois, as interpreted by its courts.

Argument is not necessary to show that a federal tribunal must determine what such public Acts are, and the interpretation thereof.

Bank v. *Skelly*, 1 Black, 436 (66 U. S., XVII., 173); *R. R. Co.* v. *Miss.* (*supra*).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit begun in a state court of Missouri by the Wiggins Ferry Company, an Illinois Corporation, against the Chicago and Alton Railroad Company, another Illinois Corporation, to recover damages for the breach of a contract by which, as is alleged, the Railroad Company bound itself not to employ any other means than the Ferry Company's ferry for the transportation of passengers and freight, coming and going on its railroad, across the Mississippi at St. Louis. The Railroad Company defends on the ground, among others, that if the agreement actually entered into by the parties contains by construction any such provision as is claimed, it is in violation of the laws of Illinois, and in excess of the corporate powers of the Company as an Illinois Corporation. To avoid the effect of this defense the Ferry Company sets up, by way of estoppel, a judgment in another suit in a State Court of Missouri, between the same parties, where precisely the same question was raised on the same contract, and in which it was decided that the Railroad Company did have the corporate authority under the laws of Illinois to make the contract.

[19] As soon as the pleadings in the case developed this issue, the Railroad Company petitioned for the removal of the suit to the Circuit Court of the United States for the Eastern District of Missouri, the proper district, on the ground that "Full faith and credit has not been given to the public Acts of the State of Illinois by the Supreme Court of the State of Missouri in the adjudication aforesaid, and that by reason of the facts herein set forth, and of such adjudication, and the pleading thereof as an estoppel, in the manner set forth in the plaintiff's amended petition, this suit is one arising under the Constitution and laws of the United States." The facts set forth in the petition were the charter and laws of Illinois, which governed the powers of the Railroad Company as an Illinois corporation.

The State Court, on the filing of the petition for removal, accompanied by the necessary bond, stopped proceedings; but the circuit court, when the record was entered there, remanded the cause. From an order to that effect this writ of error has been taken, and is now for hearing on the merits under the operation of Rule 32, adopted at the last Term, with a view to facilitating the final determination of questions of removal under the Act of March 3, 1875, ch. 137. 1 Supp. Rev. Stat., 173.

In our opinion this is not a suit arising under the Constitution or laws of the United States, within the meaning of that term as used in the Removal Act. If the courts of Missouri gave a wrong construction to the laws of Illinois in the judgment set up as an estoppel, that error cannot be corrected by means of a transfer of this suit from the State Court to the Circuit Court of the United States. So long as the judgment stands, it cannot be impeached collaterally in the courts of the United States, any more than in those of the State, by showing that if due effect had been given to the laws it would have been the other way. If it has the effect of an estoppel, as is claimed, it will continue to have that effect until reversed or set aside in some appropriate form of proceeding instituted directly for that purpose. The courts of the United States must give it the same effect as a judgment that it has in the courts of the State. Whether as a judgment it operates as an estoppel, does not depend on the Constitution or laws of the United States. The correct decision of this question of estoppel, therefore, does not depend on the construction of the Constitution or laws of the United States, but on the effect of a judgment under the laws of Missouri. The public Acts of Illinois are in no way involved. If full faith and credit were not given to them by the Missouri court in the judgment which has been rendered, that may entitle the Railroad Company to a review of the judgment here on a writ of error, but in no other way can this or any other court of the United States invalidate that judgment on account of such mistakes, if any were in fact made.

Another ground taken in support of the jurisdiction of the circuit court upon the removal is, [23]
if we understand the argument of the counsel for the plaintiff in error, that the laws of Illinois, rightly construed, prohibit such a contract as it is alleged has been made, and as the Missouri court decided the other way when the former judgment was rendered, a transfer may be made so as to avoid a like error in this suit. The question thus presented is not what faith and credit must be given the public Acts of Illinois in Missouri, but what the public Acts of Illinois, when rightly interpreted, mean. That does not depend on the Constitution or laws of the United States, but on the Constitution and laws of the State alone.

It is not even alleged in the petition for removal, or claimed in argument, that the courts of Illinois have as yet actually given the statutes in question any such construction as it is contended they should have. The most that can be insisted upon from all the allegations is, that on account of what has been done in other cases, the Railroad Company expects, when an opportunity occurs, the courts of Illinois will decide that the laws of that State gave the Company no power to bind itself in the way the Missouri Court has determined it did. So that the position of the Railroad Company on this application seems to be, that, while the questions arising on the effect of the public Acts are apparently open in the courts of Illinois, and nothing has been done which, even on the principles of comity, can bind the courts of

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Missouri, a suit, pending in a Missouri court, may be removed to a court of the United States, because the Missouri court, on a former occasion, construed a public law of Illinois, which is involved, differently from what it should have done. To allow a removal upon such grounds would be to say that a suit arises under the Constitution and laws of the United States whenever the public Acts of one State are to be construed in an action pending in a court of another State. Clearly this is not so. Even if it be true, as is contended by the counsel, for the plaintiff in error, that a suit can be removed as soon as a federal question becomes involved, it is sufficient to say that in this case such a question has not arisen. Until the Missouri court fails, in this suit, to give full faith and credit to the public Acts of Illinois, no case has arisen to which the jurisdiction of the courts [24] of the United States can attach, and then only for the correction of the errors that have been committed. It is not enough that in other cases decisions have been made which, if followed in this, will be erroneous. Until the error has actually been committed in this case, a federal question has not become involved. The presumption in all cases is that the courts of the States will do what the Constitution and laws of the United States require, and removals cannot be effected to the courts of the United States because of fear that they will not.

The order remanding the cause is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Chicago & Alton Railroad Company, Plff. in Err., v. *Wiggins Ferry Company.*

[No. 839.]

In error to the Circuit Court of the United States for the Eastern District of Missouri.

This case is in all material respects like that between the same parties just decided, and the order of the Circuit Court remanding the case is affirmed for the reasons there given.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, *Appt.*,

v.

SOUTHERN EXPRESS COMPANY.

(See S. C., Reporter's ed., 24-29.)

Final decree—what is—supplemental order.

1. A decree is final, for the purposes of an appeal to this court, when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.

2. In a suit to compel a railway company to do an express company's business, a decree which requires the carriage, fixes the compensation to be paid, adjudges costs and awards execution, is final, although leave is given the parties to apply for a modification of the rates.

3. Matters which relate to the administration of the cause are incidents of the main litigation, but not necessarily a part of it, such as a supplemental order, made after the decree, relating only to the settlement of the accounts which accrued pending the suit.

[No. 914.]

Submitted Jan. 3, 1883. Decided Jan. 29, 1883.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

On motion to dismiss.

The history and facts of the case appear in the opinion of the court.

Messrs. **S. T. Glover, J. R. Shepley, S. M. Breckinridge, Clarence A. Seward** and **F. E. Whitfield,** for appellee in support of motion:

An appeal is a matter of statutory right, and in equity lies from final decrees only.

R. S., sec. 692; *Barry* v. *Mercein*, 5 How., 119; *Durousseau* v. *U. S.*, 6 Cranch, 314; *U. S.* v. *Curry*, 6 How., 113; *Ex parte Vallandigham*, 1 Wall., 251 (68 U. S., XVII., 593); *U. S.* v. *Young*, 94 U. S., 259 (XXIV., 153).

Although the transcript was filed at this Term, only the appellee may now move to dismiss the appeal, and before the cause is reached in its regular order, if the decree appealed from was not a final one.

Clark v. *Hancock*, 94 U. S., 493 (XXIV., 146); *Ex parte Russell*, 13 Wall., 671 (80 U. S., XX., 634).

The fact that an appeal has been allowed by the court below, is of no weight in deciding the question whether such appeal was properly allowed.

Callan v. *May*, 2 Black, 541 (67 U. S., XVII., 281).

As to what is and what is not a final judgment or decree, see the following cases:

Ray v. *Law*, 3 Cranch, 179; *Whiting* v. *Bank*, 13 Pet., 15; *Carr* v. *Hoxie*, 13 Pet., 460; *Bronson* v. *R. R. Co.*, 2 Black, 524 (67 U. S., XVII., 259); *R. R. Co.* v. *Swasey*, 23 Wall., 409 (90 U. S., XXIII., 137); *Young* v. *Grundy*, 6 Cranch, 51; *Houston* v. *Moore*, 3 Wheat., 433; *Gibbons* v. *Ogden*, 6 Wheat., 448; *The Palmyra*, 10 Wheat., 502; *The Santa Maria*, 10 Wheat., 444; *Chase* v. *Vasques*, 11 Wheat., 429; *Canter* v. *Am. Ins. Co.*, 3 Pet., 318; *Brown* v. *Swann*, 9 Pet., 1; *Young* v. *Smith*, 15 Pet., 287; *Forgay* v. *Conrad*, 6 How., 201; *Perkins* v. *Fourniquet*, 6 How., 206; *Puliam* v. *Christian*, 6 How., 209; *Barnard* v. *Gibson*, 7 How., 650; *U. S.* v. *Girault*, 11 How., 22; *Fourniquet* v. *Perkins*, 16 How., 82; *Craighead* v. *Wilson*, 18 How., 200 (59 U. S., XV., 333); *Beebe* v. *Russell*, 19 How., 283 (60 U. S., XV., 668); *Farrelly* v. *Woodfolk*, 19 How., 238 (60 U. S., XV., 670); *Humiston* v. *Stainthorp*, 2 Wall., 106 (69 U. S., XVII., 905); *Thompson* v. *Dean*, 7 Wall., 342 (74 U. S., XIX., 94).

The policy of the law and the decisions of the court are alike adverse to fragmentary appeals.

The Palmyra, 10 Wheat., 502; *Canter* v. *Ins. Co.*, 3 Pet., 318; *Young* v. *Smith*, 15 Pet., 287; *Crosby* v. *Buchanan*, 23 Wall., 453 (90 U. S., XXIII., 142); *The Santa Maria*, 10 Wheat., 444.

Messrs. **Broadhead & Haeussler,** *John F. Dillon, Wager Swayne* and *Thomas J. Portis,* for appellant, *contra*:

The question of what is a final decree has been repeatedly passed upon by this court; and while this court has several times intimated that

NOTE.—*What is final decree or judgment of state or other court from which appeal lies.* See, *note* to Gibbons v. Ogden, 19 U. S. (6 Wheat.), 448.

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it is greatly to be desired that a decree should not only be final, but complete, before the case is brought up by appeal, yet we think that the authorities are clear, to the effect that a decree such as this, is both final and complete.

Forgay v. *Conrad*, 6 How., 201; *Barnard* v. *Gibson*, 7 How., 657; *Whiting* v. *Bank*, 13 Pet., 15; *Ray* v. *Law*, 3 Cranch, 179; *Thompson* v. *Dean*, 7 Wall., 342 (74 U. S., XIX., 94); *French* v. *Shoemaker*, 12 Wall., 86 (79 U. S., XX., 270); *Stovall* v. *Banks*, 10 Wall., 586 (77 U. S., XIX., 1037); *R. R. Co.* v. *Swasey*, 23 Wall., 405 (90 U. S., XXIII., 136); *Green* v. *Fisk*, 103 U. S., 518 (XXVI., 486); *Bronson* v. *R. R. Co.*, 2 Black, 531 (67 U. S., XVII., 360); *Michoud* v. *Girod*, 4 How., 503.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The Southern Express Company, an express carrier, filed its bill in equity against the St. Louis, Iron Mountain & Southern Railway Company, in the Circuit Court for the Eastern District of Missouri, to enjoin the Railway Company from interfering with or disturbing the Express Company in the enjoyment of the facilities it then had for the transaction of its express business over the Railway Company's railroad, so [25] long as the Express Company conformed to the regulations of the Railway Company and paid all lawful charges for the business. A preliminary injunction was asked for and, in this connection, the bill prayed that if any dispute or disagreement should arise between the parties during the pendency of the suit, upon the question of compensation to be paid for transportation, the Express Company might be permitted to bring the same before the court for decision by way of an interlocutory application. On the filing of the bill, the preliminary injunction was granted, which was afterwards modified in some particulars affecting the compensation to be paid and the mode of doing the business.

On the 25th of March, 1882, the court entered a decree containing the following provisions:

"V. That it is the duty of the defendant to carry the express matter of the plaintiff's Company, and the messengers or agents in charge thereof, at a just and reasonable rate of compensation, and that such rate of compensation is to be found and established as a unit and is to include as well the transportation of such messengers or agents as of the express matter in their custody and under their control.

X. Whereas, it is alleged by complainant that since the commencement of this suit and the service of the preliminary order of injunction herein, the defendant has, in violation of said injunction and of the rights of complainant, made unjust discriminations against complainant, and has charged complainant unjust and unreasonable rates for carrying express matter, therefore, it is ordered that complainant have leave hereafter to apply for an investigation of these and similar allegations, and for such order with respect thereto as the facts, when ascertained, may justify, and for the appointment of a master to take proof and report thereon.

XI. That the defendant, its officers, agents, servants and *employés* and all persons acting under their authority be and they hereby are permanently and perpetually enjoined and restrained from interfering with or disturbing in any manner the enjoyment by the plaintiff, of the facilities provided for in this decree, to be accorded to it by the said defendant upon its lines of railway, or such as have been heretofore accorded to it for the transaction of the business of the plaintiff and of the express busi- [26] ness of the public confided to its care, and from interfering with any of the express matter or messengers of the plaintiff, and from excluding or ejecting any of its express matter or messengers from the depots, trains, cars or lines of the said defendant as the same are by this decree directed to be permitted to be enjoyed and occupied by the said plaintiff, and from refusing to receive and transport in like manner as the said defendant is now transporting, or as it may hereafter transport for itself or for any other express company over its lines of railway, the express matter and messengers of the said plaintiff, and from interfering with or disturbing the business of the said plaintiff in any manner whatsoever, the said plaintiff paying for the services performed for it by the defendant monthly, as herein prescribed, at a rate not exceeding fifty *per centum* more than its prescribed rates for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account, or for any other express or other corporation, or for private individuals, reserving to either party a right, at any time hereafter, to apply to this court, according to the rules in equity proceedings, for a modification of this decree as to the measure of compensation herein prescribed.

It is further ordered, adjudged and decreed that the defendant pay the costs to be taxed herein, and that an execution or a fee bill issue therefor."

On the 29th of March the Railway Company prayed an appeal, which was allowed and, on the 15th of May, perfected by the approval of the necessary bond. During the same Term of the court, but after the appeal bond was accepted and approved, the Express Company moved the court to grant it the benefit of a reference authorized by sections V. and X. of the decree, and a master was appointed to inquire into and report on the matters alleged.

The cause having been duly docketed here, the Express Company moves to dismiss the appeal, on the ground that the decree appealed from is not a final decree.

As we have had occasion to say at the present Term, in *Bostwick* v. *Brinkerhoff* and *Grant* v. *Ins. Co.* [*ante*, 73, 237], a decree is final, for the purposes of an appeal to this court, when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined. Under this rule we think the pres- [29] ent decree is final. The suit was brought to compel the Railway Company to do the Express Company's business. The controversy was about the right of the Express Company to require this to be done on the payment of lawful charges. It was no part of the object of the suit to have it definitely settled what these charges should be for all time. The point was to establish the liability of the Railway Company to carry. The decree requires the carriage, and fixes the compensation to be paid. It adjudges costs against the Railway Company

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and awards execution. Nothing more remains to be done by the court to dispose of the case. Inasmuch as the rates properly chargeable for transportation vary according to circumstances, and what was reasonable when the decree was rendered may not always continue to be so, leave is given the parties to apply for a modification of what has been ordered in that particular, if they, or either of them, shall desire to do so. In effect, the decree requires the Railway Company to carry for reasonable rates, and fixes for the time being the maximum of what will be reasonable.

The controversy which the Express Company has had referred to the master, about the compensation to be paid for the transportation during the pendency of the suit, does not enter into the merits of the case. All such matters relate to the administration of the cause, and the accounts to be settled under the present order are of the same general character as those of a receiver who holds property awaiting the final disposition of a suit. They are incidents of the main litigation, but not necessarily a part of it. The supplemental order, made after the decree, relates only to the settlement of the accounts which accrued pending the suit.

The motion to dismiss is denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 242.

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[30] MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, *Appt.*,

v.

WILLIAM B. DINSMORE, As President of the ADAMS EXPRESS COMPANY, And a Stockholder Therein.

(See S. C., Reporter's ed., 30, 31.)

Case followed—certificate to transcript—certiorari—*when granted.*

1. St. Louis, I. M. & S. R. Co. v. Southern Exp. Co., *ante*, followed.
2. Where the clerk certifies the transcript sent up to be a true, full and perfect copy from the record of all the proceedings in the suit, this is sufficient for all the purposes of jurisdiction.
3. If the certificate is not true, the remedy is by *certiorari*, to supply deficiencies, and not by motion to dismiss.
4. A *certiorari* to bring up the evidence may be granted although it appears that the case was disposed of on demurrer to the bill, if the record has not been printed in full, and the parties do not agree as to what it contains.

[No. 994.]

Submitted Jan. 3, 1883. Decided Jan. 29, 1883.

APPEAL from the Circuit Court of the United States for the District of Kansas.

On motion to dismiss, or for a *certiorari*.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **C. A. Seward,** for appellee, in support of motion.

Messrs. **A. T. Britton J. H. McGowan, Thomas J. Portis** and **A. L. Williams,** for appellant, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion to dismiss is made because, as is alleged: 1, the decree appealed from is not a final decree; and 2, the transcript is not properly certified.

1. As to the decree:

The case is in some particulars different from that of the *R. Co.* v. *Exp. Co.*, just decided, [*ante*, 688], but in our opinion the differences do not materially affect the present question. The decree in this case, as in that, requires the [31] Railway Company to carry for the Express Company and fixes the rate of compensation, "until the further order or decree of this (circuit) court." In this case, the reference to the master "To take and state an account between the parties as to the compensation that should be and has been paid during the litigation, and up to the final termination thereof," was entered before or at the time of the decree from which the appeal was taken. Still, in this, as in that, the reference is in respect to matters affecting the administration of the cause, and does not involve the merits. The reservation of power to change the rates operates only on the future, and was evidently intended for the purpose of enabling the court to act in case a change should be required. As the decree stands, the Express Company can require the Railway Company to carry at the rate which has been fixed.

2. As to the certificate:

The clerk certifies the transcript sent up to be a true, full and perfect copy from the record of all the proceedings in the suit. Certainly this is sufficient for all the purposes of jurisdiction. If, in point of fact, the certificate is not true, the remedy is by *certiorari* to supply deficiencies, and not by motion to dismiss.

To meet this view of the case, the appellee suggests diminution and asks for a *certiorari* to bring up "The evidence taken before * * * William H. Rossington, as examiner * * * remaining on file in the office of the clerk, constituting the exhibits, depositions, and proofs used on the argument of the cause in the * * * circuit court."

Upon the face of the decree it appears that the case was disposed of on demurrer to the bill. If that be the truth, the evidence on file is not necessary for the hearing of the appeal, *but as the record, which is here, has not been printed in full, and the parties do not agree in their statements as to what it contains, we will grant the* certiorari *asked for, reserving all further questions until the return is made.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

HARRY STUCKY, Assignee in Bankruptcy of BEN. MELTER, *Appt.*, [74]

v.

MASONIC SAVINGS BANK AND JACOB KRIEGER, Sr.,

(See S. C., Reporter's ed., 74, 75.)

Fraudulent preference under bankrupt Act.

A creditor dealing with a debtor whom he may suspect to be in failing circumstances, but of which he has no sufficient evidence, may receive payment or security without violating the bankrupt law; although he is unwilling to trust him further and is anxious about his claim and has a strong desire to

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secure it, yet if such belief as the Act requires is wanting, obtaining additional security or receiving payment is not prohibited by law.

[No. 164.]

Argued Jan. 26, 29, 1883. Decided Feb. 5, 1883.

APPEAL from the Circuit Court of the United States for the District of Kentucky.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **D. W. Armstrong**, *L. N. Demlitz* and *P. A. Gaertner*, for appellant.

Messrs. **J. P. Helm** and *W. O. Dodd*, for appellees.

Mr. Justice **Miller** delivered the opinion of the court:

This suit originated in a bill in equity brought in the district court by Stucky, as assignee of Melter, a bankrupt, against the Bank and against Jacob Krieger, Sr., for the purpose of having two mortgages made by the bankrupt declared void, and the real estate covered by them sold free of the lien of those mortgages. The ground of this relief is the allegation that the mortgages were made by Melter when insolvent, and were preferences in contemplation of bankruptcy, void by the bankrupt law, and that, by virtue of the bankrupt proceedings commenced within two months after they were made, they are void.

The case was decided in favor of the assignee in the district court, but on appeal the circuit court reversed this decree and dismissed the bill.

It is shown that both mortgages were taken to secure renewal notes for pre-existing debts, one note and mortgage being made to the Bank directly, and the other to Mr. Krieger, who was president of the Bank, the note being indorsed by him to the Bank. They were for $6,000 each.

[75] The whole matter turns upon the question whether Krieger, who acted almost alone for the Bank, had reasonable ground to believe that Melter was insolvent at the time the mortgages were made.

The District Judge, who decided that he had such reasonable ground, does not seem to have given due weight to the principles of the case of *Grant* v. *Nat. Bank*, decided by this court, and reported in 97 U. S., 80 [XXIV., 971], a case which was fully considered and which has since been followed by us as a leading one on the subject.

That case establishes the doctrine that a creditor dealing with a debtor whom he may suspect to be in failing circumstances, but of which he has no sufficient evidence, may receive payment or security without violating the bankrupt law.

"He may be unwilling to trust him further; he may feel anxious about his claim and have a strong desire to secure it, yet such belief as the act requires may be wanting. Obtaining additional security or receiving payment of a debt under such circumstances is not prohibited by law."

In the case before us the testimony of Krieger himself, as the one who best knows the strength of the suspicion, if any, on which he acted, and what evidence was before him, must chiefly control.

We have examined his deposition very carefully. We think it bears the impress of candor and it negatives the idea that he had reasonable ground to believe Melter insolvent, or that he actually did believe it.

The evidence, outside of this, as to the various estimates of the value of Krieger's property and the amount of his debts, while it shows that Melter was probably insolvent, does not show that this was known to Melter himself or to Krieger, or that the latter had reasonable grounds to believe him so.

It would serve no useful purpose to give in this opinion a full examination of all the evidence. *It is sufficient to say that in looking it all over we concur with the Circuit Judge, and his decree dismissing the bill is affirmed.*

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

HOWARD STEBBINS, *Plff. in Err.*, [32]

v.

MARIA L. DUNCAN ET AL., Devisees of WILLIAM B. MORRIS, Deceased.

(See S. C., Reporter's ed., 32-51.)

Death of sole plaintiff—proof of loss of instrument—handwriting—insufficient objection—error—identity—recording deed—effect of record—certified copy, of deed and time of record.

1. The suggestion of the death of a sole plaintiff, made while both parties were present, and an order made without objection that the devisees be substituted as plaintiffs, settle *prima facie*, the fact of the death of such party.

2. Where the existence of an original deed and its destruction is proved, it is competent to prove its contents by secondary evidence.

3. Where the witnesses to a deed are dead, to establish the execution of the deed, proof of the handwriting of one of them is sufficient.

4. Objection to copies of depositions that the death of the witnesses was not shown, nor was it proven that they were incompetent to testify, will not cover an objection that the witnesses were not shown to reside in another State, and more than a hundred miles from the place of trial.

5. When a party excepts to the admission of testimony, he is bound to state his objection specifically, and in a proceeding for error he is confined to the objection so taken.

6. Slight proof of identity of a grantor is sufficient in tracing titles; identity of names is *prima facie* evidence of identity of persons.

7. Where, by the laws of a State, a deed may be recorded though not proven or acknowledged, the record will operate as constructive notice to subsequent purchasers and creditors.

8. When the same person has executed two deeds for the same land, the first deed recorded will hold the title, although not proven or acknowledged, particularly where the first executed deed was not recorded until fifty years from its date, and long after innocent purchasers had bought the lands.

9. Although an original deed had not been so acknowledged and certified as to make a certified copy competent evidence; yet, where a record of such a deed is by the law of Illinois, notice to subsequent purchasers, a certified copy from the record is proof that such deed and memorandum was of record in the proper office.

10. Every document of a public nature which there would be an inconvenience in removing, and

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NOTE.—*Effect of death of parties, on suit.* See *note* to Green v. Watkins, 19 U. S. (6 Wheat.), 260.

Evidence of lost paper and secondary evidence of contents. See *note* to Bouldin v. Massie, 20 U. S. (7 Wheat.), 122.

Effect of refusal to produce, or destruction of paper. See *note* to Hanson v. Eustace, 43 U. S. (2 How.), 653.

Methods of proving death. See *note* to Mut. Life Ins. Co. v. Tisdale, 91 U. S., XXIII., 314.

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which the party has a right to inspect, may be proved by a duly authenticated copy.

II. It is the duty of the recorder to note when the record was made; a certified copy of such memorandum is competent evidence to prove the memorandum and the date of the registration of the deed.

[No. 153.]

Submitted Jan. 19, 1883. Decided Mar. 5, 1883.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The history and facts of the case very fully appear in the opinion of the court.

Messrs. **Geo. O. Ide, John W. Ross** and *R. Lloyd*, for plaintiff in error:

Proof of the death of Wm. B. Morris was an essential link in the plaintiff's chain of title. The probate record offered was not competent evidence of such death.

Ins. Co. v. *Tisdale*, 91 U.S., 241 (XXIII., 316); *Carroll* v. *Carroll*, 60 N. Y., 123; 2 Whart. Ev., secs. 810, 1278; *Milliken* v. *Marlin*, 66 Ill., 17.

The certified copy of a record of an alleged deed from Dunbar to Prout was improperly admitted in evidence.

R. S. Ill., 1877, ch. 30, sec. 36; *McCormick* v. *Evans*, 33 Ill., 328; *Fabbri* v. *Cunio*, 1 Bradw. (Ill.), 244.

It was not acknowledged pursuant to any statute of Illinois.

Hammers v. *Dole*, 61 Ill., 308; *West* v. *Krebaum*, 88 Ill., 263.

It was not entitled to record.

Act 1807, sec. 13, 1 Adams & Durham, R. Est. St., 64; *Carpenter* v. *Dexter*, 8 Wall., 525 (75 U. S., XIX., 429); *Semple* v. *Miles*, 2 Scam., 317; *Choteau* v. *Jones*, 11 Ill., 320; *Buckmaster* v. *Job*, 15 Ill., 328.

The copy of the destroyed depositions of Middleton and Collard was improperly admitted.

Stout v. *Cook*, 47 Ill., 530; *S. C.*, 57 Ill., 386; *Aulger* v. *Smith*, 34 Ill., 537; *Hutchins* v. *Corgan*, 59 Ill., 70.

The deed to Prout was not admissible as an ancient deed.

1 Whart. Ev., sec. 194; *Jackson* v. *Blanshan*, 3 Johns., 297; *Smith* v. *Rankin*, 20 Ill., 14; *Jackson* v. *Luquere*, 5 Cow., 221.

No accompanying possession for any period of time was shown.

Clarke v. *Courtney*, 5 Pet., 344; *Fell* v. *Young*, 63 Ill., 109; *Jackson* v. *Blanshan*, 3 Johns., 297.

The certificate of the recorder, attached to the copy of the record of the deed, was not evidence of the contents of the deed and of the indorsements upon it. The ancientness of the alleged deed could not be so proved.

Smith v. *Rankin*, 20 Ill., 22; 1 Whart. Ev., sec. 115; *Younge* v. *Guilbeau*, 3 Wall., 636 (70 U. S., XVIII., 262).

The deed not having been properly acknowledged, the certified copy was incompetent to prove the alleged recording.

Smith v. *Rankin*, 20 Ill., 19.

The law presumes that these deeds were made and delivered on the day of their dates.

Deininger v. *McConnel*, 41 Ill., 232; *Harden* v. *Osborne*, 60 Ill., 97; *Jayne* v. *Gregg*, 42 Ill., 416; *McConnel* v. *Brown*, Litt. Sel. Cas., 459.

The record of a deed not entitled to record is void, and cannot avail as notice.

St. John v. *Conger*, 40 Ill., 535; *Smith* v. *Rankin*, 20 Ill., 23.

To entitle a deed to record, when acknowledged before a justice of the peace out of the county where the land lies, the indispensable certificate of magistracy must accompany the deed.

Harding v. *Curtis*, 45 Ill., 254; *Vance* v. *Schuyler*, 1 Gilm., 163.

Mr. **Thomas Dent**, for defendant in error:

It is submitted that no further proof of the death of the said Morris was necessary.

R. S. Ill., tit. Ejectment, ch. 45, sec. 51; also, title Abatement, ch. 1, sec. 10.

We had more than was required by Greenleaf's Evidence.

1 Greenl. Ev., sec. 550; *Jeffers* v. *Radcliff*, 10 N. H., 242; *Cunningham* v. *Smith*, 70 Pa., 458.

Mr. Justice **Woods** delivered the opinion of the court:

This was an action of ejectment, originally brought by William B. Morris, in the Circuit Court of the United States for the Northern District of Illinois, against Howard Stebbins, the plaintiff in error, for the recovery of a quarter section of land, originally situate in Madison County, Illinois, but when the suit was begun, situate in Stark County. Before the final trial of the cause, to wit: on January 22, 1879, the death of the plaintiff was suggested, and the devisees named in the last will were made parties, as appears by the following entry upon the record of the court:

"Now come the parties by their attorneys, and Thomas Dent, Esq., the attorney of the plaintiff, suggests to the court the death of William B. Morris, and that Maria L. Duncan, Harriet B. Cooledge, and Helen Cooledge are

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Record of deed; its effect as notice; as to whom not necessary to record.

It is not necessary to record a deed so far as the parties to it are concerned. Wood v. Chapin, 13 N. Y., 509; Walker v. Coltrane, 6 Ired. Eq., 79; McCaskie v. Amarine, 12 Ala., 17; Belk v. Massey, 11 Rich., 614; Hill v. Epley, 31 Pa. St., 335; Fitzhugh v. Croghan, 2 J. J. Marsh., 429; S. C., 19 Am. Dec., 139; Phillips v. Green, 3 A. K. Marsh., 7; S. C., 13 Am. Dec., 124.

A subsequent purchaser, with notice of an unrecorded deed, cannot claim title as against it. Jackson v. Sharp, 9 Johns., 163; Schutt v. Large, 6 Barb., 373; Watkins v. Edwards, 23 Tex., 443; Martin v. Quattlebam, 3 McCord, 205; Morrison v. Kelley, 22 Ill., 610; Corliss v. Corliss, 8 Vt., 373; Trull v. Bigelow, 16 Mass., 418; Morrison v. Wilson, 13 Cal., 494; Draper v. Bryson, 17 Mo., 71; Van Rensselaer v. Clark, 17 Wend., 25; S. C., 31 Am. Dec., 280; McConnel v. Reed, 4 Scam., 117; S. C., 38 Am. Dec., 124.

Notice may be inferred from circumstances, as well as proved by direct evidence. Jones v. Loggins, 37 Miss., 546; Hunter v. Watson, 12 Cal., 363; Watkins v. Edwards, 23 Tex., 443; Troup v. Hurlbut, 10 Barb., 354; Helms v. May, 29 Ga., 121; Newman v. Chapman, 2 Rand., 93; S. C., 14 Am. Dec., 763.

Creditors are bound by actual notice of an unrecorded deed. Jackson v. Leek, 19 Wend., 339; Swan v. Moore, 14 La. Ann., 833; Doe v. Beardsley, 2 McLean, 421.

An unrecorded deed is void only as to creditors and subsequent *bona fide* purchasers without notice. Van Rensselaer v. Clark, 17 Wend., 25; S. C., 31 Am. Dec., 280; Vance v. M'Nairy, 3 Yerg., 171; M'Connell v. Reed, 2 Scam., 374; Derbes v. Romero, 32 La. Ann., 927; Snodgrass v. Ricketts, 13 Cal., 359; Bellas v. McCarty, 10 Watts, 13; Losey v. Simpson, 3 Stockt. Ch., 246.

A deed must be duly recorded and legally recordable to make the record thereof constructive notice. Pringle v. Dunn, 37 Wis., 449; S. C., 19 Am. Rep., 772; Musgrove v. Bonser, 5 Oregon, 313; S. C., 20 Am. Rep., 737.

A deed duly acknowledged and recorded is constructive notice to, and conclusive on, all persons

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the devisees of said deceased; and, on motion of the plaintiff's attorney, it is ordered by the court that said devisees, Maria L. Duncan, Harriet B. Cooledge and Helen Cooledge, be made plaintiffs herein."

The defendant pleaded the general issue. The cause was tried by a jury, who returned a verdict for the plaintiffs, upon which judgment was rendered in their favor for the lands in controversy. To reverse that judgment, the defendant in the circuit court has brought the case here upon writ of error.

A bill of exceptions was taken upon the trial, from which the following statement of the case is made:

Disregarding the order in which the testimony was introduced, and arranging in chronologically, the plaintiffs below, to prove title in themselves, offered the following evidence: [36]

1. An exemplification of a patent from the United States to one John J. Dunbar for the lands in controversy.

2. A certified copy of a deed for the same lands from John J. Dunbar to William Prout, dated January 6, 1818, said copy being certified to have been made February 3, 1875.

3. A certified copy of a deed for the same lands from William Prout to Joseph Duncan, dated May 2, 1834, and recorded in said county October 29, 1838.

4. A certified copy of a decree in chancery in the United States Circuit Court for the District of Illinois, dated June 9, 1846, rendered in a cause wherein the United States were complainants and the widow and heirs of Joseph Duncan defendants, and of the proceedings under said decree by which the premises in controversy in this suit were sold to the United States.

5. Certified copy of the deed to the United States under said decree for the same premises, made by William Thomas, commissioner, dated August 12, 1846, and recorded January 17, 1848.

6. Certified copy of a deed for the same premises, dated December 28, 1847, and recorded June 5, 1848, to William W. Corcoran, executed by R. H. Gillett, Solicitor of the Treasury, in behalf of the United States.

7. Certified copy of a deed for the same premises, dated December 20, 1867, and recorded March 12, 1868, from William W. Corcoran to William B. Morris.

8. Certified copy of the will of William B. Morris and of the probate thereof, from which it appeared that Maria L. Duncan, Harriet B. Cooledge, and Helen L. Cooledge, the plaintiffs, were his residuary legatees.

To sustain the title, which the plaintiffs contended that they derived through these documents, they offered other evidence, which will be noticed hereafter, but they offered no evidence of the death of William B. Morris the original plaintiff, since the certified copy of his will and of the probate thereof and the letters testamentary issued thereon.

The defendant, Stebbins, to show title in his lessor, offered in evidence the following title papers: [37]

1. An exemplification of a patent by the United States to John J. Dunbar, dated January 6, 1818, for the lands in controversy.

2. A certified copy from the recorder's office in Stark County, Illinois, in which county the land is situate, of a deed, dated January 6, 1818, from John J. Dunbar to John Frank, conveying said land in fee, and recorded in said county June 18, 1870.

3. Other title deeds, by which the title passed from the heirs of John Frank to Benson S. Scott.

4. The stipulation of plaintiffs that Stebbins, the defendant, was in possession of the land in controversy at the commencement of the suit under said Benson S. Scott as his tenant only, and, at no time, under any other claim.

No exceptions were taken by the plaintiffs to the introduction of these title papers by the defendant.

The real contest in the case was between the title of the plaintiffs deduced through the deed of Dunbar to Prout, and their subsequent muniments of title put in evidence, and the title of defendant derived through the deed of Dunbar to Frank, and the subsequent conveyances put in evidence by him.

The defendant was in possession of the premises sued for. His evidence, which was not excepted to, gave him a *prima facie* title, and unless the plaintiffs showed a better title, they should not have recovered the lands in controversy. It is, therefore, only necessary to consider the title which the plaintiffs claim to have shown in themselves. The errors assigned all relate to the admission, by the court below, of the evidence offered by the plaintiffs to sustain their title, and the charge of the court to the jury upon the effect of that evidence. These

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claiming through or under the grantor. Johnson v. Stagg, 2 Johns., 510; Schutt v. Large, 6 Barb., 373; Doe v. Beardsley, 2 McLean, 412; Tilton v. Hunter, 25 Me., 11; Rogers v. Burchard, 34 Tex., 453; S. C., 7 Am. Rep., 283; Bates v. Norcross, 14 Pick., 241; Flynt v. Arnold, 2 Met., 619.

An index of the record of a conveyance is not notice, but a deed filed for record and recorded is notice, although the officer fail to index it. Mut. L. Ins. Co. v. Dake, 87 N. Y., 257; Gilchrist v. Gough, 63 Ind., 576; S. C., 30 Am. Rep., 250; Chatham v. Bradford, 50 Ga., 327; S. C., 15 Am. Rep., 692; Bishop v. Schneider, 46 Mo., 472; S. C., 2 Am. Rep., 533; Pringle v. Dunn, 37 Wis., 449; S. C., 19 Am. Rep., 772; Scheil v. Stein, 76 Pa. St., 398; S. C., 18 Am. Rep., 416.

The time of recording is the time of delivery to the proper officer at the place of record. McCabe v. Gray, 20 Cal., 509; Gill v. Fauntleroy, 8 B. Mon., 177; Metts v. Bright, 4 Dev. & B., 173; Duboss v. Young, 10 Ala., 365; Davis v. Ownsby, 14 Mo., 175; Booth v. Barnum, 9 Conn., 286; S. C., 23 Am. Dec. 339; Breckenridge v. Todd, 3 T. B. Mon., 52; S. C., 16 Am. Dec., 83; Parker v. Scott, 64 N. C., 121; Horsley v. Garth, 2 Gratt., 471; S. C., 44 Am. Dec., 393.

A deed once recorded is notice to all the world, although the record be destroyed. Leger v. Doyle, 11 Rich., 109; McRaven v. McGuire, 9 Smedes & M., 34; Frisler v. Frisler, 38 Ind., 232; Brannon v. May, 42 Ind., 92; Anderson v. Dugas, 29 Ga., 440.

Knowledge of an intended conveyance is not sufficient notice. Warden v. Adams, 15 Mass., 233; Cushing v. Heard, 4 Pick., 252.

A purchaser is not affected with notice of a prior unrecorded conveyance merely from being one of the subscribing witnesses to it. Vest v. Michie, 31 Gratt., 149; S. C., 31 Am. Rep., 722.

Record of a conveyance is only notice to after purchasers from the same grantor. Roberts v. Bourne, 23 Me., 165; S. C., 39 Am. Dec., 614.

A deed actually recorded, if not entitled to record, is not constructive notice to a subsequent grantee; but if he has in fact seen the record he is affected with actual notice. Musgrove v. Bonser, 5 Oregon, 313; S. C., 20 Am. Rep., 737.

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assignments of error we shall now proceed to consider.

The court admitted as evidence, tending to prove the death of William B. Morris, the original plaintiff, the duly certified copy of his will and of the probate thereof in the Probate Court of the County of Suffolk, in the State of Massa- [38] chusetts, and of the letters testamentary issued thereon, and the court charged the jury, in effect, that this evidence, uncontradicted, was sufficient to show the death of Morris. The admission of this evidence and the charge of the court thereon are assigned for error.

Whether the evidence objected to was or was not competent and sufficient to prove the death of Morris, it was clearly competent, the death of Morris being proved, to show title in the plaintiffs. The objection to its admissibility must, therefore, fall if there was other evidence to show *prima facie* the death of Morris. We think that the suggestion in the record of the death of Morris and the order of the court making his devisees parties, was sufficient for this purpose.

Section 10 of chapter 1 of the Revised Statutes of Illinois, p. 94 (Hurd, 1880), provides that "When there is but one plaintiff, petitioner or complainant in an action, proceeding or complaint in law or equity, and he shall die before final judgment or decree, such action, proceeding or complaint shall not, on that account, abate if the cause of action survive to the heir, devisee, executor or administrator of such decedent; but any of such to whom the cause of action shall survive may, by suggesting such death upon the record, be substituted as plaintiff, petitioner or complainant, and prosecute the same as in other cases."

The suggestion of the death of Morris, the sole plaintiff, was made in this case, as the record shows, by counsel for the devisees, both parties being present, and the court made the order, without objection, that the devisees be made plaintiffs in the case. We think that this suggestion, made without objection, and the order of the court thereon, settles *prima facie*, for the purposes of this case, the fact of the death of the original plaintiff. The statute provides upon whose suggestion of the death of a sole party plaintiff, the court shall make his heir or devisee, etc., plaintiff in his stead. It certainly cannot be the fair construction of the statute that a party may stand by and see the suggestion of the death of the opposing party entered of record and his heir or devisee substituted in his stead, and upon final trial require [39] further proof of the death, at least without some notice of his purpose to raise that particular issue. The death of the plaintiff, after the order of the court, may be considered as settled between the parties for that case, unless some motion is made or issue raised on the part of the defendant, by which the fact of the death is controverted. We have been referred to no decision of the Supreme Court of Illinois where a different rule has been announced. In the case of *Milliken* v. *Marlin*, 66 Ill., 17, cited by counsel for defendant, the court merely decided that where a party plaintiff had died and his heirs were substituted in his place, they must prove that the person under whom they claimed was seised of the title and that they were his heirs. But the report of the case clearly shows that the point now under consideration was neither decided nor touched. We think, therefore, that the ruling and charge of the court below did not prejudice the defendant.

The next assignment of error relates to the admission in evidence by the court of the certified copy of the deed from Dunbar to Prout and the testimony offered by the plaintiff to sustain such copy. The deed purported to be a conveyance, with covenants of general warranty, by Dunbar to Prout, of the land in controversy, for the consideration of $80. It recited that Dunbar was the patentee thereof, and set out the patent in full. The following is a copy of the *in testimonium* clause of the deed, of the signatures of the grantor and witnesses, the acknowledgment, affidavit of the grantor of his identity, his receipt for the purchase money, memorandum of registration, and certificate of the recorder of deeds for Madison County, Illinois:

"In witness of all the foregoing I have hereunto affixed my hand and seal, at Washington City, in the County of Washington and District of Columbia, this sixth day of January, one thousand eight hundred and eighteen.

John J. Dunbar. [Seal.]

Signed, sealed and delivered in the presence of— Samuel N. Smallwood.
Joseph Cassin.

District of Columbia, *County of* ———, *ss.* [40]

Be it remembered that, on this sixth day of January, 1818, the above named John J. Dunbarr, who has signed, sealed and delivered the above instrument of writing, personally came and appeared before us, the undersigned justices of the peace, and acknowledged in due form of law, the same to be his free act and deed, for the purposes therein set forth, and also gave his consent that the same should be recorded whenever it might be deemed necessary. In witness of all which the said ——— has hereunto affixed his name and has undersigned the same.

his
John + J. Dunbarr.
mark.

Acknowledged before—
Samuel N. Smallwood.
Joseph Cassin.

I, John J. Dunbarr, do declare upon oath that I am the same person intended and named in the above deed, dated the sixth day of January, 1818, and more particularly in the patent therein recited at length, and further, that I was duly placed in possession of the patent for the land conveyed in the above deed, by receiving the same from the General Land Office.

his
John + J. Dunbarr.
mark.

Sworn and subscribed to before me this 7th day of January, 1818.

Samuel N. Smallwood.

Received, this sixth day of January, 1818, from William Prout, the sum of eighty dollars, being the consideration money expressed in the above deed.

his
John + J. Dunbarr.
mark.

Witness: Joseph Cassin.
Recorded June 23d, 1818.
State of Illinois, *Madison County, ss.*

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I, John D. Heisel, clerk of the circuit court, and *ex officio* recorder of deeds within and for Madison County, in the State of Illinois, do hereby certify the above and foregoing to be a true, perfect and complete copy of an instrument of writing or deed of conveyance now appearing of record at my office in book E, pages 154, 155 and 156.

"In witness whereof I have hereunto set my hand and affixed the seal of our said court, at office in the City of Edwardsville, this third [41] day of February, A. D., one thousand eight hundred and seventy-five.

[Seal.] John D. Heisel, *Clerk.*"

The defendant below objected to the introduction of said certified copy in evidence, because the original deed was not so certified and proven as to make a certified copy from the record competent evidence under the laws of Illinois.

The court, without passing at that time upon the objection, and not then admitting said writing in evidence as a certified copy, permitted the plaintiffs, at their request, to make the following proofs:

"And thereupon," as the bill of exceptions states, "the plaintiffs proved, to wit:

1. By Mr. Dent, one of the plaintiffs' counsel, that said counsel had had in their possession, prior to the great fire of October 8 and 9, 1871, in Chicago, an original deed corresponding substantially in contents to the writing offered in evidence, except that there was not attached to it the official certificate, dated February 3, 1875; that he had not compared said offered copy with said original, but he believed from recollection that it corresponded with the original, and that he had not made said alleged copy; that said original deed had been sent to said counsel in behalf of Wm. B. Morris, the then plaintiff, for use in this suit, and had been offered in evidence on the first trial; that said original deed had been burned up in the Chicago fire of October 8 and 9, 1871; further, that said original deed had been sent to Washington and attached as an exhibit to the original depositions of E. J. Middleton and George Collard, hereinafter mentioned, and had subsequently been detached therefrom by leave of the court, and returned to Washington for use in taking the depositions of Henrietta Boone.

2. The plaintiffs further offered to read in evidence a copy of the original depositions of E. J. Middleton and George Collard, taken *de bene esse* on September 21, 1870, at Washington, D. C., to which the defendant below objected. It was admitted that the depositions had been correctly copied by an attorney in the cause from the original depositions on file in the case; that the original depositions, with the other files [42] and records of the court, were burned up in the fire at Chicago of October, 1871; that no order of the court had ever been made authorizing the filing of said copy as a substitute for the original depositions, and that no proceedings under any statute had been had for the purpose of restoring said original, but that after said fire the plaintiffs' counsel had procured said copy from the counsel of defendant, and, with his consent, had placed it on file in this cause as a copy of the original depositions."

"The court thereupon overruled each of said objections to the reading of said copy of the depositions, and permitted the contents of said copy to be read in evidence, which was done; to which decision of the court the defendant then and there excepted."

"The contents of said copy so read were as follows:

"That said Middleton and Collard had carefully examined the signatures of Samuel N. Smallwood on said original deed purporting to be his in three different places, and aver the said signatures to be the genuine handwriting of said Samuel N. Smallwood; and that said original deed is annexed to their depositions as Exhibit A; that they were personally acquainted with Samuel N. Smallwood in his lifetime, and knew his handwriting, having often seen him write, and they have no hesitation in declaring said signatures to be his genuine signatures."

The plaintiffs also offered in evidence the deposition of William W. Corcoran, who testified that in 1847 he purchased the lands in controversy from the United States at public sale and paid the purchase money for them into the Treasury of the United States, and that at the time of the purchase he had no notice of any adverse claim.

The plaintiffs further read in evidence a certified copy of a commission from President Monroe, attested by Richard Rush, acting Secretary of State, and the seal of the United States, dated April 30, 1817, appointing Joseph Cassin justice of the peace in the County of Washington, in the District of Columbia, until the end of the next session of the U. S. Senate, and no longer; also a certified copy of a like commission, dated September 1, 1817, appointing Samuel N. Smallwood a justice of the peace of said county until the end of said session, and no longer.

The plaintiffs also offered in evidence the deposition of Anthony Hyde, who testified that he [43] was the business agent in Washington City of W. W. Corcoran; that he knew of the purchase of the land in question by said Corcoran in 1847 and of the payment by him of over $22,000 into the Treasury of the United States for this and other lands; that from February, 1848, up to the time when his testimony was taken, February 24, 1875, he had attended to all matters touching the tract of land in suit, such as the payment of taxes and the appointment of agents, up to the time of the conveyance thereof by Corcoran to Wm. B. Morris; that he sent the original deed from Dunbar to Prout, attached to the depositions of E. J. Middleton and George Collard, to the counsel of plaintiffs below in Chicago on October 11, 1870; that said deed was afterwards returned to obtain a deposition of one Mrs. H. H. Boone as to Joseph Cassin's signature, and was afterwards forwarded, attached to a deposition of Mrs. Boone to the clerk of the United States Circuit Court at Chicago, on or about January 26, 1871.

Hyde further testifies that he had paid the taxes on said lands for Mr. Corcoran from 1847 to 1864, mainly through agents who lived in Illinois, but that he himself had for a year or two paid the taxes directly to the county officers.

Assuming, for the present, that the evidence offered to support the deed from Dunbar to Prout was competent and properly admitted, the question is presented whether the deed itself, thus supported, was admissible. We are of opinion that it was.

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The existence of the original deed and its destruction in the fire at Chicago, in October, 1871, was distinctly proved by the testimony of Dent, counsel for plaintiffs. He testified that it had been sent to the counsel in Chicago of the original plaintiff in the case; that it had been offered in evidence on the first trial of the case, and had been burned with the other papers and records of the court in the fire mentioned. It was, therefore, competent for the plaintiffs to prove its contents. Thus, in *Riggs* v. *Taylor*, 4 Wheat., 486, this court said:

"The general rule of evidence is, if a party intend to use a deed or any other instrument in [44] evidence, he ought to produce the original if he has it in his possession, or if the original is lost or destroyed, secondary evidence, which is the best the nature of the case allows, will, in that case, be admitted. The party, after proving any of these circumstances to account for the absence of the original, may read a counterpart; or if there is no counterpart, an examined copy; or if there should not be an examined copy, he may give parol evidence of its contents."

In the present case it does not appear that there was in existence any counterpart or examined copy of the destroyed deed. The only resource left to the plaintiffs was to prove the contents of the original by a witness who knew its contents. This was done by the deposition of Dent. He testified that the original deed corresponded substantially in contents to the certified copy offered in evidence, except that there was not attached to it the official certificate of the court, dated February 3, 1875. This evidence made the copy competent for the purposes of the trial.

Having thus established the fact of the original deed and its contents, the plaintiffs below were in the same position as if the original deed was in their possession and they had offered it in evidence. It remained for them to prove its execution.

It has been held by the Supreme Court of Illinois, that, under the Act of February 19, 1819, for establishing a recorder's office, and which was substantially the same as the Act of 1807, which was in force when the deed from Dunbar to Prout was executed, a deed is valid as between the parties to it without being acknowledged. *Semple* v. *Miles*, 2 Scam., 315; see, also, *McConnell* v. *Reed*, Id., 371.

Having established by proof the fact that the deed had existed and had been destroyed, and that the copy offered in evidence was a copy of the original, it only remained to prove the signing and sealing of the deed by the grantor.

As the witnesses to the deed were shown to be dead, the method pointed out by law to establish the execution of the deed was by proof of the handwriting of the witnesses to the deed. *Clarke* v. *Courtney*, 5 Pet., 319; *Cooke* v. *Woodrow*, 5 Cranch, 13. [45] And when there was more than one witness, proof of the handwriting of one was sufficient. 1 Greenl. Ev., sec. 575; *Adam* v. *Kerr*, 1 B. & P., 360; 3 Preston, Abstracts of Title, pp. 72, 73.

By the depositions of Middleton and Collard, which the court admitted in evidence, the handwriting of Samuel N. Smallwood, one of the subscribing witnesses of the deed, was fully proven. His signature also to the acknowledgment of the deed as one of the justices of the peace before whom the acknowledgment was taken, and his signature to the jurat of an oath of identity indorsed on the deed, subscribed and sworn to before him by Dunbar, were proven by the same testimony. The genuineness of the handwriting of Smallwood as a witness to the deed was placed beyond all doubt by the depositions of these witnesses.

If, therefore, the evidence by which this proof was made was competent and admissible, the execution of the deed from Dunbar to Prout was established, and the deed itself was properly admitted in evidence.

We are next to consider the question whether the copies of the depositions of Middleton and Collard, by which the handwriting of Smallwood was proven, were properly admitted in evidence. This evidence was objected to by the defendant, and his objection was overruled, to which he excepted.

The admission of the parties, as appears by the bill of exceptions, showed the existence of the original depositions, that they had been destroyed with the other records of the court in the fire of October, 1871, that the copies were correct copies of the original depositions and had been furnished by counsel for defendant, and with his consent had been placed on file in the cause as correct copies of the original. The objection made to the introduction of the copies was that the death of the witnesses was not shown, nor was it proven that they were incompetent to testify, and that their depositions could not be retaken; therefore, proof of what they had testified in their depositions was not admissible.

The rule invoked to exclude copies of the depositions is, that in the absence of evidence that the witness who testified in a former trial is dead or incapable of testifying, or that his deposition cannot be retaken, it is not competent to show what his testimony in the former trial was; and [46] that when the deposition of a witness which was read upon a former trial is lost its contents cannot be proved except after proof of the death of the witness whose testimony it contained. *Stout* v. *Cook*, 47 Ill., 530; *Aulger* v. *Smith*, 34 Ill., 534.

But if the witnesses had lived in another State and more than a hundred miles distant from the place of trial, proof of the contents of their deposition would have been admissible. *Burton* v. *Driggs*, 20 Wall., 125 [87 U. S., XXII., 299]. Therefore, to have made the objection tenable, it should have also been put upon the ground that the witnesses were not shown to reside in another State and more than a hundred miles from the place of trial. This it did not do. When a party excepts to the admission of testimony he is bound to state his objection specifically, and in a proceeding for error he is confined to the objection so taken. *Burton* v. *Driggs*, *ubi supra*. The original depositions were taken in the City of Washington. It is, therefore, probable that the witnesses resided there. If the copy of the depositions had been objected to because it was not shown that the witnesses resided out of the district, and more than a hundred miles from the place where the court was held, the plaintiffs below might have supplied proof of that fact. The objection, as it was made, was not broad enough and specific enough and was, therefore, properly overruled and the evidence admitted.

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But we think the rule relied on by defendant to exclude copies of the deposition does not apply to the case in hand. The plaintiffs did not offer oral evidence of the contents of the depositions, but offered copies which were admitted by counsel for defendant to be true copies. It was, therefore, not necessary to retake the depositions or to prove the death of the witnesses or their incapacity to testify. The copy of the deposition was, by consent, substituted for the original, which was proven to have been destroyed, and being admitted to be a true copy, spoke for itself. It was, therefore, properly received in evidence.

It was further objected to the admission in evidence of the proof relating to the deed of John J. Dunbar to Prout, that as the testimony [47] to establish its execution was the proof of the handwriting of subscribing witnesses, it was necessary to prove the identity of the grantor in the deed; that is to say, that the John J. Dunbar by whom the deed purported to be executed was the same John J. Dunbar named in the patent for the lands in controversy.

In any case slight proof of identity is sufficient. *Nelson* v. *Whittall*, 1 B. & Ald., 19; *Warren* v. *Anderson*, 8 Scott, 384; 1 Selwyn, *N. P.*, 538, *n.* 7, 18th ed. But the proof of identity in this case was ample. In tracing titles, identity of names is *prima facie* evidence of identity of persons. *Brown* v. *Metz*, 33 Ill., 339; *Cates* v. *Loftus*, 3 A. K. Marsh, 202; *Gitt* v. *Watson*, 18 Mo., 274; *Balbec* v. *Donaldson*, 2 Grant (Pa.), 450; *Bogue* v. *Bigelow*, 29 Vt., 179; *Chambles* v. *Turbox*, 27 Tex., 139; see, also, *Sewell* v. *Evans*, 4 Ad. & E. (N. S.), 626; *Roden* v. *Ryde*, Id., 629. There was no evidence that more than one John J. Dunbar lived at the date of the deed in Matthias County, Virginia, which the deed recites was the residence of the grantor, nor in the District of Columbia, where the deed was executed, and there was no other proof to rebut the *prima facie* presumption raised by the identity of names in the patent and deed.

But, besides the identity of names, there was other evidence showing the identity of persons. The patent and the deed bore date the same day, and the patent was recited *in hæc verba* in the deed. These circumstances tend strongly to show that the party by whom the deed was executed must have had possession of the patent. The deed recites that the patent was delivered to the grantor, John J. Dunbar, and the affidavit of John J. Dunbar, sworn to and subscribed on January 7, 1818, before Smallwood, a justice of the peace, and one of the subscribing witnesses to the deed, whose signature to the jurat is shown to be genuine, to the effect that he was the same John J. Dunbar to whom the patent was issued, was indorsed upon the deed.

After a lapse of sixty-one years, this evidence is not only admissible to prove the identity of the grantee in the patent with the grantor in the deed but, uncontradicted, is conclusive.

We are, therefore, of opinion that the deed [48] from John J. Dunbar to William Prout, which formed a link in the title of the plaintiffs, was sufficiently proven and was properly admitted in evidence by the circuit court. The other muniments of title put in evidence by the plaintiffs were admitted without objection, and established *prima facie* their title to the lands in controversy.

But it will be remembered that the defendant below had also shown a *prima facie* title to the lands in question; that both parties traced title through the patent of the United States issued to Dunbar and through deeds apparently executed by him on the same day, to wit: January 6, 1818, one to William Prout, under which the plaintiffs claimed, and the other to John Frank, under which the defendant claimed.

The question, therefore, still remains: which is the superior title? According to the jurisprudence of Illinois this must be settled by the fact, which of the two deeds, apparently executed by Dunbar, were first recorded.

Section 15 of the Act approved January 31, 1827 (Purple, Real Estate Statutes, 480), provided as follows: "All grants, bargains, sales, etc., of or concerning any lands, whether executed within or without the State, shall be recorded in the recorder's office in the county where such lands are lying and being, within twelve months after the execution of such writings, and every such writing that shall, at any time after the publication hereof, remain more than twelve months after the making of such writing, and shall not be proved and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent *bona fide* purchaser or mortgagee for valuable consideration, unless such deed, conveyance or other writing be recorded as aforesaid before the proving and recording of the deed, mortgage or other writing under which any subsequent purchaser or mortgagee shall claim." This Act remains substantially in force. Hurd's R. S., p. 271, sec. 30.

By an Act, approved July 21, 1837 (Purple, Real Estate Statutes, 496, 497), it was provided that the recording of any deed, * * * whether executed within or without the State, by the recorder of the county in which the [49] lands intended to be affected are situated, shall be deemed and taken to be notice to subsequent purchasers and creditors from the date of such recording, whether said writing shall have been acknowledged or proven in conformity with the laws of the State or not, and that the provisions of the Act shall apply as well to writings heretofore as those hereafter admitted to record. This law is still in force. See Hurd, R. S., 1880, p. 271, sec. 31.

It was held by the Supreme Court of Illinois, in *Reed* v. *Kemp*, 16 Ill., 445, that an instrument affecting or relating to real estate may be recorded though not proven or acknowledged, and the record will operate as constructive notice to subsequent purchasers and creditors. See also *Choteau* v. *Jones*, 11 Ill., 320; *Martin* v. *Dryden*, 1 Gilm. (Ill.), 213.

And in *Cabeen* v. *Breckenridge*, 48 Ill., 94, the court declared that "as a general rule, when the same person has executed two deeds for the same land, the first deed recorded will hold the title."

The evidence shows that the deed of Dunbar to Frank, under which the defendant claimed title, was not recorded until June 18, 1870. The plaintiffs contended that the deed from Dunbar to Prout, under which they claimed, was recorded on June 23, 1818, and it was shown that the deed from Prout to Duncan was recorded

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October 29, 1838, and the deed of Gillett to Corcoran, June 5, 1848, and the deed of Corcoran to Morris, March 12, 1868.

If, therefore, the contention of the plaintiffs that the deed of Dunbar to Prout was recorded June 23, 1818, is sustained by competent proof, their title must prevail.

But it is insisted for defendant that there was no competent proof of the registration of the deed of Dunbar to Prout. The proof relied on was the testimony of Dent, that the certified copy from the records of the County of Madison was a copy of the original deed; the certificate of the recorder that the certified copy was a copy of a deed which appeared of record in his office; and the certified copy of a memorandum at the foot of the record of the deed as follows, "Recorded June 23, 1818."

[50] Conceding that the certified copy of the deed from the records of Madison County would not be proof of the contents of the original deed, because such original deed had not been so acknowledged and certified as to make a certified copy competent evidence, yet the fact that such a record of the deed existed was, by the law of Illinois, as we have seen, notice to subsequent purchasers. A certified copy from the record was, therefore, proof that such a deed and memorandum was of record in the proper office.

For it is a settled rule of evidence that every document of a public nature which there would be an inconvenience in removing, and which the party has the right to inspect, may be proved by a duly authenticated copy. *Saxton* v. *Nimms*, 14 Mass., 320; *Thayer* v. *Stearns*, 1 Pick., 109; *Denning* v. *Roome*, 6 Wend., 651; *Dudley* v. *Grayson*, 6 Mon., 259; *Bishop* v. *Cone*, 3 N. H., 513; 1 Greenl. Ev., sec. 484.

The memorandum at the foot of the record was the usual record evidence, competent and conclusive, that the deed had been recorded at the date mentioned.

It was evidence of the date of the registration of the deed, because it was the duty of the recorder, by the nature of his office and without special statutory direction, to note when the record was made. 1 Greenl. Ev., sec. 483.

But we think it may be fairly inferred from section 10 of the Act of September 17, 1807, which was in force when it is claimed that the deed from Dunbar to Prout was recorded, that it was the duty of the recorder to note the time when deeds left with him for record were recorded. He was specifically required to note the date when the deed was received, and was liable to a penalty of $300 for recording any deed in writing "before another first brought into his office to be recorded." 1 Adams & Durham, Real Estate Statutes, p. 63. The making of a memorandum of the date of the record was, therefore, an official act, which naturally fell within the line of his statutory duties, and a certified copy of it would be competent evidence to prove the memorandum and the date of the registration of the deed.

We are of opinion, therefore, that the fact [51] that the deed of Dunbar to Prout was recorded on June 23, 1818, was proved by competent evidence, and that it therefore follows that the title of the plaintiffs was better and superior to that of defendants, who claimed under a deed for the same lands not recorded until June 18, 1870, more than fifty years after its date, and long after innocent purchasers had bought the lands and paid a valuable consideration for them.

The plaintiff in error contends that the Act of 1837, *supra*, cannot apply in this case, because at its date the lands in question were no longer within the limits of Madison County, but in the County of Putnam. But the Act expressly declares that it shall apply to writings theretofore as well as those thereafter admitted to record. The deed of Dunbar to Prout was recorded under the Act of 1807, *supra*, which required it to be recorded in the county where the lands conveyed were situated. It was so recorded. No law of Illinois since passed has required any other registration of deeds by the parties thereto, or has changed the effect of the original registration. See, Act of Feb. 27, 1841; 1 Adams & Durham, Real Estate Statutes, pp 93, 94.

The view we have taken of the case renders it unnecessary to notice certain questions of local practice argued by counsel.

We find no error in the record of the Circuit Court. Its judgment must, therefore, be affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court. U. S.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, *Appt.*,

v.

ANNA C. CUSHMAN, SOUTH SIDE HOMESTEAD ASSOCIATION OF THE CITY OF CHICAGO, ET AL.

(See S. C., Reporter's ed., 51-66.)

Redemption from mortgage sales—state law—rule in circuit court—Illinois Statute—interest on sale—effect of existing laws.

*1. The statutes of Illinois relating to the redemption of mortgaged property from sales under decree of the Federal Courts, examined.

2. While the local law giving the right of redemption, first to the mortgagor, then to judgment creditors, is a rule of property obligatory upon the Federal Court, it is competent for the latter by rules to prescribe the mode in which redemption from sales under its own decrees may be effected.

3. The rule in the Circuit Court of the United States for the Northern District of Illinois requiring a judgment creditor to pay the redemption money to the clerk of that court and not to the officer holding the execution, sustained as being within the domain of practice, and not affecting the substantial right to redeem within the time fixed by the local statute.

4. The Illinois Statute of 1879, entitling the purchaser in case of redemption to receive interest upon his bid at the rate of eight per cent per annum, the previous law prescribing ten per cent, is applicable to all decretal sales of mortgaged premises thereafter made, although the mortgage was given before the passage of that statute. Such reduction in the rate of interest did not impair the obligation of the contract between mortgagor and mortgagee, because the amendatory statute did not diminish the duty of the mortgagor to pay what he agreed to pay, or shorten the period of payment, or affect any remedy which the mortgagee had, by existing law, for the enforcement of his contract.

5. The purchaser at decretal sale is entitled to interest at the rate prescribed by statute when he purchased. The amendatory statute operated, *proprio vigore*, to change the rule of court previously fixing the rate at ten per cent.

6. The existing laws, with reference to which the mortgagor and mortgagee must be assumed to have

*Head notes by *Mr. Justice* HARLAN.

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contracted, are those only which in their direct or necessary legal operation controlled or affected the obligations of their contract.

[No. 662.]

Submitted Jan. 19, 1883. Leave granted to appellant to file additional brief, Jan. 22, 1883. Decided Mar. 5, 1883.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **Edward S. Isham** and *C. Beckwith*, for appellant:

The question sought to be presented is, whether a redemption was effectively made by the proceedings shown in this record from the master's sale in foreclosure.

The parties in interest on that issue are the appellant, mortgagee and purchaser at the master's sale, and still a creditor of the mortgagor, and one Robert D. Fowler. Fowler is a stranger to the original cause, and was never a creditor of the mortgagor; but he became purchaser of a judgment entered by confession against the grantee of the mortgagor after that grantee's year for redemption had expired, and when he, therefore, had no interest remaining in the land. *Dunn* v. *Rogers*, 43 Ill., 263.

This judgment, of course, was never a lien on the land, the judgment debtor having no interest therein; and no equity of redemption ever existed in favor of such a judgment. The equity to redeem attended, not the judgment but its interest in the land; the substitution to that extent, of the creditor for the mortgagor. Story, Eq. Jur., sec. 1023; Ad. Eq., 130; *Stonehewer* v. *Thompson*, 2 Atk., 440; *Mildred* v. *Austin*, L. R. 8 Eq. Cas., 220; *Grant* v. *Duane*, 9 Johns., 612; *Ewing* v. *Ainsworth*, 58 Ill., 464; 2 Jones, Mort., sec. 1069.

No right to redeem exists in favor of Fowler, except as it is given by a construction yielded by the courts to the letter of the statute. *Phillips* v. *Demoss*, 14 Ill., 414.

The law of the State is settled by repeated decisions, all without qualification and covering the whole history of the statute. The statute is the source of the right; its terms are the measure of the right apart from the condition; no right is given to anyone; a redemption sale not in compliance with the statutory method is without the statutory authority, and is void, and may be attacked collaterally.

Littler v. *People*, 43 Ill., 194; *Durley* v. *Davis*, 69 Ill., 134; *Clingman* v. *Hopkie*, 78 Ill., 156.

Another consideration is fatal to the redemption asserted in this case. An amendatory Act of the Legislature, passed long after this mortgage was made and after the bill of foreclosure in this case was filed, reduced the rate of interest to eight per cent. This change impaired the obligation of the contract. *Bronson* v. *Kinzie*, 1 How., 311; *Edwards* v. *Kearzey*, 96 U. S., 601 (XXIV., 796); *Von Hoffman* v. *Quincy*, 4 Wall., 535 (71 U. S., XVIII., 403); *McCracken* v. *Hayward*, 2 How., 608; *Planters' Bk.* v. *Sharp*, 6 How., 301; *Green* v. *Biddle*, 8 Wheat., 1.

Messrs. **Geo. F. Edmunds, William R. Page** and *W. C. Goudy*, for Fowler, one of the appellees:

If the rules are not destructive of legal rights; if they are so framed as to preserve, substantially, rights created by law, the fact that they prescribe or regulate the form or mode of proceeding to secure the benefits of such rights, differing in some particulars from the form or mode of proceeding prescribed by the state statute, will not vitiate them.

Brine v. *Ins. Co.*, 96 U. S., 639 (XXIV., 863); *Allis* v. *Ins. Co.*, 97 U. S., 144 (XXIV., 1008).

The substantial right established by the Statute of Illinois is the right of the mortgagor or of the judgment creditor to redeem from a foreclosure sale within a period prescribed by the statute; and this right should be favored by the courts.

Phillips v. *Demoss*, 14 Ill., 418; *Sweezy* v. *Chandler*, 11 Ill., 449.

The Supreme Court of Illinois is the creature of the Statute of the State of Illinois, and when a proceeding in foreclosure comes under its jurisdiction, it may be conceded that that court would pursue the law to which it is subordinate, provided that law be a valid law. But it has been frequently held by this court that the decisions of state courts are not so far binding upon the Federal Courts as to preclude them from following their own rules and modes of practice and procedure, provided they do not abridge or destroy the substantial rights of the individual.

The rules adopted by the Circuit Court in the Northern District of Illinois are authorized by and are in conformity with the laws of the United States (R. S., secs., 917, 918), and they are in perfect harmony with section 995 of the Revised Statutes requiring all moneys paid to the officers of the courts to be placed in some public depository. They, therefore, have the same force and effect as if they had been embodied in an Act of Congress.

What rate of interest should the redeeming judgment creditor have paid on making redemption? Or, to change the form of the proposition, which statute governs in this case, the Statute of 1845, in force when the mortgage was executed, or the Statute of 1879, in force when the decree was entered and when the sale and the redemption were made?

The rights of the appellant, if any it has, are the rights of the purchaser and not the rights of the mortgagee.

The rights of the purchaser are those given him by the law existing at the time of his purchase. That law gave to him eight per cent on the amount bid by him, if the property was redeemed, and if not redeemed it gave him the land.

The obligations resting upon the mortgagor and mortgagee arise out of the contract of mortgage.

The obligations and rights of purchasers at the sale and of the redeeming creditor arise out of and are created by the law in force at the time of the purchase.

The interest to be paid to the purchaser forms no part of the obligation of the mortgagor to mortgagee. The latter obligation is to pay the debt. After the debt is paid by sale of the land, the obligation under the contract between mortgagor and mortgagee is ended.

Again; we say that the amount to be paid by the mortgagor or his assignee or judgment creditor is a penalty, imposed upon the mortgagor or his judgment creditor in case he redeems.

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It is a well settled principle that a law which relieves from penalties, or consequences in the nature of penalties, is not obnoxious to the constitutional provision here invoked.

Wood v. *Kennedy*, 19 Ind., 68.

If the position of counsel for the appellant be sound, then would a law changing the amount of costs as to pending suits to be paid to the officers of a court, or abolishing or changing the fees to be allowed the plaintiff's attorney or solicitor, also come within the constitutional provision; yet it has frequently been held that such laws do not impair the obligation of existing contracts.

Bank v. *Dudley*, 2 Pet., 492; *Yeaton* v. *U. S.*, 5 Cranch, 281; *Taylor* v. *Keeler*, 30 Conn., 324; 2 Story, 247, 4th ed.

This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect.

Terry v. *Anderson*, 95 U. S., 632 (XXIV., 366), and cases cited.

The purchaser bought with full knowledge that the redemption could be made with eight per cent interest. It received all it bought and ought not to be allowed to complain.

Smith v. *Bryan*, 34 Ill., 364; *Hall* v. *Bunte*, 20 Ind., 304; *Frost* v. *Ilsley*, 54 Me., 345; *Martin* v. *Hewett*, 44 Ala., 418.

Mr. Justice **Harlan** delivered the opinion of the court:

The property involved in this suit is certain real estate in the City of Chicago, covered by a mortgage, executed January 29, 1870, by W. H. W. Cushman and wife, to secure the Connecticut Mutual Life Insurance Company in the payment of $75,000, five years thereafter, with interest, payable semi-annually, at the rate of nine per cent per annum. The property was thereafter conveyed to W. H. Cushman, subject, however, to that mortgage.

On the 12th day of December, 1877, the Insurance Company instituted a suit for foreclosure, in which a final decree of sale was passed on the 14th day of July, 1879. The sale occurred on the 15th day of August, 1879, when the Insurance Company became the purchaser of various lots, into which the mortgaged premises had been subdivided, at prices aggregating in amount the principal and interest of its debt, the latter being computed up to the decree at the rate stipulated in the mortgage, and thereafter at the statutory rate of six per cent per annum. The sale was duly confirmed by an order entered October 10, 1879.

The property so sold was, as is claimed by appellee, subsequently redeemed within the time and in the mode prescribed in the rules established by the court below for the redemption of real estate from sales under decrees.

But the contention of the Insurance Company is, that those rules do not conform to the Statutes of Illinois; that the latter, equally, as to the time within which, the persons by whom, and the mode in which, redemption may be effected, constitute a rule of property, obligatory as well upon the Federal Court as upon the courts of the State; and as the property sold was not redeemed in the particular mode prescribed by the local statutes, there was no effectual redemption and, consequently, the Company became entitled to a deed at the expiration of the period fixed for the exercise of the right of redemption. [58]

The circuit court was of opinion, and so adjudged, that the rights of the parties as to the mode of redemption were to be determined by its rules; and since there had been a substantial compliance with them, the application by the Company for a deed was overruled. From the final order denying that application, the present appeal is prosecuted.

It is necessary, at the threshold of the discussion, to ascertain in what particulars the Statutes of Illinois and the rules of the Federal Court differ in respect of the manner in which redemption may be accomplished.

The local law, in force when the mortgage was given, provided that upon a sale of lands or tenements, under execution, the officer should give to the purchaser a certificate showing the property purchased, the sum paid therefor, or, if the plaintiff is the purchaser, the amount of his bid and the time when the purchaser (unless the property be redeemed as provided in the statute) will be entitled to a deed. A duplicate of such certificate, signed by the officer, is required to be filed by him in the office of the county recorder within ten days from the sale. Within twelve months from the sale, the defendant, his heirs, executors, administrators or grantees may redeem by paying the purchaser, *or the officer* for his benefit, the sum bid by the former, with interest thereon at the rate of *ten* per cent per annum from date of sale. Whereupon, the sale and certificate becomes null and void. After the expiration of twelve, and at any time before the expiration of fifteen months from the sale, a judgment creditor (even one who became such after the expiration of twelve months from the sale, *Phillips* v. *Demoss*, 14 Ill., 418), may redeem by suing out execution, placing the same in the hands of the proper officer (whose duty is to indorse thereon a levy upon the property to be redeemed), and by paying *to such officer*, for the use of the purchaser, his executors, administrators or assigns, the amount for which the premises were sold, with interest at the rate of *ten* per cent per annum from the date of sale. The officer, having filed in the county recorder's office a certificate of the redemption by such judgment creditor, is required to advertise and offer the property for sale under the execution. The judgment creditor, thus redeeming the property, is considered as having bid at the execution sale the amount of the redemption money paid by him with interest from the date of redemption to the day of sale. If no larger bid is offered, the property is struck off and sold to such judgment creditor, who becomes entitled to a deed.

The statute provides that the whole or part of any lands sold under execution may be redeemed by a judgment creditor in the like distinct quantities or parcels in which the same are sold; also, if there be no redemption within the time prescribed, that the purchaser is entitled to a deed; further, that "lands sold under and by virtue of any decree of a court of equity for the sale of mortgaged lands," may be redeemed by the mortgagor, his heirs, executors, administrators or grantees, and by judg-

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ment creditors, in the same manner as is prescribed for the redemption by such parties, respectively, of lands sold under executions at law.

By a subsequent Act in force July 1, 1879, the foregoing statutes were amended so as to require the party redeeming to pay the amount going to the purchaser with interest at the rate of only *eight* per cent per annum.

In *Brine* v. *Ins. Co.*, 96 U. S., 627 [XXIV., [61] 858], it is decided, reversing the practice which had obtained for many years in the Circuit Court of the United States sitting in equity in Illinois, that the state law giving to a mortgagor of real estate the privilege, within twelve months after a decree of foreclosure, and to his judgment creditors within three months thereafter, of redeeming the premises, is a substantial right and constitutes a rule of property, to which the circuit court must conform.

In anticipation, however, of the difficulties which might attend exact conformity, in every case, to the local statutes, the court, in the *Brine Case*, said: "It is not necessary, as has been repeatedly said in this court, that the form or mode of securing a right like this should follow precisely that prescribed by the statute. If the right is substantially preserved or secured, it may be done by such suitable methods as the flexibility of chancery proceedings will enable the court to adopt, and which are most in conformity with the practice of the court."

The decision in that case doubtless suggested to the circuit court the necessity of adopting definite rules in relation to redemptions from sales under its own decrees. Hence the rules to which reference has already been made. They were established by an order of court entered July 11, 1878.

As the determination of the present case depends upon their construction and effect, those rules are given in full in the margin.*

On the 8d day of November, 1880, these rules being in force and no redemption having been made by the mortgagor or by anyone claiming under him, a judgment by confession on a warrant of attorney was entered in the court below for $10,150 in favor of Henry S. Monroe against W. H. Cushman, the grantee of the mortgagor. An execution on that judgment, sued out November 9, 1880, was placed in the hands of the Marshal of the United States for the Northern District of Illinois, who indorsed thereon a levy, as of that date, on a portion of the lots purchased by the Insurance Company. Monroe, on the succeeding day, deposited with the clerk of the Federal Court the sum of $12,741.95, which covered as well the aggregate amount of principal and interest, as the commissions and fees allowed to the clerk. R. S., sec. 828. Thereupon, on the next day, the clerk, under his hand and seal of office, issued a certificate of redemption for the lots so levied on.

On November 15, 1880, on which day, according to the rule established by the Supreme Court of Illinois, the additional three months given to judgment creditors expired; *Roan* v. *Rohrer*, 73 Ill., 583; *Protection Life Ins. Co.* v. *Palmer*, 81 Id., 89, Robert D. Fowler, assignee of Monroe's judgment and of his interest in the levy and redemption that had been made, deposited with the clerk of the Federal Court the further sum of $62,037.01 for the redemption of certain others of the lots purchased by the Company. That sum covered the latter's bid for those lots, with interest at eight per cent. A certificate of redemption covering such lots was issued on the day of Fowler's deposit. The marshal, on November 16, 1880, advertised for the sale, on the 8th day of December, 1880, of all the lots sought to be redeemed under the Monroe judgment and execution. The record does not show the indorsement of any additional levy beyond that made November 9, 1880. The sale occurred as advertised, Fowler becoming the purchaser of all the lots embraced in the two certificates of November 10th and November 15th, at a sum equal to the amount of the sums deposited, with interest at the rate of eight per cent per annum from the date of such deposits. No money was paid to the marshal, and none to any other officer, except that deposited with the clerk, who, as required by the Act of Congress and the rules in question, placed it in the registry of the court.

It will have been observed that the rules established by the Federal Court differ from the provisions of the local statutes in this, that, by the former, the redemption money in all cases is required to be paid to the holder of the certificate *or to the clerk of the court;* whereas, by the lat-

*"*Ordered*, That the following rules be entered in regard to the redemption of property from sales under decrees in chancery in this court:

First. That whenever any real estate is sold by a master in chancery, special commissioner, or other officer of this court, by virtue of any decree of foreclosure of mortgage or vendors' lien, or mechanics' lien, or for the payment of money, the master in chancery, or officer making such sale, shall, instead of executing a deed for the property so sold, give to the purchaser a certificate describing the premises purchased by him, showing the amount paid therefor, or, if purchased by the complainant, in whose favor the decree is made, the amount of his bid, and that such purchaser will be entitled to a deed of the property so purchased, on the expiration of fifteen months from the date of said sale, unless said property shall have been duly redeemed.

Second. It shall be the duty of the master in chancery, or other officer making such sale, to report the same to the court within ten days from the day of the making thereof, unless time for filing said report shall be extended by the court, which report shall be confirmed as a matter of course, unless objections to said sale are filed within twenty days after said report is required to be filed.

Third. Any defendant in the suit in which such decree is rendered, his heirs, administrators or assigns, or any person interested through or under the defendant in the premises so sold, may, within twelve months from said sale, redeem the real estate so sold *by paying to the purchaser thereof*, his heirs, executors or assigns, *or to the clerk of this court* for the benefit of such purchaser, his executors, administrators or assigns, the sum of money for which said premises were sold or bid off, with interest at the rate of ten per cent per annum from the date of such sale, and in case such redemption is made by payment of the money to the clerk, the person so redeeming shall also pay an additional sum of one per cent on the amount so paid in as the clerk's fee for receiving and disbursing said redemption, and the clerk on receiving said redemption money shall at once deposit the same in the registry of this court and file a certificate among the papers in the cause in which said decree was entered, stating that said real estate has been redeemed.

Fourth. If property sold under any decree of this court shall not be redeemed by the defendant, or defendants in the decree, or some persons claiming by, through or under him or them, within twelve months from the date of said sale, then any creditor of the debtor defendant, or defendants, in such decree who holds a decree or judgment in full force, and on which he is entitled to execution against such debtor defendant, or defendants, may redeem

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ter, in the case of redemption by a judgment creditor, the money must be paid *to the officer having the execution*. In no case do the rules of the Federal Court provide for payment, either to the master or other officer who conducted the decretal sale or to the officer holding the execution of the judgment creditor.

However this difference may be regarded in the courts of Illinois when administering the statutes by which they are created and their jurisdiction defined and limited, *Littler* v. *People*, 43 Ill., 188; *Stone* v. *Gardner*, 20 Id., 309; *Durley* v. *Davis*, 69 Id., 134, we entertain no doubt of the power of the Federal Court to adopt its own modes or methods for the enforce-
[62] ment of the right of redemption given by the local law. The substantial right given, first, to mortgagors, their representatives and grantees, and then to the judgment creditors of such mortgagors or their grantees, was to redeem the property sold within the time specified. Whether the redemption is by the one or the other class, the money is for the benefit of the purchaser at the decretal sale. When the amount going to him is *secured* by payment into the hands of some responsible officer, the object of the law, both as respects the purchaser at the decretal sale and the party redeeming, is fully attained. Redemption is effected when, by payment of the redemption money into proper hands, the purchase at the decretal sale is annulled, and the way opened for another sale. The Federal Court, as indicated by its rules, preferred that the money, if not paid directly to the purchaser, should by payment, through its clerk, come directly under its control for the benefit of the purchaser. Where the sale of mortgaged premises is under a decree of the Federal Court, and the execution of the judgment creditor, who seeks to redeem, is from a state court, there is an evident propriety in requiring the money going to the purchaser at the decretal sale to be paid through the clerk of the Federal Court into its registry. The necessity for such a regulation is not so urgent where the judgment creditor's execution is from the Federal Court, but we perceive no objection to extending the regulation to that class of cases. Under the operation of the rules in question the records of the Federal Court will, in all cases, show whether the right of the purchaser to a deed has been defeated by redemption. Can it be said that the mode prescribed by the Federal Court for securing the money going to the purchaser impairs his substantial rights? Is he less secure than he would be if the money is paid to the officer having the execution? Clearly not. The substantial right given by the statute to the purchaser is that the redemption money be secured to him before the benefit of his purchase is taken away, and the substantial right given to the party redeeming is that the redemption become complete and effectual upon his payment of the required amount. The particular mode in which the money is paid or secured by the latter for the benefit of the former, is not [63] of the substance of the rights of either. The mode or manner of payment belongs, so far as the Federal Court is concerned, to the domain of practice, the power to regulate which, in harmony with the laws of the United States and the rules of this court, as might be necessary and convenient for the administration of justice, is expressly given by statute to the circuit courts. R. R., sec. 918.

In the conclusions thus indicated we are only giving effect to former decisions. In *Brine* v. *Ins. Co.*, *supra*, it was, as we have seen, distinctly ruled, touching these local statutes, that the Federal Court, preserving substantially the right of redemption, could pursue its own forms and modes for securing such right. The same doctrine, in effect, is announced in *Allis* v. *Ins. Co.*, 97 U. S., 144. [XXIV., 1008.] That case arose under a Statute of Minnesota which allowed the defendant in a foreclosure proceeding to redeem within twelve months after the *confirmation* of the sale. The decree ordered the master, on making sale, to deliver to the purchaser a certificate, stating that unless the property be redeemed within twelve months after the *sale*, he would be entitled to a deed. This departure from the letter of the statute was held not to be material, since substantial effect was given to the right to redeem within one year. The court said: "In the state courts, where the practice undoubtedly is to report the sale at once for confirmation, the time begins to run from that confirmation. But if in the Federal Court the practice is to make the final confirmation and deed at the same time, it is a necessity that the time allowed for redemption shall precede the deed of confirmation. There is here a substantial recognition

said property after the expiration of twelve months and before the expiration of fifteen months, in the following manner: such creditor shall sue out an execution on his decree or judgment, and place the same in the hands of the proper officer to execute, who shall thereupon indorse on such execution a levy on the property which is to be redeemed, and thereupon the person desiring to make such redemption shall pay *to the holder of such certificate*, or *to the clerk of this court*, the amount for which the premises to be redeemed were sold, with interest at the rate of ten per cent per annum from the date of such sale, and if the redemption is made by the payment of the money to the clerk, there shall also be paid the additional sum of one per cent on the amount of money so paid to redeem, as the clerk's fee for receiving and disbursing said redemption money. And the clerk shall at once pay said money into the registry of the court for the use of the person entitled thereto, and give a receipt for said sum to the person making such redemption.

And the clerk of this court shall thereupon make and file in the office of the recorder of the county where said premises are situate, a certificate of such redemption, and the officer in whose hands said execution shall have been placed, and who shall have made said levy, shall proceed in the manner required by the twentieth and twenty-first sections of chapter seventy-seven of the Revised Statutes of Illinois, entitled 'Judgments, decrees, and executions.' After the first redemption, made as aforesaid, any other judgment or decree creditor who shall have the right under the laws of this State to redeem said premises from the first redeeming judgment or decree creditor, may apply to this court for leave to redeem said premises from the creditor first redeeming the same, and the court will make such order in regard to further redemption as the rights of the parties under the law shall seem to require.

Fifth. In all cases when the master in chancery or any other special or general officer of this court is required to make sale of real estate under any decree or order of this court in any chancery suit, notice of the time and place of such sale shall be given by publication in some newspaper of general circulation published in the county where said real estate is situated, and in case there is no such newspaper published in such county, then such publication shall be made in one of the newspapers hereafter named, published in the City of Chicago, such publication to be made as often as once each week for three successive weeks, and the first publication shall be at least twenty days before the day fixed for such sale."

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of the right to redeem within twelve months." It results that the objection taken to the rules established by the court below must be overruled.

The next question to be examined is, whether there could be an effectual redemption except by payment of the amount bid, with interest at ten per cent, the rate prescribed by statute at the date of the mortgage. Redemption was [64] made upon the basis of the amendatory Act of 1879, reducing the rate of interest, in such cases, to eight per cent. The contention of the Company's counsel is that that Act cannot be applied without impairing the obligation of its contract. What was that contract? In what did its obligation consist? By the contract between the mortgagor and mortgagee, the former became bound to pay, within a certain time, the mortgage debt, with the stipulated interest of nine per cent up to final decree, if one was obtained, and with six per cent thereafter as prescribed by statute when the mortgage was given. R. S., Ill., 1874, p. 614. Certainly the obligation of *that* contract was not impaired by the Act of 1879, for it did not diminish the duty of the mortgagor to pay what he agreed to pay, or shorten the period of payment, or interfere with or take away any remedy which the mortgagee had, by existing law, for the enforcement of its contract.

The statute, in force when the mortgage was executed, prescribing the rate of interest which the amount paid or bid by the *purchaser* should bear, as between him and the party seeking to redeem, had no relation to the obligation of the contract between the *mortgagor and the mortgagee*. The mortgagor might, perhaps, have claimed that *his* statutory right to redeem could not be burdened by an *increased* rate of interest beyond that prescribed by statute at the time he executed the mortgage. But, as to the mortgagee, the obligation of the contract was fully met when it received what the mortgage and statute, in force, *when the mortgage was executed*, entitled it to demand. The rights of the purchaser at the decretal sale, if one was had, were not of the essence of the mortgage contract, but depended wholly upon the law in force when the sale occurred. The Company ceased to be a mortgagee when its debt was merged in the decree, or, at least, when the sale occurred. Thenceforward its interest in the property was as purchaser, not as mortgagee. And to require it, as purchaser, to conform to the terms for the redemption of the property as prescribed by statute at the time of purchase, does not, in any legal sense, impair the obligation of its contract as mortgagee. It assumed the position of a purchaser subject, necessarily, [65] to the law then in force defining the rights of purchasers.

But it is insisted that the value of the mortgage contract was impaired by a subsequent law reducing the interest to be paid to a purchaser at decretal sale; this, upon the assumption that the probability of the debt being satisfied by the decretal sale of the property, was lessened by reducing the interest which any purchaser could realize on his bid in the event of redemption. In other words: the reduction, by a subsequent statute, of the interest to be paid to the purchaser would, it is argued, necessarily tend to lessen the number of bidders seeking investments, and thereby injuriously affect the value of the mortgage security.

In support of this proposition, counsel cite several decisions of this court, in which it is ruled that the objection to a law, as impairing the obligation of a contract, does not depend upon the extent of the change it affects; that the laws in existence when a contract is made, including those which affect their validity, construction, discharge and enforcement, enter into and form a part of it, measuring the obligation to be performed by one party, and the rights acquired by the other; and that one of the tests that a contract has been impaired is, that its value has been diminished, when the Constitution prohibits any impairment at all of its obligation. *Green* v. *Biddle*, 8 Wheat., 1; *McCracken* v. *Hayward*, 2 How., 612; *Planters' Bk.* v. *Sharp*, 6 Id., 327; *Edwards* v. *Kearzey*, 96 U. S., 601 [XXIV., 796].

These decisions clearly have no application to the case now before the court. The laws with reference to which the parties must be assumed to have contracted, when the mortgage was executed, were those which in their direct or necessary legal operation controlled or affected the obligations of such contract. We have seen that no reduction of the rate of interest, as between the purchaser of mortgaged property at decretal sale and the party entitled to redeem, affected, or could possibly affect, the right of the insurance company to receive, or the duty of mortgagor to pay, the entire mortgage debt, with interest as stipulated in the mortgage up to the decree of sale. And the result of the sale in this case shows that the Company, as mortgagor, has received all that it [66] was entitled to demand. The reduction of the rate of interest by the Act of 1879 was by way of relief to the mortgagor and his judgment creditors and, in no sense, an injury to the mortgagee. When that Act was passed there was no person to answer the description or to claim the rights of a purchaser; consequently, no existing rights were thereby impaired. That the reduction of interest to be paid to the purchaser would lessen the probable number of bidders at the decretal sale, and thereby diminish the chances of the property bringing the mortgage debt, are plainly contingencies that might never have arisen. They could not occur unless there was a decretal sale, nor unless the mortgagee became the purchaser; and are too remote to justify the conclusion, as matter of law, that such legislation affected the value of the mortgage contract.

One other point remains to be considered. It is said that the rules of the circuit court requiring payment to the purchaser of interest at the rate of ten per cent, were never modified by any order. The court below, we suppose, proceeded upon the ground that the interest to be paid to the purchaser by the party redeeming was of the substance of the rights of both; consequently that the change, in that respect, made by the state law prior to the decretal sale, *proprio vigore*, effected a modification of the rule without a formal order. In that view we concur.

For the reasons given, the decree below should be affirmed, and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 668.

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JOHN R. METSKER AND ELIZABETH METSKER, *Appts.*,

v.

GEORGE H. BONEBRAKE, Assignee of JOHN R. METSKER, a Bankrupt.

(See S. C., "*Medsker* v. *Bonebrake*," Reporter's ed., 66-73.)

Voluntary bankruptcy—findings by master—wife's equity—conveyance by husband to wife—trustee.

1. It is not a case of voluntary bankruptcy, where one is forced into it against his will by his partner; it is compulsory and involuntary, if he refuses to join in such case, as much as in any other enforced bankruptcy.

2. In chancery cases in the Circuit Courts of the United States, whatever may be the rule in the state courts, the findings made by a master are *prima facie* correct, and only such matters of law and of fact as are brought before the court by exceptions are to be considered, and the burden of sustaining the exception is on the objecting party.

3. A loan by a wife to her husband, of money which is her separate property, upon his promise to repay it, creates an equity in her favor, which a court of equity will enforce.

4. His subsequent conveyances of land through a third person to her, in repayment of that loan, not made with the purpose of hindering, delaying or defrauding creditors, but to satisfy his equitable obligation to his wife, is not a voluntary conveyance, and is valid against his creditors.

5. The conveyance by him first to a third person who paid nothing, but took the title in trust for his wife, and from him to her to satisfy the common law inability to make a direct conveyance from husband to wife, is no evidence of fraud.

[No. 156.]

Argued Jan. 23, 1883. Decided Mar. 5, 1883.

APPEAL from the Circuit Court of the United States for the District of Indiana.

The bill in this case was filed in the court below, by the appellee, as assignee in bankruptcy of John R. Metsker, to set aside certain conveyances, which effected a transfer of certain lands, from said Metsker to his wife, as fraudulent.

The matter was referred to a master, who found for the defendants. Exceptions to his report were sustained by the court, and a decree entered in favor of the complainant declaring said conveyance void and ordering a sale of the premises in question; whereupon the defendants appealed to this court.

The facts of the case are stated by the court.

Messrs. **John A. Finch, S. Shellabarger** and *J. M. Wilson*, for appellants:

Unless the wife's money came into the husband's possession as his property, by such acts as evinced an intention to devest the wife's right or title, it does not become his absolutely and she may follow it, or land purchased therewith; and this against creditors.

Standeford v. *Devol*, 21 Ind., 405; see, also, *Dayton* v. *Fisher*, 84 Ind., 356; *Summers* v. *Hoover*, 42 Ind., 153; *Davis* v. *Davis*, 43 Ind., 561; *Watkins* v. *Jones*, 28 Ind., 12; *Wilkins* v. *Miller*, 9 Ind., 100; *Carver* v. *Carver*, 53 Ind., 241; *Sherman* v. *Hogland*, 54 Ind., 578.

A conveyance cannot be avoided under the bankrupt law or under the decisions of the Courts of Indiana, as well as of all the other States, for fraudulent preferences, unless the grantee had knowledge of the fraud.

Vide, Indiana Cases, supra; Spaulding v. *Myers*, 64 Ind., 264; *Evans* v. *Nealis*, 69 Ind., 148; *Bail* v. *Barnett*, 39 Ind., 53; see, also, *Dickinson* v. *Adams*, 17 Bk. Reg., 380; *Clark* v. *Iselin*, 21 Wall. (88 U. S., XXII., 568).

Messrs **Addison C. Harris**, *W. H. Calkins* and *Shirts, Shirts & Fertig*, for appellee:

The temptation to make colorable transfers to defraud creditors is so great that very satisfactory evidence is always required to uphold a conveyance from the husband to the wife.

Seitz v. *Mitchell*, 94 U. S., 582 (XXIV., 180); *Humes* v. *Scruggs*, 94 U. S., 22 (XXIV., 51); see, also, *Wickes* v. *Clarke*, 8 Paige, Ch., 163; *Reade* v. *Livingston*, 3 Johns. Ch., 481; *Savage* v. *Murphy*, 34 N. Y., 508; *Case* v. *Phelps*, 39 N. Y., 164; *Fox* v. *Moyer*, 54 N. Y., 125; *Jacobs* v. *Hesler*, 113 Mass., 160; *In re Jones*, 6 Bis., 68; *Moyer* v. *Adams*, 9 Bis., 390; *Lyon* v. *R. R. Co.*, 42 Wis., 548.

If the wife yields up to the husband, for his use, the proceeds of her separate estate, unaccompanied by a present promise on his part to refund or re-imburse her, this will not afford or constitute a valuable consideration, as against his creditors, for making a settlement upon the wife years thereafter.

Phillips v. *Frye*, 14 Allen, 36; *Lyne* v. *Bk. of Ky.*, 5 J. J. Marsh, 545; *Wylie* v. *Basil*, 4 Md. Ch., 327; *Nolen's Appeal*, 23 Pa., 37.

Mr. Justice **Miller** delivered the opinion of the court:

This is a bill in chancery, brought by Bonebrake as assignee in bankruptcy of John R. Metsker, against said Metsker and his wife. [69]

The object of the bill is to subject to administration, as part of the assets of the bankrupt, a farm of one hundred sixty-two acres of land on which Metsker and his wife were living, the legal title of which was in Mrs. Metsker.

It appears that on August 2, 1876, Metsker and wife conveyed this land to McCole, who, on the 4th day of the same month, conveyed it to Mrs. Metsker, the consideration in each deed being recited as $8,000.

On December 1, 1876, one Poe, with whom Metsker was in partnership in the hardware business, filed his petition in bankruptcy, alleging that Metsker would not join him, and making him a party and praying that he be adjudged a bankrupt. On the 29th of that month Metsker came in and confessed himself a bankrupt, and was so adjudged.

The charging part of the bill, as regards the invalidity of the title conveyed to Mrs. Metsker by these two deeds, reads as follows:

"On that day, to wit: August 2, 1876, within four months of the time of filing said petition in bankruptcy, the said John R. Metsker, being the owner, in his own right, of the real estate above described, and being indebted as aforesaid, with the fraudulent intention of defeating the operation and effect of the bankrupt law, and with the fraudulent intention of preventing his property from being distributed and applied in payment of his debts, as provided for in the bankrupt law, and with the intention of defrauding and cheating his creditors, and with the intention of preferring, in violation of the provisions of the bankrupt law, a pretended claim of the defendant Elizabeth Metsker, which claim your orator says was unjust and incorrect, and not a valid and legal claim against said John R. Metsker, the said John R. Metsker, together with his wife, the defendant Elizabeth

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Metsker, did execute, without any consideration whatever, to one C. J. McCole, who was a party to such fraudulent purpose, a deed of conveyance of said real estate, and the said grantee, C. J. McCole, in pursuance of the previous understanding and agreement, and for the purpose of carrying out the fraudulent intent before expressed, did convey said real estate to the de- [70] fendant, Elizabeth Metsker, wholly without any consideration, on the 4th day of August, 1876.

And your orator states that said Elizabeth Metsker was fully cognizant of the fraudulent and wrongful intention of said John R. Metsker, and participated in the same and joined in the deed to McCole for the purpose of carrying out the same, and accepted said fraudulent conveyance from C. J. McCole with full knowledge of its purpose, and with the intention of carrying out said fraudulent purpose."

To this bill Metsker and his wife filed their answer, under oath, in which they admit the conveyances and the bankruptcy proceedings, but denying all fraud in the transaction and that Metsker was in failing circumstances when the deeds were made, or that they knew or believed he was unable to pay his debts. They aver that, after said conveyances were made, a large part of the indebtedness of Poe and Metsker was paid off in the ordinary course of business.

They further allege that the conveyances mentioned were made in order and for the express purpose, and for no other purpose, of paying a debt of $5,700 which Metsker owed his wife, and the interest accumulated thereon, for money loaned by her to him, which he had promised to repay to her on demand.

It is evident that the bill is framed upon the idea that section 5128 of the Revised Statutes was in force, and that the periods within which such conveyances by an insolvent could be assailed as void under the bankrupt law were four and six months, and all its allegations seem aimed at such acts as would be unassailable after those periods. But the Act of 1874 has shortened these periods to four and two months in cases of involuntary bankruptcy. 18 Stat. at L., 180, sec. 10.

We do not doubt that Metsker's was a case of involuntary or compulsory bankruptcy within the meaning of this amendment. The distinction intended by this language is clearly between the cases in which the bankrupt himself and of his own volition initiates proceedings in bankruptcy, and those in which they are commenced by some one else against him.

In the one case it is voluntary and in the other [71] compulsory. It is not a voluntary bankruptcy if the man is forced into it against his will by his partner, any more than by anyone else, and it is compulsory and involuntary if he refuses to join in such case and is forced into it, as much as in any other enforced bankruptcy.

These deeds cannot be impeached, therefore, on the grounds of preference or payment in violation of the bankrupt law.

But whatever may have been the case in the mind of the pleader who drew the bill, there is language which, if liberally construed, may be held to charge that these conveyances were void or voidable, as being made with the intention of defrauding and cheating creditors generally, and without any valuable consideration.

In this view, the bill was very loosely drawn, but as issue was taken on it and testimony produced, we will inquire into its effect as proof of the charge.

When the pleadings were made up an order was entered, without objection, referring the case to a master to take the evidence and report his finding thereon.

He reported that Metsker had received, at various times during the ten years preceding his bankruptcy, moneys belonging to his wife, mostly proceeds of land inherited from her father, amounting in the aggregate to $5,600; and that he had agreed to return it to her, and that she had always claimed that he was her debtor to that amount. He, therefore, finds she was a creditor at the time of the conveyance. He also finds that Metsker was insolvent at that time, and that his wife did not know it; and, on the whole, that the allegations of the bill are not sustained.

Exceptions to this report were filed, which were sustained by the court and a decree rendered for the assignee.

The evidence taken by the master was reported with his findings, and the case seems to have been treated by the court below without much regard to the finding of the facts by the master, or any special regard to the exceptions made to his report. This is not correct practice in chancery cases in the Circuit Courts of the United States, whatever may be the rule in the state courts.

The findings of the master are *prima facie* [72] correct. Only such matters of law and of fact as are brought before the court by exceptions are to be considered, and the burden of sustaining the exception is on the objecting party.

In the case before us, we are inclined, after a careful examination of the testimony, to concur with the master's report.

It is altogether a matter of the weight of evidence.

1. It is denied that the money was received of the wife by the husband and, if received, that it was a loan.

The testimony leaves no doubt that there was received from the estates of the wife's deceased father and brother, at different times, the aggregate sum of $5,700. The wife swears positively that she loaned these sums to her husband, who repeatedly promised to pay her; that at one time, more than a year before the bankruptcy, they had sharp words or ill feeling about it, and he told her he had nothing but the farm and would convey that to her, and that the conveyances finally made were in pursuance of his repeated promise to do so. All this is wholly uncontradicted.

2. Much testimony is taken to prove that the price was so inadequate as to show fraud, though no such charge is made in the bill.

The fair result of all the testimony on this point is that the land was worth about $8,000, the sum recited in the conveyance, and if interest be computed on the $5,700 from the periods at which the various sums were received, it will amount to the full value of the land, if not more, at the time the deeds were made.

3. There is no reason to disbelieve Mrs. Metsker when she swears positively that she did not know nor suspect her husband's insolvency until bankrupt proceedings were commenced.

Her statement is confirmed by the allegation,

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undisputed, that between the time of the conveyance and the petition in bankruptcy $4,000 of their debts were paid, and the bill alleges that their debts were only $5,000 in excess of their assets.

4. The master who was present and heard Mrs. Metsker testify, and could see her manner, and is, therefore, better able to determine the weight due to her testimony, says he has no [73] doubt she was a creditor, and was in ignorance of Metsker's insolvency. *Dean* v. *Emerson*, 102 Mass., 480.

5. The conveyance first to McCole, who paid nothing, but took the title in trust for Mrs. Metsker, and from him to her, was to satisfy the common law inability to make a strict conveyance from husband to wife, and is no evidence of fraud.

In the case of the *Nat. Bk.* v. *Tavener*, 130 Mass., 409, that court says: "The question whether a loan by the wife to the husband of money, which is her separate property, upon his promise to repay it, creates an equity in her favor, which a court of equity will enforce, has not been decided in this Commonwealth. But it has generally, if not uniformly, been decided in the affirmative in other courts," for which numerous cases are cited. It is added: "That the jury in this case having found that the money delivered by the wife to the husband was by way of loan and not of gift, and that his subsequent conveyance of land through a third person to her in repayment of that loan, was not made with the purpose of hindering, delaying or defrauding creditors, that conveyance, to satisfy his equitable obligation to his wife, was not a voluntary conveyance, and was valid against his creditors. *Bullard* v. *Briggs*, 7 Pick., 533; *Forbush* v. *Willard*, 16 Pick., 42; *Stetson* v. *O'Sullivan*, 8 Allen, 321; *French* v. *Motley*, 68 Me., 326; *Grabill* v. *Moyer*, 45 Pa. St., 530; *Babcock* v. *Eckler*, 24 N. Y., 623; *Steadman* v. *Wilbur*, 7 R. I., 481."

Such is precisely the case here, as reported by the master and, as we think, supported by the evidence; and the decree of the Circuit Court is, therefore, reversed and the case remanded, with directions to dismiss the bill.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[76] STATE OF NEW HAMPSHIRE, *Complainant*,

v.

STATE OF LOUISIANA, EDWARD A. BURKE, Treasurer, LOUIS A. WILTZ, Governor, ET AL.

STATE OF NEW YORK, *Complainant*,

v.

STATE OF LOUISIANA ET AL.

(See S. C., Reporter's ed., 76-91.)

Suits in name of State on bonds of another State —controversy between States.

1. Owners of the bonds and coupons of a State, who are precluded from prosecuting these suits in their own names, cannot sue in the name of their respective States, after getting the consent of the State. A State cannot allow the use of its name in such a suit for the benefit of one of its citizens.

2. A State is not an independent Nation, clothed with the right and faculty of making an imperative demand upon another independent State for the payment of debts which it owes to citizens of the former.

3. One State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens.

[Nos. 2, 3, Orig.]

Argued Apr. 18, 19, 20, 1883. Decided Mar. 5, 1883.

BILLS in chancery.

The history and facts of the case appear in the opinion of the court. See, also, *Louisiana* v. *Jumel*, *ante*, 448.

Only a brief abstract of the able and exhaustive argument of counsel can be here given.

Messrs. **Wheeler H. Peckham** and *Mason W. Tappan, Atty-Gen. of the State*, for New Hampshire, Complainant in No. 2:

First. The record shows a controversy of which this court has jurisdiction.

The word controversy, in section 2, article 3, of the Constitution of the United States, includes controversies arising on contract.

See, *U. S.* v. *Bank*, 15 Pet., 377.

Second. The State of New Hampshire has, by assignment and delivery, the legal ownership, and is the bearer of these negotiable bonds. Between an ordinary party so circumstanced and an ordinary defendant, no question as to the character and terms of the assignment, whether absolute or in trust, whether taken for the litigation or otherwise, could arise. Payment to such a plaintiff would be a complete legal acquittance, and the defendant could ask no more.

Sheridan v. *Mayor*, 68 N. Y., 30; *Mercer Co.* v. *Hackett*, 1 Wall., 83 (68 U. S., XVII., 548); *Bank* v. *Texas*, 20 Wall., 72 (87 U. S., XXII., 295); see, also, *Hays* v. *Hathorn*, 74 N. Y., 486, and cases cited.

Third. The question may be thus stated: Complainant alleges that the State of Louisiana issued its bonds to bearer, and created a fund for their payment, and made the individual defendents *ex officio* trustees of that fund and charged with its administration. That the individual defendants are about to divert the fund from its pledged purposes. The remedy sought is to enjoin such diversion.

No remedy is sought directly against the State. If the State could not be made a party, a court of equity would proceed without it.

Board of Liquidation v. *McComb*, 92 U. S., 531 (XXIII., 623), and cases cited.

The State of New Hampshire has the capacity to acquire and become the holder and bearer of these bonds.

Life of Curtis, vol. 2, p. 146; *Texas* v. *White*, 7 Wall., 700 (74 U. S., XIX., 227); *U. S.* v. *Bank* (*supra*).

Where one Sovereign may purchase and another may make bills, surely one may purchase the bills of the other.

No distinction is perceived between bills and bonds.

Nor does subdivision 1, section 10, article 2, of the Constitution, which forbids a State to enter into any agreement or compact with another State, affect the right of complainant to hold these bonds.

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Union Br. R.R. Co. v. *E. Tenn. & Ga. R.R. Co.*, 14 Ga., 327; 2 Story, Com., secs. 1354-5, 1401-3.

If, then, complainant can become the owner and holder of these bonds, surely it is entitled to the same remedies in this court to which an individual owner would be entitled in the circuit court.

It is not necessary in this case to pass upon the question whether the complainant would be awarded a judgment *quod recuperet* in a simple action at law against the State of Louisiana on these bonds.

None of the difficulties as to the execution of any decree passed herein that were apprehended in the early cases (*e. g. Chisholm* v. *Georgia*, 2 Dall., 419), can here exist.

The decree will go against the individual defendants.

The State of Louisiana is made defendant, not so much to obtain a definite judgment against the State as to obviate any objection that might be made, that the principal is not before the court in a case where the court has jurisdiction of the principal. Such objections were made in the cases of *Osborn* v. *Bank*, 9 Wheat., 738, and *Davis* v. *Gray*, 16 Wall., 203 (83 U. S., XXI., 447), and this court answered them, by saying that the action would be against the state officers without the presence of the State or principal, where the court had no jurisdiction to bring in the principal.

It would be singular if, in a case where the court had jurisdiction of the principal, making the principal a party, should oust jurisdiction as to all.

Nor does the fact that the plaintiff has become the owner and holder of these bonds, under and pursuant to the Act stated in the answers, oust the jurisdiction.

The whole question has recently been discussed in a most able and exhaustive manner by Hon. Bradley T. Johnson, of Virginia, in the "American Law Review" for July, 1878.

It was also discussed during the last preceding era of repudiation in our country, in the "North American Review" for January, 1844, by the late *Mr. Justice* B. R. Curtis of this court.

The article of Mr. Curtis is also published in his life by his son, B. R. Curtis of Boston, Vol. 2, p. 93.

Messrs. **Leslie W. Russell,** *Atty-Gen. of the State,* **David Dudley Field,** *Wm. A. Duer,* and *Dorsheimer, Bacon & Deyo,* for New York, Complainant in No. 3:

This is a controversy between the State of New York as plaintiff, and the State of Louisiana, with several financial officers of that State, as defendant. The object of the suit is to procure redress for citizens of New York, whose claims against the State of Louisiana have been openly repudiated. The violation of its most solemn obligations by the State defending this suit is flagrant. No words need be wasted on that point. Whether in aid of public improvements, real or fancied or under the stress of war or by compulsion of political plunderers, a debt of many millions had been contracted, in the name and apparently by the authority of that State. This debt was compromised in 1874, the State agreeing to pay sixty per cent upon the remission of the remaining forty. The compromise was proposed, first by the Legislature, and then by the people. Nothing was wanting to the solemnity of the Act. Bonds, designated as consolidated bonds, payable at forty years, with interest at seven per cent, were issued for the agreed sixty per cent of the debt, and by the same legislative Act and constitutional ordinance, which provided for the issue of the bonds, a continuing tax sufficient to pay them was laid on all property in the State, and the official machinery was provided for collecting the tax and paying the bonds; that is to say, a tax of five and one half mills on the dollar of the assessed value of all real and personal property was levied, and the Auditor and Treasurer and a board of liquidation, consisting of the Governor, Lieutenant-Governor, Auditor, Treasurer, Secretary of State, Speaker of the House of Representatives and the Fiscal Agent were directed to assess and collect the tax and pay the bonds. A diversion of the fund from this, its legitimate channel, was declared to be felony; obstruction of the machinery was declared to be a misdemeanor; and finally it was ordained that each provision of the Act was a contract between the State and every holder of the bonds. These measures were taken, in order that no further legislation or appropriation should be necessary for the assessment and collection of the tax and the payment of the debt. The consolidated bonds were accordingly issued, and many of them are held by citizens of New York.

These bonds being thus issued and the old debt thereby extinguished, the State turned upon the new creditors and repudiated their demands. Within five years of the time when the statute and Constitution just recited took effect, a new Ordinance was adopted by the people of Louisiana, purporting to be an amendment of their Constitution, by which the interest due January 1, 1880, was, in the phraseology of the Ordinance, remitted; that is remitted by the debtor, and the bondholders were offered the option of taking, instead of seven per cent interest every year, two per cent for the first five years, after January, 1880; three per cent for the next fifteen; and four per cent thereafter, or new bonds at the rate of seventy-five cents on the dollar, with interest at four per cent.

We have thus before the court the State of Louisiana, maker of the bonds, the financial officers who were charged with the assessment and collection of the necessary taxes and the payment of the debt. Neither the State nor the individual defendants offer any defense for the State. They simply deny the power of this court to enforce the demands of justice.

Why should it be thought derogatory to the dignity of a sovereign State to answer in a court for its engagements? There is not a Commonwealth, save our own, nor a Prince in Christendom, save one, that cannot be made thus to answer. Every State of the old world and the new, except the States of this Union, and every Prince except the Czar, may be sued in a court of justice, by foreigner or native, citizen or subject. *Brown's Case*, 6 Ct. of Cl., 171; *Fichera's Case*, 9 Ct. Cl., 254.

We shall discover in the issue of the present suit, whether the States of this Union alone, of all the constitutional governments in the world, are above justice and judgment.

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First. Can a State of this Union implead another State, in this court, for a money demand?

The case of *Chisholm* v. *Ga.*, 2 Dall., 419, certainly decided that the Constitution included money demands, among those which would constitute a cause of action in this court, against a State.

See, also, *Vanstophorst* v. *Md.*. 2 Dall., 401; *Oswald* v. *N. Y.*, 2 Dall., 401, 402, 415; *Grayson* v. *Va.*, 3 Dall., 320; *Hollingsworth* v. *Va.*, 3 Dall., 378; *Huger* v. *S. C.*, 3 Dall., 339; *Cutting* v. *S. C.*, 2 Dall., 415, *note*; *N. Y.* v. *Conn.*, 4 Dall., 1.

Second. The assignment by the citizens of New York to the State of New York, of the money demand, is a valid transfer, according to the laws of the place where the assignment was made.

The demand being thus vested in the State, carries with it the right to demand payment and to give an acquittance when payment is made. If it may demand payment, it may follow up the demand by suit, unless there be some positive prohibition to sue.

The motive of the purchase or assignment is not material, unless made so by positive law.

Third. The real ground, however, of the present suit is the right and duty of New York, as a sovereign State, sovereign in all things save as subordinated to the Union by the federal compact, to assert the rights of her citizens, when they have been despoiled by another State, and there are no other means of redress.

"The right of interference on the part of the State, for the purpose of enforcing the performance of justice to its citizens from a foreign State, stands upon an unquestionable foundation, when the foreign State has become itself the debtor of these citizens."

Phill. Int. Law, 2d Lond. ed. Vol. 2, p. 8; 4 Hen. 4, ch. VII; French *Ordinance de la Marine*, of 1861; Grotius, book 3, ch. 2, sec. 5, subd., 2; Vatt., book 2, ch. 18, p. 347, Chitty's ed. with Ingersoll's *Notes*, 1869; Rives' Life and Times of Madison, Vol. I, p. 564; Vol. 2, p. 41; Manning Law Nat., Amos' ed., 75, p. 150; Twiss, Vol. 2, sec. II referring to Grotius, book 2, p. 2, sec. 14; Puff., book 1, p. 13, sec. 10; Vatt., book 2, p. 342.

Such, were it not for the Federal Constitution, would have been the rights and the remedies for their enforcement, on the part of New York against Louisiana. Our contention is, that in their stead, under the Constitution, the right of New York to demand of Louisiana the fulfillment of her obligation, to pay her debts to the citizens of New York, exists as fully as before, and that in place of negotiation, arbitration, embargo, reprisal, or war, as the means of enforcing the right, there is substituted an orderly and peaceful litigation in this Supreme Court of the Union.

Messrs. **John A. Campbell** and *J. C. Egan*, *Atty-Gen. of Louisiana*, for respondent:

First. The judicial power of the United States does not extend to any suit commenced or prosecuted by any individual or corporation against one of the States of this Union. No court of the United States has rendered a final judgment in any such suit, since the Constitution has existed.

Federalist, No. 81; *Briggs* v. *Light-Boats*, 11 Allen, 157; *R. R. Co.* v. *Commonwealth*, 127 Mass., 43; *State* v. *Leckie*, 14 La. Ann., 651; *Swann* v. *Buck*, 40 Miss., 268; *Bank* v. *Hastings*, 1 Walk. (Mich.), 9; *R. R. Co.* v. *Alabama*. 101 U. S., 832 (XXV., 973); *Pengree* v. *Coffin*, 12 Gray, 288.

Second. The conventions or agreements of one of the States of the Union with individuals, create no juridical relation between the parties, nor a juridical obligation. The immunity of the State from suit or claim in the courts of the United States, in her own courts, or elsewhere, leaves her conventions or agreements without other than moral sanctions.

Federalist No. 81; Hamilton, Rep. Annals of Cong., 1795, pp. 13, 62; 6 Webster, Works, 537; 1 Calhoun's Works, 260-263; *Crouch* v. *Cred. Fon.*, L. R., 8 Q. B., 384; 1 Aust. Juris., 277; 42 Dalloz, Jurisp. Gen. Tresor public, No. 1105; *U. S.* v. *Bank of U. S.*, 5 How., 382; *Sturges* v. *Crowninshield*, 4 Wheat., 122; *Dartmouth Coll.* v. *Woodward*, 4 Wheat., 518; *Ogden* v. *Saunders*, 12 Wheat., 213.

The Roman jurists distinguished between public conventions and private contracts, and they gave an admonition that they should not be confused, and that different considerations and principles applied to them.

Third. The faculty conferred upon the State is to bring suits here in respect to controversies with other States of the Union, or with citizens of other States. It is a faculty denied to the United States and to all its citizens. Controversies between two or more States must be shown to the court as the ground of jurisdiction over the cause. The grant is special, circumscribed and particular. The controversy must exist between the States and not others. Controversies between States have but little similarity to those between individuals. They arise out of their public relations and intercourse, and where their corporate or political rights are involved. In the Articles of Confederation, and in the precedents shown by the records of this court, the only causes of controversy known arise out of unascertained or disputed boundaries and jurisdiction.

N. J. v. *N. Y.*, 5 Pet., 284; *R. I.* v. *Mass.*, 12 Pet., 657; *Fla.* v. *Ga.*, 17 How., 478 (58 U. S., XV., 181); *Ala.* v. *Ga.*, 23 How., 508 (64 U. S., XVI., 556); *S. C.* v. *Ga.*, 93 U. S., 4 (XXIII., 782); *Mo.* v. *Ia.*, 7 How., 660.

The fact, that this is no other than a vicarious controversy between the States, is established. New York is a volunteer to maintain her citizen in his claim by lending to him her name for use in this court.

Fourth. Every holder taking the bonds of the State had full knowledge that no suit could be maintained in this court or in any other, in case of a failure to make any payment. No suit has been commenced against the State, except under the Acts procured from New Hampshire and New York in this court.

Fifth. The States never parted with the exemption and immunity from suit, which Hamilton testifies every State was possessed of and enjoyed at the time the Constitution was framed; there was no intent on their part to abdicate or relinquish that privilege of sovereignty; and when it was invaded by a responsible authority, there was a successful resistance to it. Had there been a grant of such a jurisdiction to this court, it might have afforded some sanction to

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the argument that the States were municipalities subject to the domination of national government, and that the government established was a government without limitation upon its powers. The 11th Amendment to the Constitution removes every foundation for such a conclusion.

Mr. Chief Justice **Waite** delivered the opinion of the court:

On the 18th of July, 1879, the General Court of New Hampshire passed an Act, of which the following is a copy:

"An Act to Protect the Rights of Citizens of this State, Holding Claims against Other States.

Be it enacted, by the Senate and House of Representatives in General Court convened:

Sec. 1. Whenever any citizen of the State shall be the owner of any claim against any of the United States of America, arising upon a written obligation to pay money issued by such State, which obligation shall be past due and unpaid, such citizen holding such claim may assign the same to the State of New Hampshire, and deposit the assignment thereof, duly executed and acknowledged in the form and manner provided for the execution and acknowledgment of deeds of real estate, by the laws of this State, together with all the evidence necessary to substantiate such claim, with the Attorney-General of the State. [77]

Sec. 2. Upon each deposit being made, it shall be the duty of the Attorney-General to examine such claim and the evidence thereof, and if, in his opinion, there is a valid claim which shall be just and equitable to enforce, vested by such assignment in the State of New Hampshire, he, the Attorney-General, shall, upon the assignor of such claim depositing with him such sum as he, the said Attorney-General, shall deem necessary to cover the expenses and disbursements incident to or which may become incident to the collection of said claim, bring such suits, actions or proceedings in the name of the State of New Hampshire, in the Supreme Court of the United States, as he, the said Attorney-General, shall deem necessary for the recovery of the money due upon such claim; and it shall be the duty of the said Attorney-General to prosecute such action or actions to final judgment, and to take such other steps as may be necessary after judgment for the collection of said claim, and to carry such judgment into effect, or, with the consent of the assignor, to compromise, adjust and settle such claim before or after judgment.

Sec. 3. Nothing in this Act shall authorize the expenditure of any money belonging to this State, but the expenses of said proceedings shall be paid by the assignor of such claim; and the assignor of such claim may associate with the Attorney-General in the prosecution thereof, in the name of the State of New Hampshire, such other counsel as the said assignor may deem necessary, but the State shall not be liable for the fees of such counsel or any part thereof.

Sec. 4. The Attorney-General shall keep all moneys collected upon such claim or by reason of any compromise of any such claim, separate and apart from any other moneys of this State which may be in his hands, and shall deposit the same to his own credit, as special trustee under this Act, in such bank or banks as he shall select; and the said Attorney-General shall pay to the assignor of such claims all such sums of money as may be recovered by him in compromise or settlement of such claims, deducting therefrom all expenses incurred by said attorney not before that time paid by the assignor.

Sec. 5. This Act shall take effect on its passage." [78]

Under this Act six of the consolidated bonds of the State of Louisiana, particularly described in the cases of *Louisiana* v. *Jumel* and *Elliott* v. *Wiltz*, just decided [*ante*, 448], were assigned to the State of New Hampshire by one of its citizens. This assignment was made for the purposes contemplated in the Act, and passed to the State no other or different title than it would acquire in that way. After the assignment was perfected, a bill in equity was filed in this court in the name of the State of New Hampshire, as complainant, against the State of Louisiana and the several officers of that State who compose the board of liquidation provided for in the Act authorizing the issue of the bonds. The averments in the bill are substantially the same as those in *La.* v. *Jumel*, *supra*, save only that in this case the ownership of the bonds specially involved is stated to be in New Hampshire, while in that it was in Elliott and his associates. The prayer is in substance for a decree that the bonds and the Act and constitutional amendment of 1874 constitute a valid contract between Louisiana and the holders of its bonds; that the defendants and each of them may be prohibited from diverting the proceeds of the taxes levied under the Act from the payment of the interest, and that the provisions of the debt Ordinance of 1879 may be adjudged void and of no effect, because they impair the obligation of the contract. The bill was signed in the name of New Hampshire by the Attorney-General of that State, and also by the same counsel who appeared for Elliott, Gwynn & Walker, in their suit in equity just decided.

On the 15th of May, 1880, the Legislature of New York passed the following Act:

"An Act to Protect the Rights of Citizens of this State Owning and Holding Claims against Other States.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Sec. 1. Any citizen of this State, being the owner and holder of any valid claim against any of the United States of America, arising upon a written obligation to pay money, made, executed and delivered by such State, which obligation shall be past due and unpaid, may assign the same to the State of New York, and deliver the assignment thereof to the Attorney-General of the State. Such assignment shall be in writing and shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds, and the certificate of such acknowledgment shall be duly indorsed upon such assignment before the delivery thereof. Every such assignment shall contain a guaranty, on the part of the assignor, to be approved by the Attorney-General, of the expenses of the collection of such claim, and it shall be the duty of the Attorney-General, on receiving such assignment, to require, on behalf of such assignor, such security for said guaranty as he shall deem adequate. [79]

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Sec. 2. Upon the execution and delivery of such assignment, in the manner provided for in section one of this Act, and furnishing the security as in said section provided, and the delivery of such claim to him, the Attorney-General shall bring and prosecute such action or proceeding, in the name of the State of New York, as shall be necessary for the recovery of the money due on such claim, and the said Attorney-General shall prosecute such action or proceeding to final judgment, and shall take such proceedings after judgment as may be necessary to effectuate the same.

Sec. 3. The Attorney-General shall forthwith deliver to the Treasurer of the State, for the use of such assignor, all moneys collected upon such claim, first deducting therefrom all expenses incurred by him in the collection thereof, and said assignor, or his legal representatives, shall be paid said money by said Treasurer upon producing the check or draft therefor of the Attorney-General to his or their order, and proof of his or their identity.

Sec. 4. This Act shall take effect immediately."

On the 20th of April, 1881, E. K. Goodnow and Benj. Graham, being the holders and owners of thirty coupons cut from ten of the consolidated bonds of Louisiana falling due January 1, 1880, July 1, 1880, and January 1, 1881, assigned them to the State of New York by an instrument in writing, of which the following is a copy:

[80] "Know all men by these presents, that we, the undersigned, citizens of the State of New York, being the owners and holders of valid claims against the State of Louisiana, arising upon written obligations to pay money, made, executed and delivered by the State of Louisiana, and now past due and unpaid, being the coupons hereto annexed, in consideration of one dollar to each of us paid by the State of New York, and for other good and valuable considerations, hereby assign and transfer the said claims and coupons to the State of New York.

And we do hereby covenant with the said State, that if an attempt is made by it to collect the said claim from the State of Louisiana, we will pay all the expenses of the collection of the same.

In witness whereof we have hereunto set our hands and affixed our seals this twentieth day of April, in the year of our Lord one thousand eight hundred and eighty-one.

E. K. Goodnow. [L.S.]
Benj. Graham. [L.S.]

Sealed and delivered in presence of—
Frank M. Carson."

Thereupon the State of New York, on the 25th of April, filed in this court a bill in equity against the State of Louisiana and the officers of the State composing the board of liquidation, with substantially the same averments and the same prayer as in that of the State of New Hampshire. There was, however, a statement in this bill not in the other, to the effect that many of the consolidated bonds were issued to citizens of the State of New York in exchange for old bonds of Louisiana which they held, and that citizens of New York now hold and own bonds of the same class to a large amount. Testimony has been taken in support of this averment.

The first question we have to settle is, whether, upon the facts shown, these suits can be maintained in this court. [86]

Article III., section 2, of the Constitution provides that the judicial power of the United States shall extend to controversies between two or more States, and between a State and citizens of another State. By the same article and section it is also provided that in cases in which a State shall be a party, the Supreme Court shall have original jurisdiction. By the Judiciary Act of 1789, ch. 20, sec. 13, 1 Stat. at L., 80, the Supreme Court was given "Exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a State and Citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction."

Such being the condition of the law, Alexander Chisholm, as executor of Robert Farquar, commenced an action of *assumpsit* in this court against the State of Georgia, and process was served on the Governor and Attorney-General. *Chisholm* v. *Georgia*, 2 Dall., 419. On the 11th of August, 1792, after the process was thus served, Mr. Randolph, the Attorney-General of the United States, as counsel for the plaintiff, moved for a judgment by default on the fourth day of the next Term, unless the State should then, after notice, show cause to the contrary. At the next Term, Mr. Ingersoll and Mr. Dallas presented a written remonstrance and protestation on behalf of the State against the exercise of jurisdiction, but in consequence of positive instructions they declined to argue the question. Mr. Randolph, thereupon, proceeded alone, and in opening his argument said, "I did not want the remonstrance of Georgia, to satisfy me that the motion which I have made is unpopular. Before the remonstrance was read, I had learnt from the Acts of another State, whose will must always be dear to me, that she too condemned it."

On the 19th of February, 1793, the judgment of the court was announced, and the jurisdiction sustained, four of the Justices being in favor of granting the motion and one against it. All the Justices who heard the case filed opinions, some of which were very elaborate, and it is evident the subject received the most careful consideration. *Mr. Justice* Wilson in his opinion uses this language (p. 465): "Another declared object (of the Constitution) is, 'to establish justice.' This points, in a particular manner, to the judicial authority. And when we view this object in conjunction with the declaration, 'that no State shall pass a law impairing the obligation of contracts;' we shall probably think, that this object points, in a particular manner, to the jurisdiction of the court over the several States. What good purpose could this constitutional provision *secure*, if a State might pass a law impairing the obligation of *its own* contracts; and be amenable, for such a violation of right, to no controlling judiciary power?" And *Chief Justice* Jay (p. 479): "The extension of the judiciary power of the United States to such controversies, appears to me to be *wise*, because it is *honest*, and because it is *useful*. It is *honest*, because it provides for doing justice without respect to persons, and by securing individual citizens as well as States, in [87]

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their respective rights, performs the promise which every free government makes to every free citizen, of equal justice and protection. It is *useful*, because it is honest, because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighboring State; because it obviates occasions of quarrels between States on account of the claims of their respective citizens; because it recognizes and strongly rests on this great moral truth, that justice is the same whether due from one man or a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican national government which places all our citizens on an equal footing, and enables each and every of them to obtain justice without any danger of being overborne with the might and number of their opponents; and, because it brings into action, and enforces the great and glorious principle, that the people are the Sovereign of this country, and consequently that fellow citizens and joint Sovereigns cannot be degraded by appearing with each other in their own courts to have their controversies determined."

Prior to this decision, the public dicussions [88] had been confined to the power of the court under the Constitution to entertain a suit in favor of a citizen against a State, many of the leading members of the Convention arguing, with great force, against it. As soon as the decision was announced, steps were taken to obtain an Amendment of the Constitution withdrawing jurisdiction. About the time the judgment was rendered, another suit was begun against Massachusetts, and process served on John Hancock, the Governor. This led to the convening of the General Court of that Commonwealth, which passed resolutions instructing the Senators and requesting the members of the House of Representatives from the State "To adopt the most speedy and effectual measures in their power to obtain such Amendments in the Constitution of the United States as will remove any clause or articles of the said Constitution, which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any courts of the United States." Other States also took active measures in the same direction and, soon after the next Congress came together, the 11th Amendment to the Constitution was proposed, and afterwards ratified by the requisite number of States, so as to go into effect on the 8th of January, 1798. That Amendment is as follows:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens and subjects of any foreign State."

Under the operation of this Amendment the actual owners of the bonds and coupons held by New Hampshire and New York are precluded from prosecuting these suits in their own names. The real question, therefore, is, whether they can sue in the name of their respective States after getting the consent of the State, or, to put it in another way, whether a State can allow the use of its name in such a suit for the benefit of one of its citizens.

The language of the Amendment is, in effect, that the judicial power of the United States shall not extend to any suit commenced or prosecuted *by* citizens of one State against another State. No one can look at the pleadings [89] and testimony in these cases, without being satisfied, beyond all doubt, that they were, in legal effect, commenced, and are now prosecuted, solely by the owners of the bonds and coupons. In New Hampshire, before the Attorney-General is authorized to begin a suit, the owner of the bond must deposit with him a sum of money sufficient to pay all costs and expenses. No compromise can be effected except with the consent of the owner of the claim. No money of the State can be expended in the proceeding, but all expenses must be borne by the owner, who may associate with the Attorney-General such counsel as he chooses, the State being in no way responsible for fees. All moneys collected are to be kept by the Attorney-General, as special trustee, separate and apart from the other moneys of the State, and paid over by him to the owner of the claim, after deducting all expenses incurred not before that time paid by the owner. The bill, although signed by the Attorney-General, is also signed and was evidently drawn by the same counsel who prosecuted the suits for the bondholders in Louisiana, and it is manifested in many ways that both the State and the Attorney-General are only nominal actors in the proceeding. The bond owner, whoever he may be, was the promoter and is the manager of the suit. He pays the expenses, is the only one authorized to conclude a compromise, and if any money is ever collected, it must be paid to him without even passing through the form of getting into the Treasury of the State.

In New York no special provision is made for compromise or the employment of additional counsel, but the bondholder is required to secure and pay all expenses and gets all the money that is recovered. This State, as well as New Hampshire, is nothing more nor less than a mere collecting agent of the owners of the bonds and coupons; and while the suits are in the names of the States, they are under the actual control of individual citizens, and are prosecuted and carried on altogether by and for them.

It is contended, however, that, notwithstanding the prohibition of the Amendment, the States may prosecute the suits, because, as the Sovereign and trustee of its citizens, a State is "Clothed with the right and faculty of mak- [90] ing an imperative demand upon another independent State for the payment of debts which it owes to citizens of the former." There is no doubt but one Nation may, if it sees fit, demand of another Nation the payment of a debt owing by the latter to a citizen of the former. Such power is well recognized as an incident of national sovereignty, but it involves also the national powers of levying war and making treaties. As was said in *U. S.* v. *Diekelman*, 92 U.S., 524 [XXIII., 744], if a Sovereign assumes the responsibility of presenting the claim of one of his subjects against another Sovereign, the prosecution will be as one Nation proceeds against another, not by suit in the courts, as of right, but by diplomatic negotiation, or, if need be, by war.

All the rights of the States as independent

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Nations were surrendered to the United States. The States are not Nations, either as between themselves or towards foreign Nations. They are Sovereign within their spheres, but their sovereignty stops short of nationality. Their political *status* at home and abroad is that of States in the United States. They can neither make war nor peace without the consent of the National Government. Neither can they, except with like consent, enter into any agreement or compact with another State. Art. I., sec. 10, ch. 3.

But it is said that, even if a State as sovereign trustee for its citizens, did surrender to the National Government its power of prosecuting the claims of its citizens against another State by force, it got in lieu, the constitutional right of suit in the national courts. There is no principle of international law which makes it the duty of one Nation to assume the collection of the claims of its citizens against another Nation, if the citizens themselves have ample means of redress without the intervention of their government. Indeed, Sir Robert Phillimore says, in his commentaries on International Law, Vol. 2, 2d ed., page 12: "As a general rule, the proposition of Martens seems to be correct, that the foreigner can only claim to be put on the same footing as the native creditor of the State." Whether this be in all respects true or not, it is clear that no Nation ought to interfere, except under very extraordinary circumstances, if the citizens can themselves employ the identical and only remedy open to the government if it takes on itself the burden of the prosecution. Under the Constitution, as it was originally construed, a citizen of one State could sue another State in the courts of the United States for himself, and obtain the same relief his State could get for him if it should sue. Certainly, when he can sue for himself, there is no necessity for power in his State to sue in his behalf, and we cannot believe it was the intention of the framers of the Constitution to allow both remedies in such a case. Therefore, the special remedy, granted to the citizen himself, must be deemed to have been the only remedy the citizen of one State could have under the Constitution against another State for the redress of his grievances, except such as the delinquent State saw fit itself to grant. In other words, the giving of the direct remedy to the citizen himself was equivalent to taking away any indirect remedy he might otherwise have claimed, through the intervention of his State, upon any principle of the law of Nations. It follows that when the Amendment took away the special remedy there was no other left. Nothing was added to the Constitution by what was thus done. No power, taken away by the grant of the special remedy, was restored by the Amendment. The effect of the Amendment was simply to revoke the new right that had been given, and leave the limitations to stand as they were. In the argument of the opinions filed by the several Justices of the *Chisholm Case*, there is not even an intimation that if the citizen could not sue, his State could sue for him. The evident purpose of the Amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued and, in

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our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens. *Such being the case, we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and the bill in each of them is, consequently, dismissed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 450; 114 U. S., 287.

UNITED STATES, *Appt.*, [92]
v.
THE STEAMER NUESTRA SEÑORA DE REGLA, Her Tackle, etc., LA COMPAGNIA DEL FERRO CARREL DE LA BAHIA DE LA HABANA A MATANZAS, Claimants.

(See S. C., "*The Nuestra Señora de Regla*," Reporter's ed., 92-104.)

Second appeal—capture by army and navy—waiver by United States, of exemption from suit—condemnation of prize—demurrage.

1. Questions settled on a former appeal of the same cause are no longer open.
2. A capture which was made by the army, or by the army and navy operating together, inures exclusively to the benefit of the United States; there is no distribution of prize money in such a case.
3. When, in pursuance of negotiation with a foreign government, the United States, through the Executive of the Nation, waived its right to exemption from suit, and asked a prize court to complete the adjudication of a cause which was rightfully begun in that jurisdiction, the Government is bound by the submission, and it is the duty of the court to proceed to the final determination of all the questions legitimately involved.
4. It is the duty of a captor to institute judicial proceedings for the condemnation of his prize without unnecessary delay, and if he fails in this the court may, in case of restitution, decree demurrage against him as damages.
5. The allowance for demurrage in such case includes reasonable compensation for the pay and expenses of an agent to look after the interests of the owners up to the time of the delivery of the vessel to the navy department by the court.

[No. 159.]

Argued Jan. 23, 24, 1883. Decided Mar. 12, 1883.

APPEAL from the District Court of the United States for the Southern District of New York.

The history and facts of the case fully appear in the opinion of the court.

Mr. **William A. Maury**, *Asst. Atty-Gen.*, for appellant.

Messrs. **Wm. Allen Butler**, *W. R. Beebe* and *Charles Donohue*, for appellee:

No question arises on this second appeal, except as to the proceedings subsequent to the mandate.

Himely v. *Rose*, 5 Cranch, 313; *Skillern* v. *May*, 6 Cranch, 267; *Ex parte Sibbald*, 12 Pet.,

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NOTE.—*Damages in cases of illegal capture and in collision.* See *note* to The Amiable Nancy. 16 U. S. (3 Wheat.), 546.

Damages, in cases of capture, on restitution.

In cases of capture, made without probable cause, the court may decree damages and costs against the captors, on restitution. Glass v. The Betsey, 3 U. S. (3 Dall.), 16; The Isabella Thompson v. U. S., 70 U. S., XVIII., 55.

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488; *The Santa Maria*, 10 Wheat., 431; *Corning* v. *Troy Iron & Nail Factory*, 15 How., 451; *Supervisors* v. *Kennicott*, 94 U. S., 498 [XXIV., 260]; *The Lady Pike*, 96 U. S., 461 [XXIV., 672].

The district court sitting as a prize court, had full jurisdiction to award costs and damages on restitution.

1 Kent, Com., 354; *The Appollon*, 9 Wheat., 362; *The Lively*, 1 Gall., 315; *The Glen*, Blatchf. Pr. Cas., 375; *The Sybil*, Blatchf. Pr. Cas., 615; *The Siren*, 7 Wall., 152 [74 U. S., XIX., 129], and cases cited on p. 161 [133].

The United States, having invoked the jurisdiction, has waived all objection to the adjudication on the subject of damages as an incident of the main cause, and such adjudication is final and conclusive.

R. I. v. *Mass.*, 12 Pet., 657; *Bangs* v. *Duckinfield*, 18 N. Y., 592.

"When a sovereign State or her representatives are brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty."

Davis v. *Gray*, 16 Wall., 203, 232 [83 U. S., XXI., 447, 457].

The Sovereign cannot be sued in his own courts without his consent. *U. S.* v. *Clarke*, 8 Pet., 444; *The Siren* (*supra*).

But this prerogative may be waived. *The Siren* (*supra*).

In the cases of *The Labuan*, Blatchf. Prize Cas., 165; *The Sybil*, Blatchf. Prize Cas., 615, the decrees were made against the United States and the captors, and Congress by passing the several Acts directing payment of the several amounts awarded by the decrees, approved and adopted the adjudications of the court.

See, Acts, July, 7 and 8, 1870, ch. 220, 231, 16 Stat. at L., 47; also. ch. 219, *Id.*, directing payment in the case of *The Flying Scud*, pursuant to decree of U. S. District Court in Louisiana.

It is the settled law of prize that the captured vessel must be despatched promptly to some convenient port for libeling.

Rob. Adm. & Prize, 446; Upton, Prize Courts, 246; Phillim. Int. Law, sec. 449; *The Lively*, 1 Gall., 310.

The measure of damages is stated by *Mr. Justice* Nelson, in *Williamson* v. *Barrett*, 13 How., 101, p. 111:

"The principle * * * in adopting the freight which the vessel was in the act of earning as a just measure of compensation in the case, is one of general application. It looks to the capacity of the vessel to earn freight for the benefit of the owner, and consequent loss sustained while deprived of her service."

This is the settled rule in cases of collision in both the admiralty and civil courts.

The Gazelle, 2 Wm. Rob., 279; *The Glaucus*, 1 Low., 366; *Vantine* v. *The Lake*, 2 Wall., Jr., 52; *The Narragansett*, Olcott, 388; *The Rhode Island*, Olcott, 528; *The M. M. Caleb*, 10 Blatchf., 467; *The Stormless*, 1 Low., 153; *Trans. Co.* v. *Steamboat Co.*, 51 N. Y., 369; *Mailler* v. *Exp. Prop. Line*, 61 N. Y., 312.

Complete indemnity can only be given by compensation for the loss of earnings as well as the value of the vessel.

Allen v. *Fox*, 51 N. Y., 562; *Star of Indi* [illegible] R., 1 Prob. Div., 466; *Dermott* v. *Jones*, 2 Wall., 1 [69 U. S., XVII., 762].

Government charters of vessels in time of war, form an exceptional kind of employment and service, for which special rates are always permitted. and have been upheld by the courts.

Sturgis v. *Steamboat Co.*, 35 N. Y., 251; *S. C.*, 62 N. Y., 625; *Howland* v. *Coffin*, 47 Barb., 653.

Even in actions *ex contractu*, the loss of profits is included in the computation of damage.

Hadley v. *Baxendale*, 9 Exch., 341; *R. R. Co.* v. *Howard*, 13 How., 307.

The award was properly made for the entire period from the seizure to June 20, 1863, the date of the decree of restitution.

The order of the prize court, of August 22, 1862, permitting the delivery of the vessel to the navy department for government use, does not vary or affect the right of the claimants to the whole award.

Captured property is under control of the court and its officers until the final adjudication and disposal of it by the court.

The Memphis, Blatchf. Pr. Cas., 202; *The Ella Warley*, Blatchf. Pr. Cas., 207.

This power of a prize court to permit delivery of the prize to the Government for use pending

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In case of a recapture, the owners may recover damages for seizure without grounds. Miller v. The Resolution, 2 U. S. (2 Dall.), 19; Hollingsworth v. The Betsey, 2 Pet. Adm., 330; The Leucade, Sparks, 175; The Odessa, Sparks, 210; British Consul v. The John L. Thompson, Bee, 144; The Ostsee, Spinks, 175; The Nemesis, Edw. Adm., 50; The Hoppet, Edw. Adm., 369; The Mercurius, 1 C. Rob., 80.

Where the captors consented to restitution, demurrage for the time of detention was allowed. The Corier Maritimo, 1 C. Rob., 241; The Zee Star, 4 C. Rob., 71; The St. Juan Baptista, 5 C. Rob., 36.

Demurrage and interest allowed. Talbot v. Janson, 3 U. S. (3 Dall.), 133; The Lively, 1 Gall., 322.

Demurrage is given for unjustifiable delay by the captors in proceeding to adjudication; but no allowance is made for loss of profits. Cases last cited; Maley v. Shattuck, 7 U. S. (3 Cranch), 458; The Corier Maritimo, 1 C. Rob., 241; The Lacheman, 5 C. Rob., 152.

Where the property has been sold and no account of sales rendered, the damages are the prime cost and ten per cent profit. Where there is an account of sales, that is generally the basis of the decree. The Lucy, 3 C. Rob., 208; The Narcissus, 4 C. Rob., 17; The Lively, 1 Gall., 322; The Empire State, 2 Ben., 179; The Catherine v. Dickinson, 58 U. S., XV., 233.

The captors are substituted for the owners and are liable for freight of the cargo, and in case of restitution the neutral carrier is entitled to freight where the capture prevented the vessel from earning the same. The Frances, 12 U. S. (8 Cranch), 418; The Société, 13 U. S. (9 Cranch), 209; The Antonia Johanna, 14 U. S. (1 Wheat.), 159; The Commercen, 14 U. S. (1 Wheat.), 382; S. C., 2 Gall., 264; The Ann Green, 1 Gall., 294; The Copenhagen, 1 C. Rob., 289; but not if the property was ultimately bound to the same market where the captors carry the ship; (The Vrow Henrica, 4 C. Rob., 243; The Ann Green, 1 Gall., 294); nor where the ship is carrying contraband; (The Commercen, 14 U. S. (1 Wheat.), 382; S. C., 2 Gall., 264; The Mercurius, 1 C. Rob., 80; The Sarah Christina, 1 C. Rob., 237); nor where the carrier is guilty of fraudulent suppression or spoliation of papers; (The Commercen, 14 U. S. (1 Wheat.), 382; S. C., 2 Gall. 264); nor where he is engaged in the coasting or colonial trade of the enemy. The Immanuel, 2 C. Rob., 186; The Minerva, 3 C. Rob., 34; The Anna Catharina, 4 C. Rob., 107.

Full freight will be decreed, although only part of the goods are saved, if the loss is owing to the negligence of the prize master. The Der Mohr, 3 C. Rob., 129.

The captor takes the prize *cum oneris* and in ordinary cases freight is a privileged lien. The Bremen Fluge, 4 C. Rob., 90; The Vrow Henrica, 4 C. Rob., 347.

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adjudication, is exercised for the protection of all parties in interest.

2 Wheat App. p. 17; *Smart* v. *Wolfe*, 3 T. R., 323; *The Herkimer*, Stew., 128; *S. C.*, 2 Hall, Am. L. J., 133.

The jurisdiction cannot be affected by any change in the local situation of the property after capture, but wherever it may be found, or its proceeds, the court will follow it with its process.

Hudson v. *Guestier*, 4 Cranch, 293; *Home* v. *Camden*, 2 H. Bl., 533; *Cambden* v. *Home*, 4 T. R., 383; *Willis* v. *Commissioners of Prize*, 5 East, 22; *The Noysomhed*, 7 Ves., 593; *The Brig Louis*, 5 C. Rob., 147; *The Two Friends*, 1 C. Rob., 271; *The Eliza*, 1 Acton, 336; *Smart* v. *Wolfe*, 3 T. R, 323; *The Pomona*, 1 Dod., 25; *LeCaux* v. *Eden*, 2 Doug., 594; *Goss* v. *Withers*, 2 Burr., 683; *The Flad Oyen*, 1 C. Rob., 135; *The Santa Cruz*, 1 C. Rob., 50; *The Fanny and Elmira*, 1 Edw. Ad., 117; *The Ceylon*, 1 Dod., 105.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The facts to be considered on this appeal are as follows:

The steamer Nuestra Señora de Regla was built in New York for the claimant, a railroad company in Cuba, created by the laws of Spain. She was delivered to an agent of the claimant on the 6th of November, 1861, and sailed for Havana in command of a Spanish master. She was a sidewheel steamer of about three hundred tons burthen, built to run on a ferry between [93] Havana and a terminus of the railroad company's railroad. On her way down the coast she went into Port Royal, and while there the quartermaster of the United States at that post offered to purchase her for the use of the Government. The master declined to sell, as he had no authority. She was then, on the 29th of November, seized by order of Gen. Thomas W. Sherman, in command of the United States forces. In communicating the fact of the seizure to the Adjutant-General of the Army, on the 2d of December, the General said; "If this steamer I have seized is confiscated, she should be left here. She is just the thing we want, and admirably adapted for these waters and our purpose. She is new and exactly such a boat as they have at the Jersey City Ferry in N. Y. Will carry 1,000 men, and will draw not over six or seven feet."

No judicial proceedings were instituted for her condemnation, but at some time before December 16th, the following charter-party was entered into:

"Articles of agreement made this——day of December, 1861, between————, captain of the steam ferry-boat Nuestra Señora de Regla, for and on behalf of the owners of the said ferry-boat, of the first part, and Captain Rufus Saxton, as assistant quartermaster in the United States Army, for and on behalf of the United States of America, of the second part witnesseth:

That the said party of the first part, for and in consideration of the payment hereinafter promised to be well and truly made by the said party of the second part, hath chartered to the United States the steam ferry-boat Nuestra Señora de Regla, with all her tackle, apparel, furniture and machinery, to be used for transporting troops, stores or other things, as the said party of the second part may direct.

And the said party of the second part doth agree, for and in consideration of the faithful performance of the above duty, that the said party of the first part shall receive the sum of $200 for each and every day the said boat may be kept in service, said steam ferry-boat to be kept stanch, sound and strong, and her machinery in good running order and condition, [94] by the said party of the first part.

It is understood by the parties to this agreement that in case the said steam ferry-boat shall be confiscated to the United States, then this contract shall be void; otherwise to remain in full force and virtue.

It is furthermore understood by the parties to this agreement that the said steam ferry-boat is not to be run outside of the bar of Port Royal, but at any and all points on the rivers and creeks that connect with Broad River.

This contract to commence on the 16th day of December, 1861, and continue in force ten days, after which each party has a right to cancel the same.

In witness whereof the undersigned have hereunto affixed their hands and seals, at Hilton Head, S. C., the day and date first above written.

(S'd) Ygnacio A. Reynals, [L. S.]
(S'd) R. Saxton, [L. S.]
Capt. U. S. Army Chief Quartermaster E. C."

The testimony shows that $200 a day was a fair price for the use of the vessel at that place at that time. One witness, competent to judge, testified to that effect, and no attempt was made by the United States to contradict him.

The vessel was kept in the possession or under the control of the quartermaster until the 29th of January, when she was in form delivered to the flag officer of the navy in command at that station. She was, however, kept in constant use by the Government as a transport, in the way contemplated by the charter, from the 16th of December until about the 1st of March, when she was sent to New York. No judicial proceedings were begun against her until the 9th of June, when a libel of information in prize was filed in the District Court for the Southern District of New York by the United States, in behalf of themselves and of the naval captors in interest. She was attached on the same day by the marshal, and the usual monition was issued and served. The owner filed a claim, on the 9th of July. No further proceedings were had until the 22d of August, when the following order was entered:

"On reading and filing a notice of motion and [95] a verified copy of a letter from the Secretary of the Navy, stating that the Navy Department desires to obtain possession of the steamer Nuestra Señora de Regla; and on hearing Mr. E. Delafield Smith, United States district attorney, in support of the motion, and Mr. W. R. Beebe proctor for the claimants, in opposition thereto, it is hereby ordered that the said steamer Nuestra Señora de Regla be appraised by Benjamin F. Delano, United States naval constructor, and Benjamin F. Garvin, chief engineer, both now stationed at the navy yard, New York, and John Inglis; that such appraisement be filed with all convenient speed with the clerk of this court; that thereafter said steamer be delivered

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to the Navy Department for the use of the Government, upon filing in court a certificate of the assistant treasurer of the United States in New York that the amount of the appraisement has been deposited in the United States Treasury, subject to the order and disposal of the court on final decree in the case.

Samuel R. Betts."

The letter of the Secretary of the Navy referred to in this order is as follows:

"Navy Department, *August 11th, 1862.*

Sir: The department will take the steamer Nuestra Señora de Regla at the appraisement of twenty-five thousand dollars.

It desires early information, if practicable, as to the appraisement in the case of The Anne, The Stettin, and The Memphis.

I am, resp'y your ob't s'v't, Gideon Welles."

The vessel was valued by two of the appraisers at $28,000 and by the third at $30,000, and immediately delivered to the Navy Department, although the certificate of deposit provided for was never filed. The cause was heard on the 20th June, 1863, and a decree entered directing that the vessel be restored to the owner, but reserving all questions of costs and damages resulting from the capture, for future hearing and determination. On the 15th of October, 1863, the following entry was made in the cause:

"It having been mutually agreed between the [96] counsel for the respective parties that the said vessel, in the above decision, was immediately taken into the possession and use of the United States under a charter-party, and delivered them thereunder, and so remained without molestation from the claimants. On motion of the counsel for the vessel and with the assent of the United States Attorney, it is ordered by the court that further proceedings and litigation be stayed in the above cause, to the end that all questions of damages reserved in the decision of the court in the Term of June last, may be considered and adjusted by the Government of the United States in the application, and with the concurrence of the Government of Spain.

Samuel R. Betts."

On the 20th of May, 1870, the following letter was addressed to the Spanish Minister in Washington by the Secretary of State:

"Department of State, *Washington, May 20, 1870.*

Sir: I have the honor to acknowledge the receipt of your note of the 5th instant in relation to the Spanish steamer Nuestra Señora de Regla, and the claim which arose in consequence of her seizure by the United States authorities in 1861.

The District Court of the United States for the Southern District of New York, after deciding that the claimants were entitled to restitution of the vessel, made an order suspending proceedings, to the end that the question of damages might be considered and adjusted by the Government on the application and with the concurrence of that of Spain.

Without referring to the reasons which have so long delayed any arrangement between the two Governments, I have now to say that it will be most satisfactory to the Government that the parties interested should apply to the court, which still retains jurisdiction of the case, to obtain such further relief as justice may demand, and in the mode which that tribunal shall deem most proper and convenient.

I avail myself of this occasion to offer to you assurances of my very high consideration.

J. C. Bancroft Davis,
Acting Secretary of State."

On the 2d of June following, the cause was [97] referred to one of the commissioners of the court to ascertain the amount of damages the claimant had sustained by the seizure and detention of the vessel. The commissioner made his report on the 20th of May, 1871, fixing the damages for the detention at the rate of $200 a day from November 29, 1861, to June 20, 1863, the date of the decree for restoration, with interest at six per cent per annum, amounting to $167,370.66⅓, and allowing for the expenses and services of an agent remaining with and attending to the vessel $5,680; for counsel fee in defending the proceedings, $5,000, and for the value of the vessel at the date she should have been restored, with interest added, $36,833.33⅓, or a total of $214,884. Exceptions were taken to this report by the United States, but they were overruled and a decree rendered for the full amount allowed by the master, with interest added.

From that decree an appeal was taken to this court, where, at the October Term, 1872, it was decided "That the vessel was not lawful prize of war or subject of capture, and the corporation which owned her is, doubtless, entitled to fair indemnity for the losses sustained by the seizure and employment of the vessel; but it may be well doubted whether it is not more properly a subject of diplomatic adjustment than determination by the courts." It was also said in the opinion, "The decree of the district court included the sum of $5,000 for counsel fees. We think that the amount was greatly excessive, and the allowance for counsel fees wholly unwarranted." For the errors thus indicated the decree was reversed. *The Nuestra Señora de Regla*, 17 Wall., 61 [84 U. S., XXI., 597]. The case was then remanded for further proceedings in accordance with the opinion. On the 22d of July, 1878, after the mandate was filed, a second reference was made to the commissioner "To assess the damages of the claimant of the vessel sustained by him in consequence of the seizure and detention of the vessel, and that on such reference all the proofs already taken in the cause or before the referee be used together with such other proofs as may be put in by either party."

Under this reference, the commissioner again reported that the United States continued to use the vessel after she was taken possession of by [98] the Navy Department, pursuant to the order of August 22, 1862, until the 20th of June, 1863, the date of the decree for her restoration, and that she had never been restored to the owners or her value paid. He, therefore, allowed:

For detention from November 29, 1861, to June 20, 1863, 568 days, at $200 per day	$113,600
Interest at 6 per cent to date of report	81,698
For value of vessel, ascertained to be	30,000
Interest from June 20, 1863	21,549
For expenses of agent, 568 days at $10	5,680
	$252,527

To this report exceptions were filed on behalf of the United States, but they were overruled by the court and a decree entered March 8, 1879,

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for the amount found due, with interest from the date of the report, or in all, $308,932.38. From that decree, this appeal was taken.

[101] That the steamer was not lawful prize or the subject of capture was expressly decided on the former appeal. It was also impliedly settled that the capture was without probable cause, for it was said the owner was undoubtedly entitled to a fair indemnity for the losses sustained, the only difficulty being as to the amount. These questions are, therefore, no longer open. *Clark* v. *Keith* [*ante*, 302], decided at the present Term; *Supervisors* v. *Kennicott*, 94 U. S., 499 [XXIV., 260].

The first of the remaining questions to be considered is, whether a decree can be entered against the United States for damages. As the capture was made by the army, or by the army and navy operating together, it inured exclusively to the benefit of the United States. There is no distribution of prize money in such a case. *U. S.* v. *Steam Vessels of War* [*ante*, 286], decided at this Term; *The Siren*, 13 Wall., 394 [80 U. S., XX., 506]. The United States were, therefore, in legal effect the captors, and they came voluntarily into court to secure for themselves the benefit of what had been done. They deliberately adopted the acts of the military and naval officers as their own, and came, as captors, to condemn their prize. Offers to purchase the vessel were made and declined before she was seized, and soon after the seizure she was chartered and put into actual use without any attempt at securing an adjudication. It is evident, also, that the capture must have been the subject of diplomatic correspondence between the Government of Spain and the United States before the vessel was brought in for adjudication, because on the 6th of May, 1862, after the vessel got to New York, and before the libel was filed, Mr. Seward, the then Secretary of State, wrote the district attorney for the Southern District of New York, as follows:

"Sir: Noticing the arrival at New York of the Spanish steamer Nuestra Señora de la Regla which was seized at Port Royal by General Sherman for an alleged illegal breach of neutrality, I now transmit the papers found on board of her, and an abstract of them which I caused to be prepared and which you may find useful."

[102] Although the libel was filed on the 9th of June, 1862, and the claim was promptly put in, the adjudication was not had until June of the following year, when all further proceedings were stayed with the consent of both parties, to await an adjustment of damages by the two Governments. Nothing further was done until nearly seven years afterwards, when the Secretary of State informed the Spanish Government of the wish of the United States that the parties interested should apply to the court, which still retained jurisdiction, for such relief as justice demanded, and in the mode that tribunal should deem most proper and convenient. Thereupon, on motion of the claimant, and with the consent of the United States district attorney, the reference was ordered to ascertain the damages. Under these circumstance we cannot but think the United States have voluntarily submitted themselves to the court at the instance of the Spanish Government, and with the consent of the claimant, for the purpose of having the questions of damages growing out of the capture judicially settled according to the rules applicable to private persons in like cases.

It is objected, however, that the Executive Department of the Government had no power, in the absence of express legislative authority, to make such a submission. It was the duty of the United States, under the law of Nations, to bring all captured vessels into a prize court for adjudication. If that had not been done in this instance, the Spanish Government would have had just cause of complaint, and could have demanded reparation for the wrongs that had been done one of its subjects. The executive department had the right to bring the suit. In that suit it had been determined that the capture was unlawful. Necessarily, therefore, the question of damages to the owner of the captured vessel arose. Since, without the consent of the United States, no judgment for damages could be rendered against them in the pending suit that could be enforced by execution, the Spanish Government had the right to assume the prosecution of the claim, and it did. Necessarily the negotiations on the part of the United States under this claim were conducted by the Executive. After long delay no agreement was reached, and as a last resort for ending the controversy, it was determined to refer [103] the whole matter to the court for judicial inquiry and determination. We see no reason why this might not be done in such a case. It is true, any judgment that may be rendered cannot be judicially enforced, but the questions to be settled are judicial in their character, and are incidents to the suit which the United States were required to bring to enforce their rights as captors. It is too late now to insist that the case is not one of prize, because in the libel it is expressly alleged that the vessel was captured as lawful prize, and condemnation was asked on that account. When, therefore, the United States, through the Executive of the Nation, waived their right to exemption from suit, and asked the prize court to complete the adjudication of a cause which was rightfully begun in that jurisdiction, we think the Government is bound by the submission, and that it is the duty of the court to proceed to the final determination of all the questions legitimately involved.

The next inquiry is as to the amount of damages. The duty of a captor is to institute judicial proceedings for the condemnation of his prize without unnecessary delay, and if he fails in this the court may, in case of restitution, decree demurrage against him as damages. This rule is well settled. [*Slocum* v. *Mayberry*] 2 Wheat., 1; *The Appollon*, 9 Wheat., 377; *The Lively*, 1 Gall., 315; *The Corier Maratimo*, 1 C. Rob., 287.

Upon the facts in this case there can be no doubt of the propriety of such an allowance for the extraordinary detention of the vessel before she was delivered up for adjudication, especially since she was detained for the express purpose of use by the United States. And as to the amount of the allowance, there is no opportunity for discussion. The United States were willing and actually contracted to pay $200 a day for her use if she was not in fact lawful prize, and that is shown to have been a reasonable price for her charter at the time. She was seized on the 29th of November, and it is fair

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to assume that if due diligence had been used she might have been surrendered for adjudication by the 16th of December, when her charter began to run. She was not actually surrendered until the 9th of June, a delay of 175 days beyond [104] what was necessary. It is not disputed that her value at that time was $30,000. She cost when built $50,000, and was new when captured. As she has never been restored under the order to that effect, there can be no doubt of the liability of the United States for her value, when at their request she was delivered into their possession by the court. It is not a matter of any importance that the certificate of deposit in the Treasury, of the amount of her appraised value, was not filed. By taking the vessel on the terms imposed by the court, the United States impliedly agreed to restore her in as good condition as she was when taken or pay her value in money. By the surrender of the vessel for adjudication the United States relieved themselves from any further liability for damages in the way of demurrage, and became bound for the vessel instead.

The allowance for demurrage includes reasonable compensation for the pay and expenses of an agent to look after the interests of the owners up to the time of the delivery of the vessel to the Navy Department by the court. After that, no agent was necessary. From that time, the case stood as though a sale had been made and the proceeds paid into the registry of the court.

Our conclusion is that damages should be allowed as follows:

For unnecessary and unusual delay in proceeding to adjudication, 175 days at $200, - - - - - - -	$35,000
For value of vessel, - - - -	30,000
In all, - - - - - - - -	$65,000

To which add interest, at the rate of six per cent per annum, from the time of the order of restitution, June 20, 1863, until the decree.

The decree of the District Court is reversed and the cause remanded, with instructions to enter another decree in accordance with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[105] JOHN CROSSLEY & SONS (Limited), Interveners, *Plffs. in Errr.*,

v.

CITY OF NEW ORLEANS AND HENRIETTA DAVIDSON, Testamentary Exrx. of the Succession of JOHN DAVIDSON, ET AL.

(See S. C., Reporter's ed., 105, 108.)

Opinion, when determines character of suit—federal question.

1. In cases coming to this court from the Supreme Court of Louisiana, the opinion of the court below, as set out in the record, may be referred to, if necessary, to determine whether the judgment is one which this court has authority to review.

2. Where the case was disposed of in the state court before the federal question presented by the pleadings was reached, and that question was not and need not have been decided, and its decision was placed on other grounds, this court has no jurisdiction therein.

[No. 1017.]

Submitted Jan. 29, 1883. Decided Mar. 12, 1883.

IN ERROR to the Supreme Court of the State of Louisiana.

On motion to dismiss or affirm.

This action was brought in a State District Court, by Henrietta Davidson and others, defendants in error, to perpetually enjoin the City of New Orleans from executing a certain judgment of the Supreme Court of the State, *Matter of Draining Commissioners*, 27 La. Ann., 21, which had been affirmed by this court. *Davidson* v. *New Orleans*, XXIV., 616, on the ground that the drainage of certain swamp lands, the assessment for which was the basis of said judgment, had been abandoned.

The present plaintiffs in error intervened as the holders of a large amount of drainage warrants, on the ground that the injunction sought would impair the value of said warrants and the obligation of the contract under certain Acts of the General Assembly of the State authorizing their issue.

The judgment of the district court was in favor of the petitioners, the injunction being granted on the ground above stated. This judgment having been affirmed by the Supreme Court of the State, 34 La. Ann., 170, the interveners sued out this writ of error.

Mr. **B. R. Forman**, for defendants in error, in support of motion.

Mr. **Henry C. Miller**, for plaintiffs in error, *contra*.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The record shows that the defendants in error sought to enjoin the collection of a judgment against their property to enforce an assessment under the drainage laws of Louisiana: 1, because under the operation of the laws authorizing the judgment, nothing more remained to be paid thereon; and, 2, because the judgment had, in terms, been released and discharged by certain Acts of the General Assembly of the State, passed in 1877 and 1878. If the case was decided below on the first of these grounds, no federal question is involved.

It was settled long ago that, in cases coming to this court from the Supreme Court of Louisiana, the opinion of the court below, as set out in the record, may be referred to, if necessary, to determine whether the judgment is one we have authority to review. *Armstrong* v. *Treasurer of Athens Co.*, 16 Pet., 285; *Almonester* v. *Kenton*, 9 How., 9; *R. R. Co.* v. *Marshall*, 12 How., 167; *Cousin* v. *Labatut*, 19 How., 207 [60 U. S., XV., 604]; *Murdock* v. *Memphis*, 20 Wall., 633 [87 U. S., XXII., 443]. From the statement of the case and the opinion found in this record, it is manifest the decision was placed entirely on the ground that the judgment [106] was not collectible under the law as it stood before the Acts of 1876 and 1877 were passed. Consequently, the case was disposed of before the federal question presented by the pleadings was reached, and that question was not and

NOTE.—*Jurisdiction of U. S. Supreme Court where federal question arises, or where is drawn in question statute, treaty or Constitution of U. S.* See, *note* to Matthews v. Zane, 8 U. S. (4 Cranch), 382; *note* to Martin v. Hunter, 14 U. S. (1 Wheat.), 304; and *note* to Williams v. Norris, 25 U. S. (12 Wheat.), 117.

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need not have been decided. *Under these circumstances we have no jurisdiction, and the motion to dismiss is granted.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ASAHEL GAGE, *Appt.*,
v.
MARIA B. PUMPELLY ET AL. Exrs. of HARMON PUMPELLY, Deceased.

(See S. C., Reporter's ed., 164, 165.)

Jurisdiction as to amount.

When an appeal has been allowed, after a contest as to the value of the matter in dispute, and there is evidence in the record which sustains the jurisdiction of this court, the appeal will not be dismissed simply because, upon examination of all the affidavits, this court may be of the opinion that possibly the estimates acted upon below were too high, if there is no decided preponderance of evidence against jurisdiction.

[No. 974.]

Submitted Mar. 12, 1883. Decided Mar. 16, 1883.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

On motion to dismiss.

The case is sufficiently stated by the court.

Mr. **Edward G. Mason,** for appellee, in support of motion:

As this is a bill to remove cloud from title upon payment of all taxes due, the amount of taxes and not the real estate is the sum or value involved. The decree shows that the accumulated taxes of years, with accrued interest and penalties, are less than $1,200, and the payment of a sum below that amount satisfied the judgment in this case.

Walker v. *Malin*, 94 Ill., 596.

That a bill to remove cloud is not, properly speaking, a suit involving the freehold has been decided in Illinois. It was so held where the cloud was an alleged conveyance; *Akin* v. *Lloyd*, 28 Ill., 331; and was so held where the cloud was a tax certificate and would have been a tax deed but for an injunction.

Gage v. *Busse*, 94 Ill., 590.

The circuit court has already decided that the land is not worth $5,000. That was a question of fact, and was directly presented to that court. The court's opinion is plain, although it felt a delicacy about impeding any attempt to review its decisions, and therefore remitted appellee to this court to ask a dismissal of the appeal upon a question of fact decided by the circuit court in his favor, upon a preponderance of evidence.

Messrs. **Augustus N. Gage, Albert G. Riddle,** *H. E. Davis* and *J. E. Padgett*, for appellant, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied. Many of the affidavits sent up with the transcript state distinctly that the value of the property, which is the matter in dispute, exceeds $5,000. When an appeal has been allowed, after a contest as to the value of the matter in dispute, and there is evidence in the record which sustains our jurisdiction, the appeal will not be dismissed simply because, upon an examination of all the affidavits, we may be of the opinion that possibly the estimates acted upon below were too high. There is no such decided preponderance of the evidence in this case against jurisdiction as to make it our duty to dismiss the appeal which has been allowed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

EDWIN A. MERRITT, Collector of the PORT OF NEW YORK, *Plff. in Err.*,
v.
ALPHONSE STEPHANI ET AL.

(See S. C., Reporter's ed., 106-109.)

Duty Act—construction of.

*Under Schedule B of section 2504 of the Revised Statutes, which imposes a duty of thirty per cent *ad valorem* on glass bottles or jars filled with articles not otherwise provided for, such duty is chargeable on bottles filled with natural mineral water, although, by section 2505, mineral water, not artificial, is declared to be exempt from duty.

[No. 525.]

Argued Mar. 6, 1883. Decided Mar. 19, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the opinion of the court.

Mr. **S. F. Phillips,** *Solicitor-Gen.*, for plaintiff in error.

Messrs. **Edward Hartley** and *Walter H. Coleman*, for defendant in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit to recover back duties exacted by the plaintiff in error, as Collector of the Port of New York, on glass bottles imported in June, 1879, from Antwerp. The bottles contained natural mineral water. The Collector charged on the bottles a duty of thirty per cent *ad valorem*, under this provision of Schedule B of section 2504 of the Revised Statutes: "Glass bottles or jars filled with articles not otherwise provided for: thirty per centum *ad valorem*." The Collector charged no duty on the water, as being free under this clause of section 2505: "The importation of the following articles shall be exempt from duty: * * * Mineral waters, all, not artificial." At the trial, it was proved on behalf of the plaintiffs that mineral waters are and have always been generally imported [107] into this country in glass bottles, although sometimes contained in stone bottles or jugs, but that the glass bottle is the usual form and kind of package for natural mineral waters. The circuit court directed a verdict for the plaintiffs, and after a judgment for them the Collector sued out this writ of error.

In the opinion of this court delivered at this term in *Schmidt* v. *Badger* [*ante*, 328], the foregoing provision as to a duty on glass bottles or jars filled with articles not otherwise provided for, was under consideration. It was held that the duty of thirty per cent *ad valorem* was not

*Head note by *Mr. Justice* BLATCHFORD.

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a duty on the articles contained in the bottles, and on the bottles also, and was not a duty on the contents of the bottles, but was a duty merely on the bottles, leaving the articles imported in the bottles to be subject to such duty, if any, as was elsewhere imposed on them. If the contents were ale or beer, the duty on the [108] ale or beer was thirty-five cents per gallon, and the duty on the bottles was thirty per cent *ad valorem*. If the contents were natural mineral water, or mineral water not artificial, the water was free and the duty on the bottles was thirty per cent *ad valorem*. The duty on the bottle was independent of the duty on its contents, and was chargeable even though the contents were free. The statute does not contain any provision that the bottle shall be free when its contents are free, while it does contain a distinct provision that there shall be a duty of thirty per cent *ad valorem* on bottles, not otherwise provided for, filled with articles. The mineral water, not artificial, is free. By Schedule M of section 2504, artificial mineral water is made dutiable thus: "For each bottle or jug containing not more than one quart: three cents, and, in addition thereto, twenty-five per centum *ad valorem*; containing more than one quart: three cents for each additional quart, or fractional part thereof and, in addition thereto, twenty-five per centum *ad valorem*." Thus, as to artificial mineral water, the water and the bottles containing it are both charged with duty, while as to natural mineral water, it is free, and the bottles containing it are dutiable.

By section 13 of the Act of June 30, 1864, 13 Stat. at L., 214, the provision as to a duty on mineral or medicinal waters, or waters from springs impregnated with minerals, was as follows: "For each bottle or jug containing not more than one quart, three cents, and, in addition thereto, twenty-five per centum *ad valorem*; containing more than one quart, three cents for each additional quart, or fractional part thereof, and, in addition thereto, twenty-five per centum *ad valorem*."

By section 5 of the Act of June 6, 1872, 17 Stat. at L., 236, mineral waters, not artificial, were made free on and after August 1, 1872. The Act of 1872, sec. 46, repealed all prior inconsistent provisions. From this it is argued that after the Act of 1864 was passed, prior provisions, which might have embraced mineral water bottles, were annulled, and that, as the [109] Act of 1872 repealed the provisions of the Act of 1864 as to such bottles, and made mineral waters, not artificial, free, there was no law in force imposing a duty on the bottles containing such free waters. The answer to this view is, that the duty imposed by the Act of 1864 was a duty on the article composed of bottle and water, the specific duty and the *ad valorem* duty, being each of them a duty on the bottle and the water considered as one article. When the water was made free, the whole provision as to a duty on the aggregated bottle and water disappeared, leaving existing applicable general provisions to apply to the bottle.

The provisions so existing after the Act of 1872 took effect were those found in the Acts of 1861 [12 Stat. at L., 192] and 1864, and transferred into Schedule B of section 2504 of the Revised Statutes, and applied in this case. They were in force as express enactments, when the importation in this case was made. *Schmidt* v. *Badger*, *ubi supra*.

The judgment of the Circuit Court is reversed and the case is remanded to that court, with directions to grant a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

EDWIN A. MERRITT, Collector of the PORT OF NEW YORK, *Plff. in Err.*,
v.
JOSEPH PARK, Jr., ET AL.

(See S. C., Reporter's ed., 109, 110.)

Duty Act—construction of.

*The decision of this court in Schmidt v. Badger, *ante*, that, under the statutory provisions in question in this case, the proper duty on the importation of glass bottles containing beer was a duty of thirty per cent *ad valorem* on the bottles, in addition to a specific duty of thirty-five cents a gallon on the beer, confirmed and applied to this case.

[No. 711.]

Argued Mar. 6, 1883. Decided Mar. 19, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is sufficiently stated by the court.

Mr. S. F. Phillips, Solicitor-Gen., for plaintiff in error.

Messrs. **Edward Hartley** and *Walter H. Coleman*, for defendants in error. [110]

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit to recover back duties exacted by the plaintiff in error, as Collector of the Port of New York, on glass bottles imported in March, 1879, from London. The bottles contained beer, and the defendant exacted a specific duty of thirty-five cents a gallon on the beer and also a duty of thirty per cent *ad valorem* on the bottles. The bottles were the ordinary ale bottles of commerce. The circuit court directed a verdict for the plaintiffs, and they had a judgment, to review which the Collector brought this writ of error.

The question involved is the same, and arose under the same statutory provisions, as in the case of *Schmidt* v. *Badger* [*ante*, 328], decided by this court at this Term. It was there held that such duty on the bottles, in addition to such duty on the beer and ale contained in them, was a lawful duty. *That decision governs the present case, and the judgment of the Circuit Court is reversed and the case is remanded to that court, with directions to grant a new trial.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CITY OF OTTAWA, *Plff. in Err.*,
v.
WM. H. CAREY.

(See S. C., Reporter's ed., 110-124.)

Municipal bonds, when may be issued—corporate purpose—power to issue—ultra vires—manufactures—bonds when void—donation.

1. Legislative authority to a city to borrow money on the credit of the city, and to issue bonds there-

*Head note by *Mr. Justice* BLATCHFORD.

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for, does not authorize the issue of its bonds as a donation to a company or individual, to be used in the improvement of the water power within and near the city, to secure the practical and permanent use of said power to the city and its immediate vicinity.

2. The power contained in the charter of a city to borrow money, does not authorize the issue of its bonds, unless they are issued for a corporate purpose, where there is a constitutional prohibition against taxation by the city except for corporate purposes.

3. Municipal corporations have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied, except such as are essential to the objects and purposes of the corporation as created and established.

4. To the extent of their authority they can bind the people and the property subject to their regulation and governmental control by what they do, but beyond their corporate powers their acts are of no effect.

5. Power to govern the city does not imply power to expend the public money to make the water in the rivers available for manufacturing purposes.

6. Unless the specific power is granted to a municipal corporation to make subscriptions to capital stock or donations to corporations, for public improvements, all such subscriptions, and all such donations, as well as the corporate bonds issued for their payment, are absolutely void, even as against *bona fide* holders of the bonds.

7. Power to subscribe to the stock of a company does not authorize a donation by way of a bonus to the company to aid in the improvement.

[No. 694.]

Submitted Jan. 9, 1882. Decided Oct. 30, 1882. Judgment rescinded Jan. 15, 1883. Re-submitted Mar. 6, 1883. Decided Mar. 19, 1883.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This action was brought in the court below, by the defendant in error, to enforce the payment of certain municipal bonds issued by the defendant.

The case was tried without a jury. The court found the facts and rendered judgment thereon against the city and in favor of the plaintiff, for $72,814.76. Whereupon, the defendant sued out this writ of error.

The case was submitted at the last Term and early in this Term a decision was announced by this court reversing the judgment of the court below.

Subsequently, upon an application for a rehearing, that judgment was set aside and a reargument ordered. The case has accordingly been re-submitted on elaborate printed arguments, and the court again reverses the judgment of the court below.

The facts of the case are clearly stated by the court, and in its first decision,

Mr. Justice Harlan delivering the opinion of the court as follows:

The bonds here in suit were executed by the City of Ottawa, a municipal Corporation of the State of Illinois, and belong to the same issue as those involved in *Hackett* v. *Ottawa*, 99 U.S., 86 [XXV., 363], and in *Ottawa* v. *Nat. Bk.*, 105 U. S., 342 [XXVI., 1127]. In each of those cases, the holders were protected against the defenses interposed mainly upon the ground that, being *bona fide* purchasers for value, the City was estopped, by the recitals in the bonds, to say that they were not executed for proper or legitimate municipal purposes.

The present case differs from those, in certain particulars, which are disclosed by the special finding of facts. The ordinance of July 30, 1869, required the Mayor to issue bonds of the City, to the amount of $60,000, in accordance with the terms and conditions of the previous ordinance of June 15, 1869, and "That he deliver the same to Wm. H. W. Cushman, to be used by him in developing the natural resources and surroundings of the City, and that the said Cushman is authorized and directed to expend the same in the improvement of the water power upon the Illinois and Fox Rivers within the City and in the immediate vicinity thereof, under the franchises and powers which have been granted for that purpose by the Legislature of the State, or which may hereafter be granted for that purpose, in the manner which, in his judgment, shall best secure the practical and permanent use of said water power in the City and its immediate vicinity." The ordinance, however, made it a condition precedent to the delivery of the bonds to Cushman that he should execute and deliver to the mayor, for the City, his obligation that he would, without unnecessary or unreasonable delay, cause a good, substantial and sufficient dam to be constructed across Illinois River, above the City, for the purpose of bringing into use all the available water power of that river at Ottawa, and with sufficient head and tail races to make such water power available, the races to be constructed and continued to the Fox River, below the aqueduct and above the island in Fox River, as fast as the same may be required for actual use and as fast as it could be leased at fair and reasonable rates and be brought into actual operation; also, that he would erect a good, substantial and sufficient dam across Fox River, so as to make available for use the water power of both rivers at Ottawa as rapidly as called for. The ordinance further provided that Cushman should bind himself, if the work was not constructed as above required, to return the bonds, or their value, to the City, and save it harmless from all loss on account of the same, or on account of any interest accruing thereon; and in the event the work was not completed by him, that he would return the *pro rata* share of said bonds in the proportion that the cost of the work constructed should bear to the work not constructed; the whole of the bonds to be returned unless at least one of the dams, with the races necessary to make the water power thereby created available for practical use shall be completed.

On the 2d day of August, 1869, Cushman executed to the City his written obligation, embodying the terms and conditions required by the ordinance of July 30, 1869. The bonds were thereupon delivered to him by the mayor.

The court below, by consent of parties, tried the case without the intervention of a jury, and found, among other facts, that the City made no subscription of stock in the Ottawa Manufacturing Company, but issued the bonds as a donation for the purposes indicated in the con-

NOTE.—*Construction of grants to corporations.* See *note* to Charles Riv. Bridge v. Warren Bridge, 36 U. S. (11 Pet.), 420.

Corporations are limited to the exercise of powers conferred upon them. See *note* to Beaty v. Knowler, 29 U. S. (4 Pet.), 152.

Corporations possess only the powers conferred by the statute creating them and those necessarily implied. See *note* to Huntington v. Savings Inst., 96 U. S., XXIV., 777.

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tract with Cushman, the latter being the sole consideration it received for the bonds;

That, on the 11th day of March, 1871, Cushman delivered the bonds to the Ottawa Manufacturing Company, of which he was one of the corporators, and of which at the time he was a director, to be used by it for the purpose of making the improvement hereinbefore mentioned, without further consideration;

That the company "At once entered upon the work of constructing the dams and races and *partially* constructed the same under the powers granted to it, * * * and completed said work so that *some* water power was created, *but that said dam was carried away by a freshet in 1872 or 1873, and has never been reconstructed;*"

That, in June, 1871, the company sold and delivered the bonds in suit to Lester H. Eames, a citizen of Ottawa, for their face value and part of the interest which had accrued after August, 1870;

That, at the time Eames purchased the bonds he read their recitals, and had never heard their validity questioned, although the policy of issuing them and the legal authority to do so was the subject of discussion by the press and people of the City at about the time of their being issued;

That Eames had knowledge of the proceedings of the council in reference to the issue of the bonds, knew that they were issued for the purpose of being used as a donation to aid in the completion of the contemplated improvement, and knew of the contract between Cushman and the City in reference to the bonds; and,

That in November, 1869, after the bonds had matured, Eames sold and delivered them to the defendant in error, a citizen of Missouri, for value, the latter knowing, when he purchased, substantially all that Eames knew touching the history of the bonds and the purposes for which they had been applied.

We have seen that the general object which the City sought to accomplish was the development of its natural resources and advantages for manufacturing purposes. That end it proposed to attain by the construction of dams and races in such manner as to bring into practical and permanent use, in the City and its immediate vicinity, all the available power of both the Illinois and Fox Rivers. Consequently, the ordinances passed by the city council, and Cushman's contract, alike required the construction of good, substantial and sufficient dams and races. Now it is impossible to resist the conclusion that as to the work done, and as to the manner in which it was performed, there was a substantial, if not an entire, failure, upon the part of Cushman, and those whom he employed, to meet the terms of the agreement under which he, Cushman, received the bonds. The dams and races were, according to the facts found, only partially constructed. The work was completed only to the extent that *some* water power was created; and the dam erected, so far from being "good, substantial and sufficient" to secure the practical and permanent use of the water power, was carried away, in 1872 or 1873, by a freshet, and has never been reconstructed. Under these circumstances, the City, as between it and Cushman, was entitled to demand a return of all the bonds or their value, and to be saved harmless on account of them. If Cushman still held them, and had himself sued the City, the defense of the latter would be complete. Is Carey, the present holder, in any better position, as against the City, than Cushman would be, had he sued? This question must receive a negative answer, because Carey, and his immediate vendee, Eames, were well aware, at the time of their respective purchases, as well of the terms of the ordinance, in pursuance of which the bonds were issued, as of the contract between the City and Cushman; and also because, as the special finding sufficiently indicates, the same facts were known to the Ottawa Manufacturing Company when it received the bonds from Cushman, one of its corporators and directors. Neither Carey, nor Eames, nor the Company, were *bona fide* holders entitled to the benefit of the rule announced in *Hackett* v. *Ottawa* and *Ottawa* v. *Nat. Bk.* The work done was not of a character, as to extent, sufficiency or permanency, to entitle Cushman, had he sued, as against the City, to the payment of any of the bonds; and, consequently, for the reasons given, the City is not liable to Carey.

This conclusion renders it unnecessary to notice other questions raised by counsel, some of which relate to the authority of the City to issue the bonds under any circumstances, especially by way of donation.

After this case had been under submission, our attention was called to a recent decision of the Supreme Court of Illinois in *Wilson* v. *Mfg. Co.* That case is relied upon as authority for the proposition that the City had legal power to issue the bonds in question. In view of the ground upon which our conclusion, in this case, rests, it is needless to discuss that question in the different aspects in which it is presented.

The judgment is reversed, with directions to give judgment, upon the special finding of facts, for the City.

Messrs. **C. B. Lawrence** and *M. T. Moloney*, for plaintiff in error:

I. The Legislature of Illinois could not, under the Constitution of the State, authorize a town or city to issue its bonds for any but corporate purposes, and a donation of bonds to a private corporation, established for the purpose of creating a water power to be owned exclusively by such private corporation, was not an issue of bonds for a corporate purpose, and such bonds, in the hands of a purchaser with notice, are void.

S. Ottawa v. *Perkins*, 94 U. S., 264 (XXIV., 156); *People* v. *Dupuy*, 71 Ill., 653; *Pendleton Co.* v. *Amy*, 13 Wall., 304 (80 U. S., XX., 579); *Kenicott* v. *Supervisors*, 16 Wall., 452 (83 U. S., XXI., 319); *St. Joseph* v. *Rogers*, 16 Wall., 644 (83 U. S., XXI., 328); *Coloma* v. *Eaves*, 92 U. S., 484 (XXIII., 579); *Rogers* v. *Burlington*, 3 Wall., 671 (70 U. S., XVIII., 85); *Supervisors* v. *Weider*, 64 Ill., 427; *Livingston Co.* v. *Wieder*, 64 Ill., 432; *Johnson* v. *Stark Co.*, 24 Ill., 75; *Bissell* v. *Kankakee*, 64 Ill., 251; *English* v. *People*, 96 Ill., 569; *Loan Asso.* v. *Topeka*, 20 Wall., 655 (87 U. S., XXII., 455); *Lowell* v. *Boston*, 111 Mass., 460; *People* v. *Batchellor*, 53 N. Y., 143; Jones, R. R. Secur., sec. 123; *Iron Works* v. *Moundsville*, 11 W. Va., 1; *Hospital* v. *Luzerne Co.*, 84 Pa. St., 55; *Osborne* v. *Adams Co.* (*ante*, 129), and *Parkersburg* v. *Brown* (*ante*, 238), decided at the present Term of this court.

II. If these bonds had been issued for a corporate purpose, they, in order to be valid,

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should have been issued by authority of the Board of Commissioners specially appointed by the Legislature to take charge of this whole matter, to subscribe the stock and to issue and sell, at par, the bonds of the City to raise the money for its payment.

S. Ottawa v. *Perkins* (*supra*); *E. Oakland* v. *Skinner*, 94 U. S., 258 (XXIV., 126); *Middleport* v. *Ins. Co.*, 82 Ill., 562; *Supervisors* v. *People*, 25 Ill., 181; *Gaddis* v. *Richland Co.*, 92 Ill., 119; *Brush* v. *Ware*, 15 Pet., 93; *McClure* v. *Oxford*, 94 U. S., 432 (XXIV., 129).

III. Even if the bonds had been issued for a corporate purpose, and if they had been issued by the proper authorities, *viz.*: the board of commissioners, they would still be uncollectible by the present plaintiff, a purchaser with notice, because they were issued as a donation to a private manufacturing company; whereas, the commissioners were authorized to issue them only in payment of a corresponding amount of the stock of said company."

IV. Even if the bonds had been issued for a corporate purpose, and if they had been issued by the proper authorities, namely: the board of commissioners, they would still be uncollectible by the present plaintiff, because he bought with notice that they were issued to Cushman in consideration of his contract to build a good and substantial dam across the Illinois and Fox Rivers, sufficient to bring into use all the available water, and to protect the City on these bonds in case he did not create the water power; which contract he wholly failed to perform.

V. The statute authorized the commissioners to subscribe to the stock of the manufacturing company, and required them to raise the money for payment of the subscription, by issuing and selling bonds at not less than par. The mayor issued the bonds directly to Cushman, for delivery to the manufacturing company. Even if the bonds were otherwise free from exception this disposition of them was illegal.

Scipio v. *Wright*, 101 U. S., 665 (XXV., 1037); *Middleport* v. *Ins. Co.* (*supra*).

Messrs. **G. S. Eldredge** and **John Dean Caton**, for defendant in error:

The City of Ottawa had undoubted corporate power to issue the bonds in question, in pursuance of its charter, and they were thus issued for legitimate corporate purposes.

The City issued the bonds in question under its general and indisputable powers conferred by its charter, and so affirms upon the face of the bonds; hence, it is entirely immaterial and against the plaintiff, whether Cushman made any lawful or unlawful or unauthorized appropriation of them.

The question is simply, whether the general purpose in aid of which the bonds are voted is a public purpose, one affecting the general interests of the political community or of a private character; if the former and there was legislative authority for it, under its charter, it is a corporate purpose.

Maher v. *Chicago*, 38 Ill., 273; *Taylor* v. *Thompson*, 42 Ill., 11; *Burr* v. *Carbondale*, 76 Ill., 455; *Briscoe* v. *Allison*, 43 Ill., 291; *Johnson* v. *Campbell*, 49 Ill., 316; *Misner* v. *Bullard*, 43 Ill., 470; *R. R. Co.* v. *Smith*, 62 Ill., 268; *People* v. *Depuyt*, 71 Ill., 653; *People* v. *Trustees of Schools*, 78 Ill., 136; *R. R. Co.* v. *Morris*, 84 Ill., 410; *Hensley* v. *People*, 84 Ill., 544; *Hickling* v. *Wilson*, 104 Ill., 54; *People* v. *Kelly*, 76 N. Y., 477; *Weismer* v. *Village of Douglass*, 64 N. Y., 91; *Livingston Co.* v. *Darlington*, 101 U. S., 407 (XXV., 1015); *Hackett* v. *Ottawa*, 99 U. S., 93 (XXV., 364).

The question as to whether the bonds in the suit are valid, involves the question of the validity of commercial securities, which this court will determine for itself. They have never been held invalid by the state court, but on the contrary their validity has been affirmed by that court, and we submit that they are unquestionably sustainable as valid obligations under the Constitution of the State.

Pine Grove v. *Talcott*, 19 Wall., 666 (86 U. S., XXII., 227).

The distinction between corporate power and a corporate purpose must be kept in view.

The distinction between the case of *Loan Asso.* v. *Topeka*, 20 Wall., 661 (87 U. S., XXII., 460), and the case at bar is very clearly illustrated by the opinion of this court in *Burlington* v. *Beasley*, 94 U. S., 312 (XXIV., 163); but the case at bar is a much stronger one to sustain an appropriation in aid of a "public purpose," than is the *Beasley Case*.

The Act of February 19, 1867, providing that commissioners appointed by the Legislature in violation of the Constitution of Illinois of 1848, might subscribe for stock in the Ottawa Manufacturing Company on behalf of the City, and thus impose a debt *in invitum* upon the City was unconstitutional.

Harward v. *Drain Co.*, 51 Ill., 130; *Lovingston* v. *Wider*, 53 Ill., 303; *People* v. *Mayor*, 51 Ill., 17; *People* v. *Salomon*, 51 Ill., 37; *People* v. *Chicago*, 51 Ill., 58; *Gage* v. *Graham*, 57 Ill., 144; *Hessler* v. *Drainage Com.*, 53 Ill., 105; *Marshall* v. *Silliman*, 61 Ill., 218; *Middleport* v. *Ins. Co.*, 82 Ill., 562; *Barnes* v. *Lacon*, 84 Ill., 461; *R. R. Co.* v. *Aurora*, 99 Ill., 205; *R. R. Co.* v. *Sparta*, 77 Ill., 505.

The City is bound by its own construction of its charter power in this instance, and determination as a matter of fact, that the purpose for which the bonds were issued was a municipal purpose, as said by the Supreme Court of Illinois, to promote the general prosperity and welfare of the municipality.

Allegheny v. *McClurkan*, 14 Pa. St., 82.

That the construction given to the charter by the city authorities themselves, and their determination that the improvement sought to be aided was a corporate purpose, is conclusive upon the City, is shown by the following cases:

James v. *Milwaukee*, 16 Wall., 159 (83 U. S., XXI., 267); *Adams* v. *Lawrence Co.*, 2 Pittsburg (U. S. C. Ct.), 60; *Luling* v. *Racine*, 1 Biss., 314; *Van Hostrup* v. *Madison*, 1 Wall., 291 (68 U. S., XVII., 533); *Meyer* v. *Muscatine*, 1 Wall., 393 (68 U. S., XVII., 567); *Davies Co.* v. *Huidekoper*, 98 U. S., 98 (XXV., 112); *Society for Savings* v. *New London*, 29 Conn., 174; *Moran* v. *Comrs.*, 2 Black, 722 (67 U. S., XVII., 342).

Municipal corporations have the same powers as private persons, with respect to their contracts, except when restricted by necessary implication.

Keithsburg v. *Frick*, 34 Ill., 405; *Galena* v. *Corwith*, 48 Ill., 424; *Rumbroth* v. *Pittsburg*, 41 Ill., 278; *Mayor* v. *Ray*, 19 Wall., 468 (86 U. S., XXII., 164); *Ray Co.* v *Vansycle*, 96 U. S., 687 (XXIV., 804).

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All doubts as to their corporate power should be resolved in favor of the *bona fide* holder when the general power to execute bonds exists. The municipality is estopped from questioning their validity after their issue and sale. It is gross negligence, which will not be tolerated, for them to promote the negotiation of their bonds under such circumstances of general publicity, without any attempt to enjoin their issue.

Ray Co. v. *Vanseycle*, 96 U. S., 675 (XXIV., 800); *Orleans* v. *Platt*, 99 U. S., 681 (XXV., 405); *Block* v. *Comrs.*, 99 U. S., 686 (XXV., 491).

By the payment of interest to Eames, on the 2d of August following, the City ratified the transfer of the bonds by Cushman to the manufacturing company, and by the latter to Eames, and thus recognized Eames' *status* as a *bona fide* holder of the bonds, and most emphatically thereby said there had been no breach of the contract; and upon every principle of law and equity is thereby estopped from ever questioning it as against him or Carey, the plaintiff below, as his assignee; and as against them for questioning the legitimate municipal character of the purpose for which the bonds were issued.

And again; the recitals upon the face of the bonds, and by the sale and negotiation of its bonds and the levying of taxes to pay interest upon them must conclude the City upon the question, and estop it from now questioning the municipal character of the improvement; when as said by *Mr. Justice* Grier, *Adams* v. *Lawrence Co.*, 2 Pittsburg, 60, 64-66: "This sharp construction is not demanded until the convenience of total repudiation has been discovered." Your Honors, we submit, as said by *Justice* Grier, will not now permit the City to repudiate its own practical construction of its charter, to enable it to repudiate its obligations made under it.

Woodhull v. *Beaver Co.*, 3 Wall., Jr., 274; *Allegheny* v. *McClurkan*, 14 Pa. St., 82; *People* v. *Kelly*, 76 N. Y., 475; *Society for Savings* v. *New London*, 29 Conn., 174; *Luling* v. *Racine*, 1 Biss., 314; *Orleans* v. *Platt*, 99 U. S., 676 (XXV., 404); *Ray Co.* v. *Vanseycle* (*supra*); *Block* v. *Comrs.* (*supra*); *Galena* v. *Corwith*, 48 Ill., 424; *Mayor* v. *Ray* (*supra*); *Moran* v. *Comrs.*, 2 Black, 732 (67 U. S., XVII., 847).

IV. Eames was a *bona fide* purchaser of the bonds. He was not chargeable with constructive notice of anything but the charter power of the City to issue them; not even gross negligence; nothing short of positive fraud and an attempt on his part, in collusion with the officials of the City, to commit a fraud, could impair his right as a *bona fide* holder; gross negligence, even, alone, would not affect it.

Murray v. *Lardner*, 2 Wall., 120 (69 U. S., XVII., 859); *Cromwell* v. *Sac. Co.*, 96 U. S., 51 (XXIV., 681); *Nat. Bk.* v. *Crow*, 60 N. Y., 85; *Seybel* v. *Nat. Currency Bank*, 54 N. Y., 288; *Chapman* v. *Rose*, 56 N. Y., 137; *Welch* v. *Sage*, 47 N. Y., 143; Byles, Bills, 115; *Comstock* v. *Hannah*, 76 Ill., 530.

Eames had the right to rely on the fact that the charter gave the power to the City to borrow money for municipal purposes, and the determination of the City, as before suggested, as to whether it was a municipal purpose for which they proposed to expend it. Knowing that the City had the power, and believing their representations to be true, he was as much a *bona fide* purchaser as were the plaintiffs in the *Hackett* and *Portsmouth Cases*. Good faith, under such circumstances, means an honest purpose; nothing more. This court, by its own decisions, it is respectfully submitted, settled this question in the affirmative.

Goodman v. *Simonds*, 20 How., 343 (61 U. S., XV., 934); *Murray* v. *Lardner* (*supra*); *R. R. Co.* v. *Cowdrey*, 11 Wall., 459 (78 U. S., XX., 199); see, also, *Comstock* v. *Hannah*, 76 Ill., 530; *McConnel* v. *Street*, 17 Ill., 253; *Hardin* v. *Gouveneur*, 69 Ill., 148; *Woodward* v. *Blanchard*, 16 Ill., 424; *McCagg* v. *Heacock*, 42 Ill., 157; *Winters* v. *Haines*, 84 Ill., 588; *Hodgen* v. *Henrichsen*, 85 Ill., 262; *Smith* v. *Ferguson*, 91 Ill., 307.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit to recover upon bonds issued by the City of Ottawa, Illinois, as a donation to aid in the improvement of the water power upon the Fox and Illinois Rivers within the City, or in its immediate vicinity. Other bonds of the same issue are involved in *Hackett* v. *Ottawa*, 99 U. S., 86 [XXV., 363], and *Ottawa* v. *Nat. Bk.*, 105 U. S., 342 [XXVI., 1127], where it was held, in substance, that, as there was legislative authority to issue bonds for municipal purposes, and it was recited in the bonds then sued on that they were issued for such purposes; the City was estopped from proving, as against *bona fide* holders, that the recitals were untrue. Neither Hackett nor the bank had any knowledge of the precise purposes for which the bonds were issued, and it was adjudged that they had the right to rely on what was recited. [119]

The facts on which this case rests are, in brief, these:

The City of Ottawa was incorporated as a city in Illinois, on the 10th of February, 1853, and given the ordinary powers of municipal corporations of that class for local government. It was specially authorized "To provide the City with water, to erect hydrants and pumps in the streets for the convenience of its inhabitants," and, upon a vote of the people, "to borrow money on the credit of the City, and to issue bonds therefor, and pledge the revenue of the City for the payment thereof." Our attention has not been called to any other provision of the charter as having a bearing on the questions to be considered.

In February, 1851, the Ottawa Manufacturing Company was incorporated by the General Assembly of Illinois, to build a dam across the Fox River for the purpose of creating a water power to be leased and used. On the 16th of February, 1865, the charter of this Company was amended so as to authorize the building of a dam across the Illinois River, and a race to bring the water from that river into the pool of the dam across the Fox.

On the 19th of February, 1867, the General Assembly passed an Act purporting to constitute a board of commissioners to subscribe $100,000 to the capital stock of the manufacturing company for and on behalf of the City, and to pay the subscription by an issue of the bonds of the City. No subscription was ever made under this authority, and we understand the counsel for the defendant in error to concede that the Act itself was unconstitutional.

On the 15th of June, 1869, an ordinance was passed by the City, submitting to the voters at

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an election, to be held on the 20th of the same month, the question whether the council should borrow $60,000 on the bonds of the City to be expended in developing the natural advantages of the City for manufacturing purposes. This election was held, and resulted in a vote by a majority of the legal voters in favor of the project. Thereupon, the City, on the 30th of July, [120] 1869, passed another ordinance, directing the mayor to issue the bonds and deliver them to William H. W. Cushman, "To be used by him in developing the natural resources and surroundings of the City," and authorizing and directing him to expend the same in the improvement of the water power upon the Illinois and Fox Rivers, within the City and in the immediate vicinity thereof, under the franchises and powers which have been granted for that purpose by the Legislature of the State, or which may hereafter be granted for that purpose, in the manner which, in his judgment, shall best secure the practical and permanent use of said power in the City and its immediate vicinity.

Under this ordinance, the bonds were issued and delivered to Cushman on the 2d of August, 1869, as a donation to aid the City in securing the contemplated water power, he agreeing in writing to cause the necessary works to be completed in the two rivers within a reasonable time and, if not, to return the bonds or a part thereof, according to the special provisions of the contract. No arrangements were made or contemplated, for providing the City with water.

Cushman was one of the original corporators of the manufacturing company, and a director at the time the bonds were issued to him, and he, on the 11th of March, 1871, delivered them to the company "To be used by said company for the purpose of making the improvement hereinbefore mentioned, without further consideration." During the month of June, 1871, the company sold and delivered the bonds involved in this suit to Lester H. Eames, a citizen of Ottawa, for their face value and part of the interest which had accrued after August, 1870. When Eames made his purchase and paid for the bonds, he knew they had been issued as a donation to aid in the completion of the improvement contemplated in the contract with Cushman, and was cognizant of all the proceedings of the council in reference thereto. He also knew of the contract with Cushman. In November, 1879, after the bonds fell due, Eames sold them to William H. Carey, the plaintiff below, who paid value for them, with full knowledge of all that was known by Eames about their issue.

[121] Upon these facts, found by the court and set forth in the record, judgment was rendered against the City and in favor of Carey for $72,814.76. To reverse that judgment, this writ of error has been brought.

This case differs from those of *Hackett* and the *Nat. Bk.*, *supra*, in that Carey cannot claim protection as a *bona fide* holder, while Hackett and the bank could. Neither Carey, nor Eames, nor the manufacturing company, nor Cushman, were purchasers without notice. Carey and Eames both paid value, but Carey bought after maturity, and it is expressly found that both he and Eames had actual knowledge of the purposes for which the bonds were issued, and of the contract with Cushman. Under the circumstances of this case, the manufacturing company is chargeable with knowledge of all the facts known to Cushman, one of its directors and the original contractor with the City. The questions then to be considered are such as may arise between the City and a purchaser for value from Cushman with full knowledge of all the facts affecting the validity of the bonds at their inception.

In Illinois, under the Constitution of the State, the corporate authorities of cities cannot be invested with power to levy and collect taxes except for corporate purposes. This has long been settled. *Weightman* v. *Clark*, 103 U. S., 259 [XXVI., 393], and numerous Illinois cases there cited. What may be made a corporate purpose is not always easy to decide, but it has never been supposed that if legislative authority had not been granted to a municipal corporation to do a particular thing, that thing could be a purpose of that corporation.

Municipal corporations are created to aid the State Government in the regulation and administration of local affairs. They have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established. 1 Dill. Mun. Corp., sec. 89, 3d ed., and cases there cited. To the extent of their authority, they can bind the people and the property subject to their regulation and governmental control by what they do, but beyond their corporate powers their acts are of no effect. [122]

It is not claimed that express authority was given the City of Ottawa to develop, or aid in developing, the natural advantages of its rivers for manufacturing purposes; and what we are now called on to decide is, not whether, if such a power had been given, it would be within the general scope of the purposes of a city government, and thus a corporate purpose, within the meaning of that term as used in the Constitution, but whether it has been granted by the Legislature. Much is said by the Supreme Court of Illinois in *Taylor* v. *Thompson*, 42 Ill., 11; *R. R. Co.* v. *Smith*, 62 Ill., 268; *People* v. *Dupuyt*, 71 Ill., 655; *Burr* v. *Carbondale*, 76 Ill., 455; *People* v. *Trustees of Schools*, 78 Ill., 187; *R. R. Co.* v. *Morris*, 84 Ill., 410; *Hensley* v. *People*, Id., 544, and other cases of like character, as to what may be made a corporate purpose, but these were all cases in which the Legislative Department of the Government had undertaken to grant a power, and the question was whether the power was one that could rightfully be made a purpose of a municipal corporation. No matter how much authority there may be in the Legislature to grant a particular power; if the grant has not been made, the City cannot act under it.

As power in a municipal corporation to borrow money and issue bonds therefor implies power to levy a tax for the payment of the obligation that is incurred, unless the contrary clearly appears, *Ralls Co.* v. *U. S.*, 105 U. S., 733 [XXVI., 1220], it follows that the power contained in the charter to borrow money did not authorize the issue of the bonds in this case, unless they were issued for a corporate purpose,

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there being a constitutional prohibition against taxation by the City, except for corporate purposes. The question then is, whether the City has been invested with power to raise money by public taxation, to be donated to private persons or private corporations as a *bonus* for developing the water power in the City or its vicinity for manufacturing purposes.

[123] The charter confers all the powers usually granted to a City for the purposes of local government, but that has never been supposed of itself to authorize taxes for everything which, in the opinion of the city authorities, would promote the general prosperity and welfare of the municipality. Undoubtedly, the development of the water power, in the rivers that traverse the City, would add to the commerce and wealth of the citizens; but certainly power to govern the City does not imply power to expend the public money to make the water in the rivers available for manufacturing purposes. It is because railroads are supposed to add to the general prosperity that municipalities are given power to aid in their construction by subscriptions to capital stock or donations to the corporations engaged in their construction, but in all the vast number of cases involving such subscriptions and donations that have come before this court for adjudication since *Knox Co.* v. *Aspinwall*, decided twenty-five years ago, and reported in 21 How., 539 [62 U. S., XVI., 208], it has never been supposed that the power to govern of itself implied power to make such subscriptions or such donations. On the contrary, it has been over and over again held, and as often as the question was presented, that unless the specific power was granted, all such subscriptions and all such donations, as well as the corporate bonds issued for their payment, were absolutely void even as against *bona fide* holders of the bonds. *Thompson* v. *Lee Co.*, 3 Wall., 330 [70 U. S., XVIII., 178]; *Marsh* v. *Fulton Co.*, 10 Wall., 676 [77 U. S., XIX., 1040]; *St. Joseph* v. *Rogers*, 16 Wall., 659 [83 U. S., XXI., 336]; *McClure* v. *Oxford*, 94 U. S., 482 [XXIV., 129]; *Wells* v. *Supervisors*, 102 U. S., 630 [XXVI., 124]; *Allen* v. *La.*, 103 U. S., 86 [XXVI., 320].

In the present case, there is nothing whatever to indicate any special authority in this City to pay a *bonus* for the work that was to be done. It did have power to provide the City with water, but there is nowhere anything looking to such a purpose in this transaction. The object here was to bring the water into use as power, to be leased or sold at reasonable rates. An attempt was made by the Legislature to authorize a subscription to the stock of the manufacturing company; but that was of no avail, because in the form adopted the legislation was confessedly unconstitutional. The charter, therefore, stands the same as though no such attempt had [124] been made, and what was done did not create a corporate purpose to effect an improvement of the power. But even if there had been power to subscribe to the stock, it would not follow there was power to make a donation by way of a *bonus* to the company to aid in the improvement. In *R. R. Co.* v. *Smith*, *supra*, it was indeed said that the distinction between a donation to aid a company and a subscription to its stock was more apparent than real; but that was said in reference to the question of making subscriptions and donations corporate purposes, and not with reference to the effect of a power to subscribe as conferring a power to donate. In no case to which our attention has been called has it been held that a power to subscribe stock would of itself authorize a donation.

The case of *Hickling* v. *Wilson*, decided by the Supreme Court of Illinois in June of last year, and reported in 104 Ill., 54, is relied upon in support of this judgment. That was a suit by a creditor of the manufacturing company against the stockholders, to collect his debt. The City was not a party, and its liability was in no way involved. In the opinion, as published in the official report of the case, it was not even assumed that there was corporate power to issue the bonds.

The present case was submitted at the last Term [see, XXVI., 1127], and at a former day in this Term a decision was announced reversing the judgment; but in the opinion reasons were assigned for the reversal different from those now given. That judgment was afterwards, upon application for a rehearing, set aside and a reargument ordered. Upon further consideration of the whole case, we prefer to rest the decision on the ground that as between Cushman and the City, the bonds in question were illegal and void, and as the present holder occupies no better position than Cushman, he and all those under whom he claims having bought with full knowledge of all the facts, the judgment should have been in favor of the City.

The judgment of the Circuit Court is, consequently again reversed and the cause remanded, with instructions to enter another judgment in favor of the City, on the facts found.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 286, 287; 112 U. S., 165; 114 U. S., 7.

CHESTER A. ARTHUR, late Collector of the PORT OF NEW YORK, *Plff. in Err.*, [125]

v.

DAVID FOX ET AL.

(See S. C., Reporter's ed., 125-130.)

Tariff laws.

If an article not enumerated in the tariff laws bears a similitude, either in material, quality, texture or use to which it may be applied, to any article enumerated as chargeable with duty, and the similitude is substantial, then it is to be deemed the same, and to be charged accordingly.

[No. 718.]

Argued Mar. 6, 1883. Decided Mar. 19, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

This action was brought in the court below, by the defendants in error, to recover certain duties alleged to have been illegally exacted.

The trial having resulted in a verdict and judgment for $2,644.18 in favor of the plaintiffs, the defendant sued out this writ of error.

Mr. **S. F. Phillips**, *Solicitor-Gen.*, for plaintiff in error.

Messrs. **Edwin B. Smith** and *S. G. Clarke*, for defendants in error.

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Mr. Chief Justice **Waite** delivered the opinion of the court:

David Fox and Rose Fox, the defendants in error, imported from Liverpool certain goods called velours, composed of cow or calf hair, vegetable fiber and cotton, an imitation of seal skin, and used for manufacturing hats and caps. The goods were not specifically enumerated in the tariff Acts, but "In the use to which they were put, and in appearance and material, resembled manufactures of goats' hair and cotton more nearly than any other article of commerce. The goats' hair and cotton goods are also imitations of seal skin, and all these goods of both kinds are frequently commercially called 'seals,' and [126] are made to represent seal skin and are used for the purposes for which seal skin is used." The component material of chief value in velours is cow and calf hair, and not cotton.

The provisions of the tariff Acts, involved in the determination of the duties to be paid on the importation, are as follows:

"Rev. Stats., Sec. 2504, Sched. A.

* * * * * * * * *

Cotton braids, insertings, lace, trimming, or bobbinet, and all other manufactures of cotton, not otherwise provided for, thirty-five per centum *ad valorem*.

Sched. L.

* * * * * * * * *

Flannels, blankets, hats of wool, knit goods, balmorals, woolen and worsted yarns, and all manufactures of every description composed wholly or in part of worsted, the hair of the alpaca, goat or other like animals, except such as are composed in part of wool, not otherwise provided for, valued at not exceeding forty cents per pound, twenty cents per pound; valued at above forty cents per pound and not exceeding sixty cents per pound, thirty cents per pound; valued at above sixty cents per pound and not exceeding eighty cents per pound, forty cents per pound; valued at above eighty cents per pound, fifty cents per pound, and, in addition thereto, upon all the above named articles, thirty-five per centum *ad valorem*.

Sec. 2499. There shall be levied, collected and paid on each and every non-enumerated article which bears a similitude, either in material, quality, texture or the use to which it may be applied, to any article enumerated in this title, as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned;

And if any non-enumerated article equally resembles two or more enumerated articles, on which different rates of duty are chargeable, there shall be levied, collected and paid on such non-enumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest duty.

And on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which any of its component parts may be chargeable."

[127] The importers claimed that the goods were dutiable at thirty-five per centum *ad valorem* as manufactures of cotton, while the Collector exacted a duty of fifty cents per pound, and thirty-five per cent *ad valorem* on account of the similitude they bore to manufactures composed wholly or in part of the hair of the goat without wool. The duties were paid according to the demand of the Collector, and this suit was brought to recover back the excess of what was paid over the duty on manufactures of cotton; that is to say, to recover back the charge of fifty cents per pound. On the trial, the circuit court instructed the jury to find for the importers, and to reverse a judgment upon a verdict under such an instruction, this writ of error was brought.

Section 2499 of the Revised Statutes is a re-enactment of section 20 of the Act of August 30, 1842, ch. 270, 5 Stat. at L., 565, as to which this court said, in *Stuart* v. *Maxwell*, 16 How., 160, speaking through *Mr. Justice* Curtis: "It was designed to afford rules to guide those employed in the collection of revenue in certain cases likely to occur, not within the letter but within the real intent and meaning of the laws imposing duties, and thus to prevent evasions of those laws. Manufacturing ingenuity and skill have become very great, and diversities may be expected to be made in fabrics adapted to the same rules and designed to take the same places as those specifically described by some distinctive marks, for the mere purpose of escaping from the duty imposed thereon. And it would probably be impossible for Congress, by legislation, to keep pace with the results of these efforts of interested ingenuity. To obviate, in part at least, the necessity of attempting to do so, this section was enacted." And again, p. 161: "By providing for the principal thing, it has provided for all other things which the law declares to be the same. It is only upon this ground that sheer and manifest evasions can be reached. Suppose an article is designed to serve the uses and take the place of some article described, but some trifling or colorable change is made in the fabric or some of its incidents. It is new in the market. No man can say he has ever seen it before, or knows it under any commercial name. But it is substan- [128] tially like a known article which is provided for. The law of 1842, R. S., sec. 2499, then declares that it is to be deemed the same, and to be charged accordingly; that the Act of 1846 (the tariff Act then in force) has provided for it under the name it resembles."

These observations may well be applied to the present case. The goods in question are non-enumerated. But they are substantially like a manufacture of goats' hair and cotton which is enumerated. They are put to the same uses, look the same and frequently, in commerce, are called by the same name. They are made of cotton and cow hair, and are evidently of equal quality with the manufactures of cotton and goats' hair, because, in this case, they are charged with a duty of fifty cents per pound, thus indicating a value of eighty cents a pound or over, which calls for the highest duty per pound put on the goats' hair goods. It would seem to be difficult to find a closer resemblance between two articles of manufacture which were not identically the same.

But it is contended that if a non-enumerated "Article is made of materials, any of which are mentioned in the statute, it is dutiable at the highest rate imposed on either of its constituents; if neither the article nor any of its component materials is designated in the tariff, then

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(and then only) it is dutiable according to its similitude in material, quality, texture or use; and if, in these particulars, it equally resembles two or more enumerated articles, it pays the highest duty placed upon any of such like articles." Such, in our opinion, is not the effect of the statute. If an article is found not enumerated in the tariff laws, then the first inquiry is whether "it bears a similitude, either in material, quality, texture or use to which it may be applied, to any article enumerated * * * as chargeable with duty." If it does and the similitude is substantial, then, in the language of the court, in *Stuart* v. *Maxwell*, *supra*, "It is to be deemed the same, and to be charged accordingly." In other words, although not specifically enumerated, it is provided for under the name of the article it most resembles. If nothing is found to which it bears the requisite [129] similitude, then an inquiry is to be instituted as to its component materials, and a duty assessed at the highest rates chargeable on any of the materials. Any other construction would leave the law open to evasions, which, as was also said in *Stuart* v. *Maxwell*, it was the object of this statute, enacted more than forty years ago and kept continually in force since, to prevent.

None of the cases in this court governed by the statute in question sustain the position of the importer. In *Stuart* v. *Maxwell* it was not shown that the goods imported bore a similitude to any other article, and so resort was had to their component materials. The same is true of *Arthur* v. *Herman*, 96 U. S., 141 [XXIV., 812], where the importation was of "certain cheap goods, the wharf of which was made of cotton and the filling or woof of cattle hair," and the only question was whether they were to be charged at thirty-five per cent *ad valorem*, under the Act of June 30, 1864, ch. 171 [13 Stat. at L., 214], or at ninety per cent of thirty-five per cent, under the Act of June 6, 1872, ch. 315 [17 Stat. at L., 236]. This depended on whether cotton was the component part of chief value. There was no attempt to show their similitude to any other article, and both parties agreed that they were dutiable as manufactures of cotton. In *Murphy* v. *Arnson*, 96 U. S., 131 [XXIV., 773], the question was, whether the article imported resembled essential oil in material, quality or texture, and the decision was that it did not. Consequently, resort was had to the material clause of the similitude Act. In *Fisk* v. *Arthur*, 106 U. S., 434 [XXVI., 521], an article composed of cotton and linen, cotton being the material of chief value and largely predominating, was adjudged to be dutiable, under the similitude Act, as a manufacture of cotton, notwithstanding it was composed of mixed materials, and this because "In material, quality and texture, as well as the use to which it is to be put, it is precisely like cotton shirtings." To say that goods made of cow or calf hair and cotton, which were in all respects like goods made of goats' hair and cotton, and applied to the same uses, often bearing the same name in commerce, were to be dutiable at one rate as manufactures of cotton, when the goats' hair goods were assessed at a much higher rate, would be to encourage evasions of the descriptive terms in the [130] tariff laws "By some trifling or colorable change in the fabric or some of its incidents."

In our opinion, on the case as made by the bill of exceptions, the court erred in instructing the jury to find for the importer and the judgment is, consequently, reversed, and the cause remanded, with instructions to grant a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CHARLES WINCHESTER, *Appt.*,
v.
HENRY M. LOUD.

(See S. C., Reporter's ed., 130-132.)

Removal of cause.

Although one defendant is the principal defendant in interest, yet if full and complete relief cannot be afforded in respect to the single cause of action, without the presence of all the parties to the suit, and all the defendants are directly interested in the relief that is asked, it cannot be severed and removed by him from a state court to the circuit court.

[No. 924.]

Submitted Feb. 5, 1883. Decided Mar. 19, 1883.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

The history and facts of the case appear in the opinion of the court.

Messrs. **S. M. Cutcheon** and *C. A. Kent*, for appellant:

Under the Act of March 3, 1875, 18 Stat. at L., part 3, 470, the court will arrange the indispensable parties on opposite sides of the real matter in dispute, according to the facts.

Removal Cases, 100 U. S., 457 (XXV., 593); *Barney* v. *Latham*, 103 U. S., 205 (XXVI., 514).

The mere fact that Aaron F. Gay is placed in the bill as a defendant in this suit, does not change his relation to the controversy in the case.

Board of Co. Comrs. v. *R. R. Co.*, 4 Dill., 277.

The plaintiff and Aaron F. Gay are on the plaintiff's side of the first and second controversies. And they are citizens of the State of Michigan. The appellant, Winchester, is the only indispensable party to the other side of these controversies, and he is a citizen of the State of Massachusetts. Therefore, upon the filing of the petition and bond by the appellant. Winchester, the entire suit was removed to the Circuit Court of the United States.

Barney v. *Latham* (*supra*).

Messrs. **A. F. Britton**, *J. H. McGowan* and *D. C. Holbrook*, for appellee:

The object of the bill against Winchester is to determine what are his rights and obligations, and they are so stated that, in order to determine them, it is necessary to determine the rights and obligations of all the other parties.

That all of these parties are necessary, in the controversy with Winchester, is supported by the doctrine of the following authorities: Story, Eq. Pl., 8th ed., secs. 207-210; *Shields* v. *Barrow*, 17 How., 130 (58 U. S., XV., 158); *Hoe* v. *Wilson*, 9 Wall., 501 (76 U. S., XIX., 762); *Robertson* v. *Carson*, 19 Wall., 94 (86 U. S., XXII., 178); *Williams* v. *Bankhead*, 19 Wall., 571 (86

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U. S., XXII., 187); *Eldredge* v. *Putnam*, 46 Wis., 205; *Holden* v. *Stickney*, 2 McArthur, 141.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit in equity, begun in a state court of Michigan by Henry M. Loud, the appellee, a citizen of Michigan, against Charles Winchester and Herbert F. Whiting, citizens of Massachusetts, and George E. Wasey, Henry N. Loud, and Aaron F. Gay, citizens of Michigan, and removed to the Circuit Court of the United States for the Eastern District of Michigan at the instance of the defendant Winchester, on the ground, as stated in the petition for removal, "That the principal controversy in said suit is wholly between said plaintiff (Henry M. Loud) and your petitioner (Winchester), who are citizens of different States, and which controversy can be fully determined as between them, and that your petitioner is actually interested in said controversy." When the copy of the record was filed in the circuit court, that court remanded the suit to the state court. From an order to that effect this appeal was taken.

The petition for removal was filed before answer, and we must look, therefore, to the bill alone to determine what the controversy is. From this it appears that Henry M. Loud claims that the defendants, Wasey, Henry M. Loud, [132] and Whiting, hold certain real and personal property in trust to secure a debt owing by him and the defendant Gay to the defendant Winchester, and after the debt is paid for the use and benefit of himself and Gay. He asks for an accounting by the trustees, the removal of Wasey and Whiting, and the appointment of others in their places; and after the debt is paid, a conveyance of what remains of the trust property in accordance with the terms of the trust. The case presents but a single controversy, although it involves the determination of several questions. It may be that Winchester is the principal defendant in interest, but full and complete relief cannot be afforded in respect to the single cause of action, to wit: the trust, without the presence of all the parties to the suit. According to the averments in the bill all the defendants, except Henry M. Loud, deny the existence of the trust, and if that should be established, all the defendants are directly interested in the relief that is asked. The case falls clearly within the rule stated in *Hyde* v. *Ruble*, 104 U. S., 407 [XXVI., 823].

The order remanding the suit is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 193.

JOHN A. ELLIOTT, *Appt.*,

v.

GEORGE A. SACKETT AND HUGH T. DICKEY.

(See S. C., Reporter's ed., 132-143.)

Reformation of deed—final decree—amount involved—agreement—mutual mistake—negligence and laches—payment of interest—relief.

*By a written agreement between S. and E., S. agreed to convey land to E., subject to an incumbrance on it of $9,000, and E. agreed to pay to S. $15,000, by conveying to him land, some of it "subject to" an incumbrance. Without any further bargain, S. delivered to E. a deed, conveying the land subject to the incumbrance, and also containing a clause stating that E. assumes and agrees to pay the debt secured by the incumbrance, as part of the consideration of the conveyance. E., being ill, did not read the clause in the deed respecting the assumption of the debt, but discovered it afterwards, and promptly brought this suit to have the deed reformed. He had made two payments of interest on the incumbrance. In the negotiations prior to the agreement, S., through his agent, had solicited E. to assume and agree to pay the incumbrance, but E. refused. S. understood the difference in meaning between the two forms of expression. D., the owner of the incumbrance, was no party to the transaction, and had done nothing in reliance on the deed. He was, on his own application, made a party to the suit, and also filed a cross-bill for a foreclosure of the incumbrance, and the enforcement of a personal liability against S. and E. for the debt. The circuit court made a decree dismissing the bill in the original suit, and adjudging that E. had agreed with S. to pay the amount due on the incumbrance; that S. and E. or one of them, should pay the debt due to D., and, in default thereof, the land should be sold, and the deficiency reported; and that, if S. should pay any part of the debt, he might apply for an order requiring E. to repay the amount to him. On an appeal by E., held:

(1) The decree was a final decree, as to E.,

(2) The amount involved in the original suit was the $9,000;

(3) The agreement created no liability on the part of E. to pay the debt to D.;

(4) There was a departure in the deed, through mutual mistake, from the terms of the actual agreement;

(5) Under the special circumstances of the case E. had a right to presume that the deed would conform to the written agreement, and was not guilty of such negligence or laches in not observing the provisions of the deed as should preclude him from relief, nor was he guilty of any laches in seeking a remedy;

(6) The payment by E. of interest on the incumbrance was not inconsistent with his not having assumed the payment of the debt;

(7) E. is entitled to have the deed reformed.

The case of Snell v. Insurance Co., 98 U. S., 85 [XXV.], cited and applied.

[No. 152.]

Argued Mar 14, 15, 1883. Decided Mar. 26, 1883.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

John A. Elliott filed the bill in this case in the Superior Court of Cook Co., Ill., to reform a deed, executed to him by one George A. Sackett, by striking out a clause whereby Elliott assumed and agreed to pay an indebtedness secured on the premises conveyed. Hugh T. Dickey, the holder of the indebtedness was made a party and removed the cause to the Circuit Court of the United States for the Northern District of Illinois, where he filed a cross-bill to foreclose the trust-deed securing his debt, and

*Head notes by *Mr. Justice* BLATCHFORD.

NOTE.—*What is final decree or judgment of state or other court from which appeal lies.* See *note* to Gibbons v. Ogden, 19 U. S. (6 Wheat.), 448.

Jurisdiction of U. S. Supreme Court dependent on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy. See *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

Assumption of mortgage by purchaser of premises; what constitutes; effect of; conveyance subject to mortgage.

Where the purchaser agrees to pay a prior mortgage on the premises, as part of the purchase money, he becomes as between himself and the seller the principal debtor and the seller becomes his surety. Mills v. Watson, 1 Sweeny, 374; Russell v. Pistor, 7 N. Y., 171; Thorp v. Keokuk Coal Co., 48 N. Y., 253;

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to obtain a decree against Sackett and Elliott for the payment of the same. At the hearing, the court entered a decree dismissing the original bill, sustaining the cross-bill and directing the payment of the debt by Sackett and Elliott, or one of them, and ordering a sale of the premises. From this decree Elliott appealed to this court.

The history and facts of the case more fully appear in the opinion of the court.

Messrs. **Wm. E. Mason** and *John N. Jewett*, for appellant.

Mr. **Edward G. Mason**, for appellees:

It must appear that a contract is different from the intention of both parties, to justify a court of equity in reforming it.

Story, Eq. Jur., 11th ed. p. 144, sec. 138, *n.* K.; *Schettiger* v. *Hopple*, 3 Grant, Cases, 54; *Nevius* v. *Dunlap*, 33 N. Y., 676; *Coffing* v. *Taylor*, 16 Ill., 457; *Ruffner* v. *McConnell*, 17 Ill., 217 *Sutherland* v. *Sutherland*, 69 Ill., 488; *Snell* v. *Ins. Co.*, 98 U. S., 89 (XXV., 54).

A court of equity will only reform a contract upon the clearest and most convincing proof of mistake.

Story, Eq. Jur., 11th ed., pp. 157, 161, secs. 152 and 157, and cases cited; *Schettiger* v. *Hopple*, 3 Grant's Cas., 58; *Nevius* v. *Dunlap*, 33 N. Y., 680; *Edmonds' Appeal*, 59 Pa., 220; *Ruffner* v. *McConnell*, 17 Ill., 217; *Hunter* v. *Bilyeu*, 30 Ill., 228; *Sutherland* v. *Sutherland*, 69 Ill., 488; *Ivinson* v. *Hutton*, 98 U. S., 82 (XXV., 67); *Snell* v. *Ins. Co.* (*supra*).

The evidence of the deed is not overcome by that of the preliminary contract, even if they differ.

Story, Eq. Jur., 11th ed., 164, sec. 160, and cases cited.

A purchaser taking a deed subject to an incumbrance, the amount of which is deducted from the purchase price, becomes personally liable for the same.

Comstock v. *Hitt*, 37 Ill., 549; *Fowler* v. *Fay*, 62 Ill., 377.

If Elliott made any mistake, it was one of law and not of fact, from which a court of equity will not relieve him.

Hunt v. *Rousmaniere*, 1 Pet., 16; *Bank* v. *Daniel*, 12 Pet., 33; *Sibert* v. *McAvoy*, 15 Ill., 109; *Wood* v. *Price*, 46 Ill., 441; *Snell* v. *Ins. Co.* (*supra*).

Even where the minds of the parties have never met, courts of equity do not interfere where there was gross negligence on the part of the plaintiff in falling into the error or in not sooner claiming redress.

Story, Eq. Jur., 11th ed., 143, sec. 138, *i*; *Graves* v. *Ins. Co.*, 2 Cranch, 444; *Grymes* v. *Sanders*, 93 U. S., 61 (XXIII., 801); *Snell* v. *Ins. Co.* (*supra*).

Nor do courts of equity interfere where intervening rights have accrued, or where the parties cannot be placed *in statu quo*. Both objections exist in the present case, and appellant makes no offer to restore matters to their former position.

Story, Eq. Jur., 11th ed., 143, sec. 138, *i*; *Grymes* v. *Sanders*, 93 U. S., 62 (XXIII., 801); *Canal Co.* v. *Montgomery*, 95 U. S. 19 (XXIV., 347); *Adams* v. *Stevens*, 49 Me., 362.

Mr. Justice **Blatchford** delivered the opinion of the court:

In February, 1876, George A. Sackett and John A. Elliott executed a written agreement under seal, which provided that if Elliott should first make the payments and perform the covenants thereinafter mentioned on his part to be made and performed, Sackett agreed to convey to him in fee simple, clear of all incumbrances, except as stated, whatever, by a warranty deed, the house and lot known as No. 166 Calumet Avenue, the lot 50x127 feet, in Chicago, Illinois, and to assign the insurance policy then on said improvements, and to pay to Elliott $50; that Elliott agreed to pay to Sackett $15,000, "Subject to an incumbrance now on said property" of $9,000, "in the manner following: lots 8, 9 and 10, block 5, Pittner & Son's addition to So. Evanston, being 150x200 feet, subject to an incumbrance of $1,750, and interest at 8 per cent from June, 1873, also lot one (1), block seven (7), Grant's subdivision of So. Evanston, and one hundred and twenty acres of land, Palo Alto Co., Iowa; the two last named pieces of property are clear of incumbrances; and title to pass by good and sufficient warranty deeds; and to pay all taxes, assessments or impositions that may be legally levied or imposed upon said lots, except and after the fourth installment of South Park assessment;" and, in case of the failure of Elliott to make either of the payments, or perform any of the covenants on his part, the contract to be forfeited and determined, at the election of Sackett, and Elliott to fulfill all payments made by him on the contract, and such payments to be retained by Sackett, in full satisfaction and liquidation of all damages by him sustained, and he to have the right to re-enter and take possession. [134]

By a warranty deed dated March 8, 1876, acknowledged the same day, and recorded March 10, 1876, Sackett and his wife conveyed to El-

Calvo v. Davis, 8 Hun, 222; affd. 73 N. Y., 211; Osborne v. Cabell, 77 Va., 462; Corbett v. Waterman, 11 Iowa, 86; George v. Andrews, 60 Md., 26.

He cannot question the consideration or validity of the mortgage. Freeman v. Auld, 44 N. Y., 50; Parkinson v. Sherman, 74 N. Y., 88; S. C., 30 Am. Rep., 266; Dunning v. Leavitt, 85 N. Y., 30; S. C., 39 Am. Rep., 617.

The grantee in a deed, merely reciting that he is to pay off the mortgage, is not liable to a personal judgment for the mortgage debt. Mason v. Barnard, 36 Mo., 384.

A covenant assuming the mortgage is of no advantage to the mortgagee if the covenant is invalid between the parties. Bull v. Titsworth, 29 N. J. Eq., 73.

The purchaser of mortgaged property who assumes the payment of the mortgage debt becomes personally liable. This does not discharge the mortgagor except as between himself and the purchaser. Schlatre v. Greaud, 19 La. Ann., 125; Calvo v. Davies, 8 Hun, 222; affd. 73 N. Y., 211; Meyer v. Lathrop, 10 Hun, 66; affd. 73 N. Y., 315; Ely v. McNight, 30 How. Pr., 97; Lilly v. Palmer, 51 Ill., 331; Gilbert v. Averill, 15 Barb., 20.

Where the property is sold subject to an incumbrance, the purchaser cannot contest or deny its validity. Porter v. Parmley, 52 N. Y., 185; Johnson v. Thompson, 129 Mass., 398; Howard v. Chase, 104 Mass., 249; Forgy v. Merriman, 14 Neb., 513; Conover v. Hobart, 24 N. J. Eq., 120; Green v. Turner, 38 Iowa, 112.

A purchaser of an undivided half of the mortgaged premises who assumes to pay one half the mortgage debt is only liable personally for one half thereof. Logan v. Smith, 70 Ind., 597.

Where a person purchases part of the mortgaged premises from the mortgagor and assumes payment of the mortgage, the land thus purchased is the primary fund for the payment of the mortgage. Bowne v. Lynde, 91 N. Y., 92; Russell v. Pistor, 7 N. Y., 171.

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liott the Calumet Avenue property, by a proper description. The deed expressed a consideration of $15,000, and contained this clause: "This conveyance is made subject to a trust-deed executed by the parties of the first part" (Sackett and wife) "to John De Koven, on the (10th) tenth day of May, 1870, securing the notes of said George A. Sackett to Hugh T. Dickey, for nine thousand dollars, due four years from that date, with interest of nine per cent per annum, interest payable semi-annually; and a further extension of payment, commencing on the tenth day of May, 1874, for same amount above mentioned (nine thousand dollars,) payable in five years from said date, with interest of nine per cent, the interest notes payable semi-annually, which debt, with its interest, the said party of the second part (Elliott) assumes and agrees to pay as part of the consideration of this conveyance, or purchase price above stated. The covenants hereinafter are subject to the above incumbrance." Then follow covenants of seisin and warranty and against incumbrances.

The controversy in the present case arises out of the difference between the written agreement executed by the parties and the deed to Elliott, there being no question as to the conveyances [135] by Elliott of the land which he agreed to convey. By the agreement, the Calumet Avenue property was to be conveyed subject to the $9,000 incumbrance. By the deed the conveyance is not only made subject to the incumbrance, but Elliott is made to assume and agree to pay the $9,000 debt as part of the consideration of the conveyance, or purchase price of $15,000.

In April, 1877, Elliott filed a bill in a state court in Illinois against Sackett, praying that the deed be reformed by striking therefrom the words stating that Elliott assumes and agrees to pay the $9,000 debt, as part of the consideration. The bill alleges that the consideration for the agreement of Sackett to convey the Calumet Avenue property to Elliott was the agreement of Elliott to convey to Sackett the other property named in the written agreement; that one Hill, as agent of Sackett, solicited Elliott to purchase the Calumet Avenue property; that, during the negotiations, Hill and Sackett solicited Elliott to assume the payment of the incumbrance, but Elliott refused to assume any liability on account of it, and insisted that he would simply purchase the property subject to the incumbrance, and thereupon the written agreement was made; that the statement in the deed that Elliott assumes and agrees to pay the incumbrance as a part of the consideration for the premises was contrary to the mutual understanding between Hill and Sackett and Elliott, and contrary to the written agreement; that Elliott, when he received the deed, was suffering under physical infirmities and mental distress and did not examine the deed as carefully as he should otherwise have done, but had the deed recorded, believing that Sackett had acted in good faith and had made the deed in conformity with the understanding of the parties and the written agreement; and that Elliott had recently discovered the mistake in the deed.

In June, 1877, Dickey, the owner of the $9,000 note made by Sackett and secured by the deed of trust, was by an order of the state court, on his petition, made a defendant in the suit and allowed to file an answer and a cross-bill. His answer controverts the material allegations of the bill. A few days later, on the petition of Dickey, the suit was removed into the Circuit Court of the United States for the [136] Northern District of Illinois, and Dickey filed a cross-bill in the latter court, making as defendants Sackett and his wife, De Koven, the trustee, Mattocks, his successor in the trust, Elliott, and Underwood, the tenant of Elliott. The cross-bill alleges that the whole amount secured by the note and the trust-deed is due, and that by the terms of the conveyance to Elliott he became liable to pay the debt to Dickey, and prays for a sale of the premises to pay the amount due, and a foreclosure of the equity of redemption of the defendants, and the payment of the debt out of the proceeds of sale, and a decree against Sackett and Elliott for any balance due beyond the proceeds of the sale.

Sackett answered the original bill. The answer admits that Sackett entered into an agreement in writing to convey the premises in a certain manner and on certain conditions, the exact words and terms of which he does not remember. It admits that Sackett, at the time of the negotiations with Elliott for the sale of the premises, solicited Elliott to assume and agree to pay the incumbrance of $9,000. It then proceeds: "And this respondent denies that the said complainant refused the said solicitations and request of this defendant, but this respondent avers and will, at the proper time and place, prove the truth to be, that when the negotiations, conversations and details, preliminary to the final completion of the transactions upon which this suit was brought, were ended and the parties were ready to close the transaction by the delivery of the deeds, it was fully

The mortgagee may treat both the mortgagor and purchaser who has assumed the mortgage as principal debtors so far as he is concerned, until he has recognized the purchaser as principal and the mortgagor as surety. Corbett v. Waterman, 11 Iowa, 86; Waters v. Hubbard, 44 Conn., 340; Rubens v. Prindle, 44 Barb., 336; Burr v. Beers, 24 N. Y., 178.

The acceptance of a deed stating that the grantee is to pay a mortgage renders him liable. Bishop v. Douglass, 25 Wis., 696; Locke v. Homer, 131 Mass., 93; S. C., 41 Am. Rep., 199; Taylor v. Whitmore, 36 Mich., 97; Wales v. Sherwood, 1 Abb. N. C., 101; Trotter v. Hughes, 12 N. Y., 74; Sparkman v. Cove, 44 N. J. L., 252; S. C., 27 Alb. L. J., 33.

Acceptance of a conveyance by grantee's authorized agent binding grantee to pay mortgage, is sufficient. Fairchild v. Lynch, 10 Jones & Sp., 265.

Though the grantee does not sign the deed, yet if it contain words importing that he will pay the debt he is deemed by accepting it to have entered into an agreement to do so. Collins v. Rowe, 1 Abb. N. C., 97; Belmont v. Coman, 22 N. Y., 438; Spaulding v. Hallenbeck, 35 N. Y., 204; Atl. Dock Co. v. Leavitt, 54 N. Y., 35; Pike v. Brown, 7 Cush., 133; Braman v. Dowse, 12 Cush., 227; Jewett v. Draper, 6 Allen, 434; Furnas v. Durgin, 119 Mass., 500; S. C., 20 Am. Rep., 341.

If a senior mortgagee purchases the premises, assuming the junior mortgage, the senior mortgage is postponed to the junior. Fowler v. Fay, 63 Ill., 375.

Where a deed containing a covenant to assume a prior mortgage is in fact a mortgage, after payment of the sum secured by said deed and a reconveyance of the premises to the grantor, such covenant cannot be enforced. Garnsey v. Rogers, 47 N. Y., 233; S. C., 7 Am. Rep., 440.

Where the grantee failed to pay a mortgage assumed by him, the grantor has a right of action against him for the amount of the mortgage and interest, without having previously paid any part of the same. Furnas v. Durgin, 119 Mass., 500; S. C., 20 Am. Rep., 341; Lethbridge v. Mytton, 2 B. & Ad., 772.

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and fairly understood by the parties to the same that a warranty deed conveying the said premises, 166 Calumet Avenue, should and would be accepted by the said Elliott with the condition of conveyance therein provided, *viz.*: that the said Elliott did assume and agree to pay, as a covenant of said deed, the before mentioned $9,000, and interest semi-annually, and the warranty deed of this defendant contained that provision accordingly." The answer also avers that Elliott carefully read over the deed in the office of Hill, at the time of the delivery of the papers in the transaction, in the presence of Sackett, "Being fully aware of and noting especially, as this defendant believes, from his [137] best recollection, the said clause in said deed which complainant now desires shall be expunged."

In March, 1878, Elliott answered the cross-bill, setting up that the clause in the deed from Sackett and wife as to the agreement by Elliott to pay the incumbrance was inserted by mistake or fraud on the part of Sackett or his agent, and repeating the averments of his original bill.

Replications were filed to the answer of Sackett to the original bill and to the answer of Elliott to the cross-bill, and the cross-bill was taken as confessed as to the other defendants in it, and the cause was referred to a master to take proofs and report the same to the court, with the amount due to Dickey. Proofs were taken and the causes were brought to a hearing thereon. The court made a decree dismissing the original bill for want of equity, and adjudging that all the material allegations in the cross-bill are proved; that the equities are with Dickey; that there is due to him from Sackett $11,399.28, with interest; and that Elliott, for a valuable consideration, assumed and agreed with Sackett to pay the amount due on the mortgage to Dickey. The decree then provides that Sackett and Elliott, or one of them, shall pay to Dickey, within one day from the date of the entry of the decree, the amount so due to him, with interest and costs of suit, and that, in case the payment is not made, the premises be sold by a master, and that he report any deficiency in the proceeds of sale to pay the amount due. The decree concludes with providing that in case Sackett shall pay such indebtedness, or any part thereof, he shall have leave to apply to the court, on notice to Elliott, for a further order, at the foot of the decree, requiring Elliott to repay to Sackett the sum so paid on said indebtedness. Elliott has appealed to this court.

It is objected by the appellee, Dickey, that there is nothing in the record to show that the amount in controversy exceeds $5,000; and that the decree, so far as Elliot is concerned, is not a final one. It is urged that the provision of the decree is, that, if the amount specified is not paid to Dickey within one day, the premises shall be sold, and, if the proceeds of sale are insufficient, the master shall report the amount of the deficiency; that this is not a deficiency decree against Elliott; that it does not appear that it will ever be necessary to enter a deficiency decree against any one; that, on the decree, as it stands, no execution can be issued against any one; that all the evidence goes to show that the deficiency decree will not exceed $2,000; and that the decree is merely interlocutory as to Elliott, because, until a sale is made, there can be no cause of complaint on the part of Elliott. The answer to this objection is, that the decree dismisses the original bill, and adjudges that Elliott agreed with Sackett, for a valuable and sufficient consideration, to pay the amount due on the incumbrance. The amount involved in the original suit is the entire amount of the incumbrance, which Elliott is made by the deed to him to agree to pay; and the bill seeks relief from liability for that amount, by striking out the clause from the deed. The decree denies that relief. If that relief was wrongly denied, all relief against Elliott under the cross-bill necessarily falls, as the only liability from Elliott [140] to Dickey arises from that clause in the deed.

On the merits, we are of opinion that Elliott is entitled to the relief he asks by his original bill. The terms of the written agreement between Sackett and Elliott are very clear, and show that the parties were merely making an exchange of land. Sackett agrees to convey to Elliott the Calumet Avenue property, subject to the $9,000 incumbrance, and to assign an insurance policy, and to pay $50. Elliott agrees to convey to Sackett three lots subject to a specific incumbrance, and two other pieces of property clear of incumbrance. It is true, that Elliott agrees to pay to Sackett $15,000, but the agreement expressly states that that sum is to be paid "in the manner following," which is by conveying the land described. The land to be conveyed to Sackett is apparently valued by the agreement, for the purposes of the transaction, at $15,000. Nothing is said about deducting the $9,000 from the price of the property to be conveyed to Elliott, nor is any sum named as the purchase money of that property. An agreement merely to take land, subject to a specified incumbrance, is not an agreement to assume and pay the incumbrance. The grantee of an equity of redemption, without words in the grant importing in some form that he assumes the payment of a mortgage, does not bind himself personally to pay the debt. There must be words importing that he will pay the debt, to make him personally liable. The language of the agreement in the present case does not amount to such an undertaking on the part of Elliott. It is only a statement that the conveyance is to be subject to the incumbrance, and creates no personal liability in the grantee. Such is the law in Illinois, where this land is situated, *Comstock* v. *Hitt*, 37 Ill., 542; *Fowler* v. *Fay*, 62 *Id.*, 375, as well as the law in other States. *Belmont* v. *Coman*, 22 N. Y., 438; *Fiske* v. *Tolman*, 124 Mass., 254.

Under the written agreement, therefore, it is plain that Elliott assumed no personal liability. Both parties executed this agreement and are to be held to have understood it in that sense. Sackett, in his answer, does not deny the allegation of the original bill, that the agreement between the parties was that neither Sackett nor Elliott should assume or agree to pay out- [141] standing incumbrances on the respective parcels of land, and that that appears by the written agreement. But the answer, while admitting that Sackett entered into an agreement in writing to convey the premises in a certain manner and on certain conditions, and referring to such agreement for certainty, sets up, that, after the written agreement was made, the parties came to an understanding that Elliott would

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accept a deed whereby he should assume and agree to pay the $9,000 incumbrance, and that the deed given "contained that provision accordingly." There is no evidence to support this allegation. Sackett testifies that he never had any conversation with Elliott in regard to his assuming liability for the mortgage, but that they met together and the deeds to each other were passed. Sackett had employed Hill as his agent to dispose of the Calumet Avenue property. Elliott testifies that Hill offered him the property and wanted him to assume the incumbrance, but he refused, and that finally Hill brought in the agreement which was signed by both parties. Hill testifies to the same effect. Elliott says that when Sackett gave him the deed in Hill's office, he was unwell; that he did not read that part of the deed which states that he is to assume and pay the incumbrance, but only read the prior part which states that the conveyance is made subject to the incumbrance; and that he discovered the mistake in the deed a short time before he commenced this suit.

The actual contract of the parties, as understood by both of them, is shown by the written agreement. Nothing was agreed upon to vary that. Sackett, as he shows by his testimony, knew the difference as to liability which the difference in the language would make, and knew what the language of the written agreement was, and must be held to have understood it to mean what it does mean, and to have known that Elliott understood it in the same sense. So, in the departure from it in the deed, there was a mutual mistake, it not being shown, as set up in the answer of Sackett, that there was an intention, fully and fairly understood by both parties, that in the deed Elliot should assume and agree to pay the incumbrance. Under all [142] the circumstances proved in this case, and every case of the kind must depend very largely on its special circumstances, Elliott had a right to presume that the deed would conform to the written agreement, and was not guilty of such negligence or laches, in not observing the provisions of the deed, as should preclude him from relief.

Neither Dickey nor the trustee was a party or a privy to the transaction between Sackett and Elliott, nor was the trust-deed taken, nor the debt created or extended, nor anything else done by Dickey or his trustee, in reliance on any assumption of the debt by Elliott. As respects the trust-deed, the parties to it and to the debt it secured occupied the same position when this suit was brought as when the deed to Elliott was delivered, no new rights having been acquired in reliance on that deed, and none which existed when it was delivered being sought to be impaired by the relief asked by Elliott. Elliott does not seek to interfere with the property he conveyed to Sackett. No circumstances exist on which laches can be predicated on the part of Elliott as to seeking a remedy. The fact that Elliott made two payments of the interest on the incumbrance is not inconsistent with his not having assumed the payment of the incumbrance. As owner of the property subject to the incumbrance and desirous of retaining it so long as there was any value in the equity of redemption, he would naturally pay the interest to save a foreclosure.

The principles applicable to a case like the present are fully set forth in the opinion of this court delivered by *Mr. Justice* Harlan in *Snell v. Ins. Co.*, 98 U. S., 85 [XXV., 52], and the leading authorities on the subject are there collected. Within those principles, this is a case where, in the preparation of the deed to Elliott, there was, by mutual mistake, a failure to embody in the deed the actual agreement of the parties as evidenced by the prior written agreement. The meaning of that prior agreement is clear, and nothing occurred between the parties, after it was signed and delivered, to vary its terms, except the mere fact of the delivery of the deed, the terms of which are complained of and sought to be reformed. The deed did not effect what both of the parties intended by the actual contract which they made, and the [143] case is one for the interposition of a court of equity.

The decree of the Circuit Court is reversed, with costs, so far as it dismisses the original bill, and so far as it adjudges that Dickey has any equities as against Elliott, and so far as it adjudges that Elliott assumed and agreed to pay the amount due on the mortgage to Dickey, and so far as it adjudges that Elliott shall pay to Dickey the amount found due to him and the costs of the suit, and so far as it provides for an application by Sackett for an order that Elliot repay to him any sum which he may pay on the debt due to Dickey: *and the cause is remanded to the Circuit Court*, with directions to enter a decree in the original suit granting the prayer of the bill, with costs, and *for such further proceedings in the original and cross suits as may not be inconsistent with this opinion.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 352; 111 U. S., 228.

GEORGE W. EWELL, *Appt.*,
v.
THOMAS J. DAGGS.

(See S. C., Reporter's ed., 143-153.)

Statute of Limitations—foreclosure action—repeal of statute—when impairs vested rights—rate of interest.

1. A statute of limitations, that "All actions of debt grounded upon any contract in writing shall be commenced within four years," does not apply to suits for the foreclosure of a mortgage and sale of the mortgaged property; such suits are not actions of debt grounded upon a contract in writing.
2. If the debt secured by the mortgage is barred by the Statute of Limitations, then, according to the law in Texas, the foreclosure suit is barred, but not otherwise; for the mortgage is a mere incident to the debt.
3. The repeal of usury laws, without a saving clause, operates retrospectively, so as to cut off the defense of usury for the future, even in actions upon contracts previously made.
4. A statute which repeals usury laws and destroys defenses to existing contracts on the ground of usury, does not deprive parties of vested rights, nor impair the obligation of contracts.
5. Where a note, upon which a judgment in Texas was founded, stipulated for no rate of interest, the interest reserved being added to the principal in the

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NOTE.—*Effect of repeal of statute on pending action.* See *note* to U. S. v. Tynen, 78 U. S., XX., 153.
Interest after maturity, at what rate. See *note* to Ohio v. Frank, 108 U. S., XXVI., 551.

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note itself, the judgment should not bear interest at a greater than legal rate.

[No. 189.]

Argued Jan. 3, 1883. Decided Mar. 26, 1883.

APPEAL from the Circuit Court of the United States for the Western District of Texas.

The history and facts of the case appear in the opinion of the court.

Messrs. **Wm. Reynolds** and *Chas. N. West*, for appellant.

Mr. **J. Randolph Tucker**, for appellee.

Mr Justice **Matthews** delivered the opinion of the court:

On May 27, 1856, James B. Ewell and his wife, having the legal title in fee to the premises, [144] made and delivered to Daggs a promissory note of that date, payable three years after date to his order, for $3,556, and to secure the same executed and delivered to Daggs a deed of mortgage upon a tract of land in Guadulupe County, Texas, containing 1,653 acres, which mortgage was duly proved and recorded on June 5, 1856.

James B. Ewell acquired the legal title to this land on April 13, 1854; but, in equity, it belonged to his brother, George W. Ewell, the appellant, for whom and with whose money it had been bought. The legal title was conveyed by James B. Ewell to his brother, George W. Ewell, on September 6, 1856, the latter having no knowledge of the mortgage to Daggs, and Daggs having, as we find from the evidence, no notice, actual or constructive, of the equity of George W. Ewell.

On March 9, 1872, Daggs, being a citizen of Virginia, brought his action at law against James B. Ewell and wife, on the note, in the Circuit Court of the United States for the Western District of Texas, and recovered judgment against James B. Ewell, July 14, 1873, for $3,530.93.

The defense set up by James B. Ewell, in that suit was usury, the actual amount of the loan having been $2,000, the residue of the note being interest on that amount until its maturity, at the rate of twenty per cent per annum, compounded annually.

A statute of Texas in force at that time on the subject of usury was as follows: "That all contracts or instruments of writing whatsoever, which may in any way, directly or indirectly, violate the foregoing provisions of this Act by stipulating for, allowing or receiving a greater premium or rate of interest than twelve per cent per annum for the loan, payment or delivery of any money, goods, wares or merchandise, bonds, notes of hand, or any commodity, shall be void and of no effect for the whole premium or rate of interest only; but the principal sum of money or the value of the goods, wares, merchandise, bonds, notes of hand, or commodity, may be received and recovered." Paschal, Dig. sec. 3942.

Payments had been made on the note prior to the commencement of the suit, to the amount [145] of $1,745, which were allowed; but the usurious interest was not deducted on the ground that the Constitution of Texas, which went into effect in 1870, and continued in force till after the recovery of the judgment, repealed all usury laws and prevented any defense on that account.

The judgment not being paid, Daggs filed the present bill in equity January 14, 1875, to foreclose the mortgage and sell the mortgaged premises, to which James B. Ewell and his wife, George W. Ewell, and the heirs of James B. Wilson were made defendants. The heirs of Wilson claimed title to a portion of the land under George W. Ewell, by virtue of a sale and actual possession prior to the date of the mortgage to Daggs. The claim established their title, and from that there is no appeal.

As against George W. Ewell, however, it adjudges a foreclosure of the equity of redemption and sale of the remainder of the premises, in default of payment by him of the amount found due upon the judgment against James B. Ewell, and interest thereon at the rate of twelve per cent per annum. From this decree, George W. Ewell prosecutes this appeal.

Several defenses were made in the court below, the overruling of which are assigned for error, and which we proceed now to state and consider in their order:

1. The first defense is the Statute of Limitations, as contained in article 4604, Paschal's Digest, as follows:

"All actions of debt grounded upon any contract in writing shall be commenced and sued within four years next after the cause of such action or suit and not after."

It is admitted that the cause of action upon the note was not barred when the action upon it was commenced, the period of limitation not expiring till July 29, 1872, excluding from the computation the interval between January 28, 1861, and March 30, 1870, as required by article 12, section 43 of the Constitution of Texas of 1870.

But the statute quoted does not apply to suits [147] for the foreclosure of a mortgage and sale of the mortgaged property, such as the present. Such suits are not actions of debt grounded upon a contract in writing. They are suits to enforce the lien of the mortgage for the satisfaction of the debt secured by it. If that debt is barred by the Statute of Limitations, then, according to the law in Texas, the foreclosure suit is barred, but not otherwise; for the mortgage is a mere incident to the debt. It was so held by the Supreme Court of Texas, in *Eborn* v. *Cannon*, 32 Tex., 244, where it says: "If the notes were a subsisting debt at the time of the institution of the suit, not barred by the Statute of Limitations, the mortgage executed contemporaneously to secure their payment was still valid as long as the debt remained unsatisfied. No matter at what time the power of the court was invoked for its collection and foreclosure and for a decree to subject the mortgaged property to the satisfaction of the debt, it was opportune if the jurisdiction of the court over the debt itself was not ousted. The mortgage was but an incident of the debt, and the incident in law, as in logic, must abide the fate of the principal." See, also, *Perkins* v. *Sterne*, 23 Tex., 561; *Duty* v. *Graham*, 12 Tex., 427; *Flanagan* v. *Cushman*, 48 Tex., 241.

There is no force in the suggestion that although the defense of the Statute of Limitations would not avail Jas. B. Ewell, because judgment had been rendered against him before the bar took effect, it, nevertheless, is a protection to Geo. W. Ewell, because he is a stranger to the judgment and mortgage, and the suit now pending was not brought till after

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the time limited for an action to recover the debt. For the present suit is not to recover the debt, nor is it a suit against Geo. W. Ewell. He is a party defendant, because he has an interest by a subsequent conveyance in the lands sought to be sold under the mortgage. He has an equity of redemption, which entitles him to prevent a foreclosure and sale by payment of the mortgage debt; but the debt he has to pay is not his own, but that of Jas. B. Ewell. If [148] he can show that that debt no longer exists, because it has been barred by the Statute of Limitations, he is entitled to do so; but he must do it by showing that it is barred as between the parties to it. If not, the land is still subject to the pledge, because the condition has not been performed. It is not to the purpose for the appellant to show that he owes the debt no longer, for in fact he never owed it at all; but his land is subject to its payment as long as it exists as a debt against the mortgagor, for that was its condition when his title accrued.

2. The second defense is that of usury. The statute of Texas on that subject has already been quoted. A contract of loan at a stipulated rate of interest greater than twelve per cent per annum, is declared to "be void and of no effect for the whole premium or rate of interest only;" but the principal sum may be received and recovered. The provision of the Constitution of Texas, section 44, article 12, repealing this and all existing usury laws, is as follows:

"All usury laws are abolished in this State, and the Legislature is forbidden from making laws limiting the parties to contracts in the amount of interest they may agree upon for loans of money or other property; *Provided*, This section is not intended to change the provisions of law fixing the rate of interest in contracts where the rate is not specified." 2 Paschal, Annotated Digest Laws of Texas, 1182.

It is claimed by the appellant that, notwithstanding this repeal of the usury laws, the rights of the parties are to be determined according to the law in force at the time the transaction took place; that by the terms of that law the contract between Daggs and James B. Ewell was void as to the entire interest reserved and paid; that no subsequent law could make valid a contract originally void; and that the appellant is not bound by the judgment rendered against James B. Ewell in favor of Daggs, and is entitled in the present suit to make the defense.

It is quite true that the usury statute referred to declares the contract of loan, so far as the whole interest is concerned, to be void and of no effect. But these words are often used [149] in statutes and legal documents, such as deeds, leases, bonds, mortgages and others, in the sense of voidable merely, that is, capable of being avoided, and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances. Thus we speak of conveyances void as to creditors, meaning that creditors may avoid them, but not others. Leases which contain a forfeiture of the lessee's estate for non-payment of rent, or breach of other condition, declare that on the happening of the contingency the demise shall thereupon become null and void, meaning that the forfeiture may be enforced by re-entry, at the option of the lessor. It is sometimes said that a deed obtained by fraud is void, meaning that the party defrauded may, at his election, treat it as void.

All that can be meant by the term, according to any legal usage, is that a court of law will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land. Broom, Leg. Max., 732.

And *Lord* Mansfield, in *Holman* v. *Johnson*, Cowp., 341, stated the ground on which, in such cases, courts proceed. He said: "The principle of public policy is this: *Ex dolo mala non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appear to arise *ex turpi causa*, or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

And the effect is the same, if the contract is, in fact, illegal, as made in violation of a statute, whether the statute declares it to be void or not. *Bank* v. *Owens*, 2 Pet., 527. "There can be no civil right," said *Mr. Justice* Johnson, in that case, "when there can be no legal remedy; and there can be no legal remedy for [150] that which is itself illegal."

A distinction is made between acts which are *mala in se*, which are generally regarded as absolutely void, in the sense that no right or claim can be derived from them; and acts which are *mala prohibita*, which are void or voidable, according to the nature and effect of the act prohibited. *Fletcher* v. *Stone*, 3 Pick., 250. It was accordingly held in Massachusetts that a mortgage or assurance given on a usurious consideration, was only voidable, notwithstanding the strong words of the statute. *Green* v. *Kemp*, 13 Mass., 515. And, in such cases, the advance of the money, although the contract is illegal, for usury, is a meritorious consideration, sufficient to support a subsequent liability or promise, when the positive bar of the statute has been removed. "A man by express promise may render himself liable to pay back money which he had received as a loan, though some positive rule of law or statute intervened at the time to prevent the transaction from constituting a legal debt." *Flight* v. *Reed*, 1 H. & C., 703; 32 L. J. (N. S.) Exch., 265.

The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld as against all objections, on the ground that they deprived parties of vested

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rights, or impaired the obligation of contracts. The very point was so decided in the following cases. *Curtis* v. *Leavitt*, 15 N. Y., 9; *Bank* v. *Allen*, 28 Conn., 97; *Welch* v. *Wadsworth*, 30 Conn., 149; *Andrews* v. *Russell*, 7 Blackf., 474; *Wood* v. *Kennedy*, 19 Ind., 68; *Danville* v. *Pace*, 25 Grat., 1; *Parmelee* v. *Lawrence*, 48 Ill., 331; *Woodruff* v. *Scruggs*, 27 Ark., 26.

[151] And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the Act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that, whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized, by having passed into a completed transaction, may by a subsequent statute be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which contrary to law he actually made is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. *Read* v. *Plattsmouth*, decided at the present Term [*ante*, 414]. And see *Lewis* v. *McElvain*, 16 Ohio, 347; *Johnson* v. *Bently*, Id., 97; *Trustees* v. *McCaughy*, 2 Ohio St., 155; *Satterlee* v. *Matthewson* 16 S. & R., 169; 2 Pet., 380; *Watson* v. *Mercer*, 8 Pet., 88.

The right which the curative or repealing Act takes away in such a case is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect. Cooley, Const. Lim., 378, and cases cited.

The case, of *Smith* v. *Glanton*, 39 Tex., 365, cited and relied on by counsel for the appellant, we cannot accept as a settlement of the law of Texas to the contrary. The opinion does not consider the question, but dismisses it, on the assumption that the fact that the action was brought before the adoption of the Constitution which contained the repeal of the usury laws, prevented the application of the rule.

It is our opinion, therefore, that the defense of usury cannot avail the appellant, by reason of the constitutional repeal of the statute, on the continued existence of which alone his defense rested.

[152] 3. It is next objected that there is error in the amount of the decree, in allowing interest at the rate of twelve per cent per annum on the amount of the judgment against James B. Ewell, instead of finding the amount due; irrespective of the judgment by calculating interest upon the note itself since its maturity, giving proper credits for payments, at the rate of eight per cent per annum. The amount of the alleged error is $805.25, being the difference between $5,980.22, which is said to be the amount of the decree, and $5,174.97, which it is claimed is the true amount. The law of Texas provides that "On all written contracts ascertaining the sum payable, when no specified rate of interest is agreed upon by the parties, interest shall be allowed at the rate of eight per cent per annum from and after the time when the sum is due and payable." Paschal, Dig. of laws, art. 3940; R. S., 1879, art. 2976; and also that "All judgments of the several courts of this State, shall bear interest at the rate of eight per cent per annum from and after the date of the judgment, except when the contract upon which the judgment is founded bears a specified interest greater than eight per cent per annum, and not exceeding the highest rate of conventional interest permitted by law (twelve per cent), in which case the judgment shall bear the same rate of interest specified in such contract and after the date of such judgment." Paschal, Dig., art. 3943; R. S., 1879, art. 2980.

The contract on which the judgment was founded, stipulated for no rate of interest, the interest reserved being added to the principal in the note itself and, consequently, it is evident that the decree should not have allowed interest on the debt at a rate greater than eight per cent. The amount of the decree should have been the sum actually due upon the mortgage debt at the date of its maturity, May 27, 1859, with interest thereon at the rate of eight per cent per annum to the time of the decree, April 25, 1879, giving proper credit for payments made on account from time to time, which amounts to $5,174.97, and on which interest is to be allowed at the same rate until paid.

In our opinion, the appellant is entitled to have this correction made. He is not bound by the judgment against James B. Ewell, to [153] which he is neither party nor privy, and which was rendered after the appellant acquired his title to the land. He is, consequently, not cut off from his right to set up the matter, on which he now insists. *Lloyd* v. *Scott*, 4 Pet., 205; *Brolasky* v. *Miller*, 1 Stockt. (9 N. J. Ch.), 807; *Berdan* v. *Sedgwick*, 44 N. Y., 626; *Post* v. *Dart*, 8 Paige 640; *Green* v. *Tyler*, 39 Pa. St., 361.

The decree is, therefore, modified in respect to the amount found to be due and the rate of interest to be allowed thereon, as already indicated, and with this modification, affirmed, each party paying his own costs in this court.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 489.

Ex Parte:

In the Matter of WILLIAM G. WARDEN, JOSEPH G. POTTS, JAMES A. WRIGHT AND EDWARD N. WRIGHT, Petitioners.

(See S. C., Reporter's ed., as "*The Belgenland*," etc., 153-157.)

*Judgment against principal and surety—effect of appeal—*supersedeas *bond.*

1. Upon a stipulation executed under the provisions of section 941 of the Revised Statutes, judgment against both principal and sureties may be recovered at the time of rendering the decree in the original cause.

2. An appeal with *supersedeas* stays execution against the stipulators as well as against the principal.

[No. 9, Orig.]

Submitted Mar. 12, 1883. Decided Mar. 26, 1883.

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PETITION for an alternative writ of *mandamus.*

The history and facts of the case sufficiently appear in the opinion of the court.

See, also, the case of *The Belgenland* v. *Jensen, post.*

Mr. **Morton P. Henry,** for petitioners:

The relators are not parties actors in the cause in which the decree is entered against them. They are sureties, and not entitled to an appeal or writ of error. *The Wanata*, 95 U. S., 605 (XXIV., 462); *The Ann Caroline*, 2 Wall., 548 (68 U. S., XVII., 835).

They are deprived of the use of their real estate by the docket entry of a decree against them as stipulators; which decree became vacated by an appeal taken by the claimant to this court, and perfected by giving bond, conditioned that the appellant should prosecute his appeal with effect.

Their only remedy is by *mandamus*, as prohibition does not lie to the circuit court.

Bank v. *Sweeny*, 1 Pet., 569.

The illegality of the decree against stipulators before final adjudication on appeal has been passed upon, by *Mr. Justice* Blatchford, in the Circuit Court of New York.

The New Orleans, 17 Blatchf., 216.

An appeal in admiralty vacates and suspends the sentence of the subordinate court.

The Cassius, U. S. v. *Peters*, 5 Cranch., 115; *U. S.* v. *Preston*, 3 Pet., 66; *Wiscart* v. *Dauchy*, 3 Dall., 321; *The Lucille*, 19 Wall., 73 (86 U. S., XXII., 64).

This principle governs all appeals in admiralty. The appeal takes up the *res.* So that the district court after an appeal perfected can not make an order in reference to the cause.

The Collector, 6 Wheat, 194; *The Lucille* (*supra*)

There was no opposing counsel.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The petitioners in this case show that they entered into a stipulation in the sum of $70,000 on behalf of Samuel Jackson, master and claimant of the steamship Belgenland, in a suit for collision, in the District Court of the United States for the Eastern District of Pennsylvania, conditioned in the following words "Now, if the said claimant shall and will truly abide by all orders, interlocutory or final, of said court, and of any appellate court in which the said suit may be hereafter depending, and shall fulfill and perform any judgment or decree which may be rendered in the premises, and also pay all costs, etc., this stipulation shall be void, otherwise in force, and execution may issue by virtue thereof at one and the same time against any or all the parties to this stipulation." A decree was entered against the steamer in the district court. From that decree an appeal was taken to the circuit court for the district, where, on the 14th of October, 1881, it was decreed "That the libelant recover for himself and the other parties in interest, from the respondent, Samuel Jackson and his stipulators, Joseph D. Potts, William G. Warden, Edward N. Wright and James A. Wright, his or their damages for the collision mentioned in the libel * * * aggregating, in all, the sum of $51,594.14." The decree was also entered as a lien against the real estate of the stipulators.

Upon the rendition of this decree an appeal was taken by the claimant to this court, the petitioners signing a *supersedeas* bond as sureties. The petitioners being seised of real estate in the district, applied to the circuit court to vacate the decree against them, on the ground that it was inadvertently entered and caused a cloud on the titles to their property. The court declined to make the order, and this application is now presented for a *mandamus* to the Judges of the court, requiring it to be done.

It is not stated in the petition that the stipulation was executed under the provisions of section 941 of the Revised Statutes, but for the purposes of this application we assume it was, there being no representation to the contrary. That section provides in express terms for a return of the stipulation to the court, and that "judgment thereon against both principal and sureties may be recovered at the time of rendering the decree in the original cause." It would seem as though nothing more was needed to show the power of the court to include the stipulators in the original decree. Under section 1007 of the Revised Statutes, no execution can issue until the expiration of ten days after the entry of the decree. In this respect these decrees are like others. An appeal with *supersedeas* stays execution against the stipulators as well as the principal. Therefore there is nothing in the decree inconsistent with the provision in the stipulation in respect to the time when execution may issue.

It is, no doubt, within the power of the court to postpone a decree against the sureties until after the time for appeal by the principal has expired, and then to proceed only on notice. Such is the practice in some of the circuits, but we can find nothing in the statute which makes this imperative. In the case of *The New Orleans*, 17 Blatchf., 216, to which our attention has been directed by the counsel for the petitioners, the proceeding was against the sureties for the claimants, on their appeal from the district court to the circuit court, and the court refused to enter the judgment on such a bond until after the time for perfecting an appeal to this court had expired. That was an entirely different question from the one presented here upon a stipulation entered into under section 941.

It is unnecessary to consider whether in law the decree is a lien on the real estate of the stipulators after the appeal. Our inquiry is not as to the effect of the decree, but as to the jurisdiction of the court to enter it. If there was jurisdiction, any error that may have been committed cannot be corrected by *mandamus.* [157]

As, upon the showing made by the petitioners, we are clearly of opinion they are not entitled to the relief they ask, the alternative writ is denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

LEVI GOLDENBERG ET AL., *Plff. in Err.*,
v.
THOMAS MURPHY, Late Collector of the PORT OF NEW YORK.

(See S.C., Reporter's ed., 162-164.)

Limitations—state laws as to.

1. In the legislation of Congress on the subject of limitations, the words "commenced" and "brought"

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mean the same thing and are used interchangeably.

2. Where a suit was begun in a state court the laws of that State must determine when it was brought; and if that is prescribed by statute, no inquiry is necessary as to the practice in other States, or the rules of the common law.

[No. 183.]

Argued Mar. 16, 1883. Decided Mar. 26, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

This action was brought to the Superior Court of the City of New York, by the plaintiffs in error, to recover certain duties which they had paid under protest. The cause was subsequently removed into the court below.

The trial having resulted in a verdict, by direction of the court, and judgment in favor of the defendants, the plaintiffs sued out this writ of error.

The cause is stated by the court.

Mr. **Stephen G. Clarke,** for plaintiffs in error.

Mr. **Wm. A. Maury,** *Asst. Atty-Gen.*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was a suit to recover back duties on imports paid under protest, commenced in the Superior Court of the City of New York, be- [163] fore the enactment of the Revised Statutes, and the only question presented by the writ of error is, whether the suit was brought within ninety days after the decision of the Secretary, as required by the Act of June 30, 1864, ch. 171, sec. 14, 13 Stat. at L., 215, then in force. The facts are, that the decision was made by the Secretary on the 28th of May, 1872, and it was agreed at the trial that the ninety days expired on the 26th of August. A summons in the case was made out in due form of law, bearing date August 21, 1872, and efforts were made to serve it on the Collector without the intervention of the sheriff, but failing in this, the summons was, on the 26th of August, delivered to and received by the sheriff of the County of New York, where the Collector resided, with the intent that it should be actually served. Service was in fact made on the 27th.

The New York Code of Civil Procedure, sec. 99, is as follows:

"An action is commenced as to each defendant when the summons is served on him, or on a co-defendant, who is a joint contractor, or otherwise united in interest with him.

An attempt to commence an action is deemed equivalent to the commencement thereof, within the meaning of this title, when the summons is delivered, with intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants or one of them usually or last resided."

A suit is brought when in law it is commenced, and we see no significance in the fact that in the legislation of Congress on the subject of limitations the word "commenced" is sometimes used, and at other times the word "brought." In this connection the two words evidently mean the same thing, and are used interchangeably. As this suit was begun in a state court of New York, the laws of that State must determine when it was brought, and as that is prescribed by statute, we have no need of inquiry as to the practice in other States, or the rules of the common law.

As it was conceded that under the decision of this court in *Arthur* v. *Lahey*, 96 U. S., 112 [XXIV., 766], the importers were entitled to a verdict if the suit was brought in time, it fol- [164] lows that *the instruction of the court to find for the Collector was erroneous. The judgment is reversed, and the cause remanded for a new trial.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

R. M. BARTON, JR., Assignee in Bankruptcy of KESSLER & HARMON, *Plf. in Err.*,

v.

JOHN GEILER.

(See S. C., Reporter's ed., 161, 162.)

Question of fact.

In a case where the question is entirely one of fact, and there is no dispute about the law, and this court is satisfied with the conclusion reached below, the decree will be affirmed without setting forth or discussing the evidence.

[No. 188.]

Submitted Mar. 16, 1883. Decided Mar. 26, 1883.

IN ERROR to the Supreme Court of the State of Tennessee.

The case is sufficiently stated by the court.

Messrs. **Henry E. Jackson** and *J. E. Bailey*, for plaintiff in error.

No counsel appeared for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was a suit in equity brought in a state court of Tennessee by Barton, as assignee in bankruptcy of Kessler & Harmon, to set aside a conveyance made by Kessler, one of the bank- [162] rupts, to Geiler, and the only question presented by the writ of error is, whether, upon the testimony embodied in the record and considered by the Supreme Court of Tennessee in the determination of the cause, it should have been found that the conveyance was in fraud of the bankrupt law. The question is entirely one of fact. There can be no dispute about the law. It is sufficient to say that, after a careful examination of the testimony, we are satisfied with the conclusion finally reached below. It would serve no useful purpose to set forth in an opinion the details of the evidence, or to enter into any discussion as to its effect.

The decree of the Supreme Court of Tennessee is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

NOTE.—*State decisions and laws in regard to Statute of Limitations govern U. S. Courts.* See *note to* Eimendorf v. Taylor, 23 U. S. (10 Wheat.), 152.

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BENJAMIN S. HILTON, *Appt.*,

v.

WILLIAM H. DICKINSON.

(See S. C., Reporter's ed., 165-176).

Cross appeal—how prosecuted—want of jurisdiction—matter in dispute—jurisdictional amount, how determined—statement in pleading.

1. Cross appeals must be prosecuted like other appeals, and if not perfected until long after the time when by law they should be, they will be dismissed for want of prosecution.
2. If, on looking into a record, this court finds it has no jurisdiction, it is its duty to dismiss the case on its own motion, without waiting the action of the parties.
3. Upon a question as to the jurisdiction of this court, dependent upon amount as to both parties, the matter in dispute, on which our jurisdiction depends, is the matter in dispute between the parties as the case stands upon the writ of error, or appeal; that is to say, as it stands in this court.
4. This court has jurisdiction of a writ of error or appeal by a plaintiff below, when he sues for as much or more than our jurisdiction requires and recovers nothing, or recovers only a sum which, being deducted from the amount or value sued for, leaves a sum equal to or more than our jurisdictional limit, for which he failed to get a judgment or decree.
5. This court has jurisdiction of a writ of error or appeal by a defendant when the recovery against him is as much in amount or value as is required to bring a case here, and when, having pleaded a set-off or counterclaim for enough to give this court jurisdiction, he is defeated upon his plea wholly, or recovers only an amount which being deducted from his claim as pleaded, leaves enough to give us jurisdiction, which has not been allowed.
6. The amount as stated in the body of the declaration, and not merely the damages alleged, or the prayer for judgment, at its conclusion, must be considered in determining whether this court can take jurisdiction; the same is true of the counterclaim or set-off.

[No. 531.]

Submitted Feb. 2, 1883. Decided Mar. 26, 1883.

APPEAL from the Supreme Court of the District of Columbia.

The history and facts of the case appear in the opinion of the court and in the brief for appellant.

On motion to dismiss.

Mr. **Frank W. Hackett** for Dickinson, in support of motion:

A party appealing from part of a decree admits the remainder to be correct.

2 Dan. Ch. Pr., 5th ed., 1467; *Kelsey* v. *Western*, 2 N. Y., 505; *Norbury* v. *Meade*, 3 Bligh., 261; *Sands* v. *Codwise*, 4 Johns., 602.

The court will ascertain just what amount is involved between the appellant and appellee.

Terry v. *Hatch*, 93 U. S., 44 [XXIII., 796.]

Mr. **F. P. B. Sands**, for Hilton, *contra*:

As to the jurisdiction in this case, we rely upon the decisions and practice in this court.

The rule is well settled in the practice of this court (Phill. Pr., 2d ed., 77); and in *Knapp* v. *Banks*, 2 How., 73, its language is precise, that the test of jurisdiction is the amount claimed by the plaintiff below and involved in the judgment or decree appealed from; and "that where a less sum than the whole amount of his demand is allowed," he can appeal to recover the whole amount.

Mr. **M. F. Morris**, for Devlin, assignee of Dickinson, also *contra*:

This is a triangular controversy over a fund in the registry of the Supreme Court of the District of Columbia, paid in under a bill of interpleader. The money belonged originally to John Devlin. William H. Dickinson claimed it under an alleged claim of services rendered in recovering it from the United States. Benjamin S. Hilton claimed it as assignee of another individual who sought to show that he was the party who had recovered it. Devlin denied the claims of both. The Special Term of the Supreme Court of the District of Columbia decided in favor of Hilton. The General Term of that court decided that neither Hilton nor Dickinson had any just or legal claim upon the fund, yet concluded to divide it between them as the best disposition that could be made of it. Both Hilton and Devlin appealed.

Before the decree rendered by the General Term of the Supreme Court of the District of Columbia, Dickinson had recovered judgment on the same cause of action in New York; and Devlin had paid the judgment and taken an assignment or relinquishment from Dickinson of any and all rights which the latter had in these suits in the District of Columbia. In other words, Dickinson had been paid and satisfied before the decree was rendered for him and Hilton jointly in these cases.

It is submitted that, under these circumstances, the action of Dickinson's counsel is most extraordinary and most unwarrantable. His client has been paid and satisfied; and he has nothing further to do with these cases.

Neither as appellant nor as appellee, neither in his own original right nor as the assignee of Dickinson, does John Devlin assent to the motions made. On the contrary, he desires to have the appeals heard on their merits when they are reached for argument; and he protests against the action of Dickinson's counsel as unauthorized.

As to the motion to dismiss Devlin's appeal because of his failure to docket and secure the clerk, the failure seems to have been caused by inadvertence and the supposition that the docketing of one appeal would do for both. Since his attention has been called to the matter, he has caused his appearance to be entered, and has given security to the clerk, and only awaits the permission of the court to docket his appeal now. As both appeals can and should be heard together, and no injury has been or can be done to anyone by his failure to docket, and he has now secured the clerk and entered his appearance it is respectfully submitted that he should be allowed *nunc pro tunc* to docket his appeal, and that the motion to dismiss should be denied.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was a bill of interpleader filed by Charles D. Gilmore against Benjamin S. Hilton, William H. Dickinson, John Devlin, and others, to determine the ownership of $2,500, which Gilmore held as trustee. The fund was paid into court, and when the decree below was rendered had increased by investment to more than $3,000. Hilton, Dickinson and Devlin each claimed

NOTE.—*Jurisdiction of U. S. Supreme Court dependent on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

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the whole. The court, at Special Term, decreed the whole to Hilton. From this decree, both Dickinson and Devlin appealed to the General Term. There the decree at Special Term was modified so as to direct the payment of the fund to Hilton and Dickinson in equal moieties, and to adjudge the costs against Devlin alone. Hilton took an appeal to this court from this decree, "In so far as it modifies the decree of the court below, to wit: the Special Term in equity," and citation was issued to Dickinson alone. This appeal was docketed here in due time.

An appeal was also allowed Devlin at the time the decree was rendered, but that appeal has never been entered in this court. There was no appearance of counsel or security for costs within the time required by law.

Dickinson now moves to dismiss the appeal of Hilton, on the ground that the value of the matter in dispute does not exceed $2,500, and to docket and dismiss, under the 9th Rule, the appeal of Devlin.

[167] Devlin also appears by counsel, and presents an assignment to him from Dickinson of all interest in the litigation, which was executed before the decree was modified at General Term. He, therefore, insists that Dickinson has no right to move in the premises, and asks that the appearance of his own counsel be entered.

At the last Term, in the case of *The S. S. Osborne*, 105 U. S., 451 [XXVI., 1066], it was decided that "Cross appeals must be prosecuted like other appeals. Every appellant, to entitle himself to be heard on his own appeal, must appear here as an actor in his own behalf by having the appearance of counsel entered, and giving the security required by the rules." In that case the appeal had been docketed, but long after the time when by law it should have been done and, following the rule announced in *Grigsby* v. *Purcell*, 99 U. S., 505 [XXV., 354], it was dismissed for want of prosecution. Inasmuch therefore, as we would not hear the cross appeal if it should be entered at this time, we deny the motion of Devlin to have the appearance of counsel entered on that appeal, and of our own motion dismiss it for want of prosecution.

It is a matter of no importance that the motion to dismiss the appeal of Hilton is made by Dickinson after he has parted with his interest in the decree, for, if on looking into a record we find we have no jurisdiction, it is our duty to dismiss on our own motion without waiting the action of the parties. The question is then presented whether upon the face of this record it appears that the value of the matter in dispute, for the purpose of our jurisdiction, exceeds $2,500, and that depends on whether the matter in dispute is the whole amount claimed by Hilton below, or only the difference between what he has recovered and what he sued for. So far as we have been able to discover, this precise point has never before been passed upon in any reported case. There are expressions in the opinions of the court in some cases which may [169] be and probably are broad enough to sustain the jurisdiction, but these expressions are found where the facts did not require a decision of the question now formally presented.

In *Wilson* v. *Daniel*, decided in 1798, and reported in 3 Dall., 401, upon a writ of error brought by a defendant below from a judgment against him for less than $2,000, it was held that the jurisdiction of this court depended, not on the amount of the judgment, but on the matter in dispute when the action was instituted. *Chief Justice* Ellsworth, in his opinion, said: "If the sum or value, found by a verdict, was considered as the rule to ascertain the magnitude of the matter in dispute, then, whenever less than $2,000 was found, a defendant could have no relief against the most erroneous and injurious judgment, though the plaintiff would have a right of removal and revision of the cause, his demand (which is alone to govern him) being for more than $2,000. It is not to be presumed that the Legislature intended to give any party such an advantage over his antagonist; and it ought to be avoided, as it may be avoided, by the fair and reasonable interpretation, which has been pronounced." *Mr. Justice* Iredell, in a dissenting opinion, thus states the argument on the other side: "The true motive for introducing the provision, which is under consideration, into the Judicial Act, is evident. When the Legislature allowed a writ of error to the Supreme Court, it was considered that the court was held permanently at the seat of the National Government, remote from many parts of the Union; and that it would be inconvenient and oppressive to bring suitors hither for objects of small importance. Hence, it was provided that unless the matter in dispute exceeded the sum or value of $2,000, a writ of error should not be issued. But the matter in dispute here meant, is the matter in dispute on the writ of error."

In *Cooke* v. *Woodrow*, 5 Cranch, 13, decided in 1809, trover had been brought in the Circuit Court of the District of Columbia for sundry household goods, and the judgment was in favor of the defendants. Upon a writ of error by the plaintiff below, a question arose as to the [170] way in which the value of the matter in dispute should be ascertained, and *Chief Justice* Marshall, in announcing the decision, said: "If the judgment below be for the plaintiff, that judgment ascertains the value of the matter in dispute; but when the judgment below is rendered for the defendant, this court has not, by any rule or practice, fixed the mode of ascertaining that value."

Three years afterwards, the case of *Wise* v. *Turnpike Co.* was before the court, which is very imperfectly reported in 7 Cranch, 276. On referring to the original record we find that under a provision of the charter of the turnpike company (2 Stat. at L., 572, ch. 26, sec. 6) commissioners were to be appointed by the Circuit Court of the District of Columbia to decide upon the compensation to be paid the owners of land for damages growing out of the appropriation of their property to the use of the company. All awards of the commissioners were to be filed in the circuit court, and unless set aside by the court were to be final and conclusive between the parties, and recorded by the clerk. Wise & Lynn presented a claim to the commissioners and were awarded $45. On the return of the award to the court they filed exceptions, and, among other things, claimed that they should have been allowed at least $300, but the court confirmed the award. They then brought the case to this court by writ of error, and the turnpike company moved to dismiss

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because the value of the matter in dispute did not exceed $100, that being then the jurisdictional limit on appeals and writs of error from the Circuit Court of the District of Columbia. The decision of the case is reported as follows: "It appearing that the sum awarded was only $45, the court, all the Judges being present, decided that they had no jurisdiction, although the sum claimed by Wise & Lynn, before the commissioners of the road, was more than $100."

[171] In *Peyton* v. *Robertson*, 9 Wheat., 527, replevin had been brought for the recovery of personal property distrained for rent. The defendant in the action acknowledged the taking of the goods as charged in the declaration, but justified it as a distress for the sum of $591 due for rent in arrear, and recovered a judgment against the plaintiff for that amount. The plaintiff then brought the case to this court by writ of error, and insisted that as the damages laid in the declaration exceeded the jurisdictional limit his writ ought not to be dismissed; but the court said, through *Chief Justice* Marshall: "If the replevin be, as in this case, of property distrained for rent, the amount for which the avowry is made is the real matter in dispute. The damages are merely nominal. If the writ be issued as a means of trying the title to property, it is in the nature of detinue and the value of the article replevied is the matter in dispute." The writ of error was, accordingly, dismissed.

The case of *Gordon* v. *Ogden*, 3 Pet., 33, was decided in 1830. There the action was instituted for the violation of a patent, and the amount of the recovery in damages was $400 by the verdict of a jury. The damages laid in the declaration were $2,600. The defendant brought the writ of error, and on a motion to dismiss because the value of the matter in dispute was not enough to give jurisdiction, *Chief Justice* Marshall, speaking for the court said: "The jurisdiction of the court has been supposed to depend on the sum or value of the matter in dispute in this court, not on that which was in dispute in the circuit court. If the writ of error be brought by the plaintiff below, then the sum which his declaration shows to be due may be still recovered, should the judgment for a smaller sum be reversed; and, consequently, the whole sum claimed is still in dispute. But if the writ of error be brought by the defendant in the original action, the judgment of this court can only affirm that of the circuit court and, consequently, the matter in dispute cannot exceed the amount of the judgment. Nothing but that judgment is in dispute between the

[172] parties." Then, referring to *Wilson* v. *Daniel*, *supra*, he said: "Although that case was decided by a divided court, and although we think that, upon the true construction of the 22d section of the judicial Act, the jurisdiction depends upon a sum in dispute between the parties as the case stands upon the writ of error, we should be much inclined to adhere to the decision in *Wilson* v. *Daniel*, had not a contrary practice since prevailed. * * * The case of *Wise* v. *Turnpike Co.*, 7 Cranch, 276, was dismissed because the sum for which judgment was rendered in the circuit court was not sufficient to give jurisdiction, although the claim before the commissioners of the road, which was the cause of action and the matter in dispute in the circuit court, was sufficient. * * * Since this decision we do not recollect that the question has ever been made. The silent practice of the court has conformed to it. The reason of the limitation is that the expense of litigation in this court ought not to be incurred unless the matter in dispute exceeds two thousand dollars. This reason applies only to the matter in dispute between the parties in this court." The writ of error was, consequently, dismissed, all the judges agreeing that there was no jurisdiction. This case was followed at the same term in *Smith* v. *Honey*, 3 Pet., 469.

Nothing further of importance connected with the particular question we are now considering appears in the reported cases until 1844, when, in *Knapp* v. *Banks*, 2 How., 78, which was a writ of error brought by a defendant against whom a judgment had been rendered for less than $2,000, *Mr. Justice* Story said for the court: "The distinction constantly maintained is this: Where the plaintiff sues for an amount exceeding $2,000, and the *ad damnum* exceeds $2,000, if by reason of any erroneous ruling of the court below, the plaintiff recovers nothing, or less than $2,000, there the sum claimed by the plaintiff is the sum in controversy for which a writ of error will lie. But if a verdict is given against the defendant for a less sum than $2,000, and judgment passes against him accordingly, there it is obvious that there is, on the part of the defendant, nothing in controversy beyond the sum for which the judgment is given; and, conse- [173]
quently, he is not entitled to any writ of error. We cannot look beyond the time of the judgment in order to ascertain whether a writ of error lies or not."

The rule, as thus stated by *Mr. Justice* Story, was cited in *Walker* v. *U. S.*, 4 Wall., 163 [71 U. S., XVIII., 319], and in *Merrill* v *Petty*, 16 Wall., 345 [83 U. S., XXI., 500]. But these were cases in which the question was as to the right of a defendant to bring up for review a judgment against himself for less than $2,000.

In *Ryan* v. *Bindley*, 1 Wall., 66 [68 U. S., XVII., 559], the plaintiff below sued for $2,000 and the defendant pleaded set-off to the amount of $4,000. Under such a plea, if the set-off had been sustained, the defendant would have been entitled to a judgment for the difference between the amount of his claim and that established by the plaintiff. The plaintiff recovered a judgment for $575.85, and the defendant brought a writ of error, upon which jurisdiction was sustained because the defendant sought to defeat the judgment against him altogether, and to recover judgment in his own favor and against the plaintiff for at least $2,000, and possibly $4,000. Thus the matter in dispute in this court exceeded $2,000.

In *Pierce* v. *Wade*, 100 U. S., 444 [XXV., 785], the action was replevin for cattle. A judgment was rendered in favor of the plaintiffs for the most of the cattle taken on the writ, but against them for $1,400, the value of some that were taken which did not belong to them. They brought the case here by writ of error, but the writ was dismissed on the ground that the matter in dispute was only the part of the cattle for which judgment had been rendered against the plaintiffs, the court remarking that "The plaintiffs recovered everything else which they claimed, and the judgment against them is less than $5,000."

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In *Lamar* v. *Micou*, 104 U. S., 465 [XXVI., 774], where the appeal was taken by a defendant from a decree against him for less than $5,000, it was held that if the set-off or counterclaim relied on would only have the effect of reducing [174] the amount of the recovery, without entitling the defendant to a decree in his own favor, there was no jurisdiction.

We understand that *Wilson* v. *Daniel*, is overruled by *Gordon* v. *Ogden*, in which *Chief Justice* Marshall states the opinion of the court to be that "The jurisdiction of the court depends upon the sum in dispute between the parties as the case stands upon the writ of error," and that *Wilson* v. *Daniel* was not followed because "a contrary practice had since prevailed." It is undoubtedly true that until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction, but it is equally true that when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail. *Lee* v. *Watson*, 1 Wall., 337 [68 U. S., XVII., 557]; *Schacker* v. *Ins. Co.*, 93 U. S., 241 [XXIII., 862]; *Gray* v. *Blanchard*, 97 U. S., 565 [XXIV., 1109]; *Tinstman* v. *Nat. Bk.*, 100 U. S., 6 [XXV., 530]; *Banking Asso.* v. *Ins. Asso.*, 102 U. S., 121 [XXVI., 46]. Under this rule it has always been assumed, since *Cooke* v. *Woodrow*, *supra*, that when a defendant brought a case here, the judgment or decree against him governed our jurisdiction, unless he had asked affirmative relief, which was denied; and this because as to him jurisdiction depended on the matter in dispute here. As the original demand against him was for more than our jurisdictional limit, and the recovery for less, the record shows that he was successful below as to a part of his defense, and that his object in bringing the case here was not to secure what he had already got, but to get more. As to him, therefore, the established rule is that, unless the additional amount asked for is as much as our jurisdiction requires, we cannot review the case.

We are unable to see any difference in principle between the position of a plaintiff and that of a defendant as to such a case. The plaintiff sues for as much as, or more than, the sum required to give us jurisdiction, and recovers less. He does not, any more than a defendant, bring a case here to secure what he has already got, but to get more. If we take a case for him when the additional amount he asks to recover is less than we can consider, he has an advantage over [175] his antagonist, such as, in the language of *Chief Justice* Ellsworth, *supra*, "It is not to be presumed it was the intention of the Legislature to give." Such a result ought to be avoided, and it may be, by holding, as we do, that, as to both parties, the matter in dispute, on which our jurisdiction depends, is the matter in dispute "between the parties as the case stands upon the writ of error," or appeal, that is to say, as it stands in this court. That was the question in *Wilson* v. *Daniel*, where it was held that, to avoid giving one party an advantage over another, it was necessary to make jurisdiction depend "on the matter in dispute when the action was instituted." When, therefore, that case was overruled in *Gordon* v. *Ogden*, and it was held, as to a defendant, that his rights depended on the matter in dispute in this court, we entertain no doubt it was the intention of the court to adopt as an entirety the position of *Mr. Justice* Iredell in his dissenting opinion and to put both sides upon an equal footing. Certainly it could not have been intended to give a plaintiff any advantage over a defendant, when there is nothing in the law to show any such superiority in position.

Under this rule, we have jurisdiction of a writ of error or appeal by a plaintiff below when he sues for as much as or more than our jurisdiction requires and recovers nothing, or recovers only a sum which, being deducted from the amount or value sued for, leaves a sum equal to or more than our jurisdictional limit, for which he failed to get a judgment or decree. And we have jurisdiction of a writ of error or appeal by a defendant when the recovery against him is as much in amount or value as is required to bring a case here, and when, having pleaded a set-off or counter claim for enough to give us jurisdiction, he is defeated upon his plea altogether, or recovers only an amount or value which, being deducted from his claim as pleaded, leaves enough to give us jurisdiction, which has not been allowed. In this connection, it is to be remarked that the "amount as stated in the body of the declaration, and not merely the damages alleged, or the prayer for judgment, at its conclusion, must be considered in determining whether this court can take jurisdiction." *Lee* v. *Watson*, and the other cases cited in connection therewith, *supra*. The same is true of the counterclaim or set-off. It is the actual [176] matter in dispute as shown by the record, and not the *ad damnum* alone, which must be looked to.

Applying this rule to the present case, it is apparent we have no jurisdiction. The original matter in dispute was $3,000. On appeals from the Supreme Court of the District of Columbia we have jurisdiction only when the matter in dispute exceeds $2,500. Hilton recovered below one half of the $3,000. It follows that as to him the matter in dispute in this court is only $1,500.

The appeal of Hilton is dismissed for want of jurisdiction, and that of Devlin for want of prosecution.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—108 U. S., 309, 311, 565; 110 U. S., 53, 223; 112 U. S., 228, 309.

RALPH L. SHAINWALD, Receiver, etc., [158] AND HERMAN SHAINWALD, Assignee, etc., Interveners; J. A. WRIGHT, ISAAC HOFFMAN AND S. HOFFMAN, Composing the Firm of HOFFMAN BROTHERS, ET AL., *Appts.*,

v.

ISAAC J. LEWIS.

(See S. C., Reporter's ed., 158-161.)

Removal of cause—suit to settle partnership.

1. In a suit brought to close up the affairs of a partnership where the existence of the partnership

NOTE.—*Removal of causes under Act of 1875; citizenship.* See, *note* to Removal Cases, 100 U. S., XXV., 503.

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is denied, and the title of all depends on defeating the claim of one to be a partner, where there are citizens of a State on one side of a suit, and citizens of the same State on the other, the suit is not removable under the 1st clause of the 2d section of the Act of March, 1875.

2. A suit, brought to close up the affairs of an alleged partnership, where the main dispute is about the existence of the partnership, and there is no controversy which can be separated from that about the partnership and fully determined by itself, is not severable so it can be removed by part of the defendants.

[No. 976.]

Motion to advance submitted Nov. 27, 1882. Granted Dec. 4, 1882. Submitted Mar. 16, 1883. Decided Mar. 26, 1883.

APPEAL from the Circuit Court of the United States for the District of Nevada.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **T. L. Crittenden** and **F. H. Mackey**, for appellants.

Mr. **Albert Bach**, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an appeal from an order remanding a suit removed from a state court of Nevada. The facts are these:

Isaac J. Lewis, a citizen of Nevada, the appellee, on the 15th of January, 1881, began the suit against Harris Lewis, a citizen of California, for the dissolution of an alleged partnership between them, and a settlement of the partnership affairs. To this suit he made Abraham Coleman, a creditor of the firm and a citizen of California, J. A. Wright, Hoffman Brothers, Joseph Huber, Charles Sadler, A. & M. Sower, R. Hogan, J. D. Pringle, Charles Polkinghorn, B. C. Thomas, and James Brennan, citizens of Nevada, defendants, jointly with Harris Lewis. According to the averments in the bill, Harris Lewis, one of the partners, had become involved in business complications of his own, and a large judgment had been taken against him in the District Court of the United States for the District of California in favor of Herman Shainwald, assignee in bankruptcy of Schoenfield, Cohn & Co. A suit was begun on this judgment in the District Court of the United States for the District of Nevada, and Ralph L. Shainwald was, by an *ex parte* order, without notice, [159] appointed Receiver of the estate of Harris Lewis in Nevada. The Receiver at once took possession of the property of the partnership, whereupon a motion was made to vacate his appointment, which was granted. Notwithstanding this, Shainwald retained possession and was selling the interest of Harris Lewis in the property, and on such sales delivering the possession to the purchasers. All the defendants named, except Harris Lewis and Coleman, are either purchasers of the property, or in possession as the agents of the Shainwalds.

On the filing of this bill, a receiver of the property of the firm was appointed and qualified. All the defendants, except Harris Lewis and Coleman, answered the bill on the 17th of January, denying the existence of the partnership and claiming that the property in dispute was the individual property of Harris Lewis. On the same day, Herman Shainwald and Ralph L. Shainwald filed a petition of intervention in which they asked to be admitted as defendants. In this petition they averred that Ralph L. Shainwald had been appointed receiver of the property of Harris Lewis by the district court for the District of California, and that he took possession under that appointment. It was also stated that in the suit begun in the district court for the District of Nevada, an attachment was issued under which the property was seized by B. C. Thomas, the sheriff, who was in possession under that authority. It also appeared that, in obedience to an order of the District Judge in California, Harris Lewis had executed a formal assignment of all his property to the receiver appointed there.

On the 26th of January, Ralph L. Shainwald was, by order of the court, admitted as a defendant in the suit and the pleadings amended accordingly. Before this time a petition for the removal of the cause to the Circuit Court of the United States for the District of Nevada had been filed by Herman Shainwald and Ralph L. Shainwald, in which it is stated "That the real parties in interest in this action are I. J. Lewis, of the County of Lander, State of Nevada, as plaintiff, and Ralph L. Shainwald, Receiver;" that the defendant, Pringle, is the agent of Shainwald, the Receiver, and in possession for him; that Ralph L. Shainwald and Herman Shainwald are citizens of California; that the [160] defendants, Wright, Coleman, Hoffman, Huber, Sadler, Sower, Hogan, Polkinghorn, Thomas, Pringle and Brennan, are nominal defendants, and have no interest in the suit; that the goods for which they were sued were sold to them by Ralph L. Shainwald, as receiver; and "That the controversy in said action between said plaintiff and said B. C. Thomas, holding the possession of said property by virtue of said attachment in favor of said assignee, and the controversy in said action between said plaintiff and said J. D. Pringle, holding the possession of said property as agent of said Receiver, Ralph L. Shainwald and by virtue of his appointment as Receiver, is wholly between citizens of different States and which can be fully determined as between them, and that said Ralph L. Shainwald and said assignee, Herman Shainwald, are actually interested in said controversy." Upon this petition the state court, after admitting Ralph L. Shainwald as a party to the suit, but not Herman Shainwald, ordered a removal, but the Circuit Court of the United States for the District of Nevada, when the record was filed there, remanded the cause. From an order to that effect this appeal was taken.

We entertain no doubt of the propriety of the order remanding the suit, brought, as it was, to close up the affairs of the partnership between Isaac J. Lewis and Harris Lewis. All the defendants, except Harris Lewis and Coleman, who have not answered, deny the existence of the partnership. Upon one side of that issue, as now made up, is Isaac J. Lewis, a citizen of Nevada, and on the other Ralph L. Shainwald, a citizen of California, and all the other answering defendants citizens of Nevada. If Thomas, the sheriff, and Pringle, the agent, are nominal parties, the other defendants are not. If Shainwald is a necessary party, so are they, because they are interested in the controversy in the same way, if not to the same extent, that he is. They get their title from him, and if he holds the property under the assignment from Harris

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Lewis, subject to the claims of Isaac J. Lewis as a partner, and the partnership creditors, so do they. It is of no importance that Shainwald has more in amount at stake than they. The [161] title of all depends on defeating the claim of Isaac J. Lewis as a partner. To that extent their interests are identical with those of Shainwald. If there was no partnership, they all go free, and each keeps the property he has got. If there was, the interests of these parties may become antagonistic. Besides, on the question of partnership, Harris Lewis, a citizen of California, is a necessary party. If he insists on the partnership, as he certainly may, then, in arranging the parties on that question, there will be citizens of Nevada and California on one side, and citizens of the same States on the other. Clearly, under these circumstances, the suit was not removable under the 1st clause of the 2d section of the Act of March 3, 1875, ch. 137 [18 Stat. at L., 470].

Neither was there any separable controversy in the suit such as would entitle any of the parties to a removal under the 2d clause. As has already been said, the suit was brought to close up the affairs of an alleged partnership. The main dispute is about the existence of the partnership. All the other questions in the case are dependant on that. If the partnership is established, the rights of the defendants are to be settled in one way; if not, in another. There is no controversy in the case now which can be separated from that about the partnership, and fully determined by itself.

The order remanding the suit is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 193.

WILLIAM LUDLOFF AND CHARLES LUDLOFF, Trading as LUDLOFF BROTHERS, *Plffs. in Errr.*,

v.

UNITED STATES.

(See S. C., Reporter's ed., 176-184.)

Sales of cigars by manufacturer at retail—forfeiture thereby—power of commissioner.

*1. A manufacturer of cigars, in his statement furnished in May, 1878, under section 3387 of the Revised Statutes, according to Form 36½, set forth "the room adjoining the store in the rear, on the first floor" of certain premises, as the place where his manufacture was to be carried on. Circular No. 181, issued in March, 1878, by the Commissioner of Internal Revenue, required that a cigar factory should be at least an entire room, separated by walls and partitions from all other parts of the building, and that the factory designated in Form 36½ should not any part of it be used, "even though marked off or separated from the remainder by a railing, counter, bench, screen or curtain, be used as a store where the manufacturer can sell his cigars otherwise than in legal boxes, properly branded, labeled, and stamped." This circular went into effect May 1, 1878. The manufacturer was engaged at the same time and place in doing business as a dealer in tobacco, having paid the special tax as such, and also the special tax as a manufacturer of cigars. He did not comply with the said circular, and had no division between the factory in the rear part of the room, and the front part of the room, where he sold articles as a dealer in tobacco, except a wooden counter extending part of the way across the room, and some three feet high. He sold out of a show case in the front part, in quantities less than 25, from stamped boxes, which were duly branded, marked and stamped, cigars which he had made in the rear part, on which cigars the tax had been paid. For doing so, as a violation of section 3400, in removing cigars made by him without the proper stamps denoting the tax thereon, a quantity of cigars, the property of the manufacturer, found in the rear part of the room, in boxes not stamped, were seized as forfeited to the United States, under section 3400, held.

1. The requirements of the circular were within the power of the Commissioner to prescribe, under section 3396.

2. The sales at retail were in violation of law.

3. The forfeiture claimed was incurred.

2. The provisions of section 3236, and subdivisions 8 and 10 of section 3244, and sections 3387, 3388, 3390 and 3392, considered and held not to authorize such sales, they constituting, under sections 3392, 3397 and 3400, removals of cigars from the place where they were manufactured, without the proper stamp denoting the tax thereon, because the sales were sales of cigars by their manufacturer, at retail, at the place of manufacture, not in stamped boxes, the cigars being in his hands as a manufacturer and not as a retail dealer.

[No. 190.]

Argued Mar. 20, 1883. Decided Apr. 2, 1883.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

The history and facts of the case appear in the opinion of the court.

Mr. **John V. L. Findlay,** for plaintiffs in error.

Mr. **S. F. Phillips,** *Solicitor-General,* for defendant in error.

Mr Justice **Blatchford** delivered the opinion of the court:

This is an information filed by the United States in the District Court for the District of Maryland, against a quantity of domestic cigars, to obtain their condemnation, as forfeited to the United States. The information alleges, as a cause of forfeiture, that the cigars were found in the possession of two persons by the name of Ludloff, doing business as Ludloff Brothers, who had manufactured them and who had unlawfully removed certain cigars, by them manufactured at their manufactory in the City of Baltimore, without the proper stamps denoting the tax thereon, contrary to section 3400 of the Revised Statutes. Ludloff Brothers put in a claim and plea, denying forfeiture, and the issue was tried before a jury, who found a verdict for the United States. Thereupon a judgment of condemnation of the cigars seized was rendered, which was affirmed by the circuit [178] court, and is now brought here for review by a writ of error taken by the claimants.

The material facts of the case, as they appear by the bill of exceptions, are these: prior to the seizure of the cigars, and before May 1, 1878, the claimants carried on the manufacture of cigars in the rear part of a small room on the first floor of the building known as No. 60 West Fayette Street, in the City of Baltimore, and at the same time and place were also engaged in doing the business of dealers in tobacco, that is to say, selling imported and domestic cigars, partly manufactured by themselves, and partly purchased from others, and also selling pipes, smoking material, chewing tobacco, snuff, etc., etc., they having first paid to the United States the special tax as dealers in tobacco, and also the special tax as manufacturers of cigars. In the

* Head notes by *Mr. Justice* BLATCHFORD.

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course of said business they sold to their customers cigars so manufactured by them in the rear part of said room, in quantities less than twenty-five, but out of stamped boxes, which boxes were duly branded, marked and stamped, and then deposited in a show-case before said sale was made. No cigars were sold by them upon which the tax had not been paid.

On the 21st of March, 1870, the Commissioner of Internal Revenue had issued a circular (No. 181) in the following terms: "The portions of the law regulating the manufacture and sale of cigars, without declaring in specific language that the two kinds of business, to wit: manufacturing cigars and selling manufactured tobacco and cigars at retail, shall not be carried on in the same place at the same time, impose such restrictions, make such requirements, and declare such forfeitures and penalties, as renders it impracticable for these two kinds of business to be carried on together, as above stated. See sections 3387, 3392 and 3397 of the Revised Statutes of the United States; also, Special 85, revised, and Form 36¼. Under as lenient a construction of these several sections of the law as their language and the purpose for which they were enacted, to wit: the protection of the revenue, will admit, it is held that a cigar factory, or a place where cigars can be made for sale, must be at least an entire room, separated by walls and partitions from all other parts of the [179] building, and that the factory or place of manufacture designated and described in form 36¼ cannot be used, nor can any portion thereof, even though marked off or separated from the remainder by a railing, counter, bench, screen or curtain, be used, as a store where the manufacturer can sell his cigars otherwise than in legal boxes, properly branded, labeled and stamped. When a cigar manufacturer has a store in a room adjoining his factory, a door and windows may be allowed between the factory and store; and, if necessary for light or ventilation, the upper portion of the partition between the factory and store may be of glass or wire cloth. Collectors and all other revenue officers are enjoined to see that these instructions are strictly enforced on and after May 1, 1878."

This order was disregarded by the claimants, because, in June, 1878, the said district court had decided that the business of manufacturing and selling cigars at retail, by the same person, at the place of manufacture, as well as selling at said place manufactured tobacco, pipes and other smoking material, was not prohibited by law. Thereupon, in August, 1878, the cigars in suit were seized as forfeited, and were found, when seized, in boxes not stamped, in the rear part of the room before described. Such rear part had been designated as the factory or place of manufacture where the claimants proposed to carry on their business, in manner and form as prescribed by the Commissioner of Internal Revenue. as follows:

"(36¼.)

United States Internal Revenue.

Cigar Manufacturers' Statement.

To be rendered to the collector or deputy collector in duplicate, without previous demand therefor, by every manufacturer of cigars before commencing or continuing business. Act of July 20, 1868 [15 Stat. at L., 160], section 82, as modified by section 1, Act of December 24, 1872 [17 Stat. at L., 401]; section 3387, R. S.

Ludloff Bros., of Baltimore, in the 6th division of the 3d district of the State of Maryland, at No. 60 W. Fayette Street, propose to manufacture cigars; and so much of the building or parts of the building, stories, apartments, room [180] or rooms, as is hereinafter described, is to be used exclusively and solely for manufacturing cigars, and is to be known as my manufactory, or place where cigars are made, to wit, in the room adjoining the store in the rear, on the first floor of premises No. 60 West Fayette Street.

There are employed in the premises above described, or I propose to employ, five persons in making cigars; which cigars are manufactured for or to be sold and delivered to ——, residing at No. —— in the ——, and by occupation a ——.

(Signed) Ludloff Bros.

I, William Ludloff, do swear that the above is, to the best of my knowledge and belief, a true and correct statement of the place, street, number, and the exact premises where the business of manufacturing cigars is, or is to be, carried on by Ludloff Bros., and all the other matter stated herein is true and correct.

(Signed) William Ludloff.

Sworn before me this 25th day of May, 1878.

(Signed) R. G. King, *Dep'ty Collector*.

Note.—The blank space in this form after the words "to wit" is to be filled with a precise and accurate description of the premises. If the manufactory comprises anything less than the entire building, then the description must specify what portion of the building, whether the first, second, or third story of the same, and what room or rooms therein. The same premises or room cannot be used for carrying on the business of a cigar manufacturer and a dealer in cigars. In any building, room or apartment of any building designated in this statement as the manufactory or place of manufacture, no cigars can be sold except such as are there manufactured, and are in original and full packages."

At the time of said seizure, the wire partition having been previously removed by the claimants, there was no division or separation between the said rear part of the room, designated as the factory as aforesaid, and the front part of the room, where the business of selling cigars, etc., was carried on by the claimants, except a wooden counter extending part of the way across the room, and from three to three and a half feet high, upon which said wire part of the partition had rested.

The court instructed the jury that if, at the [181] time of the seizure, the cigars were found in the possession of the claimants, and they were carrying on the business of manufacturing cigars and selling the same by retail, such retail sales being in quantity less than twenty-five and not sold in stamped boxes, and that said manufacture and said retail sales were carried on in a room, in which there was no separation except a wooden bar about three feet high, extending partly across the said room, the jury should find for the United States, although they might find that the claimants made cigars only behind said wooden bar and sold at retail out of stamped boxes. The court also instructed the jury that such retail selling, under such circumstances,

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to persons who took the cigars away, constituted a removal by the claimants of cigars from their manufactory, without the proper stamps on the boxes denoting the tax thereon. The court refused to instruct the jury that the business of manufacturing cigars and selling the same in less quantities than by the box, at the place of manufacture, is not prohibited by law, provided the manufacturer has a license as a dealer in tobacco, when he sells products other than his own manufacture. These instructions and refusal were excepted to by the claimants.

The substance of the instruction of the court was, that if the claimants had sold cigars manufactured by themselves in quantities less than twenty-five, and not in boxes duly stamped, from the show-case in the part of the room in front of the bar, they had incurred the forfeiture in question, although the cigars were made by them in the rear part of the same room behind the bar, and were sold at retail out of stamped boxes. It is to be understood, from the bill of exceptions, in connection with the instructions and the verdict, that the claimants, after having had the rear part of the room, namely: the part designated in their "statement" as their manufactory, separated from the front part or store part of the same room by a wire partition, so as to substantially make two rooms, and to make the factory an entire room and a separate room, in accordance with the instructions of said circular, had, at the time of the sales at retail complained of as a ground of forfeiture, removed the wire partition, so that the factory was not [182] then a separate room in the sense of said circular, but the manufacturing was carried on in the same room in which the show-case was and in which the sales at retail took place. This being so, we are of opinion that the instructions were correct; that the requirements of the circular were within the power of the Commissioner to prescribe, and not repugnant to any statutory provisions; that the retail sales in question were in violation of law; and that the forfeiture enforced was incurred.

The claimants contend that section 3236 of the Revised Statutes provides that whenever more than one of the pursuits or occupations thereinafter described are carried on in the same place by the same person at the same time, except as thereinafter provided, the tax shall be paid for each according to the rates severally prescribed; that, by subdivision 8 of section 3244, a dealer in tobacco pays a special tax of $5, and can sell manufactured tobacco, snuff and cigars; and, by subdivision 10 of the same section, a manufacturer of cigars pays a special tax of $10; that the claimants had paid both of these special taxes; that subdivision 8 of section 3244 provides that no manufacturer of tobacco, snuff or cigars shall be required to pay a special tax as dealer in manufactured tobacco and cigars for selling his own products at the place of manufacture; that section 3392, forbidding the sale of cigars in any other form than in new boxes containing at least twenty-five cigars, provides that nothing in that section shall be construed as preventing the sale of cigars at retail by retail dealers who have paid the special tax as such, from boxes packed, stamped and branded in the manner prescribed by law; and that, under these enactments, no cause of forfeiture existed.

But we are of opinion that there is nothing in these provisions which authorizes a manufacturer of cigars to sell at the place of manufacture, from and out of boxes, cigars there made by him, even though he has paid a special tax as a dealer in tobacco. The provision in section 3236 refers only to pursuits or occupations which can be carried on in the same place by the same person at the same time consistently with other requirements of law on the subject of the special pursuit or occupation. It has no reference to the grant of any authority to carry on two occupations at the same time [183] and place by the same person, but concerns only the obtaining of a tax for each of two occupations when they are lawfully carried on.

The provision in section 3244 has no other effect than not to require that a manufacturer of tobacco, snuff or cigars, who sells his own products at the place of manufacture in such manner as is consistent with other provisions of law as to the manner of the sale of such products, shall pay a special tax as a dealer in manufactured tobacco and cigars. It has relation solely to the exaction of a tax and not to the conferring of authority to sell.

The provision cited from section 3392 has no relation to cigars sold as those in the present case were sold, by the manufacturers, at the place of manufacture. The cigars sold were not in their hands as retail dealers, but as manufacturers, because the requirements of law as to the removal of the cigars from the manufactory had not been observed and the cigars were still in the manufactory.

We perceive nothing in sections 3387, 3388 or 3390 which affects the foregoing views.

Section 3392 requires that all cigars shall be packed and sold in new boxes containing at least twenty-five. Section 3397 forbids the removal of cigars from any manufactory or place where cigars are made, without being packed in boxes as required, or without the proper stamp thereon denoting the tax. Section 3400 provides that if a manufacturer of cigars removes or sells any cigars without the proper stamps denoting the tax thereon, he shall forfeit to the United States all cigars found in his possession or in his manufactory. Under these provisions the removal of the cigars in this case from the place where they were manufactured, by selling them at retail not in stamped boxes, was ground for the forfeiture of the cigars seized.

The regulations prescribed by the Commissioner by the circular referred to were within his authority under section 3396, to prescribe such regulations for the inspection of cigars and the collection of the tax thereon as he may deem most effective for the prevention of frauds in the payment of such tax. *Thacher's Distilled Spirits*, 103 U. S., 679 [XXVI., 535].

The proposition asserted in the instruction [184] asked for by the claimants, and which the court refused to give, is understood to be, that, as the claimants sold at their shop, as dealers in tobacco who had paid the special tax, articles not of their own manufacture, in addition to cigars which they made in the same room, the sale of the last named cigars was not prohibited by law. If this proposition has any other meaning than the propositions before considered, it must be held to be entirely without support in law or in reason.

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Although the record shows that the claimants were, as dealers in tobacco, engaged at their shop in the business of selling cigars which they purchased, as well as cigars which they made, there is nothing in the case which raises any other questions than those above considered.

The judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH, *Plfs. in Err.*,

v.

EUGENE KELLY.

(See S. C., Reporter's ed., 184-191.)

City bonds for public improvement—authority to guaranty—pledge of city faith.

1. An Act to authorize a city to obtain money on loan, for the purposes of contributing to works of internal improvements, is not repealed by a subsequent Act which provided that all bonds theretofore issued by the city should be valid, and gave the city power to cause other bonds to be issued for purposes of internal improvement.
2. An Act which confers upon the mayor and aldermen of a city power to obtain money on loan on the faith and credit of the city, authorizes them to obtain money upon a guaranty by the city of bonds of a railroad company.
3. Where there was an unquestionable pledge of the faith and credit of a city it would, after the lapse of twenty years, in which no such question has been raised, be contrary to good faith and common justice to permit the city to allege a newly discovered construction of an equivocal power to avoid its obligations.

[No. 198.]

Argued Mar. 21, 22, 1883. Decided Apr. 2, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of Georgia.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **A. R. Lawton** and **W. S. Chisholm**, for plaintiff in error:

"The authority to issue railroad aid bonds is not one of the ordinary powers of a municipality. Express authority for it is required, and this authority must be exercised in conformity with prescribed forms."

Jones, R. R. Secur., 226; *Rogers* v. *Burlington*, 3 Wall., 669 (70 U. S., XVIII., 84); *Head* v. *Ins. Co.*, 2 Cranch, 169; *Scipio* v. *Wright*, 101 U. S., 674 (XXV., 1039); Burroughs, Public Securities, pp. 206-211.

The supposed obligation of the city in this case is a technical guaranty; it is a promise to pay the debt of another.

2 Dan. Neg. Inst., secs. 1752, 1753.

"The note is the debt of the maker; the guaranty is the engagement of the defendant that the defendant shall pay the note when it becomes due. * * * They are not the same, but different and distinct contracts."

Brewster v. *Silence*, 8 N. Y., 207; *Hall* v. *Farmer*, 5 Den., 484; *Bank* v. *Haynes*, 8 Pick., 427; *Floyd's Acceptances*, 7 Wall., 682 (74 U. S., XIX., 175).

Although a municipal corporation may be authorized to make and issue its own bonds, it has no power to guaranty, as a donation or otherwise, the bonds of a railroad corporation issued by, and payable at the office of, the railroad company.

1 Dill. Mun. Corp., sec. 471; *Blake* v. *Mayor of Macon*, 53 Ga., 172; *La. State Bk.* v. *N. O. Nav. Co.*, 3 La. Ann., 294.

"A municipal corporation cannot, without legislative authority, issue bonds in aid of an extraneous object. Every person dealing in them must, at his peril, take notice of the existence and terms of the law which it is claimed conferred the power to issue them, no matter under what circumstances he may obtain them."

S. Ottawa v. *Perkins*, 94 U. S., 261 (XXIV., 155); *E. Oakland* v. *Skinner*, 94 U. S., 258 (XXIV., 126).

The cases which have been decided upon the doctrine of municipal decision and estoppel by recitals, do not apply to this case as we think.

The case of *Knox Co.* v. *Aspinwall*, 21 How., 544 (62 U. S., XVI., 210), is acknowledged to have extended the doctrine to its utmost limit.

See, further, as illustrative of this doctrine: *Coloma* v. *Eaves*, 92 U. S., 490 (XXIII., 581); *Marcy* v. *Oswego*, 92 U. S., 637 (XXIII., 748); *Humboldt* v. *Long*, 92 U. S., 642 (XXIII., 752).

Mr. **George A. Mercer**, for defendant in error:

It is argued that it is foreign to the purpose of a municipal corporation to become a surety, indorser or guarantor; but it is equally foreign to its ordinary scope and purpose to borrow money at all. Such a corporation is presumed to require money only for strictly municipal uses, and to raise the same by the exercise of its power of taxation.

See this leading idea strongly put in the judgment of the court, delivered by *Mr. Justice* Bradley in *The Mayor* v. *Ray*, 19 Wall., 475 (86 U. S., XXII., 168).

The real question in each case is: what does the charter expressly grant or fairly imply?

The Act of December 27, 1838, expressly authorized the Mayor and Aldermen "To obtain money on loan, on the faith and credit of said city, for the purposes of contributing to works of internal improvement."

Wils. Dig., 518, 519.

It would be difficult to frame broader or more unrestricted authority; the city was expressly empowered to obtain money on loan; and no method being indicated, the means or manner was left discretionary.

It was empowered to obtain it on the faith and credit of the city; and no particular method or manner of pledging its faith and credit was suggested.

San Antonio v. *Mehaffy*, 96 U. S., 315 (XXIV., 817).

When municipal obligations, issued under the exercise of a doubtful authority, have passed into the possession of *bona fide* holders, the corporation will be estopped to put a different construction upon its authority to issue, although the issue might, perhaps, have been restrained in the first instance.

Bonds declared to be valid by judicial construction, cannot be rendered invalid by subsequent judicial construction.

Jones, R. R. Secur., sec. 276; *Thomson* v. *Lee Co.*, 3 Wall., 327 (70 U. S., XVIII., 177).

Even if these obligations of the City of Sa-

NOTE.—*Repeal of statute by implication.* See note to U. S. v. Henderson, 78 U. S., XX., 235.

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vannah were issued without any authority of law, and were originally void, they were subsequently ratified and made valid.

By Act of the General Assembly of Georgia, of December 9, 1858, provision was made for the election of three commissioners to prepare a Code of Georgia. The Code so prepared was submitted to the Legislature, and on December 19, 1860, was adopted as the Code of Georgia, to be of force and take effect on the first day of January, 1862.

See, original Code of Georgia, preface III., IV., IX.; *Long* v. *State*, 38 Ga., 509.

By Act of 1861, the time was extended to January 1, 1863.

This Code declared that all bonds theretofore issued by the Mayor and Aldermen of Savannah, and still outstanding, were legal and valid.

It is perfectly competent for the Legislature to render legal and valid bonds and obligations issued, or acts done, without legal authority.

Jones, R. R. Secur., sec., 278; *Winn* v. *Macon*, 21 Ga., 275; *Bass* v. *Columbus*, 30 Ga., 845.

Mr. Justice **Matthews** delivered the opinion of the court:

The Savannah, Albany & Gulf Railroad Company was a corporation of Georgia, authorized to construct and operate a railroad, the principal and beginning point of which was the City of Savannah. That city was, in fact, owner of more than one half of its capital stock, which it had subscribed in pursuance of law to aid in its construction. For purposes of construction, that is, partly to pay debts incurred for construction then made, and partly to pay for future improvements, the railroad company in 1859 made an issue of its bonds, in the usual form, payable to bearer, twenty years after date, amounting in the aggregate to $300,000, bearing interest at the rate of seven per cent per annum. On each of this series of bonds there was indorsed the following: "State of Georgia. For value received, the Mayor and Aldermen of the City of Savannah and hamlets thereof, hereby, as authorized by a public meeting of the citizens thereof, held on the 14th day of May, 1859, guaranty the payment of the within bond, principal and interest, as the same may become due, according to the tenor thereof. Witness the hand of the Mayor, with the seal of said corporation affixed. [Seal of city.] Thomas M. Turner, Mayor. Attest: Edward G. Wilson, clerk of council."

The bonds were issued with this guaranty indorsed, and were purchased in open market for value. The present action was brought by the defendant in error to enforce the liability of the City of Savannah upon this guaranty. And it [188] is not denied that the city is liable upon it, if at the time it was made there was authority of law for the city to bind itself in that form for such purposes. The judgment of the Circuit Court affirms this liability and is sought to be reversed, upon this writ of error, for that cause.

The 5th section of an Act which took effect December 27, 1838, entitled "An Act to Extend the Limits of the City of Savannah, and to Authorize the Corporate Authorities of said City to Borrow Money for Works of Internal Improvement," authorizes the Mayor and Aldermen "To obtain money on loan, on the faith and credit of said City, for the purposes of contributing to works of internal improvements." This provision is relied on as conferring authority for the guaranty in question.

It is claimed, however, on behalf of the plaintiff in error, that this provision of the Act of 1838 was not in force at the date of the guaranty, having been repealed by an Act of March 4, 1856. Wils. Dig., 526. This Act expressly repeals only such Acts as conflict with it, and the repeal, if effected, must be, therefore, by implication. The 8th section of the Act of 1856 is supposed to have wrought this result. It is as follows:

"And whereas, doubts have been entertained whether certain bonds issued and disposed of by the City of Savannah for internal improvements were legal and valid, therefore, be it further enacted, that all bonds heretofore issued by the constituted authorities of the City of Savannah are hereby declared legal and valid, and from and after the passage of this Act the Mayor and Aldermen of the City of Savannah, and the hamlets thereof, upon the recommendation of a public meeting of the citizens of Savannah, called for that purpose, shall have power and authority to cause bonds to be issued and disposed of in such manner as they may direct, for purposes of internal improvement, which bonds, so issued, shall be legal and valid."

Whether the latter repeals the former law, depends on whether the two are inconsistent; and in the present instance, that depends on whether it is manifest from the words of the enactments, that both cover the same ground, and that the latter was intended to be a substitute for the for- [189] mer. The Act of 1856 relates entirely to the issue of bonds by the city of Savannah; the Act of 1838 does not specify bonds at all as a mode of obtaining money on loan, on the faith and credit of the city. If it be assumed that the only mode by which that could be done under the Act of 1838, was by issuing bonds, it might then be argued that the two Acts covered the same subject, and the latter was designed to supersede the former. But to assume that construction of the Act of 1838 to be correct, is to beg the question at issue, which is, whether that Act requires the issue of bonds as the exclusive mode of obtaining money on loan on the faith and credit of the city. For if it does not, there is no inconsistency between the two statutes, and the Act of 1838 is not repealed. Whether it be repealed, then, depends on what it means; and if it authorizes a guaranty such as that sued on, then it is not repealed; unless it might be supposed that the term "bonds," used in the Act of 1856, was generic and not technical, and was designed to embrace every form of obligation, whereby the city might extend the aid of its credit to purposes of internal improvement. In that event, the repeal of the Act of 1838 might be effected, by conceding that the Act of 1856 was large enough to embrace every case, even that of a guaranty, which might have been included in the Act of 1838. But conceding, as we are disposed to do, for the purposes of this case, that the term "bond," as used in the Act of 1856, is to be taken in a strict sense, as confined to direct municipal obligations in the usual form of securities known as such, then we are clear that the Act of 1838 is not repealed by any necessary implication; because it is not confined

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to the case of bonds of that description; and the question remains whether it fairly includes that of an obligation, such as the guaranty sued on. The argument for the plaintiff in error moves in a circle. It is, that the Act of 1838 does not confer authority to make the guaranty, because it is repealed; and that it is repealed, because it does not confer authority to make a guaranty.

The language of the Act of 1838 is broad and unqualified. It confers upon the Mayor and Aldermen plenary power "To obtain money on loan, on the faith and credit of said City, for the purposes of contributing to works of internal improvement." The money paid for the guaranteed bonds was obtained on loan and upon the faith and credit of the City, and it was for the [190] purpose of contributing to works of internal improvement. The fact that it was not advanced directly to the City but, upon its assurance of repayment, to the railroad company, is not a departure even from the letter of the law, much less its meaning; nor does the fact that the money was advanced partly on the credit of the railroad company diminish the presumed reliance of the purchaser upon that of the City, with which it was joined. It is difficult to conceive of language more comprehensive than that employed, to embrace every form of security in which the faith and credit of the City might be embodied; and that in such cases it is not important to the character of the transaction that the money is obtained in the first instance by the railroad company, upon the credit of the City, was directly ruled in *Rogers* v. *Burlington*, 3 Wall., 654-666 [70 U. S., XVIII., 79-83], and affirmed in *Venice* v. *Murdock*, 92 U. S., 494-501 [XXIII., 583-585]. If the City of Savannah had, by virtue of an arrangement with the railroad company, received from the latter its bonds, and had itself, having indorsed the guaranty in suit, delivered them after sales to purchasers and, receiving the money, had paid it over to the railroad company as a contribution to purposes of internal improvement, the transaction could not have been made the subject of a cavil, as unauthorized by the Act of 1838; and yet this is the precise legal equivalent of the transaction as made. We have no hesitation in saying that it is equally embraced within the meaning of that statute, and that the Act in question was in force at the date of the guaranty and accordingly governs it. The substance of the transaction was that, in consideration of the money advanced to the railroad company as a loan on the faith and credit of the City, the latter required the railroad company to indemnify it against loss on that account, a precaution which no implication in the statute forbids, and that result was accomplished by the form of the obligation, by which the railroad company became the principal debtor, and the City of Savannah guarantor merely of its bonds.

[191] It does not detract from the force of this conclusion that the guaranty recites that it was authorized by a public meeting of the citizens thereof, as if it were the case of bonds issued under the Act of 1856, which required the recommendation of such a meeting. But if the fact is immaterial, the recital is not injurious. And the official record of the transaction shows that such a meeting was held for the purpose of quieting doubts, and not to raise them. The authorities of the City at that time were only anxious to omit nothing which the most critical might regard as important in securing for its obligations all the weight and value properly belonging to an unquestionable pledge of its faith and credit; and certainly now, after the lapse of twenty years, in which no such question has been raised, it would, in the language of *Mr. Justice* Grier, in *Mercer Co.* v. *Hackett*, 1 Wall., 83-94 [68 U. S., XVII., 548, 549], "be contrary to good faith and common justice to permit them to allege a newly discovered construction of an equivocal power." *Von Hostrup* v. *Madison*, 1 Wall., 291 [68 U. S., XVII., 538]; *Meyer* v. *Muscatine*, 1 Wall., 391 [68 U.S., XVII., 566]; *James* v. *Milwaukee*, 16 Wall., 159 [83 U. S., XXI., 267].

In our opinion the Act of 1838 authorized the guaranty made by the City of Savannah upon the bonds of the railroad company, and it constitutes a valid and subsisting liability. This disposes of the only question in the case deserving serious consideration; and the judgment of the Circuit Court is, therefore, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH, *Plffs. in Err.*, v. A. M. MARTIN.

(See S. C., Reporter's ed., 191, *Note.*)

[No. 199.]

Argued at same time by same counsel as in preceding case.

Mr. Justice **Matthews** delivered the opinion of the court:

This case is identical in its circumstances with that of The Mayor and Aldermen of the City of Savannah, plaintiffs in error, against Eugene Kelly [*ante*, 636].

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Plff.*, [199]
v.
JAMES H. BRITTON AND BARTON BATES.

(See S. C., Reporter's ed., 199-207.)

Indictment against bank officer—common law offense—willful misapplication of bank funds.

1. In an indictment for conspiracy under section 5440, Rev. Stat., the conspiracy must be sufficiently charged; and it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy.
2. There are no common law offenses against the United States.
3. The procuring by its directors of a dividend to be declared by a national bank when there are no net profits to pay it, is not a willful misapplication of the moneys and funds of the association, which is made an offense by section 5209 of the Revised Statutes, and a conspiracy to commit this offense is not made punishable by section 5440.

[No. 409.]

Argued Mar. 15, 16, 1883. Decided Apr. 2, 1883.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Eastern District of Missouri.

The history and facts of the case appear in the statement by the court. See, also, the re-

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lated cases of *United States* v. *Britton*, *ante*, 520, and *post*, 701.

Statement of the case by *Mr. Justice* **Woods:**

Section 5440 of the Revised Statutes declares: "If two or more persons conspire * * * to commit any offense against the United States, * * * and one or more of such parties do any act to effect the object of the conspiracy, [200] all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars, and to imprisonment not more than two years."

Section 5209, of the Revised Statutes provides as follows: "Every president, director, cashier, teller, clerk or agent of any "banking" association who embezzles, abstracts or willfully misapplies any of the moneys, funds or credits of the association, * * * or who makes any false entry in any book, report or statement of the association, with intent in either case to injure or defraud the association, or any company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of such association, * * * shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

The defendants were indicted under section 5440 of the Revised Statutes. The indictment contained two counts. The first count charged in substance as follows: that Britton was the president and a director of the National Bank of the State of Missouri, in St. Louis, a national banking association organized under the Act of Congress, and that Bates was vice-president and a director of the same association; that Britton and Bates, while president and vice-president respectively, and directors of said association, did conspire with each other to willfully misapply a large sum of money belonging to and the property of said association, to wit: the sum of $87,500, by means of procuring to be made, on June 30, 1876, by the said association, a dividend of three and one half per centum on the capital stock of the association, which said dividend was to be greater, in the sum of $87,500, than the net profits of said association on hand after deducting from said net profits the amount of the losses and bad debts of the association existing on said 30th day of June.

The acts done to effect the object of the conspiracy were, in substance alleged, as follows: that Britton falsely represented to one Walsh, who, on June 30, 1876, was also a director of the association, that the net profits of the association [201] were on that day sufficient in amount to warrant and permit the declaration of said dividend, and did thereby induce the said Walsh to assent to the declaration of said dividend, and to join on said June 30, as such director with Britton and Bates, directors as aforesaid, in the declaration of said dividend, they, the said Britton, Bates and Walsh, constituting a majority in number of the directors of said association; that to effect the object of said conspiracy, Britton did further upon the said June 30, cause and procure to be made by one Edward P. Curtis, in the record of the proceedings of the board of directors of said association the following entry: "St. Louis, June 30, 1876. Present, Messrs. Britton and Walsh, Mr. Bates assenting on the 29th. Ordered that a dividend of 3½ per cent be declared payable on the 10th *proximo*, and that the transfer books be closed till that date. Attest, Edward P. Curtis, Cashier;" that afterwards, on July 8, 1876, in further pursuance of and to effect the object of said conspiracy, the said Britton and Bates did each receive from said association and convert to his own use, a large sum of money; the said Britton the sum of $5,897 and the said Bates the sum of $4,112.

The second count was similar to the first, except that after averring that said dividend so to be declared on said June 30, 1876, was to be false and frandulent, it was added that there was on said June 30, 1876, due and owing to said association certain debts, specifying them, amounting in the aggregate to the sum of $797,214.29; that upon such debts there was owing to the association, then past due and unpaid, interest for a period of six months; that said debts were "not well secured and in process of collection," and their aggregate amount was largely in excess of the net profits and purported net profits of said association then on hand, as said Britton and Bates then well knew, and that said debts were bad debts within the meaning of section 5204 of the Revised Statutes, as said Britton and Bates then well knew.

The defendants demurred to the indictment. Upon the hearing of the demurrer, the Judges of the Circuit Court were divided in opinion upon the following questions:

1. Whether, under section 5209 of the Re- [202] vised Statutes of the United States it was necessary to aver that the alleged conspiracy was entered into with intent to injure and defraud; and whether the several counts in this indictment not containing the said allegations are good and sufficient in law.

2. Whether it was necessary, in this indictment in addition to the allegations charging the conspiracy to willfully misapply certain funds and property of the association, by means of procuring to be made by the board of directors a dividend, as alleged in the indictment, to further allege that said dividend was in pursuance of said conspiracy declared and made; and, if so, whether the same is sufficiently charged therein, and whether it was also necessary to allege that said dividend was fraudulent when declared and also when paid.

3. Whether, under section 5209 of the Revised Statutes of the United States, it was necessary in this indictment to charge that the funds alleged to have been misapplied had been previously intrusted to the possession of the defendants.

4. Whether the indictment in this case alleges with sufficient certainty that the bank had no net profits out of which to declare and pay the dividend alleged to have been fraudulent.

5. Whether the said defendants, as directors of the said banking association, are liable to the penalties provided by the said section 5209 upon proof that they, as such directors, willfully voted for the declaration of a dividend, knowing that there were no net profits out of which to pay the same; and, if liable, must the indictment charge that such dividend was ordered and voted for with intent thereby to defraud the association or other persons.

Mr. **Wm. A. Maury,** *Asst. Atty-Gen.*, for plaintiff.

Messrs. **Chester H. Krum, Geo. H.**

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Shields and *John B. Henderson*, for Britton, defendant.

Messrs. **S. T. Glover** and *J. R. Shepley*, for Bates, defendant.

Mr. Justice **Woods** delivered the opinion of the court:

The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, [205] that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiæ*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy. *Reg.* v. *King*, 7 Q. B., 782; *Commonwealth* v. *Shedd*, 7 Cush., 514.

The charge against the defendants is a conspiracy to willfully misapply the funds of the association. It is alleged in the counts of this indictment that they, being directors, with intent to defraud the association, did conspire to willfully misapply its moneys and funds by procuring to be declared by the association a dividend of its net profits, when there were no net profits sufficient in amount to pay it.

Such a dividend is forbidden by section 5204 of the Revised Statutes, which declares as follows:

"No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained equal to or exceeding its undivided profits then on hand, no dividend shall be made, and no dividend shall ever be made by any association while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. All debts due to any association on which interest is past due and unpaid for a period of six months, unless the same are well secured and in process of collection, shall be considered bad debts within the meaning of this section."

We are, therefore, to inquire whether the conspiracy entered into by and between the defendants to misapply the moneys of the association by procuring the declaration by the association of a dividend greater than the net profits of the association, is a criminal offense against the United States.

[206] There are no common law offenses against the United States (*United States* v. *Hudson*, 7 Cranch, 32; *United States* v. *Coolidge*, 1 Wheat., 415), and section 5204 does not of itself create any offense against the United States.

But it is contended on behalf of the United States that the procuring of the dividend to be declared by the association when there are no net profits to pay it is a willful misapplication of the moneys and funds of the association, which is made an offense by section 5209 of the Revised Statutes, and that a conspiracy to commit this offense is made punishable by section 5440.

We think this construction of the statute is unwarranted and that the indictment is based on a misconception of its provisions.

The indictment having charged a conspiracy between the defendants to misapply the moneys of the association, proceeds to aver by what means the misapplication was to be effected, namely: by procuring to be declared by the association a dividend when there were no net profits to pay it. If procuring the declaring of such a dividend by the association is not a willful misapplication of its funds by these defendants, then the indictment charges no offense. The declaring of a dividend by the association when there were no net profits to pay it is, in our judgment, not a criminal misapplication of its funds. It is an act done by an officer of the association in his official and not in his individual capacity. It is, therefore, an act of maladministration and nothing more, which, while it may subject the association to a forfeiture of its charter, and the directors to a personal liability for damages suffered in consequence thereof by the association or its shareholders, does not render them liable to a criminal prosecution. The act belongs to the same class as the purchase, by a banking association, of its own shares when not necessary to prevent a loss on a debt due it, which in case No. 406, *ante*, 520, just decided, we held not to be a criminal misapplication of the funds of the association. If, therefore, the indictment had charged that the defendants had misapplied the funds of the association by themselves declaring a dividend, when there were no net profits to pay it, it would not have charged a criminal act; much [207] less when it merely charges that they conspired to procure the association to declare a dividend under like circumstances. So that it appears on the face of the indictment that the conspiracy charged was not a conspiracy to commit an offense against the United States.

We, therefore, answer the first branch of the fifth question propounded to us by the Judges of the Circuit Court in the negative.

Our opinion is that, under this indictment, the defendants are not "Liable to the penalties provided by section 5209, upon proof that they, as such directors, willfully voted for the declaration of a dividend knowing there were no net profits out of which to pay the same," because this is not the offense with which they are charged in the indictment. And as they are charged with a conspiracy to do an act which is not an offense, we are of opinion that no penalties could be inflicted on them under the indictment.

As the answer we have given to this question is fatal to the indictment, it is not necessary for us to answer the other questions sent to us by the Judges of the Circuit Court.

In case No. 410, *The United States* v. *James H. Britton and Barton Bates*, on certificate of division in opinion from the same court, the indictment contained five counts, all substantially similar to the counts in case No. 409, just disposed of. What we have said in reference to the indictment in case 409 applies to the indictment in this case. As the indictment is bad, and no good indictment can be framed upon the facts as they appear therein, it is un-

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necessary and we decline to answer the specific questions submitted to us by the Judges of the Circuit Court. *United States* v. *Buzzo*, 18 Wall., 125 [85 U. S., XXI., 812].

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Plff.*,
v.
JAMES H. BRITTON.

(See S. C., Reporter's ed., 193-199.)

Indictment against bank officer—withdrawal of deposit.

1. The procuring, by an officer of a national bank, his own note to be discounted by such bank, the note not being well secured, and both the maker and indorser being to the knowledge of such officer insolvent when the note was discounted, is not a willful misapplication of the moneys of the bank, and does not charge an offense within the meaning of section 5209 of the Revised Statutes; where it is not charged that the note was discounted without the authority of the Board of Directors, nor that the discount was procured by any fraudulent means, nor that the note was not paid at maturity, nor that the association suffered any loss by reason of its discount.

2. Allowing a depositor who is largely indebted to a national bank to withdraw his deposit without paying his indebtedness, is not a criminal misapplication by the president of the bank of the funds, under section 5209, Rev. Stat.

[No. 407.]

Argued Mar. 15, 16, 1883. Decided Apr. 2, 1883.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Eastern District of Missouri.

The history and facts of the case appear in the statement by the court. See, also, the related cases of *U. S.* v. *Britton*, *ante*, 520, 698, and *post*, p. 703.

Statement, by *Mr. Justice* **Woods**:

The indictment in this case contained three counts. It was found by the same grand jury as the indictment in case No. 406 [*ante*, 520], just decided, and was remitted and transferred to the circuit court in like manner.

The first count charged that the defendant, James H. Britton, on March 24, 1877, within [194] the Eastern District of Missouri, being the president and a director of the National Bank of the State of Missouri, the same being a national banking association organized under the Act of Congress, "Did cause and procure to be then and there received and discounted by said association a certain promissory note, which said note was then and there in the words and figures following:

"[$20,835.] St. Louis, March 24th, 1877.

Four months after date I promise to pay to the order of Geo. F. Britton, negotiable and payable at the National Bank of the State of Missouri, in St. Louis, twenty thousand eight hundred thirty-five dollars, for value received, without defalcation or discount, with interest after maturity, at the rate of ten per cent per annum. J. H. Britton."

That the note was indorsed as follows: "Geo. F. Britton;" that the defendant converted to his own use the proceeds of the discount of said note, to wit: the sum of $20,251.63; that said note, when so discounted, was not well secured: that "Said James H. Britton, and the said payee and indorser of said note, to wit: one George F. Britton, were then and there insolvent, as he, the said James H. Britton, as president and director as aforesaid then and there well knew;" and that said James H. Britton, by procuring said note to be discounted, and by applying the proceeds of said discount to his own use, willfully misapplied the said sum of $20,251.63 of the money and funds of said association, with intent then and there to defraud said association and certain persons to the grand jurors unknown.

The second count charged that, on June 2, 1877, within the Eastern District of Missouri, one George F. Britton was indebted to said association in the sum of $79,480.23, as the maker of five promissory notes then unpaid; that said indebtedness of George F. Britton was known to James H. Britton president and director of said association: that on said June 2, 1877, said notes were not well secured and said George F. Britton was insolvent, both of which facts said James H. Britton then well knew. Nevertheless, said James H. Britton, as president and director of said association, did then and there receive and [195] discount a note for $800, dated June 2, 1877, due and payable on August 5, 1877, signed by the said George F. Britton as maker, and indorsed by him, the said James H. Britton, he being then insolvent, as he then well knew, that said James H. Britton did then and there pay out of the moneys and funds of said association, as the proceeds of said discount, to the said George F. Britton, the sum of $780.45, contrary to the form of the statute, etc.

The third count charged that, on May 18, 1877, within the Eastern District of Missouri, said James H. Britton was president and a director of said banking association; that from April 12, 1873 to May 18, 1877, one Alfred M. Britton had been continuously indebted to said association in the sum of $37,122.67, as maker of a certain promissory note during said period, owned and held by said association, and was then indebted to said association for interest past due on said note in the further sum of $4,529.01; that said Alfred M. Britton was on said May 18, 1877, insolvent; that on the day and year last named there was in the moneys and funds of said association to the credit of said Alfred M. Britton the sum of $36,860.45; that said James H. Britton, well knowing the said indebtedness of Alfred M. Britton to said association and his said insolvency, failed and neglected to cause to be applied to the said indebtedness of said Alfred M. Britton the said sum of $36,860.45, so as aforesaid in the moneys and funds of said association to the credit of said Alfred M. Britton, and did then and there willfully permit said Alfred M. Britton, while so indebted, to transfer and assign said sum of $36,860.45 to the credit of the City National Bank of Fort Worth, Texas. "And so the said James H. Britton did willfully misapply the said sum of $36,860.45 of the moneys of said association, with intent to injure and defraud said association and certain persons to the grand jurors unknown, contrary," etc.

Upon demurrer to the indictment the Judges of the Circuit Court were divided in opinion upon the question whether the several counts

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charged with sufficient certainty an offense un-
[196] der section 5209 of the Revised Statutes. The case comes to this court upon this certificate of division.

Mr. **Wm. A. Maury,** *Asst. Atty-Gen.*, for plaintiff.

Messrs. **Geo. H. Shields, Chester H. Krum,** *John B. Henderson* and *Thomas C. Fletcher*, for defendant.

Mr. Justice **Woods** delivered the opinion of the court:

It is not alleged in the first count that the J. H. Britton, maker of the note discounted, was the James H. Britton who was president and a director of the association and the defendant in the indictment and, consequently, there is no averment that the maker of the note was insolvent. Passing by this defect, and assuming that the maker of the note, being the defendant in this case, the *gravamen* of the charge is that defendant, being president and a director of the association, and being insolvent, procured to be discounted his own note, the same not being well secured, the payee and indorser thereof being also insolvent, which he, the defendant, well knew. The incriminating facts are that the note was not well secured, and that both the maker and indorser were, to the knowledge of defendant, insolvent when the note was discounted. The question is, therefore, presented whether the procuring of the discount of such a note by an officer of the association is a willful misapplication of its moneys within the meaning of the law. We are clearly of opinion that it is not. It is not even necessarily a fraud on the association.

One branch of the business of a banking association is the discounting and negotiating of promissory notes, and this is to be done by its board of directors or duly authorized officers or agents. Sec. 5136, Revised Statutes. There is no provision of the Statute which forbids the discounting of a note not well secured, or both the maker and indorser of which are insolvent. It is within the discretion of the directors, or the officers or agents lawfully appointed by them, to discount such a note if they see fit, and it might, under certain circumstances, tend to the advantage of the association. This count
[197] does not charge that the note of the defendant was discounted at his instance, without the authority of the board of directors. On the contrary, the charge is that he caused and procured it to be discounted. This implies that it was done by the directors or other duly authorized officers or agents. It is not alleged that the discount was procured by any fraudulent means. From all that appears, the board of directors, or the officer or agent by whom the note was discounted, may, upon knowledge of all the facts in the utmost good faith and for the advantage of the association, have decided to discount the note. The discount may have turned out to be a benefit to the association, for there is no averment that the note was not paid at maturity or that the association suffered any loss by reason of its discount.

But whether the discounting of the note was an advantage to the association or not, and whether the note was paid or not is immaterial. If an officer of a banking association, being insolvent, submits his own note, with an insolvent indorser as security, to the board of directors for discount, and they, knowing the facts, order it to be discounted, it would approach the verge of absurdity to say that the use by the officer of the proceeds of the discount for his own purposes, would be a willful misapplication of the funds of the bank, and subject him to a criminal prosecution. The count under consideration charges nothing more than this against the defendant. We are of opinion, therefore, that it does not charge an offense under section 5209 of the Revised Statutes.

What we have said in reference to the first count of this indictment also applies in all respects to the second. We are, therefore, of opinion that it also does not charge an offense under section 5209.

In respect to the third count we observe that the statute (section 5130, clause seven) places the conduct of the business of banking associations with its board of directors or its duly authorized officers or agents. Section 5145 provides that the affairs of each banking association shall be managed by not less than five directors to be chosen by the shareholders. It is alleged in this count that the defendant was the president and one of the directors of the association. But he was only one of at least five directors. The [198]
only duties imposed on him as president were to certify payments on the capital stock of the association (sec. 5140), to cause to be kept in the office where the business of the association was transacted a list of the shareholders (sec. 5210), and to verify by his oath the general reports made by the association to the comptroller of the currency (sec. 5211), and the reports of dividends declared (sec. 5212). It is nowhere averred in this count that the defendant was the duly authorized officer or agent of the association, whose duty it was to look after the accounts of depositors, to apply the sums standing to their credit to the payment of their obligations to the association, or to prevent the withdrawal or transfer of their deposits while they continued indebted to the association or that he was even charged with a general superintendence of the affairs of the association. Until it is shown that some officer or agent of the bank was duly authorized to take charge of this branch of the business of the association, the presumption is that it was the duty of the board of directors, and if such was the fact, the defendant was powerless to prevent the transfer of the deposits of Alfred M. Britton to the credit of the City National Bank of Fort Worth. At all events, it is not charged that it was his duty to prevent such transfer, and this constitutes a fatal defect in the indictment.

But even if the defendant had been charged with the duty of looking after the deposits of debtors of the association and of applying their deposits to the payment of their debts, we do not think that the fact, that he permitted Alfred M. Britton while indebted to the association to withdraw and assign to the City National Bank of Fort Worth his deposit, would constitute a criminal misapplication by the defendant of the funds of the association.

The count charges neither application nor misapplication, by the defendant, of the funds of the association. It merely charges that he failed to apply certain funds standing to the credit of Alfred M. Britton to the payment of

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Britton's debt. It charges that he permited Alfred M. Britton to do a perfectly lawful act, namely: to withdraw his own funds from the the association and transfer them to another bank.

[199] This might be an act of maladministration on the part of the defendant. It might show neglect of official duty, indifference to the interests of the association or breach of trust, and subject the defendant to the severest censure and to removal from office; but to call it a criminal misapplication by him of the moneys and funds of the association, would be to stretch the words of this highly penal statute beyond all reasonable limits.

In our judgment, the count under consideration, as well as the first and second, is bad.

We, therefore, answer the first, third and fourth questions submitted to us by the Judges of the Circuit Court in the negative.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Plff.*,
v.
JAMES H. BRITTON ET AL.

(See S. C., Reporter's ed., 192, 193.)

Indictment against bank president.

1. An indictment which charges a conspiracy between the president and a director of the same national bank to misapply its funds, by the purchase therewith of the shares of the association, does not sufficiently state an offense under sections 5209 and 5440 of the Revised Statutes.
2. U. S. v. Britton, *ante*, followed.

[No. 411.]

Argued Mar. 15, 16, 1883. Decided Apr. 2, 1883.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Eastern District of Missouri.

The history and facts of the case appear in the opinion of the court, and in the related cases of *U. S.* v. *Britton*, *ante*, 520, 698, 703.

Mr. **Wm A. Maury**, *Asst. Atty-Gen.*, for plaintiff.

Messrs. **Geo. H. Shields, Chester H. Krum, S. T. Glover**, *J. R. Shepley* and *J. B. Henderson*, for defendants.

Mr. Justice **Woods** delivered the opinion of the court:

In this case the indictment contained two counts. They charged a conspiracy between James H. Britton and Barton Bates, the first being president and a director, and the latter a director of the same banking association, to misapply its funds by the purchase therewith of the shares of the association. The first count described the offense which defendants conspired to commit substantially as it is set forth in count seventy-seven, and the second count described the offense as the same is set forth in [193] count ninety-seven in the case just decided [*ante*, 520].

The Judges of the Circuit Court were divided in opinion upon the question whether the counts sufficiently stated an offense under sections 5209 and 5440 of the Revised Statutes, and the same has been duly certified to us for our opinion. What we have said in the case just decided, disposes of this question.

We answer it in the negative.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ST. PAUL AND CHICAGO RAILWAY COMPANY, *Plff. in Err.*,
v.
SAMUEL McLEAN.

(See S. C., Reporter's ed., 212-217.)

Removal of cause—failure to file record—second removal.

*1. Where, upon the removal of a cause from a State Court, the copy of the record is not filed within the time fixed by statute, it is within the legal discretion of the Federal Court to remand the cause, and the order remanding it for that reason should not be disturbed unless it clearly appears that the discretion with which the court is invested has been improperly exercised.

1. If, upon the first removal, the Federal Court declines to proceed and remands the cause because of the failure to file the copy of the record within due time, the same party is not entitled, under existing laws, to file in the State Court a second petition for removal upon the same ground.

[No. 174.]

Submitted Mar. 14, 1883. Decided Apr. 2, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the opinion of the court.

Messrs. **C. W. Bangs** and *F. L. Stetson*, for plaintiff in error:

We assume that only such parts of the decision of the court below are open to review as are adverse to the contention of the plaintiff in error, and have been assigned as error.

Rule No. 21, U. S. Supreme Court, sec. 3 (XX., 905); *Clark* v. *Killian*, 108 U. S., 766 (XXVI., 607); *The Enterprise*, 2 Curt., 317.

The first remand was improperly ordered. The proceedings for removal were properly completed by the filing of the record as and when it was filed, and the case was thereby removed.

It has been repeatedly held that when a sufficient case has been made for removal in a State Court, its jurisdiction ends, and no order of the State Court for the removal is necessary.

Hatch v. *R. R. Co.*, 6 Blatchf., 105; *Fisk* v. *R. R. Co.*, 8 Blatchf., 243; *Removal Cases*, 100 U. S., 475 (XXV., 600); *Kern* v. *Huidekoper*, 103 U. S., 490 (XXVI., 356); *R. R. Co.* v. *Koonts*, 104 U. S., 5 (XXVI., 643).

The failure to file the record in the Circuit Court on the first day of the Term was sufficiently excused.

It was an unintentional oversight, which was rectified as soon as discovered.

It was within the cases of *Kidder* v. *Featteau*, 3 Fed. Rep., 616; *Meyer* v. *Construction Co.*, 100 U. S., 457 (XXV., 598); *R. R. Co.* v. *Koonts* (*supra*).

Mr. **D. M. Porter**, for defendant in error:

The cause on the first removal was properly remanded, because the Railroad Company did not comply with the statute nor with the terms of its bond.

*Head notes by *Mr. Justice* HARLAN.

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Bright v. *R. R. Co.*, 14 Blatchf., 214; *Broadnax* v. *Eisner*, 13 Blatchf., 366; *Kauffman* v. *McNatt*, 3 Cent. Law J., 408; *Scott* v. *R. R. Co.*, 6 Biss., 529.

The defendant, by making its second application to the State Court for removal, is estopped of record from claiming that the case was improperly remanded on the first application.

Dillon, Removal of Causes, pp. 73, 74, 76, *n.* 130; *Scarf* v. *Jardine*, 30 Weekly Rep., 893.

Inasmuch as the right to removal is statutory, the plaintiff in error must allege all the facts in its petition which show that it was entitled to removal, among which facts are, that no term has elapsed in the State Court at which the case could have been tried.

Ins. Co. v. *Pechner*, 95 U.S., 183 (XXIV., 427); *Kaiser* v. *R. R. Co.*, 6 Fed. Rep., 1.

The party who, through his own neglect, once fails to perfect his removal, loses the right forever.

See, Dill. Removal of Causes, 73, and *notes*.

The defendant availed itself of the order remanding the cause for the first time, and acted upon it, which constitutes a waiver.

Gaire v. *Goodman*, 2 Smith (Eng.), 391; *Pearce* v. *Chaplin*, 9 Q. B. O. S., 802; *S. C.*, 16 L. J. Q. B., 49; *Taussig* v. *Hart*, 33 Supr. Ct. N. Y., 157; *Nat. Bk.* v. *Smith*, 13 Blatchf., 224; *Hazard* v. *Durant*, 9 R. I., 602; *Ins. Co.* v. *Curtis*, Sup. Ct. Mich. (Cent. L. J.), 27; *Broadnax* v. *Eisner*, 13 Blatchf., 366.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought in the Court of Common Pleas for the City and County of New York by Samuel McLean, a citizen of that State, against the St. Paul and Chicago Railway Company, a Corporation of the State of Minnesota. After answer, the action was, upon the petition of the defendant, accompanied by a proper bond, removed for trial into the Circuit Court of the United States for the Southern District of New York. The sole ground of removal was that the case presented a controversy between citizens of different States. The removal was had before the Term at which the cause could have been first tried in the State Court. The first day of the next session of the Federal Court, succeeding the removal, was the [213] 7th day of April, 1879. But the copy of the record from the State Court was not filed in the Federal Court until April 10, 1879, on which day, upon motion of the attorney for the Company, an *ex parte* order was made, stating the filing of such copy, the appearance of defendant, and that the action should proceed in that court as if originally commenced therein. Subsequently, April 14, 1879, the plaintiff, upon notice to defendant, moved the court to remand the cause for the failure of the defendant to file a copy of the record and enter his appearance within the time prescribed by statute. This motion was resisted upon the ground, supported by affidavit, that it was by inadvertence that the record was not filed in the Federal Court in proper time and that counsel did not discover that fact until April 10, 1879, when it was filed, and notice thereof, on the same day, given to plaintiff's attorney. This motion to remand was granted by an order entered May 24, 1879.

On the 28th of May, 1879, the Company filed in the State Court a second petition, accompanied by the required bond, for the removal of the action into the Federal Court upon the same grounds as those specified in its first petition. A copy of the record was promptly filed in the Federal Court, but the cause, upon motion of plaintiff, was again remanded by an order entered December 27, 1879.

The present writ of error brings before this court both of the orders of the Circuit Court remanding the cause to the State Court.

In *Removal Cases*, 100 U. S., 474 [XXV., 599], the court had occasion to construe the Act of March 3, 1875 [18 Stat. at L., 470], determining the jurisdiction of Circuit Courts of the United States and regulating the removal of causes from State Courts. The court there said, speaking by the *Chief Justice*: "While the Act of Congress requires security that the transcript shall be filed on the first day, it nowhere appears that the Circuit Court is to be deprived of its jurisdiction, if by accident the party is delayed until a later day of the term. If the Circuit Court, for good cause shown, accepts the transfer after the day and during the term, its jurisdiction will, as a general rule, be complete and the removal properly effected." In reference [216] to this language, it was said in *R. R. Co.* v. *Koontz*, 104 U. S., 16 [XXVI., 646]. "This was as far as it was necessary to go in that case, and in entering, as we did then, on the construction of the Act of 1875, it was deemed advisable to confine our decision to the facts we then had before us." In the latter case, it was further determined that "If the petitioning party is kept by his adversary, and against his will, in the State Court, and forced to a trial there on the merits, he may, after having obtained in the regular course of procedure a reversal of the judgment and an order for the allowance of the removal, enter the cause in the Circuit Court, notwithstanding the term of that court has gone by during which, under other circumstances, the record should have been entered."

In *Steamship Co.* v. *Tugman*, at the present Term [*ante*, 87], it was ruled that upon the filing of the petition for removal, accompanied by a proper bond, the suit being removable under the statute, the jurisdiction of the Federal Court immediately attached in advance of the filing of a copy of the record; and whether that court should retain jurisdiction, or dismiss or remand the action because of the failure to file such copy, was for it, not for the State Court, to determine.

These cases abundantly sustain the proposition that the failure of the defendant to file the copy on or before the first day of the succeeding session of the Federal Court, does not deprive that court of jurisdiction to proceed in the action, and that whether it should do so or not upon the filing of the copy, is for it to determine. In this case, it was undoubtedly within the sound legal discretion of the Circuit Court to proceed as if the copy had been filed within the time prescribed by statute. But clearly it had a like discretion to determine whether the reasons given for the failure to comply in that respect with the law were sufficient. We do not say that in the exercise of that discretion the court may not commit an error which would bring its action under the reviewing power of [217]

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this court. But since the question, whether the cause should be remanded for failure to file the necessary copy in due time, is one of law and fact, its determination to remand, for such a reason, should not be disturbed unless it clearly appears that the discretion with which the court is invested has been improperly exercised.

We perceive no ground whatever to question the correctness of the order of May 28, 1879, or to conclude that there was any abuse by the court of its discretion. The only reason given for the failure to file the transcript within proper time was inadvertence upon the part of counsel; in other words, the filing was overlooked. It is scarcely necessary to say that this did not constitute a sufficient legal reason for not complying with the statute. At any rate, the refusal of the court to accept it as satisfactory cannot be deemed erroneous.

But it is contended that the order of December 27, 1879, remanding the cause, was erroneous, because the copy, upon the second petition for removal, was filed in the Federal Court within due time, after that petition, with the accompanying bond, was presented in the State Court. Assuming that the second petition for removal was filed before or at the Term at which the cause could have been tried in the State Court, we are of opinion that a party is not entitled, under existing laws, to file a second petition for the removal upon the same grounds, where, upon the first removal by the same party, the Federal Court declined to proceed and remanded the suit, because of his failure to file the required copy within the time fixed by the statute. When the Circuit Court first remanded the cause, the order to that effect not being superseded, the State Court was re-invested with jurisdiction, which could not be defeated by another removal upon the same grounds and by the same party. A different construction of the statute, it can be readily seen, might work injurious delays in the preparation and trial of causes.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[208] JONATHAN KIRKBRIDE, *Plf. in Err.*,

v.

LAFAYETTE COUNTY.

(See S. C., Reporter's ed., 208-212.)

Municipal bonds—legislative authority for.

Under an Act of the Legislature of Missouri, county courts of counties were authorized to subscribe, in behalf of townships in their respective counties, to the capital stock of any railroad company within that State, building or *proposing* to build a railroad into, through, or *near* such township, and to issue bonds in the name of the county in payment of such subscription. There was a vote of a township in favor of issuing bonds in aid of a particular railroad company. The subscription was made and the bonds issued, reciting that they were authorized by a vote of the people, and were issued under and pursuant to an order of the county court by authority of the Act. When the vote was taken and the bonds issued, the company did not propose to build a road into or through the township, but it was proposing to build one from a point nine miles distant from the township to a farther distance. Interest on the bonds was paid for three years. In a suit on coupons of the bonds by a *bona fide* holder for value; held, that the courts should acquiesce in the determination by the qualified voters and the local authorities that the proposed road was near the township, and hold that there was legislative authority for issuing the bonds.

[No. 197.]

Argued Mar. 20, 21, 1883. Decided Apr. 2, 1883.

IN ERROR to the Circuit Court of the United States for the Western District of Missouri.

This action was brought in the court below, by the plaintiff in error, to enforce the payment of certain interest coupons on bonds issued by by the defendant.

The trial of the case was by the court, a jury having been waived, and resulted in a judgment for the defendant, on a special finding of facts. Whereupon, the plaintiff sued out this writ of error.*

A sufficient statement of the facts of the case appears in the opinion of the court.

Messrs. **John B. Henderson**, *H. C. Ewing* and *Jos. Shippen*, for plaintiff in error:

The plaintiff in error insists that the judgment of the lower court is erroneous, for the reasons: first, that the line of the railroad is sufficiently near to the township to comply with the provisions of said Act; second, that whether the road be far from or near to the township, is a question exclusively for the consideration of the people of the township and the county authorities, and their decision is final in the premises; and third, the recital in the bonds that they were issued under the Act of March 23, 1868, operates as an estoppel against the township, and makes them valid in the hands of an innocent holder for value.

Von Hostrup v. *Madison*, 1 Wall., 296 (68 U. S., XVII., 539); *Meyer* v. *Muscatine*, 1 Wall., 384 (68 U. S., XVII., 564).

In *Knox Co.* v. *Aspinwall*, 21 How., 539 (62 U. S., XVI., 208), it is said: "The bonds on their face import a compliance with the law under which they were issued and the purchaser was not bound to look further for evidence of a compliance with the condition of the grant of the power."

See, also, *Woods* v. *Lawrence Co.*, 1 Black, 386 (66 U. S., XVII., 122); *Von Hostrup* v. *Madison* (*supra*); *Coloma* v. *Eaves*, 92 U. S., 490 (XXIII., 581); *Humboldt* v. *Long*, 92 U. S., 642 (XXIII., 752): *Moultrie Co.* v. *Bank*, 92 U. S., 631 (XXIII., 631); *Comrs.* v. *Bolles*, 94 U. S., 109 (XXIV., 47); *Comrs.* v. *January*, 94 U. S., 205 (XXIV., 111); *Pompton* v. *Cooper Union*, 101 U. S., 200 (XXV., 804); *Tipton* v. *Locomotive Works*, 103 U. S., 539 (XXVI., 346); *Walnut* v. *Wade*, 103 U. S., 695 (XXVI., 580); *Menasha* v. *Hazard*, 102 U. S., 95 (XXVI., 85).

When bonds purport to be issued under a particular statute, a *bona fide* purchaser is authorized to assume that all the conditions and requirements of the law have been complied with.

Marcy v. *Oswego*, 92 U. S., 637 (XXIII., 748); *Humboldt* v. *Long* (*supra*); *Knox Co.* v. *Aspinwall* (*supra*).

Messrs. **Alexander Graves**, *Wm. Young* and *W. B. Wilson* for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This is an action upon sundry coupons of

*Head note by *Mr. Justice* HARLAN.

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bonds issued in November, 1868, and March, 1869, by the County Court of Lafayette County, Missouri, in the name of that County, and in payment of a subscription by it made, in behalf of Lexington Township, in that County, to the capital stock of the St. Louis and St. Joseph Railroad Company, a corporation created under the laws of that State. The bonds recite that they were authorized by a vote of the people, and also that they were issued "Under and pursuant to an order of the County Court of Lafayette County, by authority of an Act of the General Assembly of the State of Missouri, approved March 23, 1868, entitled [211] 'An Act to Faciliate the Construction of Railroads in the State of Missouri.'"

The special finding of facts presents a single question, *viz.*: whether there was legislative authority for this issue of bonds. Its decision depends upon the construction to be given to that part of the before mentioned Act which invests county courts in Missouri with power to subscribe in behalf of townships, in their respective counties, to the capital stock of any railroad company within that State, building or proposing to build a railroad into, through, or near such township, etc.

When these bonds were voted by the township, as well as when they were issued, the St. Louis and St. Joseph Railroad Company did not propose to build a road into or through Lexington Township, but it was proposing to build the road which its charter authorized it to construct and operate, to wit: from Richmond, in Ray County, by the way of Plattsburg, to St. Joseph, in Buchanan County. Richmond is nine miles distant from Lexington Township The contention of the defendant in error is, that a road so far away was not, within the provisions of the statute, near to the township.

The word "near" is relative in its signification. What would be near in one locality would not be in another. Each case must be governed by its special circumstances. The main inquiry was, whether a railroad, when constructed, would be near enough to contribute to the convenience or advance the business interests of the particular township involved. It cannot be said, as matter of law, that this road was not near enough to Lexington Township to bring about such results. That was a question which the people of that township and the county court of the County were qualified and, within reasonable limits, authorized to settle for themselves. Their action in favor of a subscription was supplemented by payment of interest for three years. Under these circumstances, as between the township and a *bona fide* holder for value, as the plaintiff is conceded to be, the courts should acquiesce in the determination, by the qualified voters and the local authorities, that the road in question was near to Lexington Township. If there was error, in this determination, it is not so plain [212] as to justify the courts in disturbing the practical construction put upon the statute, at the time the bonds were voted and issued, by those immediately interested in executing its provisions.

Von Hostrup, v. *Madison*, 1 Wall., 291 [68 U. S., XVII., 588]; *Meyer* v. *Muscatine, Ib.*, 391 [68 U. S., XVII., 566].

The judgment is reversed, with directions to enter judgment for plaintiff.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 165.

MANHATTAN MEDICINE COMPANY, [218]
Appt.,
v.
NATHAN WOOD AND JOHN T. WOOD.

(See S. C., Reporter's ed., 218-227.)

Trade-mark—transfer of use of—fraudulent use of—false trade-mark.

1. The object of the trade-mark being to indicate, by its meaning or association, the origin or ownership of the article, when a right to its use is transferred to others, either by act of the original manufacturer or by operation of law, the fact of its transfer should be stated in connection with its use.

2. To put forth a trade-mark attached to an article showing that it is manufactured in a particular place, by a person whose manufacture there had acquired a great reputation, when, in fact, it is manufactured by a different person at a different place, is a fraud upon the public which no court of equity will countenance.

3. An exclusive privilege, for deceiving the public by means of a trade-mark, containing misrepresentations, is not one that a court of equity will aid or sanction.

[No. 66.]
Argued Mar. 7, 1883. Decided Apr. 2, 1883.

APPEAL from the Circuit Court of the United States for the District of Maine.

The history and facts of the case appear in the opinion of the court.

Messrs. **Geo. F. Edmunds, Philo Chase,** *Thorndike Saunders* and *R. D. Mussey*, for appellant:

The Atwood Label was a trade-mark right, entitled to protection, and assignable.

McLean v. *Fleming*, 96 U. S., 245 (XXIV., 828); *Kidd* v. *Johnson*, 100 U. S., 617 (XXV., 769); *Hall* v. *Barrows*, 4 DeG. J. & S., 150; *S. C.*, 33 L. J. Ch., 204; *S. C.*, 10 Jur. (N. S.), 55; *Fulton* v. *Sellers*, 4 Brews., 42; *Field* v. *Lewis*, Seton, Decrees in Equity, 4th ed., 237.

The record shows an express assignment; but such proof is not necessary, because a transfer and succession of business of an article carries with it its trade-mark, by implication.

Shipwright v. *Clements*, 19 W. R., 599; *Congress & E. Spring Co.* v. *High Rock Spring Co.*, 45 N. Y., 291.

The law will not allow one man to sell his goods as those of another, by the use of similar labels.

Cases cited above; also, *Perry* v. *Truefitt*, 6 Beav., 66; *Croft* v. *Day*, 7 Beav., 84; *Taylor* v. *Carpenter*, 11 Paige, 292; *Mfg. Co.* v. *Spear*, 2 Sandf. S. C., 599; *Coffeen* v. *Brunton*, 5 McL., 256; *Taylor* v. *Taylor*, 2 Eq. Rep., 290; 23 Eng. L. & E., 281; *Farina* v. *Silverlock*, 2 Jur. (N. S.), 1008; *White Lead Co.* v. *Maury*, 25 Barb., 416; *Edelston* v. *Edelston*, 9 Jur. (N. S.), 479; *Boardman* v. *Meriden Brit. Co.*, 35 Conn., 402; *Colman* v. *Crump*, 70 N. Y., 573.

NOTE.—*When an injunction will be granted to restrain the unauthorized use of a trade-mark.* See note to McLean v. Fleming, 96 U. S., XXIV., 828.

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The court will enjoin any imitation calculated to deceive ordinary purchasers.

Crawshay v. *Thompson*, 4 Man. & G., 385; *Davis* v. *Kendall*, 2 R. I., 566; *Holmes* v. *Holmes*, 37 Conn., 278; *Wotherspoon* v. *Currie*, 22 Law T. (N. S.), 260; *Hookham* v. *Pottage*, 26 L. T. (N. S.), 755.

It is not necessary that the imitation should be complete; it may be limited and partial.

Lockwood v. *Bostwick*, 2 Daly (N. Y.), 521; *Franks* v. *Weaver*, 10 Beav., 297; *Coffeen* v. *Brunton*, 4 McLean, 516; *Mfg. Co.* v. *Spear*, 2 Sandf. S. C., 599; *Shrimpton* v. *Laight*, 18 Beav., 164; *Clark* v. *Clark*, 25 Barb., 76; *White Lead Co.* v. *Masury*, 25 Barb., 416; *Hostetter* v. *Vowinkle*, 1 Dill., 329.

It need not be intentionally deceptive.

Millington v. *Fox*, 3 Myl. & C., 338; *S. C.*, Cox, Am. T. M. Cas., 642; *Dale* v. *Smithson*, 12 Abb. Pr., 237; *S. C.*, Cox, Am. T. M. Cas., 282.

It is no defense that the imitator informs purchasers of the imitation. It is no answer for the defendants to say that they sold the bitters as theirs.

Coats v. *Holbrook*, 2 Sandf., Ch., 586; *S. C.*, Cox, Am. T. M. Cas., 20; *Chappell* v. *Davidson*, 2 Kay & J., 123.

It is sufficient to show that the imitation has led or is likely to lead to mistakes.

Clement v. *Maddick*, 5 Jur. (N. S.), 592.

Mr. **William Henry Clifford**, for appellees.

Mr. Justice **Field** delivered the opinion of the court:

This is a suit in equity, to restrain the defendants from using an alleged trade-mark of the complainant, upon certain medicines prepared by them, and to compel an accounting for the profits made from its use in their sale of the medicines; also, the payment of damages for their infringement of the complainant's rights.

The complainant, a Corporation formed under the laws of New York, manufactures in that State, medicines designated as "Atwood's Vegetable Physical Jaundice Bitters;" and claims as its trade-mark this designation, with the accompanying labels. Whatever right it possesses it derives by various *mesne* assignments from one Moses Atwood, of Georgetown, Massachusetts. The bill alleges that the complainant is and for a long time previous to the grievances complained of was the manufacturer and vendor of the medicine mentioned; that it is put up and sold in glass bottles with twelve panel-shaped sides, on five of which in raised words and letters "Atwood's Genuine Physical Jaundice Bitters, Georgetown, Mass.," are blown in the glass, [219] each bottle containing about a pint, with a light yellow printed label pasted on the outside designating the many virtues of the medicine, and the manner in which it is to be taken; and stating that it is manufactured by Moses Atwood, Georgetown, Mass., and sold by his agents throughout the United States.

The bill also alleges that the bottles thus filled and labeled are put up in half-dozen packages with the same label on each package; that the medicine was first invented and put up for sale about twenty-five years ago by one Dr. Moses Atwood, formerly of Georgetown, Massachusetts, by whom, and his assigns and successors, it has been ever since sold "By the name, and in the manner, and with the trade-marks, label and description substantially the same as aforesaid;" that the complainant is the exclusive owner of the formula and recipe for making the medicine, and of the right of using the said name or designation, together with the trade-marks, labels and good will of the business of making and selling the same; that large sales of the medicine under that name and designation are made, amounting annually to twelve thousand bottles; that the defendants are manufacturing and selling at Portland, Me., and at other places within the United States, unknown to the complainant, an imitation of the medicine, with the same designation and labels, and put up in similar bottles, with the same, or nearly the same, words raised on their sides, in fraud of the rights of the complainant and to its serious injury; that this imitation article is calculated and was intended to deceive purchasers, and to mislead them to use it instead of the genuine article manufactured by the complainant, and has had and does have that effect. The bill, therefore, prays for an injunction to restrain the defendants from affixing or applying the words "Atwood's Vegetable Physical Jaundice Bitters," or either of them, or any imitation thereof, to any medicine sold by them, or to place them on any bottles in which it is put up; and, also, from using any labels in imitation of those of the complainant. It also prays for an accounting of profits and for damages.

Among the defenses interposed are these: [220] that Moses Atwood never claimed any trade-mark of the words used in connection with the medicine manufactured and sold by him; and assuming that he had claimed the words used as a trade-mark, and that the right to use them had been transferred to the assignors of the complainant, it was forfeited by the misrepresentation as to the manufacture of the medicine on the labels accompanying it, a misrepresentation continued by the complainant.

In the view we take of the case, it will not [222] be necessary to consider the first defense mentioned, nor the second, so far as to determine whether the right to use the words mentioned as a trade-mark was forfeited absolutely by the assignor's misrepresentations as to the manufacture of the article. It is sufficient for the disposition of the case, that the misrepresentation has been continued by the complainant. A court of equity will extend no aid to sustain a claim to a trade-mark of an article, which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured, both of which particulars were originally circumstances to guide the purchaser of the medicine.

It is admitted that whatever value the medicine possesses was given to it by its original manufacturer, Moses Atwood. He lived in Georgetown, Massachusetts. He manufactured the medicine there. He sold it with the designation that it was his preparation, "Atwood's Vegetable Physical Jaundice Bitters," and was manufactured there by him. As the medicine was tried and proved to be useful, it was sought for under that designation, and that purchasers might not be misled, it was always accompanied with a label, showing by whom and

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at what place it was prepared. These statements were deemed important in promoting the use of the article and its sale, or they would not have been continued by the assignees of the original inventor. And yet they could not be used with any honest purpose when both statements had ceased to be true. It is not honest to state that a medicine is manufactured by Moses Atwood, of Georgetown, Massachusetts, when it is manufactured by the Manhattan Medicine Company in the City of New York.

Anyone has an unquestionable right to affix to articles manufactured by him a mark or device not previously appropriated, to distinguish them from articles of the same general character manufactured or sold by others. He may thus notify the public of the origin of the article and secure to himself the benefits of any particular excellence it may possess from the manner or materials of its manufacture. His trade-mark is both a sign of the quality of the article and an assurance to the public that it is [223] the genuine product of his manufacture. It thus often becomes of great value to him, and in its exclusive use the court will protect him against attempts of others to pass off their products upon the public as his. This protection is afforded not only as a matter of justice to him, but to prevent imposition upon the public. *Mfg. Co.* v. *Trainer*, 101 U. S., 54 [XXV., 994].

The object of the trade-mark being to indicate, by its meaning or association, the origin or ownership of the article, it would seem that when a right to its use is transferred to others, either by act of the original manufacturer or by operation of law, the fact of transfer should be stated in connection with its use; otherwise a deception would be practiced upon the public and the very fraud accomplished, to prevent which courts of equity interfere to protect the exclusive right of the original manufacturer. If one affix, to goods of his own manufacture, signs or marks which indicate that they are the manufacture of others, he is deceiving the public and attempting to pass upon them goods as possessing a quality and merit which another's skill has given to similar articles, and which his own manufacture does not possess in the estimation of purchasers. To put forth a statement, therefore, in the form of a circular or label attached to an article, that it is manufactured in a particular place, by a person whose manufacture there had acquired a great reputation, when, in fact, it is manufactured by a different person at a different place, is a fraud upon the public which no court of equity will countenance.

This doctrine is illustrated and asserted in the case of *Leather Cloth Co.* v. *American Leather Cloth Co.*, which was elaborately considered by *Lord Chancellor* Westbury, and afterwards in the House of Lords, on appeal from his decree. 4 De G. J. & S., 137, and 11 H. of L. Cas., 523.

In that case, an injunction was asked to restrain the defendant from using a trade-mark to designate leather cloth manufactured by it, which trade-mark the complainant claimed to own. The article known as leather cloth was an American invention, and was originally manufactured by J. R. and C. P. Crockett, at [224] Newark, New Jersey. Agents of theirs sold the article in England as "Crockett's Leather Cloth." Afterwards a company was formed entitled "The Crockett International Leather Cloth Company," and the business previously carried on by the Crocketts was transferred to this company, which carried on business at Newark, in America, as a chartered company, and at West Ham, in England, as a partnership. In 1856, one Dodge took out a patent in England for tanning leather cloth and transferred it to this company. In 1857 the complainant company was incorporated, and the international company sold and assigned to it the business carried on at West Ham, together with the letters patent, and full authority to use the trade-mark which had been previously used by it in England. A small part of the leather cloth manufactured by the complainant company was tanned or patented. It, however, used a label which represented that the articles stamped with it were the goods of the Crockett International Leather Cloth Company; that they were manufactured by J. R. and C. P. Crockett; that they were tanned leather cloth; that they were patented by a patent obtained in 1856, and were made either in the United States or at West Ham, in England. Each of these statements or representations was untrue so far as they applied to the goods made and sold by the complainant.

The defendant having used on goods manufactured by it a mark having some resemblance to that used by the complainant, the latter brought suit to enjoin the use. *Vice-Chancellor* Wood granted the injunction, but on appeal to the Lord Chancellor the decree was reversed and the bill dismissed. In giving his decision the Lord Chancellor said that the exclusive right to use a trade-mark with respect to a vendible commodity is rightly called property; that the jurisdiction of the court in the protection of trade-marks rests upon property, and that the court interferes by injunction because that is the only mode by which property of that description can be effectually protected. But, he added: "When the owner of the trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representa- [225] tions to the public, it is essential that the plaintiff should not in his trade-mark, or in the business connected with it, be himself guilty of any false or misleading representation; for if the plaintiff makes any material false statement in connection with the property he seeks to protect, he loses and very justly, his right to claim the assistance of a court of equity." And again; "Where a symbol or label, claimed as a trade-mark, is so constructed or worded as to make or contain a distinct assertion which is false, I think no property can be claimed in it; or in other words, the right to the exclusive use of it cannot be maintained."

When the case reached the House of Lords the correctness of this doctrine was recognized by *Lord* Cranworth, who said that of the justice of the principle no one could doubt; that it is founded in honesty and good sense, and rests on authority as well as on principle, although the decision of the House was placed on another ground.

The soundness of the doctrine declared by the Lord Chancellor has been recognized in numerous cases. Indeed, it is but an application of the common maxim, that, he who seeks equity

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must present himself in court with clean hands. If his case discloses fraud or deception or misrepresentation on his part, relief there will be denied.

Long before the case cited was before the courts, this doctrine was applied when protection was sought in the use of trade-marks. In *Pidding* v. *How.*, 8 Sim., 477, which was before *Vice-Chancellor* Shadwell in 1837, it appeared that the complainant was engaged in selling a mixed tea composed of different kinds of black tea, under the name of "Howqua's Mixture," in packages having on three of their sides a printed label with these words. The defendant having sold tea under the same name, and in packages with similar labels, the complainant applied for an injunction to restrain him from so doing. An *ex parte* injunction, granted in the first instance, was dissolved, it appearing that the complain-
[226] ant had made false statements to the public as to the teas of which his mixture was composed, and as to the mode in which they were procured. "It is a clear rule," said the Vice-Chancellor, "laid down by courts of equity, not to extend their protection to persons whose case is not founded in truth."

In *Perry* v. *Truefitt*, 6 Beav., 66, which was before *Lord* Langdale, Master of the Rolls, in 1842, a similar ruling was had. There it appeared that one Leathart had invented a mixture for the hair, the secret and receipe for mixing which he had conveyed to the plaintiff, a hair-dresser and perfumer, who gave to the composition the name of "Medicated Mexican Balm," and sold it as "Perry's Medicated Mexican Balm." The defendant, one Truefitt, a rival hair-dresser and perfumer, commenced selling a composition similar to that of plaintiff, in bottles with labels closely resembling those used by him. He designated his composition and sold it as "Truefitt's Medicated Mexican Balm." The plaintiff thereupon filed his bill, alleging that the name or designation of "Medicated Mexican Balm" had become of great value to him as his trade-mark, and seeking to restrain the defendant from its use. It appeared, however, that the plaintiff, in his advertisements to the public, had falsely set forth that the composition was "a highly concentrated extract from vegetable balsamic productions" of Mexico, and was prepared from "an original recipe of the learned J. F. Von Blumenbach, and was recently presented to the proprietor by a very near relation of that illustrious physiologist;" and the court, therefore, refused the injunction, the Master of the Rolls holding that, in the face of such a misrepresentation, the court would not interpose in the first instance, citing with approval the decision in the case of *Pidding* v. *How*.

In a case in the Superior Court in the City of New York, *Fetridge* v. *Wells*, 4 Abb. Pr., 144, this subject was very elaborately and ably treated by *Chief Justice* Duer. The plaintiff there had purchased a recipe for making a certain cosmetic, which he sold under the name of "The Balm of a Thousand Flowers." The defendants commenced the manufacture and sale of a similar article, which they called "The Balm of Ten Thousand Flowers." The complainant, claim-
[227] ing the name used by him as a trade-mark, brought suit to enjoin the defendants in the alleged infringement upon his rights. A temporary injunction was granted, but afterwards, upon the coming in of the proofs, it was dissolved. It appeared that the main ingredients of the compound were oil, ashes and alcohol, and not an extract or distillation from flowers. Instead of being a balm the compound was a soap. The court said it was evident that the name was given to it and used to deceive the public, to attract and impose upon purchasers; that no representation could be more material than that of the ingredients of a compound recommended and sold as a medicine; that there was none so likely to induce confidence in its use, and none, when false, that would more probably be attended with injurious consequences. And, it also said: "Those who come into a court of equity, seeking equity, must come with pure hands and a pure conscience. If they claim relief against the frauds of others, they must themselves be free from the imputation. If the sales made by the plaintiff and his firm are effected, or sought to be, by misrepresentation and falsehood, they cannot be listened to when they complain that, by the fraudulent rivalry of others, their own fraudulent profits are diminished. An exclusive privilege for deceiving the public is assuredly not one that a court of equity can be required to aid or sanction. To do so would be to forfeit its name and character." See, also, *Seabury* v. *Grosvenor*, 14 Blatchf., 262; *Hobbs* v. *Francais*, 19 How. Pr., 567; *Connell* v. *Reed*, 128 Mass., 477; *Palmer* v. *Harris*, 60 Pa. St., 156.

The doctrine enunciated in all these cases is founded in honesty and good sense; it rebukes fraud and encourages fair dealing with the public. In conformity with it, this case has no standing before a court of equity. *The decree of the court below dismissing the bill must, therefore, be affirmed; and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Ex Parte:

In the Matter of EMERY E. NORTON, *Petitioner.*

(See S. C., Reporter's ed., 237-243).

Final decree—what is.

In an action to set aside proceedings of foreclosure and to obtain a conveyance of the mortgaged property, a decree is final for the purpose of an appeal, which settles every question in dispute between the parties, and leaves nothing to be done but to complete the sale under the proceedings for foreclosure, and hand over the surplus as the decree directs.

[No. 10, Orig.]

Submitted Mar. 19, 1883. Decided Apr. 2, 1883.

APPLICATION for a writ of *mandamus*. The history and facts of the case appear in the opinion of the court.

Messrs. **J. D. Rouse** and **Charles Case**, for petitioner:

A final decree is one which disposes of the controversy between the parties.

Forgay v. *Conrad*, 6 How., 201; *Thompson* v. *Dean*, 7 Wall., 342 [74 U. S., XIX., 94]; *R. R. Co.* v. *Bradley*, 7 Wall., 575 (74 U. S., XIX., 274); *Stovall* v. *Bank*, 10 Wall., 587 (77 U. S.,

NOTE.—*What is final decree or judgment of state or other court from which appeal lies.* See *note* to Gibbons v. Ogden, 19 U. S. (6 Wheat.), 448.

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XIX., 1038); *Whiting* v. *Bank*, 13 Pet., 15; *Ray* v. *Law*, 3 Cranch, 179; *Comrs.* v. *Lucas*, 93 U. S., 113 (XXIII., 824).

These authorities demonstrate that the decree under consideration is a final one.

The petitioner is without remedy in the premises, except by the aid of this court; and it is now well settled that where, on an appeal from the district to the circuit court, the latter court, without considering the exceptions or errors assigned, dismisses the cause for want of jurisdiction, *mandamus*, and not error or appeal, is the proper remedy. *Ins. Co.* v. *Comstock*, 16 Wall., 258 (83 U. S., XXI., 493); *R. R. Co.* v. *Wiswall*, 23 Wall., 507 (90 U. S., XXIII., 103); *Ex parte Hoard*, 105 U. S., 578 (XXVI., 1176); *Ex parte Bradstreet*, 7 Pet., 634; *Ex parte Russell*, 13 Wall., 670 (80 U. S., XX., 634).

Mr. **John A. Campbell**, for respondent:

This decree is not final within the meaning of Section 631 of the Revised Statutes. Unless the decree of the district court be final, an appeal is not authorized.

Mordecai v. *Lindsay*, 19 How., 199 (60 U. S., XV., 624); *Montgomery* v. *Anderson*, 21 How., 386 (62 U. S., XVI., 160).

The mere dissolution of the injunction is not the subject of revision in any court, on appeal.

Verden v. *Coleman*, 18 How., 86 (59 U. S., XV., 272); *Ex parte Schwab*, 98 U. S., 240 (XXV., 105); *Buffington* v. *Harvey*, 95 U. S., 99 (XXIV., 381).

The retention of control over the sheriff, the directions in respect to the sale and the distribution of the proceeds, and the reservation of the subject of costs and the avoidance of a decree to dismiss the bill against Frellsen, furnish satisfactory evidence that the district court had not designed to make a final decree at this date.

Beebe v. *Russell*, 19 How., 284 (60 U. S., XV., 668); *Barnard* v. *Gibson*, 7 How., 653; *Cushing* v. *Laird*, 15 Blatchf., 219, 236-8.

The question whether a court can exercise jurisdiction under the Constitution and laws, is involved in every judicial Act. It has not been considered that when the decision has been made, the court can be ordered to justify its judgment, and that the litigation should be conducted between the plaintiff and the judge.

The authorities seem to be to the contrary of this. No *mandamus* is allowable. *Ex parte Newman*, 14 Wall., 152 (81 U. S., XX., 877); High, Extr. Legal Rem., secs 188, 189, 190; *State* v. *Morgan*, 12 La., 118.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an application for a writ of *mandamus* to the Circuit Court of the United States for the Eastern District of Louisiana, requiring that court to take jurisdiction of, and hear and determine an appeal by the petitioner, Emery E. Norton, from a decree of the district court of that district.

The case as presented shows that Norton, being assignee in bankruptcy of Govy Hood, filed in the district court a bill in equity against Hood, the bankrupt, John Asberry, sheriff of the Parish of East Carroll, and Henry Frellsen, setting forth that Hood, being insolvent, in April, 1866, confessed a judgment in favor of [238] Frellsen for $39,319.49; that in July, 1868, execution was issued on this judgment and levied on three plantations belonging to Hood, known, respectively, as "Black Bayou," "Home Place," and "Hood and Wilson Place;" that on the 5th of September, 1868, there was a pretended sale of these plantations to Frellsen under an execution issued on his judgment for the sum of $24,000; that on the 23d of November, 1868, another execution was issued on the judgment and levied on other property, which was also nominally sold under the execution to Frellsen; that in December, 1869, the Black Bayou plantation was sold to William Alling for $32,000, one half of which was paid in cash, and for the other half Frellsen took from Alling a half interest in the land; that in January, 1869, Hood was adjudged a bankrupt on his own petition, and in January, 1871, received his discharge; that in May, 1871, Frellsen re-conveyed to Hood all the property he had bought under the executions, except the Black Bayou plantation, for $30,152, payable in seven installments, and evidenced by mortgage notes; that all these transactions, except the sale of the one half of the Black Bayou plantation to Alling, were a fraud upon the bankrupt law, and devised for the purpose of giving Frellsen an unlawful preference and to keep the property from the other creditors; that from the beginning it was the understanding between Hood and Frellsen that Frellsen should buy the property under his judgment, hold it for Hood during the bankruptcy proceedings, and then reconvey it to Hood, subject only to any balance that might remain due upon the judgment, after deducting the rents and profits and the proceeds of any sales in the meantime received by Frellsen; and that all the facts were unknown to Norton, the assignee, until certain disclosures were made on the trial of a suit between Frellsen and Hood in the Thirteenth District Court of the Parish of East Carroll, growing out of proceedings by Frellsen to foreclose his mortgage notes received on the reconveyance of the property. It further appears that in the proceedings for foreclosure, Asberry, the sheriff, had been empowered to sell the property reconveyed to Hood to pay what remained due on the mortgage debt.

The prayer of the bill of Norton, as stated in the petition for *mandamus*, was that Norton "Be [239] decreed to be the owner, in his capacity as assignee of said bankrupt, of all the property described in his said bill, from the 29th day of December, 1868 (when said Hood filed his petition to be decreed a bankrupt), and entitled to recover the rents and revenues thereof from the said Hood and Frellsen; that said Hood be ordered to transfer to complainant the property reconveyed to him by said Frellsen as aforesaid; that the mortgage put upon the same by said Hood in favor of said Frellsen be canceled, annulled and erased, and the sale thereof, under said executory process foreclosing said mortgage, or any other process against said Hood, be enjoined and prohibited; that said Frellsen be ordered and decreed to convey to complainant one half of the Black Bayou plantation, which he had retained by some arrangement with William Alling, the purchaser, and to pay the complainant the sum of sixteen thousand dollars, received from said Alling for the sale of the other half of said plantation, together with the interest thereon from the date of said sale, and for general relief, process, etc."

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Answers were filed and testimony taken. After hearing, the district court entered a decree declaring "That the judgment in favor of Henry Frellsen against Govy Hood, in the Parish of Carroll, in the year 1866, and the executions thereunder in 1868, with the sales and conveyances by the sheriff, as shown in the record, have been established as valid and operative, and that no fraud, collusion nor malpractice is established against him; that these proceedings entitle him to the property so conveyed to him, discharged of any claim of the plaintiff in this suit;" and further declaring "That whatever surplus may arise from the sale of the property under the process in favor Henry Frellsen * * * which is described in the plaintiff's bill and which is now held by the sheriff, and has been levied on the plantations known as the Home Place and Hood & Wilson Place, the said surplus shall not be paid to the said Hood, but shall be paid to the complainant * * * after deducting such costs as this court may decree shall be paid out of the same." The injunction which had been allowed restraining the sheriff from the execution of the process was dissolved and [240] he was permitted to proceed, but was to dispose of the surplus that might remain in his hands after the payment of the debt specified in the process as due to Frellsen, and the costs of suit, as directed by the District Court of the United States. Leave was granted the complainant to apply for further orders, regulating the sale in respect to time, and appraisement and sale on credit, according to the laws of Louisiana. The sheriff was directed to make a return of his sale to the District Court of the United States, and the question of costs was reserved until the coming in of the return.

From this decree an appeal was taken to the circuit court where, on the 27th of May, 1882, the appeal was dismissed on the ground that the decree appealed from was not a final decree within the meaning of that term as used in the statute regulating appeals from the district to the circuit court. The writ now asked for is to require the circuit court to set aside its order of dismissal and take jurisdiction.

We have had occasion at the present Term, in *Bostwick* v. *Brinkerhoff* [*ante*, 78], *Grant* v. *Life Ins. Co.* [*ante*, 237], and *R. Co.* v. *Express Co.* [*ante*, 638], to state the rule applicable to the determination of the question here involved, and we there say: "A decree is final for the purpose of an appeal * * * when it terminates the litigation between the parties, and leaves nothing to be done but to enforce by execution what has been determined." Under this rule, we think, this appeal was well taken. The decree settled every question in dispute between the parties, and left nothing to be done but to complete the sale under the proceedings in the state court for foreclosure, and hand over to Norton any surplus of the proceeds there might be after satisfying the debt due Frellsen as stated in the process under which the sale was made. The case stands precisely as it would if Frellsen were proceeding in the district court for the foreclosure of his mortgage, and a decree had been en- [243] tered establishing his rights, ascertaining the amount due to him, and ordering a sale of the property and the payment to Norton of the surplus after discharging the mortgage debt. Here the bill was filed by Norton to set aside the proceedings for foreclosure and obtain a conveyance of the mortgaged property. The court refused to set aside the proceedings or to order a conveyance, but did order the sale to go on and that the proceeds, after the mortgage was satisfied, be paid to Norton. It adjudged the case on the merits in favor of Frellsen as against Norton, and in favor of Norton as against Hood. The bill was not dismissed in form because it asked relief both as against Frellsen and Hood, and relief was granted as against Hood. It was in legal effect dismissed as to Frellsen when the decree was entered in his favor on all the questions in which he was interested.

The writ of mandamus *asked for is granted, but without costs.*

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

MEMPHIS & CHARLESTON RAILROAD COMPANY, *Plff. in Err.*, [228]

v.

UNITED STATES.

(See S. C., Reporter's ed., 228-237.)

Income tax on railroad dividends and interest.

1. A railroad company is not exempt from an income tax on dividends, because the resolution declaring the dividend was adopted within the confederate lines, and the payments, on account of which the taxes are demanded, were actually made there; it is a matter of no importance that the income came from property which was within confederate territory.

2. When a railroad company, at the end of a civil war, during which its interest had fallen in arrear, and earnings had been substantially suspended, in reorganizing its affairs for future business, either funded its past due coupons in a new issue of bonds, or paid them from the proceeds of the sale of new bonds, the income tax cannot be charged on such payments of interest.

[No. 179.]

Argued Mar. 12, 1883. Decided Apr. 2, 1883.

IN ERROR to the Circuit Court of the United States for the Western District of Tennessee.

The history and facts of the case appear in the opinion of the court. For additional facts as to the compromise, see the abstract of the argument for the defendant in error.

Messrs. **W. Y. C. Humes**, *L. W. Humes* and *Poston & Poston*, for plaintiff in error:

From June 6, 1862, to September 12, 1865, the persons in charge of this railroad, with all its rolling stock and equipments, were forcibly detained within the military lines of the confederate armies.

They passed under a temporary allegiance to the Confederate Government and were bound by such laws, and such only as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty, there can be no claim to obedience.

U. S. v. *Rice*, 4 Wheat., 246; *Thorington* v. *Smith*, 8 Wall., 1 (75 U. S., XIX., 361); *Hanauer* v. *Woodruff*, 15 Wall., 445 (82 U. S., XXI., 226); *Fleming* v. *Page*, 9 How., 614; *Dean* v. *Nelson*, 10 Wall., 172 (77 U. S., XIX., 929); *Lasere* v. *Rochereau*, 17 Wall., 437 (84 U. S., XXI., 694).

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Messrs. **S. F. Phillips,** *Solicitor-Gen.*, and *John S. Blair*, for defendant in error:

By section 81 of the Act of July 1, 1862, 12 Stat. at L., 469, the Company became subject to a duty of 3 per cent upon interest or dividends "whenever the same shall be paid;" by the Act of June 30, 1864, 13 Stat. at L., 284, to a duty of 5 per centum on interest or dividends whenever the same shall be payable; and by the Act of July 13, 1866, 14 Stat. at L., 139, to a duty of 5 per centum upon interest or dividends whenever the same shall be payable, with a proviso that if the Company should be unable, and should in fact fail to pay the interest, the tax should not be due until resumption of such payment.

The finding of coupons in second mortgage bonds appears to have been done after January 1, 1866.

By the Act of 1864, the tax became due whenever the interest was payable. Installments of interest which had matured prior to June 30, 1864, although under the Act taxable only when paid, became the subject of tax *eo instanti* on the passage of the Act of 1864, being then payable; so far, therefore, as this finding was of interest which matured prior to June 13, 1866, its makes no difference whether the interest was or was not paid. Its payment in second mortgage bonds was, therefore, immaterial. After that date, in order to relieve the Company from the tax, proof was required, not merely of actual failure to pay such interest, but also of inability to pay.

The force to be given to transactions based upon confederate currency has been frequently considered by this court. The following authorities seem to be decisive of the question:

Thorington v. *Smith*, 8 Wall., 1 (75 U. S., XIX., 361); *Confederate Note Case*, 19 Wall., 548 (86 U. S., XXII.; 196); *U. S.* v. *Villalonga*, 23 Wall., 35 (90 U. S., XXIII., 64); *R. R. Co.* v. *King*, 91 U. S., 3 (XXIII., 186); *Stewart* v. *Salamon*, 94 U. S., 434 (XXIV., 275).

Upon the 24th of September, 1870, the Company paid to the collector $12,000, and took the following receipt: "Received of M. T. Wicks, President Memphis and Charleston Railroad Company, $12,000, being balance due on $24,-088.25, for penalty of neglect to make returns of interest on its bonds maturing from May, 1866, to July, 1869, agreeably to instructions from Commissioner, under date of August 27, 1870, accepting proposition in compromise made to him by Memphis and Charleston Railroad Company."

If this receipt failed to express the intent of both parties, so far as it is a contract, it was not to be re-formed for mistake in this common law proceeding. *Hurt* v. *Hollingsworth*, 100 U.S., 100 (XXV., 569); *Thompson* v. *R. R. Co.*, 6 Wall., 134 (73 U. S., XVIII., 765).

As the parol evidence would not have warranted a verdict for the Company, the court was not bound to submit it to the jury, *Comrs.* v. *Clark*, 94 U. S., 278 (XXIV., 59), and it was not error to explain to the jury the correspondence and compromise.

Whatever may have been the purpose of the Company, the United States, by its acceptance of the $12,000, waived no right not embraced in the language of the receipt.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit to recover taxes upon dividends and interest paid by the Memphis & Charleston Railroad Company between the first day of July, 1862, and the first day of December, 1865. The items which go to make up the amount of the judgment brought here for review are thus stated in the verdict of the jury:

1. "On dividend declared March 17, 1863, a tax of $1,625.45, being three per centum on $57,515.60, the value in legal currency, when paid, of $143,789, the whole amount of said dividend then paid in confederate money.

2. On interest coupons of said defendant falling due November 1, 1862, May 1, 1863, November 1, 1863, and May 1, 1864, a tax of $819.17, being three per cent on $27,326.55, the value, when paid, in legal currency of $88,935, the portion of such coupons paid in confederate money; and the further tax of $2,274.45 on the remaining portion of said coupons falling due as aforesaid, being three per cent on $75,815.83, such remaining portion of said coupons.

3. On interest coupons of said defendant falling due November 1, 1864, May 1, 1865, and November 1, 1865, a tax of $6,793.50, the same being five per centum on $135,870, the amount of said last named coupons."

The questions presented by the bill of exceptions may be separated into three classes, as follows: [232]

1. Those which relate to dividends and interest paid in confederate money and during the late civil war.

2. Those which relate to the payments of interest after the close of the war; and,

3. Those which relate to an alleged compromise between the United States and the Railroad Company under date of September 24, 1870.

These will be considered in their order.

1. As to payments in confederate money:

Upon this branch of the case the facts are these: at the beginning of the war, the Memphis and Charleston Railroad Company was the owner of an equipped line of railroad extending from Memphis, in the State of Tennessee, through the States of Tennessee, Mississippi, and Alabama, to Stephenson, in the last named State. It was divided into two divisions, one known as the Eastern Division, extending from Stephenson westward to Bear Creek, on the line between Mississippi and Alabama, having its principal office at Huntsville, Alabama; and the other, known as the Western Division, extending from Bear Creek to Memphis, and having its principal office at Memphis. On the 11th of April, 1862, the military forces of the United States took possession of the Eastern Division of the road, with all its rolling stock and equipment, and kept it until the close of the war. The Western Division was run by the officers of the Company under the control of the military superintendent of the confederate authorities until the 6th of June, 1862, when it was taken possession of by the United States. Three days before the capture of Memphis by the military forces of the United States the officers and rolling stock of the Western Division were moved south within the confederate lines by command of the confederate military authori-

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ties, and were kept there until the end of the war. During this period the rolling stock was hired by the officers of the Company to other railroad companies, and in this way a large amount in confederate treasury notes came into the hands of the officers of the Company with-
[233] in the confederate lines. On the 17th of March, 1863, a resolution was passed within the confederate lines declaring a dividend of four per cent on the capital stock, payable in confederate treasury notes on the 15th of April. Under this resolution, payments were made, to the amount stated in the verdict. The confederate money used to pay the coupons, as stated in the verdict, was all obtained from the hire of the rolling stock within the confederate lines.

Upon this state of facts the court instructed the jury, in substance, that the United States were entitled to such a verdict as was rendered, and the question presented here is, in effect, whether that instruction was right.

At the times when the dividend and interest now in question were paid, the entire railroad of the Company and its two principal offices were within the lines of the military forces of the United States. The Act of 1862, ch. 119, which provided for the tax, was not passed until after the United States had established their military possession of the territory traversed by the railroad, and within which the principal offices were located. The corporation was, therefore, subject to the actual governmental control of the United States, and the laws of the United States were both operative upon and enforcible against it. No one will deny that the internal revenue laws were intended to reach all persons and corporations within the dominion of the United States against whom they could for the time being be enforced by judicial process or otherwise. They were broad enough in their language to embrace all, and could be limited only in their operation by the power of the United States to enforce them. Clearly, then, if this dividend had been declared, and the dividend and interest paid at either of the principal offices of the Company, or within the military lines of the United States, the taxes sued for would have been recoverable, notwithstanding the payments were made out of earnings derived from the use of property which had been taken inside the lines of the enemy. Thus the question now to be determined seems to be, whether the Company is exempt from the tax, because the resolution declaring the dividend was adopted within the confederate lines, and
[234] the payments, on account of which the taxes are demanded, were actually made there.

In *R. Co.* v. *Collector*, 100 U. S., 595 [XXV., 647], followed at the present Term in *U. S.* v. *R. Co.* [*ante*, 151], it was held that the internal revenue tax on interest and dividends was an excise tax on the business of corporations, to be paid by the corporations out of their earnings, income and profits. The payments made in this case were for dividends to stockholders and interest to bondholders out of the earnings, income and profits of the corporation in its business. By means of the dividend, the surplus earnings were distributed to the stockholders, and the debts of the company were discharged to the extent of the interest paid. In this way the earnings on the inside of the confederate lines were made available to the corporation which was subject to the actual control of the United States, and bound for the payment of all internal revenue taxes chargeable by law against it. To our minds it is a matter of no importance that the income came from property which was within confederate territory. The property, although within the confederate lines, belonged to the company, and the income derived from its use was actually paid out by the company in dividends to stockholders, and to discharge the corporate debts for interest. We think it would hardly be claimed that if a private individual, living in one of the loyal States during the war, derived an income which he actually reduced to possession, or used in the payment of debts, from property in confederate territory, he would be exempt from the income tax imposed on him by the internal revenue laws, because of the source from which his income was derived. But, if he would not be, it is difficult to see how this Corporation is. In both cases the tax is, in legal effect, on the income of persons subject to the actual dominion and control of the United States. The tax is payable by the person because of his income, according to its amount, and without any reference to the way in which it was obtained.

Under the instructions which were given the jury, the verdict was only for the taxes on the value of the confederate treasury notes in legal currency at the times the dividend and interest were paid. In this way, the Company has only [235] been charged with an income estimated in lawful money. Without, therefore, considering in detail the particular instructions given to the jury or refused as stated in the bill of exceptions, it is sufficient to say that upon the undisputed facts it would have been proper for the court to have directed the verdict for the United States which was given in this branch of the case.

2. As to the payments of interest not made in confederate notes:

All these payments were made after the close of the war, and there is no pretense that they were made out of earnings or income. The statement in the bill of exceptions is that they were paid "either in cash or in second mortgage bonds of the defendant Company at a discount, at the option of the holder." As to this the court instructed the jury as follows:

"The defendant's counsel insists that a portion of the interest on which a tax is claimed by the plaintiffs was funded in second mortgage bonds of the Company, and that such funding did not amount to a payment of such interest. If you find that any of the interest on the bonds of the defendant on which a tax is claimed in this suit was so funded, and that it was optional with the holders of such interest coupons to have the same paid in cash or funded in second mortgage bonds at a discount, I charge you that if such holders of interest coupons took second mortgage bonds in preference to the cash, that it did amount to a payment, and the plaintiffs would be entitled to recover the tax claimed on the amount so funded." And again: "It is in proof that some of the coupons were not paid in cash, but were funded in second mortgage bonds. It appears that the creditor had his option to take payment in cash, or take these new bonds at a certain agreed discount. It was, therefore, substantially a payment in cash, and a re-investment of the amount in second mort-

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gage bonds. This can constitute no defense to the suit."

[236] In this, we think, there was error. Although the tax is imposed on interest paid, the evident intention of Congress was to tax only such payments as were either in fact or in legal effect made from the income. As was said in *R. R. Co.* v. *Collector, supra*, "The tax * * * is essentially an excise on the business of the class of corporations mentioned in the statute. The section is a part of a system of taxing incomes, earnings and profits, adopted during the late war and abandoned as soon after the war was ended as it could safely be done." Under ordinary circumstances, it will be conclusively presumed that payments of interest were made from earnings, but when it appears that at the end of a civil war, during which interest had fallen in arrear, and earnings had been substantially suspended, the company, in reorganizing its affairs for future business, either funded its past due coupons in a new issue of bonds, or paid them from the proceeds of the sales of new bonds, no such presumption can arise, and if the facts are established they will constitute a complete defense to a suit for the recovery of a tax charged on such payments of interest. Any other construction would be in violation of the whole spirit and purpose of the statute. The bondholder would undoubtedly be taxable for his income derived in that way, but the payment would not be one upon which the company could be taxed.

3. As to the alleged compromise:

Without recapitulating the facts connected with this part of the case, it is sufficient to say that in all the correspondence which preceded the payment of the money on the 24th of September, 1870, and in the receipt given for the money when paid, reference was had only to the payments of interest maturing from May, 1866, to July, 1869. It was not erroneous, therefore, for the court to exclude all testimony showing a different understanding on the part of the officers of the Company, and to instruct the jury that the legal effect of the papers in evidence was to confine the compromise to the claims of the United States for taxes and penalties growing out of the interest maturing between the dates specified in the receipt of the collector. It nowhere appears that the officers of the United States had any knowledge of the payments, either of interest or dividends, which [237] had been made at earlier dates.

There are other assignments of error, but those already considered dispose of the entire case in a way to render the others immaterial on another trial.

The judgment is reversed, and the cause remanded for such further proceedings, not inconsistent with this opinion, as justice may require.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

DISTRICT OF COLUMBIA, *Plff. in Err.*, *v.* WASHINGTON MARKET COMPANY.

(See S. C., Reporter's ed., 243-256.)

Debates in Congress as evidence—Washington Market Company.

1. Debates in Congress at the time of the passage of an Act, are not necessarily to be accepted as evidence of its meaning.

2. The Act of 1873, giving authority to the Governor and Board of Public Works of the District of Columbia to make arrangements to secure certain land which had been granted to the Washington Market Company by their Act of incorporation, also gave power on the part of the Market Company to become parties to a final arrangement for the land and authorized as a consideration for the release of such property, an equitable or agreed apportionment and reduction of the rent due the District from such Company.

[No. 193.]

Argued Mar. 26, 27, 1883. Decided Apr. 9, 1883.

IN ERROR to the Supreme Court of the District of Columbia.

The history and facts fully appear in the opinion by the court.

Messrs. **A. G. Riddle** and **H. E. Davis**, for plaintiff in error.

Messrs. **William Birney** and **B. F. Butler**, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

The object of this action was to recover the sum of $53,847.23, with interest, alleged to be due from the Washington Market Company, by virtue of the terms of its charter, to the City of Washington, of which the plaintiff in error is the legal successor.

The Act of Congress to incorporate the Washington Market Company, 16 Stat. at L., 124, took effect May 20, 1870. By the 2d section, it was enacted that the Company "Is hereby authorized and empowered to locate and construct a suitable building or buildings upon the following described grounds, namely: commencing at the intersection of the center line of B Street north with the west line of Seventh Street west, running thence north along the west side of Seventh Street to the southerly side of Pennsylvania Avenue; thence westerly along the southerly side of Pennsylvania Avenue to the southerly side of Louisiana Avenue; thence westerly along the southerly side of Louisiana Avenue to the east side of Ninth Street west; thence along the east line of Ninth Street to the center line of B Street; thence along the center line of B Street to the place of beginning; and to use and occupy the same by the erection of a suitable building or buildings for a public market-house, including the necessary stalls and sheds, and also for stores, public halls and such other purposes as may be determined by said Company, not inconsistent with its use as a public market. The buildings herein designated to be used for the purposes of a market shall be used for no other purpose inconsistent therewith, but the same shall remain a public market as hereinbefore described."

And provision was made, when the building was ready for occupancy, for letting out parts [245] of the same as stalls and stands for market purposes, the rents for which were to belong to the Market Company. The buildings were to be constructed according to plans set forth in a schedule made part of the Act. The Company was required to purchase and pay for all buildings and fixtures then on the premises belong

NOTE.—*Construction of statutes; journals of the Legislature; views of individual members; motive of Legislature; fraud in passage.* See *note* to Blake v. Nat. Bks., 90 U. S., XXIII., 119.

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ing to individuals, at prices to be fixed, if not agreed on; and to completely finish its structures and improvements within two years and sixty days after obtaining possession of the premises described. The 12th, 13th and 14th sections of the Act are as follows:

"Sec. 12. *And be it further enacted*, That the privileges conferred by this Act shall be enjoyed by said Company for the term of ninety-nine years, unless sooner terminated for a non-compliance or abuse of the conditions herein imposed upon said Company, which may be done by suit in the name of the United States, to recover possession of said property. At the end of said period of ninety-nine years, the said lands, with all the erections and improvement thereon, shall revert to the United States, unless Congress shall by law extend the period of occupation thereof by said Company; *Provided*, That, if the Corporation of the City of Washington shall, after a period of thirty years from the approval of this Act, by a vote of the councils thereof express a desire to possess itself of the said market buildings and grounds, Congress may authorize the corporate authorities to take possession of the same upon payment to the said Market House Company of a sum of money equal to a fair and just valuation of the buildings and improvements then standing on said grounds, and the mode and manner of ascertaining such valuation shall be determined by Congress.

Sec. 13. *And be it further enacted*, That the real estate herein described is hereby vested in the said Corporation for and during the said term of ninety-nine years, or until a forfeiture of its rights and privileges by a breach of the conditions herein imposed on said Company, and said estate shall be taken and considered as a determinable fee. The real and personal property of said Corporation shall be subject to assessment and taxation for all District and municipal purposes, in the same manner and to the same extent that like property in the City of [246] Washington, owned and possessed by individuals, is liable to assessment and taxation.

Sec. 14. *And be it further enacted*, That, in consideration of the privileges granted by this Act to the Washington Market Company the said Company shall pay, yearly, every year during the said term of ninety-nine years, unto the City of Washington, the sum of $25,000; which sum shall be received by said city, and set apart and expended by and under the direction of the city government of said city, for the support and relief of the poor of said city and of the District of Columbia; and said city may enforce the payment of said sum from time to time as the same shall become due, either by an action at law or by the same proceedings now authorized by law for the collection of taxes by said city."

The real estate granted by this Act was public property of the United States. It had been and at the time of the passage of the Act was used as a market, and the buildings thereon erected by individuals for such use, and which the Market Company was required to purchase, were subsequently destroyed by fire. Thereupon Congress passed the following Joint Resolution, which took effect December 20, 1870, 16 Stat. at L., 589:

"*Be it resolved, by the Senate and House of Representatives of the United States of America in Congress assembled*, That the chairman of the committees on Public Buildings and Grounds of the Senate and House of Representatives, with the Mayor of Washington, be, and hereby are, constituted commissioners to require the Washington Market Company, organized under the 15th section of the Act of May 20th, 1870, promptly to furnish temporary market accommodations for the marketmen who were driven out by the late fire; and also to erect, at the earliest possible day, the first stories or market portions of the permanent market buildings provided for in said Act; and that said commissioners be authorized to make such alterations in the buildings and such arrangements with said Company as shall be best calculated to secure the speedy erection of buildings creditable to the city, and sufficiently commodious for all the wants of the public; *Provided, however*, That the passage of this Resolution shall not be construed to supersede, delay or in any way affect the pending investigations into the [247] affairs of said Company, nor to relieve the Company or any person from consequences of any Acts under investigation."

On Febuary 21, 1871, the municipal government of the City of Washington was superseded by the Act of Congress of that date, providing a government for the District of Columbia as its successor and the Legislative Assembly of the District of Columbia, on August 23, 1871, passed the following Resolution:

"*Be it resolved by the Legislative Assembly of the District of Columbia*, That the Governor be authorized and required to act as one of the commissioners of the Washington Market Company, under the Resolution of Congress approved December 20, 1870; and that he be requested to procure such alterations in the plan of the buildings to be erected by said Company as shall transfer the proposed hall from the Ninth Street wing to the main building on Pennsylvania Avenue, and also to secure a reduction from $25,000 to $20,000 of the annual rental required to be paid by said Company, and which is now assessed by the Company upon the stall holders.

The Act of Congress making appropriations to supply deficiencies, etc., approved March 3, 1873, 17 Stat at L., 540, contains the following paragraph.

"For the purchase by the United States of the interest of the District of Columbia in the present City Hall building in Washington, now used solely for government purposes, such sum as may be determined by three impartial appraisers, to be selected by the Secretary of the Interior, not exceeding $75,000, the same to be applied by said District only for the erection of a suitable building for the District offices; and the Governor and Board of Public Works are authorized, if they deem it advisable for that purpose, *to make arrangements to secure sufficient land fronting* on Pennsylvania and Louisiana Avenues, between Seventh and Ninth Streets; *Provided*, That the Government of the United States shall not be liable for any expenditures for said land, or for the purchase [248] money therefor, or for the buildings to be erected thereon; and no land or the use thereof is hereby granted for the purpose of erecting any building thereon for such building."

On June 26, 1873, the Legislative Assembly

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of the District of Columbia passed an Act appropriating the sum of $90,000 for the erection of a suitable building for the District offices, under the direction of the Governor and Board of Public Works, which included the sum of $75,000, receivable for its interest in the City Hall building, under the provisions of the above paragraph from the Deficiency Appropriation Act.

In view of that expenditure, the Governor and Board of Public Works had made an arrangement for a site for the intended structure with the Washington Market Company, which is contained in the following memorandum of agreement between them:

"In pursuance of the Act of Congress of March 3, 1873, authorizing the Governor and Board of Public Works, if they deem it advisable, for the purpose of erecting thereon a suitable building for District offices, to make arrangements to secure sufficient land fronting on Pennsylvania and Louisiana Avenues, between Seventh and Ninth Streets, it is hereby agreed that:

1. The Washington Market Company shall, by good and sufficient quitclaim deed, release and convey to the District of Columbia, all the title and interest of said Company, acquired under Act of Congress of May 20, 1870, incorporating said Company, in and to so much of the land within said District, described in section 2, of said Act, and fronting Pennsylvania and Louisiana Avenues, as is contained within the following limits:

Beginning at the southwest corner of Seventh Street and Pennsylvania Avenue; thence westerly along the southerly side of Pennsylvania Avenue to its intersection with the southerly side of Louisiana Avenue; thence westerly along the southerly side of Louisiana Avenue to the east side of Ninth Street; thence along the east line of Ninth Street eighty-six feet; thence easterly on a line parallel with the aforesaid southerly line of Louisiana Avenue to a point eighty-six feet south of said intersection of the southerly line of Pennsylvania and Louisiana Avenues; and thence on a line parallel with the aforesaid southerly side of Pennsylvania Avenue to the westerly line of Seventh [249] Street, at a point eighty-six feet from the corner began at; thence northerly along the west line of Seventh Street eighty-six feet, to the corner began at.

The Washington Market Company shall also, in said deed, convey to said District the right to use in common with said Market Company, as a passage way and court yard, all the land between the lot conveyed in said deed and a line drawn westerly from Seventh to Ninth Street, ten feet north of the north walls of the present Seventh and Ninth Street buildings of said Market Company.

2. In consideration of the aforesaid release and conveyance by the Washington Market Company to the District of Columbia, the District will assume and fulfill all obligations imposed upon the Company by section 14 of said Act of May 20, 1880, as modified by Act of the Legislative Assembly of the District, of August 23, 1871, except as follows:

The Market Company shall pay annually to the District of Columbia, during the term, and for the purpose mentioned in said section 14, *the sum of $7,500*, payable quarterly, which sum shall, during said term, be in the place of all rental for the ground occupied by the market buildings of said Company; and in case in any year the general district taxes upon said ground and market buildings shall exceed $5,500, the excess above that amount shall be deducted from said rental of $7,500, so that the total annual payments for rental and taxes shall not exceed $13,000; the District, however, not hereby releasing, but expressly reserving, and the Market Company hereby confirming, the right of the District, given by section 2 of the Act of May 20, 1870, of fixing and controlling, for the protection of the market dealers and of the public, the amount of rentals of the stalls and stands in said market buildings; and it is also hereby agreed that the annual rental of stalls and stands in the other markets in the City of Washington shall not be fixed by the district authorities at a lower rate per square foot of area than seventy per cent of the rate fixed under said section for stalls and stands in the market buildings of said Company; and the district shall not use the land released and conveyed as aforesaid for the purpose of a market.

This agreement shall take effect April 1, 1873, and the Market Company shall at once settle its past rental account to that time at the rate; [250] since August 23, 1871, fixed by the Resolution of the Legislative Assembly of that date; and shall immediately pay the balance due the treasurer of the District.

Possession of the land conveyed shall be given the District upon the day of executing this agreement.

Dated at Washington, March 18, 1873.

Washington Market Company,
By M. G. Emery, *President*,
H. D. Cooke, *Governor*,
Alex. R. Shepherd,
James A. Magruder,
S. P. Brown,
Adolf Cluss,
Board of Public Works."

By a deed of the same date, the Washington Market Company conveyed and released to the District of Columbia the real estate described in the agreement, which deed was delivered and recorded.

From the bill of exceptions, taken upon the trial of the action in the Supreme Court of the District of Columbia, it appears that, "To further maintain the issues upon its part joined, the defendant offered and gave evidence to the jury tending to prove that immediately upon the execution of said agreement of March 18, 1873, said defendant settled with the proper officers of said District of Columbia its past rental account on the terms and in the manner fixed in said agreement, and paid to the treasurer of said District the balance agreed in said settlement to be due from the defendant to said District; that defendant had paid its said rental account from and including March 18, 1873, to April 1, 1873, at the rate of $20,000 per annum. Defendant further gave in evidence a letter dated April 1, 1873, signed officially by the comptroller at that date of said District, and addressed to said defendant, acknowledging that defendant had settled and paid to said District all amounts due from defendant on rental account up to said April 1, 1873. Defendant further proved that

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from said last date to the date of this suit it has [251] paid to the plaintiff, on account of said rent, at the rate of $7,500 annually; that immediately subsequent to the date of said agreement and execution and delivery of said indenture, conveying to the plaintiff the property fronting on Pennsylvania Avenue between Seventh and Ninth Streets northwest, in the City of Washington, District of Columbia, the plaintiff took possession of the ground between said limits, and made excavations for a foundation for a building for offices for the District of Columbia, but had not proceeded more than a few days in excavating before the work was stopped; that the defendant has not, from the date of said indenture, been in possession of or exercised any power or authority over the ground so conveyed, or any part thereof."

And there was no evidence inconsistent with this.

The amount sought to be recovered by the plaintiff is the annual rental of $25,000, accrued during the period specified in the declaration, giving credit for payments actually made, but without regard to the reduction and settlement claimed by the defendant under the agreement of March 18, 1878. This agreement the plaintiff in error claims to be void. The court below being of a different opinion, directed a verdict for the defendant, the judgment on which is brought into review by this writ of error.

We see no ground of support for the suggestion of counsel, that Congress, by the Act incorporating the Washington Market Company and fixing the terms for the use of the public property granted to it, established an irrevocable charitable trust for the poor of Washington City, and thereby disabled itself from authorizing any subsequent changes in the mode and conditions of that grant; nor are we willing to accept the debates that are reported as occurring in Congress at the time of the passage of the Deficiency Appropriation Act of March 3, 1873, as evidence of the meaning of the clause on which the controversy in this case depends.

The question is, whether, according to its correct construction, that clause authorized the parties to execute the agreement into which they entered.

Upon a consideration of the language of the provision, it becomes apparent that the sum of money appropriated by it as compensation to the District of Columbia, for its interest in the city hall building, was to be applied only for the erection of a suitable building for the district offices. No part of it could lawfully be expended in the purchase of land for a site. It is equally plain that no public lands belonging to the [255] United States were granted to be used for that purpose. Express authority is given to the Governor and Board of Public Works to make arrangements to secure land fronting on Pennsylvania and Louisiana Avenues, between Seventh and Ninth Streets, if they deem it advisable, for that purpose. It is not denied that, in connection with the express declaration that no right to use any public ground was thereby granted, this description necessarily covered a portion of the real estate granted to the Market Company by its Act of incorporation. Any arrangement to secure it as a site for the district buildings must necessarily be made with it. And power granted to the authorities of the District of Columbia to make such an arrangement also carried with it power on the part of the Market Company to become a party to it. The fact that the latter is not expressly named is without legal significance. The designation of the property was also the designation of its owner.

It is evident, also, that the arrangement authorized to be made was described as intended to have the effect of securing the land for the purpose. This necessarily implied that the arrangement, when made, as authorized, should be final. The suggestion that it was intended to be preparatory and preliminary only, as the basis of a report to be made afterwards to Congress for its approval and ratification, finds no warrant in the context, and is quite clearly negatived by the terms in which the Act repels the idea, that the arrangement to be made should in any way commit the United States to any liability to pay for any expenditures, either for the land itself or the improvements to be made upon it. It is, therefore, clearly to be inferred that the arrangement intended was to be made with the Market Company for a designated portion of its land, and that it must be effected without the outlay of any money.

This could be accomplished in but one way. It was to induce the Market Company to relinquish its right to the exclusive use of the specified portion of its land, upon the basis of some modification of the terms upon which it was held. As these embraced payments of money, which the Market Company was under obligation to pay to the District of Columbia, and [256] which the government of the District had exclusive power to administer for the purposes described in the Act, it follows that it must have been intended to authorize such an arrangement in respect to these obligations of the Market Company as would furnish to the latter a consideration and inducement for a release of a part of its property. And no consideration for the release of a part of demised property is more suitable to the nature of the relation between the parties than an equitable or agreed apportionment of the rent. Such was the form and substance of the arrangement in question. The adjustment of the arrearages of rent was a legitimate incident, whether the prior agreement for a reduction of the amount from $25,000 to $20,000 was lawful, at the time it was first made, or not. It became so by becoming part of the arrangement finally entered into. Whether other provisions of the arrangement, not brought into this controversy, such as the provision relating to the maximum of taxes thereafter to be assessed, and in respect to the rental of stalls, to be charged to occupants in the market house building, are lawful and binding, it is not necessary to decide, as they are not proper matters of consideration in the present action.

We are of opinion that there is no error in the record of this judgment and it is, accordingly, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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JAMES S. WILKINS, *Plf. in Err.*,
v.
SEMPLE ELLETT, Admr. of THOMAS N. QUARLES, Deceased.

(See S. C., Reporter's ed., 256-259.)

Payment to administrator of another State—when good.

* When a debt due to a deceased person is voluntarily paid by the debtor at his own domicil in a State in which no administration has been taken out, and in which no creditors or next of kin reside, to an administrator appointed in another State, and the sum paid is inventoried and accounted for by him in that State, the payment is good as against an administrator afterwards appointed in the State in which the payment is made, although this is the State of the domicil of the deceased.

[No. 180.]

Argued Mar. 7, 8, 1883. Decided Apr. 16, 1883.

IN ERROR to the Circuit Court of the United States for the Western District of Tennessee.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **W. Y. C. Humes** and *D. H. Poston*, for plaintiff in error.

Messrs. **S. P. Walker** and *R. T. McNeal*, for defendant in error.

Mr Justice **Gray** delivered the opinion of the court:

This is an action of *assumpsit* on the common counts, brought in the Circuit Court of the United States for the Western District of Tennessee. The plaintiff is a citizen of Virginia, and sues as administrator, appointed in Tennessee, of the estate of Thomas N. Quarles. The defendant is a citizen of Tennessee, and surviving partner of the firm of F. H. Clark & Company. The answer sets up that Quarles was a citizen of Alabama at the time of his death; that the sum sued for has been paid to William Goodloe, appointed his administrator in that State, and has been inventoried and accounted for by him upon a final settlement of his administration; and that there are no creditors of Quarles in Tennessee. The undisputed facts, appearing by the bill of exceptions, are as follows:

Quarles was born at Richmond, Virginia, in 1835. In 1839 his mother, a widow, removed with him, her only child, to Courtland, Alabama. They lived there together until 1856, and she made her home there until her death in 1864. In 1856 he went to Memphis, Tennessee, and there entered the employment of F. H. Clark & Company, and continued in their employment as a clerk, making no investments himself, but leaving his surplus earnings on interest in their hands, until January, 1866, when he went to the house of a cousin in Courtland, Alabama, and while there died by an accident, leaving personal estate in Alabama. On the 27th of January, 1866, Goodloe took out letters of administration in Alabama, and in February, 1866, went to Memphis, and there, upon exhibiting his letters of administration, received from the defendant [258] the sum of money due to Quarles, amounting to $3,455.22, which is the same for which this suit is brought, and included it in his inventory, and in his final account, which was allowed by the probate court in Alabama. There were no other debts due from Quarles in Tennessee. All his next of kin resided in Virginia or in Alabama; and no administration was taken out on his estate in Tennessee until June, 1866, when letters of administration were there issued to the plaintiff.

There was conflicting evidence upon the question whether the domicil of Quarles at the time of his death was in Alabama or in Tennessee. The jury found that it was in Tennessee, under instructions, the correctness of which we are not prepared to affirm, but need not consider, because, assuming them to be correct, we are of opinion that the court erred in instructing the jury that, if the domicil was in Tennessee, they must find for the plaintiff; and in refusing to instruct them, as requested by the defendant, that the payment to the Alabama administrator before the appointment of one in Tennessee, and there being no Tennessee creditors, was a valid discharge of the defendant, without reference to the domicil.

There is no doubt that the succession to the personal estate of a deceased person is governed by the law of his domicil at the time of his death; that the proper place for the principal administration of his estate is that domicil; that administration may also be taken out in any place in which he leaves personal property; and that no suit for the recovery of a debt due to him at the time of his death can be brought by an administrator as such in any State in which he has not taken out administration.

But the reason for this last rule is the protection of the rights of citizens of the State in which the suit is brought; and the objection does not rest upon any defect of the administrator's title in the property, but upon his personal incapacity to sue as administrator beyond the jurisdiction which appointed him.

If a debtor, residing in another State, comes into the State in which the administrator has been appointed, and there pays him, the payment is a valid discharge everywhere. If the debtor, being in that State, is there sued by the [259] administrator, and judgment recovered against him, the administrator may bring suit in his own name upon that judgment in the State where the debtor resides. *Talmage* v. *Chapel*, 16 Mass. 71.

The administrator, by virtue of his appointment and authority as such, obtains the title in promissory notes or other written evidences of debt, held by the intestate at the time of his death, and coming to the possession of the administrator; and may sell, transfer and indorse the same; and the purchasers or indorsees may maintain actions in their own names against the debtors in another State, if the debts are negotiable promissory notes, or if the law of the State in which the action is brought permits the assignee of a chose in action to sue in his own name. *Harper* v. *Butler*, 2 Pet., 239; Shaw, *C. J.*, in *Rand* v. *Hubbard*, 4 Met., 252, 258-260; *Petersen* v. *Chemical Bk.*, 32 N. Y., 21. And on a note made to the intestate, payable to bearer, an administrator appointed in one State may sue in his own name in another State. *Barrett* v. *Barrett*, 8 Me., 353; *Robinson* v. *Crandall*, 9 Wend., 425.

In accordance with these views, it was held by this court, when this case was before it after a former trial, at which the domicil of the intestate appeared to have been in Alabama, that

* Head note by *Mr. Justice* GRAY.

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the payment in Tennessee to the Alabama administrator was good as against the administrator afterwards appointed in Tennessee. *Wilkins* v. *Ellett*, 9 Wall., 740 [76 U.S., XIX., 586].

The fact that the domicil of the intestate has now been found by the jury to be in Tennessee, does not appear to us to make any difference. There are neither creditors nor next of kin in Tennessee. The Alabama administrator has inventoried and accounted for the amount of this debt in Alabama. The distribution among the next of kin, whether made in Alabama or in Tennessee, must be according to the law of the domicil; and it has not been suggested that there is any difference between the laws of the two States in that regard.

The judgment must, therefore, be reversed and the case remanded, with directions to set aside the verdict and to order a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court U. S.

Cited—109 U. S., 656.

MARTIN BASKET, *Appt.*,
v.
MILAS J. HASSELL, Admr. of HILLARY M. CHANEY, Deceased.

(See S. C., Reporter's ed., 267-269.)

Gift causa mortis.

The indorsement and delivery of a certificate of deposit, void as a gift *mortis causa*, is not good as a will of personalty under the laws of Tennessee, and does not pass the title as such, so as to entitle the donee to a decree for the payment of the money; for a will of personalty in that State does not take effect until probate.

[No. 170.]

Petition filed Apr. 16, 1883. Decided Apr. 16, 1883.

APPEAL from the Circuit Court of the United States for the Southern District of Indiana.

Petition for rehearing.

For the history and facts of the case, see, *ante*, p. 500.

Messrs. **P. Phillips, W. Hallett Phillips** and *Charles Denby*, for appellant:

We ask for a rehearing on a single point involved in the opinion of the court, to wit:

"As the gift was to take effect only upon the death of the donor, it was not a present executed *donatio causa mortis*, but a testamentary disposition, void for want of compliance with the statute of wills."

In Tennessee there is no statutory provision governing such a testamentary disposition—the principles of the common law being there in force.

R. S. Tenn., 1871, sec. 2162, *n.*; *Suggett* v. *Kitchell*, 6 Yerg., 428.

"The English law is very loose as to the nature of the instrument disposing of personal property; and marriage articles, promissory notes, assignment of bonds, letters, etc., etc., although not intended as wills, yet if they cannot operate in one way, may be admitted to probate as wills of personal property, provided, the intention of the deceased be clear that the instrument should operate after his death." 4 Kent, 518.

This is recognized as the law of Tennessee in the case of *McLean* v. *McLean*, 6 Humph., 452; *Watkins* v. *Dean*, 10 Yerg., 321.

See, also, 1 Rob. Wills, 1 Am. ed., 148; 2 Bl. Com., 501; cited in *Suggett* v. *Kitchell*, 6 Yerg., 428.

When it is said that this disposition is void for want of compliance with the Statute of Wills, it is evident that the court fell into an error.

If there was here a good testamentary disposition, then the decree must be reversed.

The indorsement was urged by the complainant to constitute a testamentary paper. There was no question as to probate, even if the defendant was under any obligation to produce one.

Tarver v. *Tarver*, 9 Pet., 179.

Were this the case of a complainant seeking relief on a will not probated, it would have been error in the court to have dismissed his bill absolutely.

Armstrong v. *Lear*, 12 Wheat., 175.

Messrs. **Asa Iglehart** and *Jno. E. Iglehart*, for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

It is now urged that the indorsement and delivery of the certificate of deposit, if void as a gift *mortis causa*, is, nevertheless, good as a will of personalty under the laws of Tennessee and, passing the title as such, entitled the appellant to a decree for the payment of the money.

But the conclusion is not justified by the assumption, for a will of personalty in Tennessee does not take effect until probate, Stat of Tenn., 1871, sec. 2169; *Suggett* v. *Kitchell*, 6 Yerg., 425; and until probate and the appointment of an executor or an administrator *cum testamento annexo*, the title to the fund passes to the administrator appointed previously, as in case of intestacy, to whom the decree in this case awarded it.

The petition is, therefore, denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CHRISTOPHER F. HAMPTON, Admr. of FRANK HAMPTON, Deceased, AND MARIA C. OTIS AND EMMA S. WELSMAN, *Executrices* of JAMES WELSMAN, Deceased, *Appts.*, [260]
v.
J. L. PHIPPS.

(See S. C., Reporter's ed., 260-267.)

Subrogation by creditors—mortgages by co-sureties.

1. Mortgages given by co-sureties, each to the other as security to indemnify him from any claim beyond his proportion assumed, are not in equity securities for the payment of the principal debt, which inure to the benefit of the creditors upon the principle of subrogation.

2. Where mortgages are given by co-sureties, each to the other to indemnify him for an over payment, unless one of them has been compelled to pay and has in fact paid an excess beyond his agreed share of the debt, there can have been no breach of the conditions of the mortgage and, consequently, no right to a foreclosure and sale of the mortgaged premises.

[No. 218.]

Argued Mar. 29, 30, 1883. Decided Apr. 16, 1883.

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APPEAL from the Circuit Court of the United States for the District of South Carolina.

The history and facts of the case appear in the opinion of the court.

Messrs. **W. G. DeSaussure** and *Theodore G. Barker*, for appellants:

We submit that *Ex parte Warren*, 10 Ves., 622, does not, in principle, support the deduction or conclusion of law reached by the special master, that the creditor is entitled to be subrogated to the security held by the surety. It is also submitted that the conclusion being deducted from such uncertain case as *Maure* v. *Harrison*, 1 Eq. Cas. Abr., 93, from a new *obiter* in *Wright* v. *Morley*, 11 Ves., 22; both of which appear to be repudiated as principles, by *Ex parte Warren;* and *Ex parte Warren, supra*, being decided, apparently, upon another point and on its own circumstances, it was error in the report to reach the conclusion of law which it did, and it was error in the circuit decree to adopt and confirm it as law.

It has been previously said, that it may be questioned, how far *Wright* v. *Morley* was operative in the United States Courts.

By no statute, decision or rule, has this court ever been and we feel assured it never will be held blindly to follow decisions made in the English courts, unless such decisions meet its concurrence and approval. And it will be less influenced by a case of so doubtful authority as *Maure* v. *Harrison*, or a mere *obiter*, uncalled for, unsupported and apparently doubted by the highest judicial officer of the kingdom in which such *obiter* was made.

The questions of subrogation decided in this court have been singularly few, and chiefly upon official bonds or insurance cases. We have failed to find a single decision of this court upon the subject now under discussion, and regard it as one entirely open for the adjudication of the court.

Messrs. **James Lowndes** and *A. G. Magrath*, for appellee:

All of Mr. Trenholm's property is liable for these bonds, and so is all the property of Mr. Welsman. The bondholders reach the property of Mr. Trenholm by their equity through Mr. Welsman; and they reach the property of Mr. Welsman by their equity through Mr. Trenholm; and this is the only way in which this property can be reached and applied to the payment of these bonds.

The propositions which the bondholders advance as the rules under which are deduced the conclusions we have stated, are:

1. That all securities given to a surety, whether in terms to pay the debt, for which he is surety, or to indemnify and save him harmless from any harm or loss by reason of his suretyship, inure to the benefit of the creditor, who is entitled to apply the same in satisfaction of the debt.

Maure v. *Harrison*, 1 Eq. Cas. Ab., 93; *Wright* v. *Morley*, 11 Ves., 22; *Ex parte Warren*, 10 Ves., 622; *Moses* v. *Murgatroyd*, 1 Johns. Ch., 119; *Phillips* v. *Thompson*, 2 Johns. Ch., 418; *Hayes* v. *Ward*, 4 Johns. Ch., 123; *Haggarty* v. *Pittman*, 1 Paige, 299; *Heath* v. *Hand*, 1 Paige, 329; *Hopewell* v. *Bank*, 10 Leigh, 206; *Halsey* v. *Reed*, 9 Paige, 446; *Vail* v. *Foster*, 4 N. Y., 312; *Webster* v. *Brown*, 2 Rich. (N. S.), 431; 1 Jones, Mort., sec. 837, citing *Inst. for Sav.* v. *Bank*, 9 Allen, 175; *Aldrich* v. *Martin*, 4 R. I., 520; *Saylors* v. *Saylors*, 3 Heisk., 525; *Riddle* v. *Bowman*, 27 N. H., 236; 2 Johns. Ch., 418, *supra;* *Hand* v. *R. R. Co.*, 12 S. C. (Shand), 314; *Gibbes* v. *R. R. Co.*, 13 S. C., 228.

And such is the firmly established rule in all the States.

Owens v. *Miller*, 29 Md., 144; *Roberts* v. *Colvin*, 3 Gratt., 358; *Saffold* v. *Wade*, 51 Ala., 214; *Rice's Appeal*, 79 Pa. 168; *Kinsey* v. *McDearmon*, 5 Coldw. (Tenn.), 392; *Carpenter* v. *Bowen*, 42 Miss., 28.

See, also, in the United States Circuit Courts: *Young* v. *R. R. Co.*, 2 Woods, 609; *R. R. Co.* v. *Drew*, 3 Woods, 692.

2. That the above rule applies to all securities by whomsoever given to the surety to indemnify him; and that the security given by one co-surety, to secure and save harmless his co-surety, comes within the rule, and the creditor is entitled to the benefit of the same.

Curtis v. *Tyler*, 9 Paige, 432; *Webster* v. *Brown*, 2 Rich. (N. S.), 431.

3. Upon the failure of the principal debtor and surety to pay when due, whether by reason of insolvency or otherwise, the creditor can proceed directly on the security, in the ordinary and customary method of enforcing the same; that is in the method the surety himself might have enforced it.

Hopewell v. *Bank* (*supra*); *Curtis* v. *Tyler*, 9 Paige, 432; *Young* v. *R. R. Co.* (*supra*); *Re Jaycox and Green*, 8 Bk. Reg., 241.

Mr. Justice **Matthews** delivered the opinion of the court:

The facts upon which the controversy in this suit depends are as follows:

The appellee, who was complainant below, is the holder, and filed his bill in equity, on behalf of himself and the other holders of bonds, executed and delivered by Theodore D. Wagner and William L. Trenholm, to the amount of $710,000, and paid to creditors in settlement of the liabilities of two insolvent firms, in which they were two of the copartners. These bonds were dated January 1, 1868. The payment of the principal and interest of each of these bonds was guarantied, by writing indorsed thereon, by George A. Trenholm and James T. Welsman, who were sureties merely. These sureties entered into a written agreement each with the other, dated May 3, 1869, in which it was recited that, in becoming parties to said guaranty, they had agreed between themselves that the said George A. Trenholm should be liable for the sum of $400,000, and the said Jas. T. Welsman for the sum of $310,000, of the aggregate amount of the bonds, and no more, and that each would be respectively liable to the other for the full discharge of the said sum and proportion by them respectively undertaken, and that each would save and keep harmless and indemnify [261] the other from all claim, by reason of the said guaranty, beyond the amount or proportion respectively assumed, as stated; and it was thereby further agreed that, at any time when either of them should so require, each should, by mortgage of real estate, secure to the other more perfect indemnity, because of the said guaranty. Thereupon, and on the same date, each executed to the other a mortgage upon real estate of which they were respectively the owners, the

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condition of which was that the mortgagor should perform on his part the said agreement of that date. The guarantors, as well as the principal obligors, had become insolvent before the present bill was filed.

It also appears that, of the sum of $573,300 due on account of outstanding bonds, George A. Trenholm, one of the guarantors, had paid $108,454, leaving still due from his estate to make good the proportions assumed by him, $214,532; and that the proportion for which the estate of James T. Welsman, the other guarantor, was liable, was $250,314, of which nothing had been paid. The appellees claimed that the mortgages interchanged between the guarantors inured to their benefit as securities for the payment of the principal debt, and prayed for a foreclosure and sale for that purpose.

This was resisted by the appellants, one of whom, Hampton's administrator, as a judgment creditor of George A. Trenholm and James T. Welsman, claimed a lien on the mortgaged premises; the others, *executrices* of James Welsman, deceased, being subsequent mortgagees of the same property.

A decree passed in favor of the complainants, according to the prayer of the bill, and is now brought under review by this appeal.

[263] The ground on which the court below proceeded seems to have been that the mortgages given by the co-sureties, each to the other, were in equity securities for the payment of the principal debt, which inured to the benefit of the creditors upon the principle of subrogation.

The application of the principle of subrogation in favor of creditors and of sureties, has undoubtedly been frequent in the courts of equity in England and the United States, and is an ancient and familiar head of their jurisdiction.

It was distinctly stated, as to creditors, in the early case of *Maure* v. *Harrison*, 1 Eq. Cas. Abr., 93, where the whole report is as follows: "A bond creditor shall, in this court, have the benefit of all counter bonds or collateral security given by the principal to the surety; as if A owes B money, and he and C are bound for it, A gives C a mortgage or bond to indemnify him, B shall have the benefit of it to recover his debt." And the converse of the rule was stated by Sir Wm. Grant in *Wright* v. *Morley*, 11 Ves., 12, where he said: "I conceive that, as the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety, the surety has full as good an equity to the benefit of all the securities the principal gives to the creditor." And it applies equally between sureties, so that securities placed by the principal in the hands of one, to operate as an indemnity by payment of the debt, shall inure to the benefit of all.

Many sufficient maxims of the law conspire to justify the rule. To avoid circuity and multiplicity of actions; to prevent the exercise of one's right from interfering with the rights of others; to treat that as done which ought to be done; to require that the burden shall be borne by him for whose advantage it has been assumed; and to secure equality among those equally [264] obliged and benefited, are perhaps not all the familiar adages which may legitimately be assigned in support of it. It is, in fact, a natural and necessary equity which flows from the relation of the parties, and though not the result of contract, is nevertheless the execution of their intentions. For, when a debtor, who has given personal guaranties for the performance of his obligation, has further secured it by a pledge in the hands of his creditor, or an indemnity in those of his surety, it is conformable to the presumed intent of all the parties to the arrangement, that the fund so appropriated shall be administered as a trust for all the purposes which a payment of the debt will accomplish; and a court of equity accordingly will give to it this effect. All this, it is to be observed, as the rule verbally requires, presupposes that the fund specifically pledged and sought to be primarily applied, is the property of the debtor, primarily liable for the payment of the debt; and it is because it is so, that equity impresses upon it the trust, which requires that it shall be appropriated to the satisfaction of the creditor, the exoneration of the surety, and the discharge of the debtor. The implication is, that a pledge made expressly to one, is in trust for another, because the relation between the parties is such, that that construction of the transaction best effectuates the express purpose for which it was made.

It follows that the present case cannot be brought within either the terms or the reason of the rule; for, as the property, in respect to which the creditors assert a lien, was not the property of the principal debtor, and has never been expressly pledged to the payment of the debt, so no equitable construction can convert it by implication into a security for the creditor.

It is urged that the logic of the rule would extend it so as to cover the case of all securities held by sureties for purposes of indemnity of whatsoever character and by whomsoever given. But this suggestion is founded on a misconception of the scope of the rule and the rational grounds on which it is established. Of course, if an express trust is created, no matter by whom nor of what, for the payment of the debt, equity will enforce it, according to its terms, for the benefit of the creditor, as a *cestui que trust*; but the question concerns the creation of a trust, by operation of law, in favor of a creditor, in a [265] case where there was no duty owing to him, and no intention of bounty. A stranger might well choose to bestow upon a surety a benefit and a preference, from considerations purely personal, in order to make good to him exclusively any loss to which he might be subjected in consequence of his suretyship for another. In such a case neither co-surety nor creditor could, upon any ground of privity in interest, claim to share in the benefit of such a benevolence.

There may be, indeed, cases in which it would not be inequitable for the debtor himself to make specific pledges of his own property, limited to the personal indemnity of a single surety, without benefit of participation or subrogation; as, when the liability of the surety was contingent upon conditions not common to his co-sureties, and which may never become absolute. *Hopewell* v. *Bank*, 10 Leigh, 206.

We are referred by counsel to the case of *Curtis* v. *Tyler*, 9 Paige, 432, as an instance in which the rule has been extended to securities in the hands of a surety not derived from the principal debtor. But the fact in that case is otherwise. The question was as to the right

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of an assignee of a mortgage to the benefit of the guaranty of one Allen to make good any deficiency in the mortgaged property to pay the mortgage debt. This bond had been given to one Murray, a prior holder of the mortgage, who had assigned it to the complainant. The court say, in the opinion, p. 486: "In the case under consideration, Murray had assigned the bond and mortgage given to him, and had guarantied the payment thereof to the assignee. He, therefore, stood in the situation of a surety for the mortgagor, when the latter procured the bond of Allen as a collateral security, or as a guaranty of the payment of his original bond and mortgage. The present holders are, therefore, in equity entitled to the benefit of this collateral bond, in the same manner and to the same extent as if it had been given to Murray before he assigned his bond and mortgage, and had been expressly assigned by him to Beers, and by Beers to the complainants." It thus distinctly appears that the bond of Allen, which [266] was the collateral security in controversy, was procured by and derived from the original mortgagor, the principal debtor. We have been referred to no case which forms an exception to the rule as we have stated it.

But the claim of the complainants fails for another reason. The right of subrogation, on which they rest it, is merely a right to be substituted in place of each of the co-sureties in respect to the other, in order to enforce the mortgages given by them respectively according to their terms. But the conditions of those mortgages have not been broken, and the very fact, which is supposed to confer the right upon the creditor to interpose, the insolvency of the sureties, has rendered it impossible for either to fasten upon the other a breach of the condition of his mortgage. As neither can pay his own proportion of the liability they agreed to divide, neither can claim indemnity against the other for an over-payment. It is entirely clear, therefore, that neither of the sureties could be, under the circumstances as they appear, entitled, as mortgagee, to foreclose the mortgage against the other. The condition of each mortgage was, that the mortgagor would perform his part of the agreement and indemnify the mortgagee against the consequences of a failure to do so. Unless one of them had been compelled to pay, and had in fact paid, an excess beyond his agreed share of the debt, there could have been no breach of the conditions of the mortgage, and consequently no right to a foreclosure and sale of the mortgaged premises. And the amount which the mortgagor could be required to pay, as a condition of redeeming the mortgaged premises, in case of foreclosure, would be, not the amount which the mortgagee, as between himself and the common creditor, was bound to pay on account of the debt, but the amount which, as between himself and his co-surety, the mortgagor, he had paid beyond the proportion which, by the terms of the agreement between them, was the limit of his liability. The mortgages were not created for the security of the principal debt, but as security for a debt possibly to arise from one surety to the other. As to which of them has there been as yet any default? Plainly none [267] as to either. And yet the complainants assert the right to foreclose them both; a claim that is self-contradictory, for, by the very nature of the arrangement, it is impossible that there should be a default as to both. The fact that one mortgagor had failed to perform his part of the agreement could only be on the supposition that the other had not only fully performed it on his part, but had paid that excess against which his co-surety had agreed to indemnify him. There is, therefore, no right to the subrogation insisted on, because there is nothing to which it can apply.

It results, therefore, that the complainants were not entitled to participate in the benefit of the mortgages in question, nor to share in the proceeds of the sale of the mortgaged premises; but that the same should have been applied to the payment of the other judgment and mortgage liens upon the premises, in the order of their priority. *The decree of May 29, 1879, therefore, being the one from which the appeal was taken, is reversed and the cause remanded, with directions to take such further proceedings therein, not inconsistent with this opinion, as justice and equity require. Decree reversed.*

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

JOHN H. ROUNTREE, *Plf. in Err.*,

v.

ERNEST F. SMITH ET AL.

(See S. C., "*Rountree v. Smith*," Reporter's ed. 269-277.)

Gambling contract, evidence as to.

Where there is no evidence whatever that a written contract was a gambling contract on the prices of produce, evidence of what other people intended by other contracts of a similar character, however numerous, is not competent to prove the contract to be of that character; and if there is no evidence on the subject, the court may refuse to charge the jury to find upon that question.

[No. 234.]

Submitted Apr. 5, 1883. Decided Apr. 16, 1883.

IN ERROR to the Circuit Court of the United States for the Western District of Wisconsin.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **W. E. Carter**, for plaintiff in error:

"A contract to deliver at a future day is not necessarily a wagering or gambling contract. But when such a contract is made as a cover for gambling, without any intention to deliver or receive the grain, but merely to pay and receive the differences between the price agreed upon and the market price at such future day, then it comes within the statute of gaming and is not in law. Courts, in the main, are in accord in regard to these legal principles. If any diversity of views is found to exist, it is rather in the application of the law to the particular facts than as to the law itself."

Dos Passos, Stock Brokers, 434.

In the following cases the question has been considered and substantially the same conclusion reached:

Lyon v. *Culbertson*, 83 Ill., 33; *Bigelow* v. *Benedict*, 70 N.Y., 202; *Ex parte Young*, 6 Biss., 53; *Re Green*, 7 Biss., 388; *Clarke* v. *Foss*, 7 Biss., 540; *Kingsbury* v. *Kirwin*, 43 N. Y. Supr. Ct., 451; *Rudolf* v. *Winters*, 7 Neb., 125; *Pickering* v. *Cease*, 79 Ill., 328: *Rumsey* v. *Berry*, 65 Me.,

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570; *Waterman* v. *Buckland*, 1 Mo. App., 445; *Yerkes* v. *Salomon*, 11 Hun (Sup. Ct.), 471; *Logan* v. *Musick*, 81 Ill., 415; *Gregory* v. *Wendell*, 39 Mich., 337; *S. C.*, 40 Mich., 432; *Everingham* v. *Meighan*, 55 Wis., 354; 13 N.W. Rep., 269; *Lowe* v. *Young*, 59 Ia., 364; 13 N.W. Rep., 329; *Brua's Appeal*, 55 Pa., 294; *Kirkpatrick* v. *Bonsall*, 72 Pa., 155; *Grizewood* v. *Blane*, 11 C. B., 526; 78 E. C. L., 526; *Matter of Chandler*, 13 Am. Law Reg., 310; *North* v. *Phillips*, 89 Pa., 250; *Dickson* v. *Thomas*, 97 Pa., 278; 10 Weekly Notes of Cas. 112, 38 Leg. Int., 115; *Ruchizky* v. *De Haven*, 97 Pa., 202; *Fareira* v. *Gabell*, 89 Pa. St., 89; *Melchert* v. *Am. Un. Tel. Co.*, 11 Fed. Rep., 193, and *n.* by Francis Wharton, p. 201; *Bartlett* v. *Smith*, 13 Fed. Rep., 263; *Tenney* v. *Foote*, 4 Brad., Ill., 594; *Noyes* v. *Spaulding*, 27 Vt., 420; *Sampson* v. *Shaw*, 101 Mass., 145; *Ex parte Marnham*, 2 DeG. F. & J., 640; *Rourke* v. *Short*, 34 Eng. L. & Eq., 219; *Doxy* v. *Spaids*, 8 Ill. App., 549; *Bank* v. *Spaids*, 8 Ill. App., 493; *Kingsbury* v. *Kirwin*, 77 N. Y., 612; *Shaw* v. *Clark*, 13 N. W. Rep., 786.

Where actual delivery is intended, the contract is not void.

Clark v. *Foss*, 7 Biss., 540; *Cole* v. *Milmine*, 88 Ill., 349; *Phillips* v. *Ocmulgee Mills*, 55 Geo., 633; *Bank* v. *McDougall*, 28 U. C. C. P., 345; *Smith* v. *Bouvier*, 70 Pa. St., 325; *McIlvaine* v. *Egerton*, 2 Rob. N. Y., 422; *Stanton* v. *Small*, 3 Sandf., 230; *Brown* v. *Speyers*, 20 Gratt., 296; *Cassard* v. *Hinman*, 1 Bos., 207; *Ashton* v. *Dakin*, 4 Hurl. & N., 867; *Sawyer* v. *Taggart*, 14 Bush., 727; *Cameron* v. *Durkheim*, 55 N. Y., 425.

The form of the contract is not conclusive, but parol evidence is admissible to show what the real intentions of the parties were. And if, from the acts and conduct of the parties, it appears that, notwithstanding the form of the contract, the real intention of the parties was to settle by the payment of differences, the contract is a gaming one and void.

Dos Passos, 477; *Yerkes* v. *Salomon*, 11 Hun (Sup. Ct.), 471; *Story* v. *Salomon*, 71 N. Y., 420; *Hibblewhite* v. *McMorine*, 5 Mees. & W., 466; *North* v. *Phillips*, 89 Pa., 250; *Dickson* v. *Thomas*, 97 Pa., 278; *Barnard* v. *Backhaus*, 52 Wis., 593; *Bartlett* v. *Smith*, 13 Fed. Rep., 263; *Melchert* v. *Am. Un. Tel. Co.*, 11 Fed. Rep., 193.

"The question of intention to deliver is for the jury."

Biddle, Law of Stockbrokers, 313; Dos Passos, Stockbrokers, 424.

Messrs. **Francis H. Kales, C. B. Lawrence** and *P. H. Smith*, for defendants in error:

It was the duty of the court below, on the evidence, to hold and to instruct the jury, that the defendant had failed to make out his first plea, namely: that the contracts referred to were illegal and void as gambling contracts.

Ins. Co. v. *Doster* (*ante*, 65); opinion filed by this court, Oct. 23, 1882.

The principle of this and preceding cases decided by this court is, that wherever there is an entire failure on the part of the defendant to establish his plea, it is the duty of the court, as a matter of law, to withdraw the subject thereof from the consideration of the jury; and this rule was properly applied in the present case.

In this case, there was nothing in the treaty between Rountree and his brokers, nor anything in the terms of the contracts made by his brokers on the board of trade, nor in the evidence, from which the alleged illegality could be inferred.

On the other hand, the form and terms of these contracts had previously, as respects legality, been upheld by the decisions of the Supreme Court of Illinois.

Wolcott v. *Heath*, 78 Ill., 433; *Fanborn* v. *Benedict*, 78 Ill., 309; *Pixley* v. *Boynton*, 79 Ill., 351; *Logan* v. *Musick*, 81 Ill., 415; *Lyon* v. *Culbertson*, 83 Ill., 33; *Pickering* v. *Cease*, 79 Ill., 328.

These cases, most of which uphold like contracts made on the board of trade, proceed upon the ground that the sale of property is, under this form of contract, made at the time when the contract is entered into; but that delivery only is postponed, with an option as to the time thereof.

Wolcott v. *Heath*, 78 Ill., 436.

While such is the legal effect of contracts of this character when unexplained by evidence, still it is competent, under an issue made for that purpose, to receive evidence tending to show that such contracts were or were not mere covers for betting on the price of grain during a limited period.

Beveridge v. *Hewitt*, 8 Bradw., 479; *Tenney* v. *Foote*, 95 Ill., 99.

At the trial, there was no evidence tending to show that the contracts for the purchase and sale of property for the defendant's account, were not *bona fide* or what, by their terms, they purported to be, namely: transactions for the actual sale and delivery of property.

Mr. Justice **Miller** delivered the opinion of the court:

Smith and Lightner, plaintiffs in the circuit court, recovered against Rountree, plaintiff in error, a judgment for $5,614.46 for services rendered and money advanced by them as brokers and members of the board of trade of Chicago, for Rountree at his request.

The case was tried before a jury, the parties being the principal, if not the only witnesses, and their testimony, with some correspondence by letters and telegrams, was all the evidence.

The record presents but two questions necessary to be decided.

It was alleged by the defendant that on the 11th of March, 1879, he had notified the plaintiffs in writing that thereafter he would advance them no more margins, and would not be responsible for any losses on contracts made by them in his name. To which their answer was a denial of such instruction, and an allegation that, if it had been given it was subsequently withdrawn and waived by other instructions and actions of defendant.

Specific questions on this subject were submitted by the court to the jury, under the practice allowed by the Wisconsin Statute.

Some objection is made to the form of some of these questions, which we do not think necessary to consider here, for the fourth question and the answer of the jury to it render the other questions and answers immaterial. That question and answer is as follows: [275]

"Fourth. If you find there was such a contract or understanding between the parties as is mentioned in the last question, did the defendant, by his subsequent acts, declarations, directions or conduct waive the same and become lia-

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ble for further losses incurred over and above the money so placed in plaintiffs' hands? Answer. Yes."

It was undoubtedly competent for defendant to withdraw, waive or countermand his former order on this subject, and this could be done verbally or by actions and need not be in writing, and the fact found by the jury that he did so, renders his former notice wholly immaterial to the issue.

The counsel for defendant resisted recovery against him, on the ground that the sales and purchases made for him by plaintiffs were gambling contracts on the prices of the various articles of produce to which they related, never designed to be actually performed by delivery, but the damages were to be adjusted and payments made and accepted, according to the difference between the contract price and the market price at the date fixed for delivery. And on this subject he asked certain instructions of the court which were refused. The court also charged the jury that there was no evidence on this subject which they could consider. An exception was taken to this ruling, and a bill of exception purports to embody all the testimony.

The evidence of the defendant on this point was that he gave the instructions to buy. He says: "I could not say that I had any understanding on the subject of the nature and character of the board of trade deals, whether the property was to be actually delivered or whether it was to be settled for."

It is obvious, therefore, that so far as plaintiff, one of the parties to all these contracts which he now impeaches, is concerned, they were not gambling contracts, and that he had no understanding or agreement, express or implied, that [276] they were bets upon the future price of the article.

The other party to these contracts, or rather parties, for the contracts were numerous, are not produced, nor their testimony given, and there is no direct evidence that any of them either bought or sold with any other purpose than to perform the agreement as its terms bound them.

The plaintiffs, in answer to questions on this subject, say that in no instance had they any agreement with the parties to the contracts made by them for Mr. Rountree, that performance was not expected or intended, but a mere adjustment of differences, and they say that actual delivery of the article was made in some of them. So that, as to these contracts, in regard to which the services were rendered and money advanced by plaintiff for defendant, there is no evidence whatever that they were not *bona fide* contracts enforcible between the parties, and made to be performed.

Evidence was given that a very large proportion of all the contracts made for the sale of produce at the Board of Trade of Chicago, were settled by payment of differences, and that nothing else was expected by the parties to them, and the number of these in proportion to the number of *bona fide* contracts, in which delivery was expected and desired, is said to be so large as to justify the inference that it was so in these cases.

But since the plaintiff testifies that he had no such understanding; since nothing is proved of the intention of the other parties; and since the contracts were always in writing, we do not think the evidence of what other people intended by other contracts of a similar character, however numerous, is sufficient of itself to prove that the parties to these contracts intended to violate the law or to justify a jury in making such a presumption.

It is also to be observed that the plaintiffs in this case are not suing on these contracts, but for services performed and money advanced for defendant at his request, and though it is possible they might, under some circumstances, be so connected with the immorality of the contract as to be affected by it if proved, they are certainly not in the same position as a party sued [277] for the enforcement of the original agreement.

Without pursuing the subject further, we are of opinion that there was no evidence on this subject which ought to have been submitted to the jury, and the court was right in withdrawing it from their consideration.

We see no error in the record, and the judgment of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—110 U. S., 509; 59 Wis., 352; 48 Am. Rep., 527.

LITTLE MIAMI, COLUMBUS AND XENIA RAILROAD COMPANY,

Plff. in Err.,

v.

UNITED STATES.

(See S. C., Reporter's ed., 277-281.)

Tax on railroad profits—burden of proof—insufficient findings.

1. The tax of five per cent on the profits of a railroad company, provided for by the Act of 1864, amended by that of 1866, is not upon earnings carried to the account of any fund or used for construction, but upon profits.

2. In an action by the United States to recover such sum as upon an investigation of the accounts of a railroad company, it shall appear ought to have been paid, the burden of proof is upon the Government to show what is due.

3. Where the findings are not sufficiently specific, this court may remand the cause for further inquiry and such further proceedings in the inferior court as the justice of the case may require.

[No. 214.]

Argued Mar. 28, 1883. Decided Apr. 16, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio.

This action was brought in the court below, by the defendant in error, to recover certain taxes alleged to be due under the Acts of June 30, 1864 and July 13, 1866.

The trial was by the court, a jury having been waived. It having resulted in a judgment in favor of the plaintiff for $8,435.86, with costs, the defendant sued out this writ of error.

The further facts of the case are sufficiently stated by the court.

Mr. **Wm. A. Ramsey**, for plaintiff in error.

Mr. **Samuel F. Phillips**, *Solicitor-Gen.*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was a suit begun by the United States

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on the 29th of March, 1875, to recover of the Little Miami and Columbus and Xenia Railroad Company a tax of five per centum on alleged profits of the Company "carried to the account of any fund or used in construction," provided for by the Act of June 30, 1864, ch. 173, sec. 122, 13 Stat. at L., 284, amended by the Act of July 13, 1866, ch. 184, 14 Stat. at L., 139. A jury was waived and the trial had by the court. The case comes here on a finding of facts. From this finding it appears "That during the period covered by the petition, *viz.:* from the first day of July, 1864, to the 30th day day of November, 1869, inclusive, the defendant, in good faith, regularly made returns of earnings, profits, income and gains, and of profits carried to the account of any fund, or used for construction, arising or accruing to it during said period, intended and believed by it to embrace all such profits, incomes and gains, and all such profits carried to the account of any fund, or used for construction, which by law it was bound to return; which returns were received and accepted, and for the amount of which assessments from time to time were made of the taxes payable thereon, which taxes were regularly paid by it to the officer lawfully authorized by law to collect the same." In addition to this it also appears "That over and above the amount so returned, on which taxes were paid as aforesaid, the defendant did in fact make additional earnings, which by it were carried to the account of some fund, or used for construction during said period, amounting in all to the sum of $168,707.22, on which no tax has been paid."

The finding also shows that during the year 1869, the defendant carried to the debit of profit and loss on its books, various items amounting in all to $184,895.06. In this way the books show no profits between July 1, 1864, and November 30, 1869, beyond the amount on which [279] taxes were paid in the regular course of business. Of the sum so charged up, one item of $51,155.44 was for loss and depreciation on book accounts and other choses in action, acquired by the Company prior to July 1, 1864, and which had been standing on the books until 1869 at their par value; another item of $22,000 was for the depreciation in the value of bonds purchased after July 1, 1864; another item of $106,014.62 was for the depreciation in the value of what was known as the "street connection track," and another item for $5,225 was for losses on a purchase in 1867 of shares of capital stock in a cotton press company.

Upon these facts, so found, the Company claimed that, in ascertaining the amount of profits liable to taxation, there should be deducted from the earnings during the period for which the tax was claimed these several items of loss and depreciation, but the court ruled, as a matter of law, "that for the purpose of taxation the defendant is not entitled by law to make the deduction as claimed," and gave judgment for five per cent on the whole sum of $168,707.22.

In our opinion there was error in this ruling. The tax in question is not upon *earnings* "carried to the account of any fund or used for construction," but upon *profits*. Earnings used to pay interest or dividends are taxable, whether actual profits or not; but earnings used for construction, or carried to the account of a fund, are not to be taxed, unless they represent profits of the Company in its business as a whole, that is to say, the excess of the aggregate of gains from all sources, over the aggregate of losses. The law evidently contemplated an annual statement of accounts, and in this way an annual striking of balances between gains and losses. When, in such statements, it appeared that a part of the excess of gains over losses had been used for construction or added to some fund, then a tax was to be paid on what had been so used or appropriated. This was part of the system adopted for the taxation of the "profits, income or gains" of railroad corporations, which, as was said in *R. R. Co.* v. *Collector*, 100 U. S., 598 [XXV., 647], it was the object of this statute to provide. A tax was put on dividends, [280] interest paid in the ordinary way, and *profits* used for construction or carried to some fund. This was a classification of the income of the corporation for the purposes of taxation.

In the present case there has been no assessment of a tax, but the United States have sued to recover such sum as, upon an investigation of the accounts of the Company, it shall appear ought to have been paid. The burden of proof is upon the Government. No more can be recovered than is shown to be due. In presenting the evidence, no attempt seems to have been made by the United States to state annual accounts and ascertain the amount to be paid on that basis. The court has found that between July 1, 1864, and November 30, 1869, earnings to the amount of $168,707.22 had been used for construction or carried to the account of some fund, but it has also found that, between the same dates, the Company lost $22,000 by depreciation in its investments in bonds, and $5,225 by depreciation in the stock of a cotton press company. In the view we take of the law, these sums should have been deducted from the earnings as ascertained before fixing the amount of profits on which the tax was to be paid. It is not stated with certainty in the finding at what dates the losses actually occurred which are represented by the items of $51,155.44, depreciation in the value of book accounts and choses in action, and $106,014.62, depreciation in the value of the street connection track. For this reason, we are unable to decide whether these losses or any part of them should be deducted. As the omission to make the finding sufficiently specific in this particular undoubtedly arose from the fact that the court ruled as a matter of law that no deductions could be made on account of losses of this character, we will remand the cause, so that further inquiry may be had on that point. This we have authority to do under section 701 of the Revised Statutes, which allows a cause to be remanded for "such further proceedings to be had in the inferior court as the justice of the case may require."

The judgment of the Circuit Court is reversed and the cause remanded, with instructions to deduct from the amount of earnings, as ascertained upon the former trial, the items of $22,000, depreciation in the value of bonds, and [281] $5,225, depreciation in the value of cotton press stock, together with such other sums included in the items of $51,155.44, depreciation in book accounts and choses in action, and $106,014.62, depreciation in value of the street connection

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track, as, upon further hearing, shall be found to represent losses accruing to the Company between July 1, 1864, and November 30, 1869, and to render judgment only for such an amount of tax as shall appear to be due upon that basis.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[288] JOHN S. FARLOW, Receiver of the CINCINNATI, SANDUSKY AND CLEVELAND RAILROAD COMPANY, *Appt.*,

v.

SYLVANUS KELLY.

(See S. C., Reporter's ed., 288-291.)

Negligence of railroad company—contributory negligence.

1. It is culpable neglect for the managers of a railroad to leave a freight car standing on the side track so near the main track as to make a collision with an approaching train inevitable.
2. It is not contributory negligence for a passenger to ride with his elbow on the sill of an open window, when by a collision his arm is jarred outside of the car and broken.

[No. 226.]

Submitted Apr. 2, 1883. Decided Apr. 16, 1883.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

The history and facts of the case fully appear in the opinion of the court.

Mr. **S. A. Bowman**, for appellant:

The appellee was guilty of contributory negligence in placing his arm in the open window.

Todd v. *R. R. Co.*, 3 Allen, 18; *R. R. Co.* v. *McClurg*, 56 Pa., 294; *R. R. Co.* v. *Sickings*, 5 Bush., 1; *P. & C. R. R. Co.* v. *Andrews*, 39 Ind., 329; *I. & C. R. R. Co.* v. *Rutherford*, 29 Ind., 83.

The party injured cannot recover if he contributed in any degree to the injury.

Geiselman v. *Scott*, 25 Ohio, 88.

Mr. **R. F. Buckland**, for appellee:

The position of the appellee's arm was not negligence, under the circumstances Railroad companies are bound to keep all obstructions so far away as to prevent the possibility of collision with passenger trains. It is almost a universal habit for passengers to rest their arms on the window sill when the windows are up, in warm weather.

Curtis v. *R. R. Co.*, 6 McLean, 401; *Barton* v. *R. R. Co.*, 52 Mo., 253; *R. R. Co.* v. *Gregory*, 58 Ill., 272; *R. R. Co.* v. *Pondrom*, 51 Ill., 333; *Winters* v. *R. R. Co.*, 39 Mo., 468; *C. C. & C. R. R. Co.* v. *Terry*, 8 O. St., 581; Whart. Neg. sec. 362.

If there be negligence on the part of the appellee, yet if, at the time when the injury was committed, it might have been avoided by the appellant in the exercise of reasonable care and prudence, an action will lie for the injury.

Whart. Neg., secs. 301 to 341 and 362; *Kerwhaker* v. *R. R. Co.*, 3 O. St., 172; *R. R. Co.* v. *Stallman*, 22 O. St., 26; *R. R. Co.* v. *Hine*, 25 O. St. 631; *Hibbard* v. *Thompson*, 109 Mass., 288; *Brown* v. *R. R. Co.*, 50 Mo., 461.

Mr. Chief Justice **Waite** delivered the opinion of the court:

While the Cincinnati, Sandusky and Cleveland Railroad was being operated by John S. Farlow, a Receiver appointed by the Circuit Court of the United States for the Northern District of Ohio, in a suit for the foreclosure of a mortgage on the road, Sylvanus Kelly, a passenger on one of the trains, was injured by the collision of a car in which he was riding with a freight car standing on a side track. Kelly thereupon petitioned the Circuit Court for leave to sue the Receiver in the Court of Common Pleas of Sandusky County, Ohio, to recover for the injuries he had sustained. This was denied. He then asked leave to file his complaint against the Receiver in the suit for foreclosure. This was granted, and the Receiver ordered to make his defense. Kelly thereupon filed in the circuit court his complaint, in which he set forth his claim growing out of the alleged carelessness and neglect of the Receiver and his agents, and prayed that an inquiry might be had as to the amount of his damages and the Receiver ordered to pay the same. The Receiver answered, denying that the injury complained of was occasioned by his negli- [289] gence or that of his servants or agents, and averring that it was "Caused by the negligence and want of care by the said Sylvanus Kelly in improperly exposing himself to injury while riding on said car, by so placing his arm in an open window of said car that it projected outside thereof, and thereby came in contact with said standing car." After the issue was thus made up, the matter was referred to a special master, on the application of Kelly, "To hear the matters set forth in said complaint, answer and replication, and such evidence as the parties may offer relevant and pertinent to the issues therein made, and determine and report whether, under the law, the said Receiver is liable for the injuries complained of by the said Sylvanus Kelly; and, if so, the amount of compensation which said Sylvanus Kelly shall be entitled to receive for the same; * * * and that he report his findings, together with the evidence and costs of his proceedings, to this court as soon as possible, at the January Term thereof."

Under this order the master heard the case and reported in substance the following facts: Bellefontaine is a station on the line of the road at which passenger trains stop and pass each other. Immediately south of the town is a side track of about one thousand feet in length, with a switch at each end uniting it with the main track. This side track has a descending grade from north to south, of about four feet in the whole distance of one thousand. On the morning of the 23d of August, 1877, three freight cars were standing on the side track, two of them near the north switch, and one about one hundred and thirty-five feet from the south switch. Kelly was a passenger on a passenger train going north on the road that day, and had a seat about midway of the car near an open window. Having a severe headache, shortly before the train reached the south end of the side track, he placed his right elbow on the sill or base of the open window and rested his head on his right hand. The train on which he rode was to pass another going south at Bellefontaine about

NOTE.—*Of the freedom of plaintiff from contributory negligence, necessary to entitle him to recover; see, note to* Stokes v. Saltonstall, 38 U. S. (13 Pet.), 181.

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noon of the day. The train going south arrived at the north end of the side track about twenty minutes before that on which Kelly was riding [290] reached the south end. The train from the north was switched from the main track on to the side track at the north end, and to make room for itself pushed the two freight cars southward, putting them in motion toward the south end of the side track on the down grade. The brakes on the freight cars were not attended to, and the impulse given them by the incoming train caused them to move the single car standing near the south end of the side track to a point so near the main track that the train from the south could not pass without contact. This freight car remained in that position from five to ten minutes before the train from the south arrived. While the freight car stood in this dangerous proximity to the main track, the train from the south came up at more than ordinary speed, and the forward right hand corner of the coach in which Kelly was riding struck the freight car and jarred his elbow from the window sill outward over the window sill and outside of the car, bringing his forearm in contact with the freight car, while his arm above the elbow was pressed against the side of the window. The train in which Kelly was riding being in motion, his arm was crushed and broken below and above the elbow in such a manner as to require amputation near the shoulder.

As conclusions of law from these facts, the master found that there was negligence in the management of the railroad in allowing the freight car to stand so near the main track when the train from the south came up, and in not keeping the train from the south under control as it approached the station. He also found that Kelly was not in fault, under the circumstances, for resting his elbow on the sill of the open window.

To this report exceptions were filed by the Receiver; 1, because the master found as a fact that the elbow of Kelly rested on the sill or base of the window until it was thrown outside by the force of the collision; and, 2, because he found, as a conclusion of law, that it was not an act of negligence for Kelly to ride with his elbow on the sill of the open window.

The court overruled the exceptions and ordered the Receiver to pay Kelly for his damages the sum of $5,000. From this order an appeal was allowed by *Mr. Justice* Swayne, at that time a Justice of this court and assigned to the Sixth Circuit, which includes the Northern District of Ohio.

The questions argued here are those presented by the exceptions below. After examining the testimony reported by the master, we are entirely satisfied with his findings of fact. There can be no doubt whatever of the culpable neglect of the managers of the road in leaving the freight car to stand on the side track so near the main track as to make a collision with the approaching train from the south inevitable, and in our opinion it was not contributory negligence for Kelly, under the circumstances, to ride with his elbow on the sill of the open window.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN D. WRIGHT, J. M. BASS, EXR. of W. H. WELLS, Deceased, ET AL., *Plffs. in Err.*,

v.

UNITED STATES.

(See S. C., 108 U. S., 281, 282.)

Distiller's survey.

Where distillers indorse on the report of a survey, "We hereby accept the within survey, and consider the same as binding upon us on and after this date," it is in law a waiver of a delivery of a copy of the report to them.

[No. 227.]

Submitted Apr. 2, 1883. Decided Apr. 16, 1883.

IN ERROR to the Circuit Court of the United States for the Middle District of Tennessee.

This action was brought in the district court, by the defendant in error, on a distillers' bond.

The trial resulted in a verdict and judgment for defendants. This judgment was reversed on error, by the court below and the cause remanded. The second trial resulted in a verdict and judgment for the plaintiff. This judgment having been affirmed, on error, by the court below, the defendants sued out this writ of error.

The facts of the case are sufficiently stated by the court.

Messrs. **R. McP. Smith, S. Shellabarger** and *J. M. Wilson*, for plaintiff in error.

Mr. **William A. Maury**, *Asst. Atty-Gen.*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was an action on a distillers' bond, to recover the difference between taxes assessed according to the producing capacity of the distillery and those calculated on the reports of production. The defense was, that a copy of the official survey had not been served on the distillers. Section 3264 of the Revised Statutes provides for a survey of the distillery by the collector and a written report thereof in triplicate, "Of which one copy shall be delivered to the distiller, one copy shall be retained by the collector, and one copy shall be transmitted to [282] the Commissioner of Internal Revenue, and the survey shall take effect upon the delivery of such copy to the distiller." In *Peabody* v. *Stark*, 16 Wall., 240 [83 U. S., XXI., 311], it was held, following the rulings of the Commissioner of Internal Revenue, that the distiller was not liable for the capacity tax until a copy of the survey had been delivered to him.

In the present case, it appeared that no copy of the survey had ever been delivered to the distillers, but when the bond sued on was executed the distillers signed the following indorsement, written on the report of the survey which had been made: "We hereby accept the within survey, and consider the same as binding upon us on and after this date, September 12, 1873. John B. Wright. Thomas Tucker." The court below decided that this indorsement was in law a waiver of a delivery of a copy of the report to the distillers, and that the tax was consequently collectible. To this we agree. The language of the Act is, that "The survey shall take effect

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upon the delivery of such copy to the distiller." This is equivalent to saying that the survey shall be binding on the distiller when the copy is delivered to him. When, therefore, the distiller in this case accepted the survey and stipulated that it was binding on him, he in effect said that he would consider the survey as having effect without the formal delivery of a copy. This he might do.

The judgment is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

CHARLES EDWARD LEWIS, *Plff. in Err.*,

v.

CITY OF SHREVEPORT, IN THE PARISH OF CADDO, IN THE STATE OF LOUISIANA.

(See S. C., Reporter's ed., 282-287.)

Municipal aid to railroads—corporate ratification.

1. Unless power has been given by the Legislature to a municipal corporation to grant pecuniary aid to railroad corporations, all bonds of the municipality, issued for such a purpose, and bearing evidence of the purpose on their face, are void even in the hands of *bona fide* holders, whether the people voted the aid or not.

2. Corporate ratification, without authority from the Legislature, cannot make a municipal bond valid which was void when issued, for want of legislative power to make it.

[No. 230.]

Submitted Apr. 4, 1883. Decided Apr. 16, 1883.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

This action was brought in the court below, by the plaintiff in error, to recover the amount of certain overdue interest coupons belonging to ninety negotiable bonds for $1,000 each, issued by the defendant.

The parties waived the intervention of a jury, and having agreed upon the facts, submitted the case to the court.

It appeared, from the agreement of the parties, that on June 26, 1872, the city council of Shreveport enacted an ordinance which provided for the purchase of certain real estate, to be donated to the Texas and Pacific Railroad Company, upon which the company was permanently to maintain and establish its depots and machine shops; which provided for the purchase price of said real estate by the issuing and sale of the bonds of the City to the amount of $260,000, payable forty years after date, with interest at eight per cent per annum, payable semi-annually, and with interest coupons attached; which provided for the levy of an annual tax to pay the principal and interest of said bonds, and which provided that said ordinance should be submitted to a vote of the people of the City for their ratification and approval; this ordinance is the only one by virtue of which the bonds in question were issued and sold; that on July 1, 1872, the said ordinance was submitted to a vote of the people of the City, and seven hundred five votes were cast for, and three votes against, its ratification and approval, and the bonds were accordingly issued; that the plaintiff is a *bona fide* owner of the bonds to which the coupons sued on belong, and of said coupons, having purchased said bonds with the coupons attached in open market, paying therefor eighty-five cents on the dollar.

The court below held that the City of Shreveport had no authority to issue the bonds in question, that they were, therefore, void, and that the defendant was entitled to judgment; whereupon, the plaintiff sued out this writ of error.

Messrs. **James Grant,** *Whit. M. Grant,* and *Alfred Ennis,* for plaintiff in error:

This charter and this identical purchase have been before the Supreme Court of Louisiana, and the power to purchase real estate held to be conferred.

Edey v. *Shreveport*, 26 La. Ann., 636.

The City had authority to purchase this land, under sections 2 and 21 of the charter.

1st. Munic. of N. O. v. *McDonough*, 2 Rob. (La.), 244; *Edey* v. *Shreveport* (*supra*).

The question then arises: had this City authority to issue negotiable bonds to raise money with which to pay for the same, or a part payment thereon?

Where a corporation is authorized to do any act, and no mode is pointed out for its exercise, it may adopt any which in its judgment will best secure the purpose contemplated.

Life Ins. & T. Co. v. *Lanier*, 5 Fla., 110; *Galena* v. *Corwith*, 48 Ill., 423; *State Board* v. *R. Co.*, 47 Ind., 407.

The power in a municipal corporation to purchase, carries with it power to incur indebtedness for the purchase money, and to issue its negotiable obligations promising to pay the indebtedness at a future day.

People v. *Brennan*, 39 Barb., 522; 1 *Dill.*, Mun. Corp., 3d ed., sec. 118, p. 144; 2 Dan. Neg. Inst., 461; *Mills* v. *Gleason*, 11 Wis., 470; *Bank* v. *Chillicothe*, 7 Ohio (part 2,), 31; *State* v. *Madison*, 7 Wis., 688; *Clark* v. *School Dist.*, 3 R. I., 199; *Ketchum* v. *Buffalo*, 14 N. Y., 356.

Holding that municipal corporations generally have the power to issue bonds and notes without express authority; see, also, *Com.* v. *Pittsburg*, 41 Pa., 278; *Douglas* v. *Virginia City*, 5 Nev., 147; *Moss* v. *Harpeth Academy*, 7 Heisk., 283; *Adams* v. *R. R. Co.*, 2 Cold., 645; *R. R. Co.* v. *Evansville*, 15 Ind., 395; *Galena* v. *Corwith*, 48 Ill., 423; *Miller* v. *Board*, 66 Ind., 162.

Where the power of taxation is given to a municipal corporation with which to accomplish the ordinary and usual objects of its organization or for specified purposes, and no other express power is given to raise money, it may be best to construe its powers strictly, although the weight of authority is opposed to such limitation.

Mills v. *Gleason*, 11 Wis., 470; *New England, etc., Co.*, v. *Robinson*, 25 Ind., 536; *Bank* v. *Danville*, 60 Ind., 504; *Lynde* v. *The Co.*, 16 Wall., 6 (83 U. S., XXI., 272); *Sheffield* v. *Andress*, 56 Ind., 157; *Kelly* v. *Brooklyn*, 4 Hill., 268; *Galena* v. *Corwith* (*supra*); *Tucker* v. *Raleigh*, 75 N. C., 267; *Ketchum* v. *Buffalo*, 14 N. Y., 356; *Sturtevants* v. *Alton*, 3 McLean, 398; *Austin* v. *Colony*, 51 Iowa, 102.

Where the power of taxation is given merely as an incident to enable the corporation to carry out the usual purposes of its organization, and it is authorized to do other and independent things which require the use of money, and es-

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pecially if in large and unusual sums, such as the purchase of property and the construction of buildings, the weight of authority is that they may, where it is not expressly prohibited, borrow the money and give notes, bonds and other usual evidences of indebtedness therefor, as incidental and necessarily implied from the express power, given.

Williamsport v. *Com.*, 84 Pa., 487; *Mills* v. *Gleason*, 11 Wis., 470; *Bank* v. *Chillicothe*, 7 Ohio (part 2), 31; *Board* v. *Day*, 19 Ind., 450; *Miller* v. *Board*, 66 Ind., 162; *Bk. of New Albany* v. *Danville*, 60 Ind., 504; *Gause* v. *Clarksville*, 5 Dill., 165; *Lynde* v. *The Co.* (*supra*); *Police Jury* v. *Britton*, 15 Wall., 566 (82 U. S., XXI., 251); *Edey* v. *Shreveport*, 26 La. Ann., 636.

And that is true, almost without exception, where the notes and bonds are issued to raise funds for an indebtedness already created, as in the case before the court.

Clark v. *School Dist.*, 3 R. I., 199; *Austin* v. *Colony*, 51 Iowa, 102; *Williamsport* v. *Com.*, 84 Pa. St., 487; *1st Munic. N. O.* v. *McDonough*, 2 Rob., 242; *Barry* v. *Merch. Exch. Co.*, 1 Sandf., Ch., 280; *Curtis* v. *Leavitt*, 15 N. Y., 9-62; *Smith* v. *Law.*, 21 N. Y., 296; *Bank* v. *Chillicothe*, 7 Ohio, part 2, 31; *Ketchum* v. *Buffalo*, 14 N. Y., 356; *Douglas* v. *Virginia City*, 5 Nev., 147.

Power to borrow money is almost universally conceded to carry, by implication, authority to the municipal corporation to issue bonds and other securities.

Commonwealth v. *Pittsburg*, 34 Pa., 496; *R. R. Co.* v. *Evansville*, 15 Ind., 395; *Commonwealth* v. *Allegheny Co.*, 37 Pa., 241; *Commonwealth* v. *Pittsburg*, 41 Pa., 278; *Seybert* v. *Pittsburg*, 1 Wall., 272 (68 U.S., XVII., 553); *Rogers* v. *Burlington*, 3 Wall., 654 (70 U. S., XVIII., 79); *De Voes* v. *Richmond*, 18 Grat., 338; *Galena* v. *Corwith*, 48 Ill., 423; *Williamsport* v. *Commonwealth*, 84 Pa. St., 487; *Kelly* v. *Mayor*, 4 Hill, 265; *Police Jury* v. *Britton* (*supra*); *Milner* v. *Pensacola*, 2 Woods, 637; *Mayor* v. *Inman*, 57 Ga., 370; *Tucker* v. *Raleigh*, 75 N. C., 267; *Mercer Co.* v. *Hackett*, 1 Wall., 95 (68 U. S., XVII., 550); *Meyer* v. *Muscatine*, 1 Wall., 384 (68 U. S., XVII., 564); *Lynde* v. *The Co.* (*supra*).

If the issue was improper, it was committed by the officers of the Corporation, and it is estopped from setting it up.

E. Lincoln v. *Davenport*, 94 U.S., 801 (XXIV., 322); *Supervisors* v. *Galbraith*, 99 U. S., 214 (XXV., 410).

This is at most a mere irregularity in the execution of a power committed by the officers of the Corporation, of which the City is now estopped from taking advantage.

Supervisors v. *Schenck*, 5 Wall., 772 (72 U. S., XVIII., 556); *Society for Sav.* v. *N. London*, 29 Conn., 174; *Keithsburg* v. *Frick*, 34 Ill., 405; *Pendleton Co.* v. *Amy*, 13 Wall., 297 (80 U. S., XX., 579); *Bissell* v. *Jeffersonville*, 24 How., 287 (65 U. S., XVI., 664); *Savings Bk.* v. *Springfield*, 4 F. R., 276; *Woodhull* v. *Beaver Co.*, 3 Wall., Jr., 274; *Humboldt* v. *Long*, 92 U.S., 642 (XXIII., 752); *Lewis* v. *Comrs.*, 105 U. S., 739 (XXVI., 993); *Warren Co.* v. *Marcy*, 97 U. S., 96 (XXIV., 977).

Mr. **B. F. Jonas**, for defendant in error:

The plaintiff's claim is resisted on the ground that the city council of the defendant was absolutely without authority to issue the bonds which constitute its basis.

Wilson v. *Shreveport*, 29 La. Ann., 673.

The power to issue these bonds being absolutely wanting, they are void into whosesoever hands they may have come, no matter how innocent a holder he may be, or how good the faith in which they may have been acquired.

Knox Co. v. *Aspinwall*, 21 How., 543 (62 U. S., XXII., 210); *Marsh* v. *Fulton Co.*, 10 Wall., 683 (77 U. S., XIX., 1042); Dill. Mun. Corp., sec. 426.

The power of taxation is granted as a means of carrying out these purposes. The diversion of these revenues to other purposes is unlawful and *ultra vires*. If it is desirable that a municipal body should have the power of subscribing to railroads or plank roads, or of issuing commercial securities to be sold in the financial markets, it is time enough for it to do so when authorized thereto by legislation. It possesses no powers but such as are given to it expressly or by necessary implication.

Chisholm v. *Montgomery*, 2 Woods, 594; see, also, Dill. Mun. Corp., sec. 106; *Mayor* v. *Ray*, 19 Wall., 468 (86 U. S., XXII., 164); *Knapp* v. *Hoboken*, 39 N. J. L., 394; *Hamlin* v. *Meadville*, 6 Neb., 227; Jones, R. R. Secur., secs. 222, 223.

The decisions of the Supreme Court of the United States are uniform to the effect that a municipal corporation cannot, without legislative authority, issue bonds in aid of an extraneous object.

Marsh v. *Fulton Co.*, 10 Wall., 676 (77 U. S., XIX., 1040); *Pendleton* v. *Amy*, 13 Wall., 297 (80 U. S., XX., 579); *Kennicott* v. *Supervisors*, 16 Wall., 452 (83 U. S., XXI., 319); *St. Joseph* v. *Rogers*, 16 Wall., 644 (83 U. S., XXI., 328); *Harshman* v. *Bates Co.*, 92 U. S., 569 (XXIII., 747); *Coloma* v. *Eaves*, 92 U. S., 484 (XXIII., 579); *S. Ottawa* v. *Perkins*, 94 U.S., 260 (XXIV., 154).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was a suit brought to recover the amount of certain coupons cut from bonds issued by the City of Shreveport, Louisiana, which appear on their face to have been issued "in aid of the Texas and Pacific Railroad Company." In point of fact, the bonds were used to buy lands to be donated to the railroad company as a site for depots and machine-shops.

We have had occasion, at this Term, in the case of *Ottawa* v. *Carey* [*ante*, 669], to repeat and apply a rule which has always been recognized and adhered to in this court, to the effect, that unless power has been given by the Legislature to a municipal corporation to grant pecuniary aid to railroad corporations, all bonds of the municipality, issued for such a purpose, and bearing evidence of that fact on their face, are void even in the hands of *bona fide* holders, and this, whether the people voted the aid or not. Every purchaser of such a bond is chargeable in law with notice of the want of power in the municipal authorities to bind the body politic in that way. This principle is elementary.

In the present case it is not pretended that any such power was expressly granted to the City of Shreveport, and we find no provision of the charter from which anything of the kind can be implied. The authority to purchase and hold

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[287] property of all kinds relates only to such property as is needed for municipal purposes. It is a matter of no importance that the City employed agents to sell the bonds, or that its law officer gave an opinion in favor of their validity, or that they have been recognized in official statements as binding obligations, or that taxes have been levied to pay either principal or interest. Corporate ratification, without authority from the Legislature, cannot make a municipal bond valid which was void when issued for want of legislative power to make it. These bonds carried on their face full notice to every purchaser that they were issued for a purpose not authorized by law, that is to say, to aid a railroad corporation. This whole subject was so fully considered in *Ottawa* v. *Carey*, *supra*, that we deem it unnecessary to discuss the subject further now.

In *Edey* v. *Shreveport*, 26 La. Ann., 686, which is relied upon as establishing the power of the City to issue the bonds, the question was whether the vendor of the land, which had been only partly paid for out of the proceeds of the bonds, could enforce his mortgage and vendor's privilege on the land to recover the balance of purchase money due him, and it was decided that he could. This is no more than was in effect held by this court at the present Term in *Parkersburg* v. *Brown* [*ante*, 238]. All that was said by the Supreme Court of Louisiana must be construed in connection with the question then up for decision. There is not a word about the validity of the outstanding bonds, nor of the right of the holders to recover upon them in a suit against the City. The whole effect of the decision is that the City could not keep the land as against the vendor without paying for it. That the court would have held the bonds void, if it had been called on to decide that question, is shown beyond all doubt in the case of *Wilson* v. *Shreveport*, 29 La. Ann., 673, where the power to issue bonds, apparently of a much less objectionable character, was expressly denied.

The judgment is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—110 U. S., 196.

JOHN H. STARIN, *Appt.*,

v.

THE SCHOONER JESSE WILLIAMSON, JR., Her Tackle, etc., WILLIAM H. SISE ET AL., Claimants.

(See S. C., "*The Jesse Williamson, Jr.*," Reporter's ed., 305-311.)

Jurisdictional amount—effect in personam *of decree.*

*1. The libelant in a suit *in rem*, in admiralty, against a vessel, for damages growing out of a collision, claimed, in his libel, to recover $27,000 damages. After the attachment of the vessel in the district court, a stipulation in the sum of $2,100, as her appraised value, was given. The libel having been dismissed by the circuit court, on appeal, the libelant appealed to this court: held, that the matter in dispute did not exceed the sum or value of $5,000, exclusive of costs, as required by section 3 of the Act of February 16, 1875, 18 Stat. at L., 316, and that this court had no jurisdiction of the appeal.

2. A decree against the vessel for $27,000 would not establish the liability of the claimant to respond for that amount *in personam* unless he was the owner of the vessel at the time of the collision, and that fact must appear by the record, in order to be so far a foundation for such liability as to authorize this court to consider the $27,000 as the value of the matter in dispute on said appeal.

*Head notes by *Mr. Justice* BLATCHFORD.

NOTE.—*Jurisdiction of U. S. Supreme Court dependent on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

[No. 212.]

Argued Apr. 10, 1883. Decided Apr. 23, 1883.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

On motion to dismiss for want of jurisdiction.

The history and facts of the case appear in the opinion of the court.

Mr. **Henry J. Scudder**, for the claimants, appellees, in support of motion:

This motion is based upon the language of section 692, of the U. S. R. S., as amended by chapter 77, of the Laws of 1874, section 3.

The matter in dispute is the alleged lien of the libelant upon the vessel of the claimants.

The value of such matter could not exceed the value of the schooner, for the lien could only consume her, and such value was $2,100.

A few elemental propositions demonstrate that it is the question of lien which is the matter in dispute.

The lien is a *jus in re*.

The Kate Tremaine, 5 Ben., 69; *The Triumph*, 2 Blatchf., *n.*, 433; *The Feronia*, 17 L. T. R., 622.

The stipulation takes the place of the vessel, and relieves her from all liability.

The Virginia Ehrman, 97 U. S., 317 (XXIV., 893); *The Lady Pike*, 96 U. S., 465 (XXIV., 674).

The utmost amount the libelant can recover is the amount of the stipulation for value.

The Wanata, 95 U. S., 614 (XXIV., 465)

If it be claimed that the decree *in rem* will establish a liability of the owners in an action *in personam*, the answer is that no such collateral action has been brought, and if it had, it would be available only to the owners to set it up; they would be the parties who might invoke the rule, not the libelant.

Troy v. *Evans*, 97 U. S., 3 (XXIV., 942).

Mr. **R. D. Benedict**, for appellant, *contra:*

The case of *The Enterprise*, 2 Curt., 317, is a strong and sufficient authority against the motion.

In that case, a decree for wages amounting to more than $50 was entered by the district court. The right of appeal to the circuit court was resisted on the ground that the matter in dispute was the proceeds of the vessel which did not equal $50.

But the circuit court allowed the appeal saying, "What is in dispute in this case is not the vessel or even the existence of a lien thereon, as a security for any wages which may be due; but it is whether any wages are due, and, if any, what is their amount."

So in this case the matter in dispute is not the vessel, nor her proceeds, nor the stipulation which takes the place of the vessel, nor the existence of a lien on the vessel for the damages

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claimed; but it is whether any damages are due and, if any, what is their amount.

We have found no authority in this court so directly in point; but authorities which adopt the principle and cover the case are not wanting.

Knapp v. *Banks*, 2 How., 73; see, also, *Wilson* v. *Daniel*, 3 Dall., 401; *Gordon* v. *Ogden*, 3 Pet., 34.

This case comes squarely within the general rule laid down by the above cases, that the damages laid are the matter in dispute in cases of tort or trespass.

The question of the amount or value of the security which the party plaintiff has for his claim, has never been considered by this court. An attempt to have it thus considered, failed, in the case of *Ross* v. *Prentiss*, 3 How., 771.

It may be suggested that these cases refer to cases at law. But the same language is used and applied to appeals in admiralty in the case of *Olney* v. *The Falcon*, 17 How , 22 (58 U. S., XV., 43).

If this libel had been filed to recover the schooner herself, the matter in dispute might be held to be her actual value.

Richmond v. *Milwaukee*, 21 How., 392 (62 U. S., XVI., 61).

This is not an action to recover the possession of the schooner, but the damages sustained by the libelant; and it is exactly covered by the language of this court in the case of "*The Falcon*," above cited, that "An appeal may be taken by the plaintiff, where his claim of damages in the declaration or libel exceeds the sum" which is necessary to the appellate jurisdiction.

It is the damages sustained by the libelant which is the matter in dispute between the parties, entirely irrespective of the amount of security which he may have for their payment.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit *in rem*, in admiralty, to recover damages, for a collision, brought in the district court, where the libel was dismissed. The decree was affirmed by the circuit court, on appeal, and the libelant has appealed to this court. The amount of damages claimed in the libel is $27,000. The collision occurred on the 2d of November, 1875. The libel was filed on the 5th day of the same month, and the vessel was attached, under process, on the same day. On the 9th, Richard H. Seward, describing himself as master of the schooner sued, filed a claim [309] to her, in which he stated that he intervened, as agent of the owners of the schooner, "For the interest of Daniel Marcy, William H. Sise, and others, owners of said schooner," in her, and made claim to her, and averred that he was in possession of her when she was attached, and that the persons above named and others are the true and *bona fide* owners of her, and that no other person is her owner. The master signed the claim as agent, and made oath to it "That the owners of said schooner reside in Portsmouth, N. H., and Kittery, Maine, and that this deponent is duly authorized to put in this claim in behalf of the owners of the said schooner, etc." On the 12th of November, the value of the schooner was fixed by appraisement at the sum of $2,100, and a stipulation for value in that amount was entered into pursuant to the rules and practice of the district court, signed "W. H. Sise & Co., by R. H. Seward," and also signed by two sureties, not claimants. A stipulation for costs, entered into on behalf of the claimants, on November 9th, pursuant to the rules and practice of the district court, recites that a claim had been filed in the cause by Daniel Marcy, William H. Sise, and others, owners of said vessel, etc. The answer, which was sworn to December 18, 1875, purports to be the answer of seventeen persons, two of whom are Daniel Marcy and William H. Sise, whom it states to be claimants of the schooner and respondents, and the answer speaks of the vessel as the respondents' schooner. The oath to the answer is made by a person who swears that he is agent for the schooner and transacts business for her owners, and that the owners are not, nor is either of them, or the master thereof, within this district.

The appellees move to dismiss the appeal for want of jurisdiction in this court to entertain it, on the ground that the matter in dispute does not exceed the sum or value of $5,000, exclusive of costs, as required by section 3 of the Act of February 16, 1875. Ch. 77, 18 Stat. at L., 316. We have held, at this Term, on a full review of the subject, in *Hilton* v. *Dickinson* [*ante*, 688], that while we have jurisdiction of a writ of error or appeal by a plaintiff below when he sues for as much as, or more than, our jurisdiction requires and recovers nothing, the actual matter in dispute in this court as shown by the record, and not alone the damages al- [310] leged or prayed for in the declaration, must be looked to in determining the question of jurisdiction. We have also held, in *Elgin* v. *Marshall* [*ante*, 249], that the required valuation is limited to the matter in dispute in the particular suit in which the jurisdiction is invoked; that any estimate of value as to any matter not actually the subject of that suit must be excluded; and that there cannot be added to the value of the matter determined in that suit any estimate in money, by reason of the probative force of the judgment itself in some subsequent proceeding. As is remarked in the latter case: "The value of the judgment, as an estoppel, depends upon whether it could be used in evidence in a subsequent action between the same parties."

In the present case, although the libelant may recover $27,000 against the vessel, because he demands that amount against her, it is plain that he cannot recover on the stipulation for value, which represents her, more than $2,100, and cannot recover against the sureties in the stipulation more than that amount. Therefore, this being a suit *in rem* only, the value of the vessel, represented by the stipulation, is all that is in dispute, because that is all that the libelant can obtain or the stipulators can lose, in this suit.

The libelant contends, however, that a decree for him for $27,000 against the vessel would establish the liability of the claimants for that amount. But it could not be contended that this would be so in any case but one where the claimants were alleged and shown to have been the owners of the vessel sued, at the time of the collision. In the case of *The Enterprise*, 2 Curt., 317, the record showed that the claimant of the vessel was an owner

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of her during the voyage for which the wages sued for were claimed, and that by his answer he contested in that character the right to wages. For these reasons it was held that the decree in the suit *in rem* bound him personally, as *res judicata;* that a libel *in personam* [311] against him would lie to execute that decree; and that the matter in dispute in that case was not the vessel or the existence of a lien on her. The proceeds of the sale of the vessel were $13.90, the decree was for more than $50, and $50 was the amount necessary for jurisdiction on an appeal. Under these circumstances an appeal was allowed.

There is no allegation, in the libel, in this case, as to who were the owners of the vessel at the time of the collision, and nothing is set forth therein as a foundation for any ultimate recovery against any particular persons, as such owners, of so much of the $27,000 claimed as may exceed the appraised value of the vessel. Rule 15, in admiralty, provides that "In all suits for damage by collision, the libelant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone, *in personam.*" This Rule, as is well settled, excludes the joining in one suit of the vessel and her owners; but it does not prevent the introduction into the libel of allegations as to the ownership of the vessel at the time of the collision, with a view to a proceeding to obtain such ultimate relief *in personam*, on the basis of a recovery *in rem*, as the libelant may be entitled to. Nor is there in the record in this case anything which can be held to establish, as against the claimants of the vessel, though they were her owners when the claim was filed, that they were her owners at the time of the collision, and so in a position to be liable to respond *in personam* for the damages suffered by the libelant, in a proper proceeding *in personam.*

If the libelant had recovered more than $5,000 in this case, in the circuit court, against the vessel, the claimants could not have appealed to this court, because, for the reasons above set forth, the amount in dispute would have been only $2,100, on the record as it stands. As we held in *Hilton* v. *Dickinson, ubi supra*, the statute does not give to the plaintiff an advantage over the defendant, under the same circumstances.

The appeal is dismissed for want of jurisdiction.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[292] MARMADUKE L. ENSMINGER, *Appt.*,

v.

JOHN C. POWERS ET AL.

(See S. C., Reporter's ed., 292-305.)

Bill of review—when may be brought after two years—erroneous decree—exemption from taxation.

*1. A decree, in a suit in equity, set forth a hearing on pleadings and proofs, and awarded relief; but it ordered that a bill of exceptions signed by the court be filed as a part of the record. The bill of exceptions showed that the Judge who held the court refused to permit the counsel for the plaintiff to argue the cause, and allowed the counsel for the defendant to determine whether the case fell within a prior decision of another judge, and refused to determine that question himself, and then directed that the decree be entered, which was in favor of the defendant. On a bill of review, filed by the plaintiff; held, that the decree must be held for naught.

2. A decree was made by a circuit court, in December, 1873, against two plaintiffs. In January, 1874, they appealed to this court. In December, 1875, the appeal was dismissed for the failure of the appellants to file and docket the cause in this court. In September, 1876, a bill of review was filed for errors in law; held, that the bill was filed in time, though not within two years from the making of the decree, because the control of the circuit court over the decree was suspended during the pendency of the appeal.

3. A lot of land, part of the navy yard at Memphis, Tennessee, not under lease to a private party, being exempt from state and county taxation by section 9 of the Act of the Legislature of Tennessee, which took effect February 20, 1860, ch. 70, *Private Acts* of 1859-'60, 284, was, by section 13 of the Act of Congress of August 5, 1861 (ch. 45, 12 U. S. Stat. at L. 297), exempt from taxation under the direct tax on land authorized by that Act.

*Head notes by *Mr. Justice* BLATCHFORD.

NOTE.—*Bill of review; nature of; when may be brought; who may maintain; time within which; what it should contain.* See, *note* to Bk. of U. S. v. Ritchie, 33 U. S. (8 Pet.), 128.

[No. 213.]

Submitted Mar. 28, 1883. Decided Apr. 23, 1883.

APPEAL from the Circuit Court of the United States for the Western District of Tennessee.

The history and facts of the case are fully set forth in the opinion of the court.

Messrs. **Nathaniel Wilson** and **W. B. Gilbert,** for appellant:

It is a fatal objection to the bill, as a bill to review the decree of December 27, 1873, that it was not filed in time.

Thomas v. *Harvie*, 10 Wheat., 146; *Whiting* v. *Bank*, 13 Pet., 6; *Kennedy* v. *Ga. State Bk.*, 8 How., 586; *Evans* v. *Bacon*, 99 Mass., 213; *Plymouth* v. *Russell Mills*, 7 Allen, 438; Dan. Ch. Pr., 1584, 5th ed.

In a bill of review for error of law, questions of fact are not open for discussion.

The only questions that can be considered, are such as arise on the face of the record without reference to the evidence in the cause, and certainly without reference to any new evidence.

Whiting v. *Bank*, 13 Pet., 6; *Putnam* v. *Day*, 22 Wall., 60 (89 U. S., XXII., 764); *Buffington* v. *Harvey*, 95 U. S., 99 (XXIV., 381); *Thompson* v. *Maxwell*, 95 U. S., 391 (XXIV., 481); *James* v. *Myrne*, 7 Fed. Rep., 533.

Messrs. **William M. Randolph** and **Fillmore Beall,** for appellees:

The lot in controversy was exempt from taxation at the time the direct tax to the United States, for the payment of which it was sold, was levied.

Act of August 5, 1861, 12 Stat. at L., ch. 45, sec. 13, p. 297; Act of June 7, 1862, 12 Stat. at L., ch. 98, sec. 1, p. 422.

There can be no doubt that the lot, being the property of the City of Memphis under the dedication of the original proprietors *Memphis* v. *Wright*, 6 Yerg., 496, or else by the grant contained in the Act of Congress of Aug. 5, 1854, 10 Stat. at L., ch. 268, sec. 3, p. 586, 587, was permanently or specially exempted from taxation by the laws of the State of Tennessee.

Acts of Tennessee, of 1859, 1860, private, ch. 70, sec. 9, p. 284, sec. 38, p. 289; Code of 1858, sec. 542, subsec. 2.

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In *U. S.* v. *R. R. Co.*, 17 Wall., 322 (84 U. S., XXI., 597), this court decided broadly that the property of a municipal corporation of a State was not subject to taxation by the National Government.

See, also, *Gilman* v. *Sheboygan*, 2 Black, 510 (67 U. S., XVII., 305); *Memphis* v. *Water Co.*, 5 Heisk., 495; *Luehrmann* v. *Taxing District*, 2 Lea, 425.

It was a fundamental error to enter a decree without giving the plaintiffs an opportunity of presenting their case and being heard through their counsel as to the merits of the cause.

McVeigh v. *U. S.*, 11 Wall., 259 (78 U.S., XX., 80); *Miller* v. *U. S.*, 11 Wall., 268 (78 U.S., XIX., 135); *Windsor* v. *McVeigh*, 93 U. S., 274 (XXIII., 914).

It was likewise erroneous to permit the entering of the decree, when by reason of the fact that the Judge was wholly uninformed as to what the issues were and how they were supported by the proofs, such a decree could not have the judicial sanction of the court.

Freem. Jud., sec. 2, and authorities there cited, Cooley, Const. Lim., 410, 411, and cases there cited.

Mr. Justice **Blatchford** delivered the opinion of the court:

In May, 1867, a bill in equity was filed by the Board of Mayor and Aldermen of the City of Memphis and Bridget Powers against Marmaduke L. Ensminger and J. J. Sears, in the Circuit Court of the United States for the Western District of Tennessee. The bill was sworn to [293] by John C. Powers as agent for Bridget Powers. The substantial allegations of the bill were that the city then owned in fee 75 acres of land in Memphis, known as the navy yard, which land, after having been dedicated by its owners, in 1844, to the Government of the United States, in fee, for naval purposes, was ceded to said city by the government, in fee; that the city, in February, 1866, leased lot 10, part of said land, to said Bridget Powers, for 20 years, and she took possession of it; that Ensminger and Sears, as his agent, were setting up a claim to said lot, as having been purchased by Ensminger at a sale of it by the United States direct tax commissioners in June, 1864, and had procured said commissioners to issue a writ of possession on April 30, 1867, to put Ensminger in possession of said lot; that the tax sale was void because: (1) the Act of Congress under which the sale was made was unconstitutional; (2) the assessment was excessive and unauthorized; (3) the enforcement of the Act was premature in time; (4) the Act was not followed as to advertising the sale in a newspaper or as to the length of time of the advertisement; (5) the sale was made on a day subsequent to that for which it was advertised. The bill prayed for a decree declaring the sale void, and for an injunction restraining the issuing or execution of any writ dispossessing the plaintiffs. A temporary injunction was issued.

Ensminger answered, setting up his tax title, as evidenced by a certificate of sale, alleging the validity of the sale and denying the allegations of the bill. The cause was heard on pleadings and proofs, and on the 27th of December, 1873, the court entered a decree that the injunction be dissolved; that lot 10 was duly sold to Ensminger, and he acquired thereby a title to it in fee simple; that he should have a writ to the marshal to put him in possession; that there be a reference to a master to take an account of the damages to Ensminger from the injunction, for which purpose only the bill should be retained; and that the plaintiffs pay the costs of the suit. The city and Bridget Powers appealed to this court. John C. Powers signed the appeal bond for costs, as surety. There was no *supersedeas* bond. On the 13th of December, 1875, the cause came on for hearing in this court, and it appearing that the appellants had failed to file and docket the cause in this court [294] in conformity with its rules, the appeal was docketed and dismissed by this court with costs, execution was awarded against the plaintiffs for the costs of the defendants in this court, and the cause was remanded to the circuit court, for execution and further proceedings. The mandate of this court was filed in the circuit court and, on the 19th of June, 1876, that court made a decree that the reference as to the damages from the injunction proceed, and that the referee also report the damages to Ensminger from the loss of rents and profits of the land; and under its order an *alias* writ of possession was issued by it, on July 8, 1876, to the marshal, to put Ensminger in possession of lot 10.

On the 9th of September, 1876, the said John C. Powers, describing himself as the husband of the said Bridget Powers, and the said Bridget Powers, filed a bill in equity against the said Ensminger and the said Sears and the said city, in the said circuit court. The bill prays for a decree that the plaintiffs, or the plaintiff Bridget, have a right to the leased premises for the term of the lease; that the sale to Ensminger be declared void; that the said decrees of December, 1873, and June, 1876, be reviewed and set aside; and that Ensminger and Sears be enjoined from collecting rent from the plaintiffs, or either of them, for said lot, and from interfering with their possession of it. Ensminger and Sears having demurred to the bill, the court gave leave to the plaintiffs to file said bill as a bill of review, and then the demurrer was heard and overruled, with leave to the defendants to embody in their answer the matters of the demurrer, and a temporary injunction was granted according to the prayer of the bill, and the bill was dismissed as to the city, and the other defendants were allowed to answer the bill. They answered, there was a replication, the case was heard on pleadings and proofs, and in December, 1878, the court rendered a decree adjudging that the said decrees of December, 1873, and June, 1876, in the first suit be reversed, vacated, set aside and canceled, and the plaintiffs as against the defendants be restored to all they had lost under and by virtue of said decrees and the process which had been issued thereunder; that the plaintiff Bridget has a good title as [295] against the defendants, for the term of her lease from the city, to said lot 10, subject only to said lease; that Ensminger be perpetually enjoined from setting up any title to said lot under said tax sale certificate; that the said temporary injunction be made perpetual; that a writ issue to put the plaintiffs in possession of said lot; and that the plaintiffs recover from the defendants the costs of both of the suits and have execution therefor. Sears having died after

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the cause was submitted, the suit was ordered to be abated as to him, and Ensminger took an appeal to this court from said decree.

The bill in this suit sets forth that the land for the navy yard, after having been dedicated by its original proprietors, in 1828, for a landing for public purposes of navigation or trade forever, was conveyed to the government by the City of Memphis, in 1844, for a navy yard, without lawful authority, because it had been dedicated to public purposes by the original proprietors, and the city had accepted the dedication; that, in 1854, by an Act of Congress, the government ceded the land to the city, for ths use and benefit of the city, and, after that, the rights of the public remained the same as before the conveyance to the government; that the city leased lot 10 to the plaintiff Bridget for the term from February 28, 1866, to December 31, 1886, for a yearly rent of $127.19, payable half-yearly; that the lot was vacant and she agreed with the city to put buildings on it, with the right to her to remove them as her own property at the end of the lease; that Ensminger and Sears had compelled John C. Powers to take a lease of the lot from Ensminger in order to enable the plaintiffs to avoid being turned out of possession, and also, as a condition of remaining, to give his 5 notes for $25 each as rent for 5 months from July 19, 1876, one of which notes he had paid; that the plaintiff Bridget had put buildings on the lot, which were now on it, at a cost to her of $9,000 or $10,000; that after the plaintiffs had constructed much the larger part of the buildings they learned of the claim of Ensminger, and the plaintiff John C. applied to the city attorney to protect the plaintiffs, and he filed the bill in the first suit, not making [296] John C. a party; that Ensminger answered setting up his tax title; that no cross-bill was filed, nor was the answer made a cross-bill, nor was any affirmative relief prayed in the answer; that some proof was taken and the cause was treated as at issue, though no replication was filed; that the decree entered was not entered on a hearing of the case by the Judge who held the court, although the plaintiffs in the suit asked for a hearing, but the Judge allowed the counsel for the defendants to enter the decree at his peril, subject to the right of the plaintiffs to bring a bill of review; that the plaintiffs excepted to such ruling and the Judge signed a bill of exceptions; that the appeal to this court was dismissed because the city refused to pay the necessary money for filing the transcript of the record, which had been made, and docketing the appeal; that the marshal was proceeding to execute the *alias* writ of possession when the plaintiff John C. accepted said lease and gave said notes, and the plaintiffs remain in possession; and that the said decree and proceedings did not bind either of the plaintiffs, because Bridget was a married woman and her husband was not a party. The bill alleges that the former decrees, so far as they undertook to decree the validity of the title of Ensminger to the premises, or to award a writ of possession to him, or to do anything more than dismiss the bill of the plaintiffs, departed from the established practice of the court, and were void or erroneous; and that the decree was erroneous, if not void, because it was not the deliberate judgment of the court upon the facts in the record, and because the cause was not at issue or ready for hearing. The bill then sets forth various reasons why the purchase and title of Ensminger were invalid. Among other things the bill says: "These plaintiffs further state and show, that, in the year 1861, and from thence up to the date of the lease aforesaid, the said premises were not and had not been leased by the City of Memphis to any one, or, if any such lease had been made, the same had been abandoned and forfeited, and was not for any part or period of the same time in force or subsisting as a valid and effectual contract. The plaintiffs further state and show, that, by a special Act of the General Assembly of the State of [297] Tennessee, in force in the year 1861, the said premises were not taxable by the State of Tennessee, or the United States of America, the same not being under a lease from the city; and, for that reason, that the said sale was void. And the plaintiffs further state and show, that the title to the said premises in 1861, and before and since that time, was in the City of Memphis, which held the same as public property, for municipal or public purposes, as provided by law and, therefore, by the law of the State of Tennessee, the said premises were not in the year 1861, or before or since, liable to a direct tax by the Government of the United States, and for that reason the said sale was void." The bill also prays that the lease taken and the notes given by John C. be canceled. The decree granted this relief also.

The answer of Ensminger and Sears asserts the validity of the title of Ensminger under the tax sale; that the decree in the first suit was an adjudication in his favor as to all the allegations in this bill; that none of the alleged objections to the tax sale proceedings are tenable; that, although the lease to Bridget was not made until 1866, the property had been divided into lots and offered for lease by the city before the assessment of said tax in 1864, and at one time before that date a lease of lot 10 had been made by the city, which was not carried into operation because of the failure of the lessee to comply with it; that the property was not exempt from taxation under any Act of the Legislature of Tennessee, and was not in 1861, or before or since, held for municipal purposes; that the said Bridget has no right to the improvements she put on the land; that the former suit was commenced at the instance and request of John C., and he swore to the bill and prosecuted it in conjunction with Bridget; that said suit, under which all of the plaintiff's rights were fully considered and passed upon by the court, was a final adjudication of all of the questions and rights therein set up, and the decision, being upon the same facts and rights as are claimed by the plaintiffs in this suit, and between the same parties, is *res judicata* as to this suit; and that the defendants plead the same as a complete bar [298] to this suit. The answer then sets up as a defense most of the matters which had been so set up in the demurrer.

After the decree of June, 1876, in the former suit, the reference as to the damages from the injunction in that suit proceeded, and in November, 1876, a report was made awarding to Ensminger, as damages, $12,962.10. The City of Memphis excepted to the report, and on the 11th of January, 1878, the court made a decree that it had no jurisdisdiction to assess the dam-

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ages from the injunction, and that the bill be dismissed, without prejudice to a suit at law on the injunction bond.

The first question to be considered is, as to whether the decree of December, 1878, can be considered as a decree of the court for any purpose. The bill in the present suit sets forth certain facts as having occurred in court when the case came up for hearing, and refers to a bill of exceptions embodying such matters as having been signed by the Judge who was holding the court and ordered to be filed and to form a part of the record of the cause, and alleges that the decree was erroneous, because it was not the deliberate judgment of the court upon the facts in the record. The decree states that the case was heard on the bill, answer, exhibits, agreement of counsel and proof, and had been fully argued, and the court had duly deliberated thereon, but it also says: "It is further ordered, that the bill of exceptions tendered and signed by the court be filed as part of the record, which is done accordingly." There is in the record a bill of exceptions filed the same day the decree was made. This bill of exceptions states that the cause came on to be heard before the Judge holding the court "Under the following circumstances, to which counsel for the City of Memphis excepted, and prayed a bill of exceptions to, upon the record of the facts below, stated as they occurred: First. Duncan K. McRae, Esq., of counsel for the claimants of the tax titles, stated that he had been instructed by His Honor, H. H. Emmons, lately presiding at this Term of the said court, [299] but who had then left the City of Memphis, where said court is held, to enter decrees in the series of causes in said court known as the 'United States Tax Title Cases,' in all such of these cases as fell within the purview of the decision of His Honor, rendered in certain of those cases tried before the said *Judge* Emmons before that time, and that said decrees were to be entered in those cases which the said counsel thought came within his decision aforesaid, but to be so entered at the peril of said parties, because said Judge would, upon a bill of review, set aside said decrees if it appeared to him by such bill of review that the case did not properly fall within his said decision; that he had, at the further suggestion of said Judge, published a notice in the city papers, that on Saturday, the 20th December aforesaid, he would proceed to take such decrees, when the counsel interested in the several cases could appear, which said newspaper notice is hereto attached. Secondly. The said counsel then proceeded to read from a list the cases and to designate such as he desired to enter decrees in and such as he would pass or continue. When the above entitled cause was called, the counsel for the city objected, and stated that the city attorney would insist that this cause did not come within the class of causes to which *Judge* Emmons referred, and stated that the city would contend that the property of its municipality was not liable to taxation; that it was exempt under an Act of the Legislature; that the proof showed the city was entitled to a decree. The counsel for the claimants of the tax titles, the said McRea, insisted that he was to be the judge of the cases in which he was entitled to take decrees, and was to take them at his peril, subject to a bill of review; and that if the city attorney would convince him, before the decree was entered, that the case was not one proper for a decree he would not enter it. The counsel for the City insisted that the presiding Judge here present was to determine that question. Whereupon the presiding Judge remarked 'that he did not know what *Judge* Emmons' decision was, nor the scope of it; that he had promised said Justice to have entered decrees in such cases as fell within the decision, and that he understood that it was left to counsel for the claimants of the tax titles to determine which were such cases, and that he would enter decrees in [300] such cases as the said counsel should designate, with the understanding that such proceedings were at his peril.' Thereupon, counsel for the city inquired if *Judge* Emmons' decree or decision, or the order under which these proceedings were had, were of record; and the counsel for the tax title claimants informed the court that such order was not of record, but that it would be entered of record before the decrees were entered. And, thereupon, B. M. Estes, Esq., who was of counsel and argued the cases in opposition to the tax titles, stated to the court, that *Judge* Emmons' written opinion had been lost or mislaid, having been rendered some time ago and then withdrawn for revision, since which time it could not be found; that in it he had only decided that the Acts of Congress under which the sales were made were constitutional, and the proceedings of the commissioners thereupon regular; that, prior to the final determination of the case by the Judge, and while he had it under advisement, the case had been compromised, and hence no decree had ever been entered. Counsel for the city then objected to a decree in this case, because it involved other questions than the constitutionality of the Acts of Congress and the regularity of the proceedings of the commissioners appointed under them, and asked to have those other questions argued. Whereupon counsel for the tax title claimants insisted, that if the case contained other questions the city could show it on bill of review and the decree would be set aside under *Judge* Emmons' order, to which counsel for the city objected, that a bill of review would not lie, and insisted on a determination of the question by the court, whether this case came within *Judge* Emmons' order for the entry of decrees. And thereupon the court decided, that the counsel for the claimants should enter decrees in such cases as he designated, as, under the undertaking with his brother Emmons, he had only to direct such decrees to be entered as the counsel should determine. To all of which counsel for the city excepted, and prayed that by bill of exceptions the city should be allowed to show the proceedings in court as they occurred and its exceptions thereto. And now accordingly the said city here tenders this bill of exceptions, and objects to the said decree and all said proceedings as heretofore on the hearing they were ob- [301] jected to, and prays that said bill of exceptions may be signed and sealed by the Judge presiding and made a part of the record, which is done accordingly."

Under this state of facts the bill of exceptions must have the same effect as if the narration it contains of what occurred were incorporated in

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the body of the decree. Thus considered, it appears that, against the objection and exception of the counsel for the city, who represented both of the plaintiffs in the suit, the plaintiffs were denied by the court a hearing of the case on the merits, and the Judge holding the court refused to decide whether the case fell within the prior decision or order of *Judge* Emmons, and allowed the counsel for the defendant to determine that question. Notwithstanding the statements in the decree that the case was heard on the pleadings and proofs and fully argued, and that the decree was the decree of the court, these statements are contradicted by the bill of exceptions, forming virtually part of the same decree. It is quite apparent that the Judge intended that what occurred should be spread before this court on an appeal, so that its effect on the validity of the decree might be considered. There can be no doubt that it could be so considered; and, if on appeal, it must have a like effect on a bill of review; as it is to be looked at as forming a part of the decree. What, then, does it show, except that the proper forms of the administration of justice were disregarded, the functions of the Judge were abnegated, there was no hearing or decision by the court, and the counsel for the defendant was allowed to prepare and enter such a decree as he chose? Words need not be multiplied to argue that a decree rendered under such circumstances must, on a bill of review, be held for naught and as if it did not exist. Though not the case of actual fraud practiced on the court or on the opposite party, what was done operated as a legal fraud in respect of the rights of such party, through the illegal co-operation of the Judge with one of the parties. In *McVeigh* v. *U. S.*, 11 Wall., 259 [78 U. S., XX., 80], an information had been filed by the United States against certain property belonging to McVeigh, to forfeit it. He appeared and [302] put in a claim and answer. The district court struck it out because McVeigh resided within the confederate lines and was a rebel, and condemned the property by default. This court, on a writ of error, reversed the judgment, on the ground that McVeigh was denied a hearing and the first principles of the due administration of justice were violated. Equally in the present case, the plaintiffs in the suit were denied a hearing, and their answer might as well have been stricken out. In addition to this, there was no judicial action by the court, and the defendant was allowed virtually to decide the cause in his own favor. For these reasons it must be held, that the decree in question cannot, in this suit, be regarded as a decree adjudicating any rights between the parties to the former suit, and that it forms no obstacle to the consideration of the issues raised in the present suit, provided the bill was filed in time, as a bill of review.

It was not filed within two years after the decree of December, 1873, was rendered. But the plaintiffs in that decree appealed from it to this court, it being a final decree. A bill of review must ordinarily be brought within the time limited by statute for taking an appeal from the decree sought to be reviewed, where, as here, the review sought is not founded on matters discovered since the decree. *Thomas* v. *Harvie*, 10 Wheat., 146; *Whiting* v. *Bank*, 13 Pet., 6; *Kennedy* v. *State Bk.*, 8 How., 609; *Clark* v. *Killian*, 108 U. S., 766 [XXVI., 607]. But, the appeal to this court was perfected by the giving of a bond for costs in January, 1874, and, although this court, in December, 1875, dismissed the appeal for the failure of the appellants to file and docket the cause in this court, yet the cause was out of the court below and in this court until within two years before the bill in this suit was filed. The pendency of the appeal by Bridget Powers would have been a valid objection to the filing of a bill of review by her for the errors in law now alleged and, inasmuch as the appeal was not heard here on its merits, but the prosecution of it was abandoned, we are of opinion that the bill of review was filed in time. While the appeal was pending here, although there was no *supersedeas*, the circuit court had no jurisdiction to vacate the decree, in pursu- [303] ance of the prayer of a bill of review, because such relief was beyond its control. The time during which that control was suspended to await the orderly conduct of business in this court in regard to hearing the appeal, is not to be reckoned against Bridget Powers in this case, although she joined in the appeal. She was exercising a right in doing so and, as the city of Memphis was the principal plaintiff and appellant, and was endeavoring to protect its title in fee, and thus her right as a lessee, it may very well have been, as is alleged in the bill, that the appeal fell because the city refused to pay the necessary money for filing the transcript of the record. Being thus left to the protection of her own rights, she may well have concluded that a bill of review was preferable to the further prosecution of the appeal, when she had such good cause for that course, as now appears, although the same error might have been corrected if the appeal had been heard on the merits.

This bill of review is properly brought, therefore, because of the error on the face of the decree which has been considered, and, the decree being set aside, as it must be, we are free to examine the question as to the validity of the tax title set up by Ensminger.

Although the sale of the lot for taxes preceded the lease to Bridget Powers, the sale was invalid as to her if the lot was not subject to be sold for taxes. By section 13 of the Act of Congress of August 5, 1861, ch. 45, 12 Stat. at L., 297, providing for a direct tax and for its assessment on land, there was exempted from tax all land permanently or specially exempted from taxation by the laws of the State wherein it was situated, at the time of the passage of that Act. The same section provided that, in making such assessment, due regard should be had to the latest valuation under the authority of the State. The exemption of land exempted from taxation by the laws of the State is repeated in section 1 of the Act of June 7, 1862, ch. 98, *Id.*, 422, and it is there provided that the direct taxes shall be charged on lands and lots of ground as the same were enumerated and valued under the last assessment and valuation thereof made under the authority of the State before January 1, 1861. Section 7 of that [304] Act, which makes the certificate of the sale of the land for the tax *prima facie* evidence of the regularity and validity of the sale, and of the title of the purchaser, provides that the certificate

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may be affected, as evidence of the regularity and validity of the sale, by establishing the fact that the property was not subject to taxes. These Acts of 1861 and 1862 governed the sale in question. By section 9 of the Act of the Legislature of Tennessee, which took effect February 20, 1860, ch. 70, Private Acts of 1859–'60, 284, it was enacted "That all buildings and grounds owned by said City of Memphis and used exclusively for public purposes, such as for fire-companies and fire-engines, city water-works, markets and market-houses, and their grounds, and such parts of the navy yard as are not leased to private parties, be and the same are hereby declared free and exempt from all state and county taxes so long as owned by the city, and so used for public purposes."

The lot in question is shown by the testimony in the present suit to have been part of the navy yard, and to have been the property of the City of Memphis from before the passage of the Act of 1861 until after the sale of it for taxes. It is not shown to have been leased to any private party between those dates. The decree in the first suit and the tax sale certificate refer to the lot as "assessed to G. McLean in 1860," and the evidence shows that it was assessed to G. W. McLean in 1860, 1865, 1866 and 1867. The lease to Bridget Powers provides that she shall save the city harmless from any damages to be claimed by the original lessees of said lot. But there is no legal evidence whatever of any subsisting lease during the period named. The bill alleges that there was none, and the answer substantially admits this averment, by saying that at one time before the assessment of the tax in 1864, a lease of the lot by the city had been made, which was not carried into operation, by failure of the lessee to comply. This is equivalent to saying that there was no subsisting lease when the tax was assessed for which the lot was sold. There is the evidence of a witness for the plaintiff familiar with the premises, and residing near them, that [305] he never knew of any assertion of any claim to the lot by any lessee, and the case is one where, on all the facts, and in the absence of affirmative proof by the defendant of the existence of such lease, the evidence that there was none must be held sufficient.

We do not perceive that any of the objections set up by demurrer and repeated in the answer are tenable. *The decree of the Circuit Court is affirmed in all respects*, except in so far as it erroneously gives the date of July 19, 1876, to the decree of June 19, 1876, and recites erroneously the contents of said decree; and except in so far as it may be construed as enjoining the defendant Ensminger from setting up any title to said lot 10 as against the City of Memphis, or as quieting or confirming the possession of the plaintiffs as against the City of Memphis under the said lease from said city; and except in so far as it adjudges that the lease made by the defendants to the plaintiff John C. Powers, and the five notes executed by him, be delivered up and canceled. As to this last named lease, the plaintiff John C. Powers, having voluntarily entered into it, no ground is shown for setting it aside. It was correct to charge Ensminger with the costs of both suits. *The decree of this court in the first suit imposed on the plaintiffs herein only the costs of the appeal to this court. The costs of the present appeal must be paid by the appellant.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 520.

ALEXANDER P. TUTTON, Collector of [312] Customs for the DISTRICT OF PHILADELPHIA, *Plff. in Err.*,

v.

ALONZO M. VITI ET AL.

(See S. C., Reporter's ed., 312–314.)

Duties on statues.

*Marble statues, executed by professional sculptors in the studio and under the direction of another professional sculptor, whether from models just made by a professional sculptor, or from antique models whose author is unknown, are "professional productions of a statuary or of a sculptor," liable to a duty of only ten *per centum ad valorem*, under the Revised Statutes, section 2504, Schedule M.

[No. 1206.]

Motion to advance submitted Mar. 19, 1883. Granted, Mar. 19, 1883. Argued Apr. 13, 1883. Decided Apr. 23, 1883.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

The history and facts of the case appear in the opinion of the court.

Mr. **S. F. Phillips,** *Solicitor-Gen.*, for plaintiff in error.

Mr. **Edward Shippen,** for defendants in error.

Mr. Justice **Gray** delivered the opinion of the court:

This is an action of *assumpsit*, to recover back an excess of duties paid upon seven marble statues imported from Italy. The importers contend that these statues were liable to pay a duty of only ten *per centum ad valorem;* but the Collector exacted payment of fifty *per centum ad valorem.*

The decision of the case turns upon the true construction of those provisions of the Customs Act which impose upon "All manufactures of marble, not otherwise provided for, fifty *per centum ad valorem;*" and upon "Paintings and statuary, not otherwise provided for, ten *per centum ad valorem.* But the term 'statuary,' as used in the laws now in force, imposing duties upon foreign importations, shall be understood to include professional productions of a statuary or of a sculptor only." R. S. sec. 2504, Schedule M.

The material facts, as found by the special verdict returned in the circuit court, are as follows: of the seven statues, two were of boys, taken out and sculptured from antique original models, the author of which is unknown. The other five statues were taken out and sculptured [313] from original models, two of angels, made by

*Head note by *Mr. Justice* GRAY.

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Achille de Cori, and three, representing Summer, Autumn and Winter, made by Carlo Nicoli, both of whom were professional sculptors of good reputation, and who had won at the Royal Academy of Fine Arts of Carrara the prize of a government pension at Rome; and they were the first productions from those models. All the seven statues were executed by Giovanni Padula and Alessandro Gemignani, professional sculptors, in the studio and under the direction of Pietro Salada, who has been a professional sculptor in Carrara for the last thirty-four years. The cost of the statues of the two boys was 300 *lire* or $58 each; of those of the two angels, 690 *lire* or $133.40 each; and of those of the Three Seasons, 480 *lire* or $92.80 each.

Judgment was given for the plaintiffs upon the special verdict, and the only question presented by the record is whether this judgment was right.

The evident intent of Congress, in putting a much lower duty on statues which are professional productions of a statuary or of a sculptor than on other manufactures of marble, is to encourage the importation of works of art, by distinguishing between the productions of an artist and those of an artisan or mechanic; between what is done in a sculptor's studio, by his own hand or under his eye, and what is done by workmen in a marble shop.

In the same spirit, Congress has exempted from all duty the importation of paintings, statues, fountains and other works of art, which are either the production of American artists, or are imported expressly for presentation, to national institutions, or to any State, or to any municipal corporation. R. S. sec. 2505.

There is nothing in the Acts of Congress to limit the professional productions of a statuary or sculptor to those executed by a sculptor with his own chisel from models of his own creation, and to exclude those made by him, or by his assistants under his direction, from models or from completed statues of another sculptor, or from works of art, the original author of which is unknown. An artist's copies of antique masterpieces are works of art of as high a grade as [314] those executed by the same hand from original models of modern sculptors.

The instructions of the Treasury Department, pursuant to which these duties were imposed, and the argument for the appellant proceed upon the ground that the statues were made by men not really professional sculptors, though calling themselves such, and were not real works of art, but mere manufactures of marble by good artisans. If this court were at liberty to consider the testimony sent up with the record, it might perhaps not reach the conclusion at which the jury have arrived. But the insurmountable difficulty in the way of the appellant is that by the special verdict the jury have found in the most explicit terms that all these statues were executed in the studio of a professional sculptor, and under his direction, by two other professional sculptors. *These facts being conclusively settled by that verdict, the law requires that the judgment be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

HOWARD COUNTY, IN THE STATE OF MISSOURI, *Plff. in Err.*
v.
CENTRAL NATIONAL BANK OF BOONVILLE, MO.

(See S. C., Reporter's ed., 314-316.)

Branch railroad, aid for.

A railroad constructed from the junction of the main line of one railroad with another, but extending in a different direction, is a branch road within the meaning of a statute authorizing the issue of bonds by a county through which it passes, for the construction of a branch.

[No. 245.]

Submitted Apr. 13, 1883. Decided Apr. 23, 1883.

IN ERROR to the Circuit Court of the United States for the Western District of Missouri.

The petition in this case was filed in the court below, by the defendant in error, to enforce payment of the coupons of certain bonds issued by the defendant in aid of a certain railroad company.

Trial by jury having been waived, the court below entered a judgment for the plaintiff for $5,678.10, with costs. Whereupon, the defendant sued out this writ of error.

The facts of the case are stated by the court.

Mr. **John D. Stevenson,** for plaintiff in error.

Mr. W. M. Williams, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The Tebo and Neosho Railroad Company was authorized by its charter to construct and operate a railroad from some point on the Pacific Railroad, between the west bank of the Laramie River and Muddy Creek, in Pettis County, in a southerly or southwesterly direction through Henry County, to some point on the state line between the northwest corner of Jasper and the southeast corner of McDonald County. It was also expressly authorized "To extend *branch* railroads into and through *any* counties that the directors may deem advisable." For the purpose of aiding in the construction by that company of a road from the junction of the main line with the Pacific Railroad, extending in a northeasterly direction, to Boonville, through the County of Howard, the county court of that County, in its behalf and after a favorable vote by the people, made a subscription to the capital stock of the company, and issued county bonds therefor. One half of the bonds were sold by the County and the proceeds paid to the company, while the remainder were delivered in full payment of the balance due on the subscription. The subscription was made and bonds issued, in pursuance of a provision in the company's charter which made it "Lawful for the county court of any county in which any part of the railroad or *branches* may be, or any county adjacent thereto, to subscribe to the stock of said company * * * and for the stock subscribed in behalf of the county may issue the bonds of the county to raise the funds to pay the same, and to take proper steps to protect the interest and credit of the county court; may appoint an agent to represent the county, vote for it, and receive its dividends." Act of January 16, 1860,

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[316] sections 6 and 8; Act of November 21, 1857, Charter of Osage Valley and Southern Kansas R. R. Co., Laws of Mo., 1857, adjourned Session, p. 62.

The railroad was constructed through Howard County as proposed, and has been in operation ever since. The county court levied and collected a tax to pay the interest on the bonds for seven years, regularly paid the semi-annual interest until March, 1878, redeemed a number of the bonds, voted the County's stock at several meetings of stockholders, and when, in 1874, the road so constructed northeasterly through Howard County, was sold to the Missouri, Kansas and Texas Railroad Company, the County received 4,000 shares of the stock of the latter company in exchange for its stock in the Tebo and Neosho Railroad Company. Counsel for the defendant in error states that the County sold its stock in the Missouri, Kansas and Texas Railroad Company for $140,000. But no such fact appears in the findings. But it does appear that the County, when the case was tried below, still held that stock.

And now it is contended in behalf of the County, and no other question is presented for determination, that there was no legal authority for this subscription or issue of bonds. The argument in its behalf is that the main road of the company was established on a line south of the Pacific Railroad; that Howard County could not, by subscription, aid in the construction of the main line; and could not, by subscription, aid in the construction of a road from the junction of the main line northeasterly through that county, because such a road would not be a *branch* road, but only an unauthorized *extension* of the *main* line.

We are of opinion that the road constructed through Howard County was, within the meaning of the statute, a branch of the original or main line. The defense cannot be sustained.

The judgment is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[317] BALTIMORE & POTOMAC RAILROAD COMPANY, *Plff. in Err.*,

v.

FIFTH BAPTIST CHURCH.

(See S. C., Reporter's ed., 317-335.)

Nuisance, what is—injunction for—corporation liable for—legislative grants—immunity for private injuries—nuisance by smoke, disturbing church services.

1. That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him.

2. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrong-doer, and when the cause of the annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance.

3. The right of a religious corporation to recover for a nuisance which causes annoyance and discomfort to its members in the use of its property, and the liability of a corporation to respond in damages for causing such nuisance, are not affected by their corporate character, but are the same as those of individuals for a similar wrong.

4. Legislative grants of privileges or powers to corporate bodies like those to a railroad company to bring its track and construct its works within a city, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion.

5. The grant of powers and privileges to do certain things does not carry with it any immunity for private injuries which may result directly from the exercise of those powers and privileges.

6. It is an actionable nuisance to build one's chimney so low as to cause the smoke to enter his neighbor's house.

7. In an action on the case brought by a religious corporation for nuisance in disturbing its use of a church, damages are not limited to a mere depreciation of the property, but may be given for the inconvenience and discomfort caused to the congregation assembled, which tends to destroy the use of the building for church purposes.

[No. 202.]

Submitted Apr. 3, 1883. Decided Apr. 23, 1883.

IN ERROR to the Supreme Court of the District of Columbia.

The history and facts fully appear in the

Statement of the case by *Mr. Justice* **Field:**

The Fifth Baptist Church, the plaintiff in the court below, is a religious Corporation, created [318] under the general incorporation Act of Congress in force in the District of Columbia. It owns a building in the City of Washington situated on D Street, between Four-and-a-half and Sixth Streets, which was erected and has been used by it as a church for many years. The defendant in the court below, the Baltimore & Potomac Railroad Company, is a Corporation created under the laws of Maryland, and is authorized by Act of Congress to lay its track within the limits of the city, and construct other works necessary and expedient to the proper completion and maintenance of its road.

The plaintiff alleges that the defendant, in 1874, erected an engine house and machine shop on a parcel of land immediately adjoining its church edifice, and has since used them in such a way as to disturb, on Sundays and other days, the congregation assembled in the church, to interfere with religious exercises therein, break up its Sunday Schools, and de-

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NOTE.—*Who may maintain action for public nuisance and when; special damage necessary; method of abatement.* See *note* to Georgetown v. Alex. Can. Co., 37 U. S. (12 Pet.), 91.

When injunction against nuisance will be granted. See *note* to Irwin v. Dixion, 57 U. S. (15 How.), 10.

Measure of damages for nuisance.

In an action for nuisance the measure of damages generally is the loss actually sustained. Luther v. Winnisimmet Co., 9 Cush., 171; Thayer v. Brooks, 17 Ohio, 489.

Every continuance of a nuisance entitles the party injured to damages. Persons continuing a nuisance are liable. Staple v. Spring, 10 Mass., 74; Vedder v. Vedder, 1 Denio, 257; Clowes v. Staffordshire Potteries, etc., Co., 8 L. R. Ch. App., 125; S. C., 4 Moak's Eng. Rep., 607; Beckwith v. Griswold, 29 Barb., 291; Irvine v. Wood, 51 N. Y., 224; Congreve v. Smith, 18 N. Y., 79.

One who commits a nuisance against the property of another, in the exercise of what he believes to be his rights, is liable only for the actual damages and the trouble and expense of establishing the right to the abatement of it. Shaw v. Cummiskey, 7 Pick., 76; Keay v. N. O. Can. Co., 7 La. Ann., 259; McKnight v. Ratcliff, 44 Pa. St., 156.

Nominal damages at least are recoverable. Cory v. Silcox, 6 Ind., 39; Casebeer v. Mowry, 55 Pa. St., 419.

Where the action is brought by a reversioner, the damages are the injury done the estate as a reversion. Dutro v. Wilson, 4 Ohio St., 101; Bathishill v. Read, 37 Eng. L. & Eq., 317; Hamer v. Knowles, 6 Hurlst & N., 454.

Where the damages are permanent and go to the entire value of the estate, the whole injury may be compensated for at once. Anon., 4 U. S. (4 Dall.), 147; Cumberland, etc., Co. v. Hitchings, 65 Me., 140;

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stroy the value of the building as a place of public worship. It, therefore, brought the present suit in the Supreme Court of the District, for the damages it had sustained. The defendant pleaded the general issue.

On the trial, evidence was given to show that the Fifth Baptist Church has owned and used the premises described as a place of worship since 1857; that the present church building was begun in 1867, and since 1868 or 1869 has been continuously occupied by the church as its house of worship; that in 1872 the defendant erected upon a parcel of ground immediately adjoining the premises on the west, and from April, 1874, till the commencement of this suit, maintained an engine house and machine shop, where a large number of locomotives and steam-engines were housed and their fires made, and to and from which the engines were propelled, and in which they were coaled, watered, repaired and otherwise used; that when the ground was first broken for the erection of these works the plaintiff advised the Company that, if put there, they would prove to be a nuisance and ruinous to the plaintiff's interests, and protested against their erection; that the Company, however, paid no heed to this protest, but proceeded to erect the works upon the building line [319] of its own premises within five and a half feet from the church edifice, and constructed upon the engine house sixteen smokestacks, lower in height than the windows of the main room of the church; that the nearest of the smokestacks was less than sixty feet from the windows, and the others were in a semicircular curve, at gradually increasing distances; that during this period, from April, 1874, to the commencement of the present suit, the plaintiff was accustomed to have, on every Sabbath Day, Sunday School exercises in the morning, preaching in the forenoon, and preaching in the evening; and that religious services were also held in it on Wednesday evening of every week, and on the first Tuesday and Friday evenings of every month, and at intervals protracted religious meetings were held in it every night in the week except Saturday night; that during this period these services were habitually interrupted and disturbed by the hammering noises made in the workshops of the Company, the rumbling of its engines passing in and out of them, and the blowing off of steam; that these noises were at times so great as to prevent members of the congregation, sitting in parts of the church farthest from the shops, from hearing what was said, that the act of blowing off steam occupied from five to fifteen minutes, and frequently compelled the pastor of the church to suspend his remarks; that this was of habitual occurrence, during the day and at night, and on Sundays as well as other days; and that in the summer time, when the windows of the church were opened for air, smoke, cinders and dust were blown from the smokestacks through the windows of the church, settling upon the pews and furniture, and soiling the clothes of the occupants, accompanied by an offensive odor, which greatly annoyed the congregation.

Evidence was also given to show that the Railroad Company, which was authorized to lay its track only along Virginia Avenue in the city, had constructed a side track from the avenue to its workshops, crossing a part of D Street and its sidewalk at a distance of about 100 feet from the door of the church; that the locomotives were allowed to stand at the entrance of its premises with their cow-catchers protruding several feet beyond the inclosure, and somo- [320] times to stand across the sidewalk along which two thirds of the congregation are obliged to pass in going to and from the church; that the access to the church was thereby obstructed and rendered dangerous, and on several occasions members had barely escaped being run over by the sudden starting of the locomotives without note or warning; that the congregation had been thereby diminished, and the attendance upon the Sunday School decreased by about one fourth; that the Sunday School was a source of revenue to the plaintiff, having contributed to the construction and improvement of the church building, and this revenue was proportioned to the attendance thereon; that the property of the plaintiff was nearly ruined for church purposes by the proximity of the works of the defendant, and the noise, smoke, cinders and dust which they created; that the rental value was ordinarily from $1,200 to $1,600 per annum, but that with the defendant's works adjoining it could hardly be rented at all; and that those works had depreciated the value of the property fifty per cent.

To meet the facts thus established, and as a defense to the action, the Railroad Company gave evidence to show that it ran about sixty trains a day over its road in the City of Washington during week days, and about ten trains on Sundays; that its locomotives were the best known in the business; that it employed about two hundred men who were all skillful in their particular branches of work, and well behaved; that in the engine and repair shop no more noise was made than was necessary; that every precaution was taken on Sundays to preserve quiet

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Plumer v. Harper, 3 N. H., 88; Town of Troy v. Cheshire R. R. Co., 23 N. H., 83; Blunt v. McCormick, 3 Denio, 283; Thayer v. Brooks, 17 Ohio St., 489.

If the nuisance be continued after verdict, exemplary damages may be given, such as will lead to its abatement. Soltau v. De Held, 9 Eng. L. & Eq., 104; Morford v. Woodworth, 7 Ind., 83; Bradley v. Amis, 2 Hayw., 399.

The rule of damage to real estate where the injury is to value of the premises themselves, is the difference between the value of the premises before the injury and immediately after. 1 Hill, Torts, 608, sec. 18, *a*; Wood's Law of Nuisances, sec. 853; Seely v. Alden, 61 Pa. St., 302; Ruckman v. Green, 9 Hun, 225; Peck v. Elder, 3 Sandf., 126; Dana v. Valentine, 5 Met., 105; Chase v. N. Y. C. R. R. Co., 24 Barb., 273.

Where the nuisance can be abated, this rule does not apply. In such case, the measure of damages is the loss in rental value by the continuance of the nuisance. Chipman v. Palmer, 9 Hun, 517; Pinney v. Berry, 61 Mo., 359; Park v. C. & S. W. R. Co., 42 Iowa, 636; McKeon v. See, 4 Rob., 450; Ruff v. Rinaldo, 55 N. Y., 664; De Wint v. Wiltse, 9 Wend., 325; Jutte v. Hughes, 67 N. Y., 267.

Evidence that the nuisance, by reason of the number of persons it employs, has increased the rental value, is not admissible. Frances v. Schoellkopf, 53 N. Y., 152; Kimel v. Kimel, 4 Jones, 121; Chipman v. Palmer, 4 Week. Dig., 158.

It is not competent to show that the rental value of other property similarly situated was diminished by the same cause. Selma, etc., R. R. Co. v. Knapp, 42 Ala., 480.

A subsequent purchaser may recover for the injury caused by the continuance of a nuisance erected previous to his purchase. Brady v. Weeks, 3 Barb., 157; Vedder v. Vedder, 1 Denio, 267; Bliss v. Hall, 33 Eng. C. L., 315; S. C., 4 Bing. (N. C.), 153.

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in the neighborhood of the church; that the main shop of the Company was in the City of Baltimore, and the shop and engine house in Washington were used only for making casual and temporary repairs in order to keep the machinery and engines in operation; that the smokestacks were higher than required by the building regulations in force in Washington; that the engine house and workshops were skillfully and carefully constructed with suitable appointments and appliances; that the bells of the locomotives were not rung, nor the whistle sounded, except when an accident was liable to [321] occur; and that when the engines were brought into the house the steam ordinarily was not blown off but allowed to go down.

The main reliance, however, of the Railroad Company to defeat the action was the authority conferred upon it by the Act of Congress of February 5, 1867, to exercise the same powers, rights and privileges in the construction of a road in the District of Columbia, the line of which was afterwards designated, which it could exercise under its charter in the construction of a road in Maryland, with some exceptions, not material here. By its charter, it was empowered to make and construct all works whatever which might be necessary and expedient in order to the proper completion and maintenance of the road.

The Act of Congress provided that the road which the Company was authorized to construct should enter the city at such place and pass along such public street or alley to such terminus as might be allowed by Congress, upon the presentation of a survey and map of its proposed location. Subsequently Congress allowed the Company to enter the city with its railroad, by one of two routes, as it might select. It selected the one by which the road is brought along Virginia avenue, in front of the church of the plaintiff, to the intersection of South C and West 9th Streets.

The testimony of the parties being closed, the plaintiff prayed three instructions to the jury, which were given by the court with additions to each. They are as follows:

First instruction prayed:

"If the jury find from the evidence that the engine house of the defendant is used for receiving its engines when they come into the city after a trip; that after coming into said engine house such engines more or less frequently blow off their steam, and that such blowing off of steam makes a loud and disagreeable noise, and that such engines are put in the stalls in said house, and emit the smoke from their fires through the chimneys of said house, and that the said engine house is used for the purpose of a shop in which to make a certain class of repairs upon the engines and cars of the defendant, and that a loud noise of hammering is cre- [322] ated in making such repairs; and that said engine house is also used to receive coal for coaling the engines of defendant before going out, and that they are all coaled therein, and also get up their fire and steam therein; and further find that said house is located so near the church of the plaintiff that the noises from said engine house can be distinctly heard inside of the said church, and also that the chimneys of said engine house are so constructed that the tops thereof are not as high as the tops of the windows of said church; and shall further find that the smoke from said chimneys is thrown through said windows into said church in such quantities and so generally as to be a common annoyance and inconvenience to the congregation worshipping therein, and that said noises in said yard of blowing off steam are of daily and nightly occurrence, and are so distinctly heard in said church on Sundays, as well as the days of the week, as to annoy, harass and inconvenience the congregation when engaged in divine worship therein, and that they disturb and greatly inconvenience the congregation in the enjoyment of said building as a church, then the plaintiff is entitled to recover, provided the jury find that said church was located upon the spot where it now is before the defendant established its engine house in its present position, and provided the jury further find that the annoyance and inconvenience to said congregation from the smoke and noises above mentioned occurred within three years before the date at which this suit was brought, and provided further that said noises and smoke depreciated the value of the property of the plaintiff within the period from April 1, 1874, to March 22, 1877."

The court granted this prayer and gave the instruction, adding to it a charge, as follows:

"If you find all these facts, then this shop is a nuisance, and a special annoyance to the congregation that worship in this church. Every man has a right to the comfortable enjoyment of his own house, in which enjoyment a neighbor cannot molest him; and no grant conferred by proper authority upon any corporation to construct a railroad along the public streets, or to build shops, can be construed as authorizing that Company to construct a nuisance. If the work is of such a necessary kind that the Company must have it, if the shop is of that char- [323] acter, and yet is a nuisance in the neighborhood, they must find some other place to put it. No Legislature has a right to establish a private nuisance."

Second instruction prayed:

"The actual amount of pecuniary loss to the plaintiff is not necessarily the rule of damages in actions like the present. In estimating the amount of compensation to the plaintiff for the injury, if any, found to have been sustained by it, the jury may determine the extent of the injury and the equivalent damages, in view of all the circumstances of said injury to said plaintiff, of depreciation in the value of its property during the period embraced in this suit, and of interference with the uses to which said property was devoted by said plaintiff during said period, and of all other particulars, if any, wherein the plaintiff is shown to have been injured during said period, and for which, under the instructions of the court, said plaintiff is entitled to recover."

This prayer was granted and the instruction given, accompanied with the following charge to the jury:

"That prayer I think is substantially right. The suit is brought by a congregation duly incorporated, and they have brought an action to recover damages for their inconvenience and discomfort in consequence of the acts of the defendant. It is the personal discomfort more than anything else which is to be considered in

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regard to the assessment of damages. Now, I can very easily imagine, and it may often happen, that the construction of an improvement such as this might increase the value of property in the vicinity, and I am not sure at all that the erection of this workshop in that neighborhood may not really have increased the intrinsic value of the property belonging to this congregation. The evidence in the case does not as it seems to me, show that this property has been depreciated by the construction of that workshop. We can imagine, and it is not a far-fetched imagination either, that the effect of such a workshop in that neighborhood might be to collect a population around it, and thus increase the population in that neighborhood, and really enhance the value of property; and yet the congregation would be entitled to recover damages (although their property might [324] have increased in value) because of the inconvenience and discomfort they have suffered from the use of the shop. The congregation has the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and it is the discomfort which is the primary consideration in allowing damages."

Third instruction prayed:

"If the jury find from the evidence that, among other purposes, the plaintiff's church was used by the said plaintiff as a schoolhouse for the instruction of children on the Sabbath Day, and that a revenue was derived from such school, depending for the amount thereof upon the number of children attending said school, and shall also find that the defendant was in the habit of allowing its engines, with steam on and ready to move out over D Street, to lie adjacent to the sidewalk of said D Street, adjacent to its workshop and engine house, and that in consequence of said engine being so allowed to occupy such position, the number of pupils attending said school was diminished, and that from the said cause the number of the pupils of the said school was lessened within the period from March 22, 1874, to March 22, 1877, then the jury will consider the extent of such special damage to the plaintiff, should they find such special damage an element in making up their verdict in this case."

This prayer was granted and the instruction given, accompanied with the following charge:

"I grant that prayer because there is some evidence that this congregation used that church partly for a Sunday School where children are instructed, and that those children were in the habit of contributing, and have contributed, sums of money to the support of the church. A party is entitled to be compensated, not only for actual damages sustained from the acts of the defendant; but, in a case like this, is entitled to his damages for a continuous and threatened danger. A man is entitled to recover damages from the owner of an adjoining property ready to tumble down upon himself or his family. That is a threatened danger, and although the danger may not have been actually sustained, yet people are not to be kept in alarm [325] constantly by a threat of danger. It may fall upon him at any time, and a court of chancery would direct it to be removed, and on an indictment for a nuisance of that kind it would be removed.

But in private actions like this, it may be taken into consideration by the jury whether those engines, standing inside the house and passing out and in so frequently as they do, and in that place, produce a reasonable and fair apprehension of danger to persons passing to that church, especially to children passing to Sunday School. You can take that element into your consideration.

To each of these instructions the defendant excepted. It also requested the court to give several other instructions, the purport of which was that if the Railroad Company constructed its smokestacks on the repair shop in the usual and ordinary manner, and built them as high as required by the building regulations in force in Washington, the plaintiff could not recover for any damage caused by smoke from such smokestacks; that the Company possessed the right to select the location in question, and to construct, maintain and use upon it such engine house and other works as were necessary and expedient for the construction, maintenance and repair of its road and engines, and to occupy the premises for that purpose; and that if the jury found that the inconveniences complained of were no more nor greater than the natural or probable result of maintaining such engine house and repair shop; or found that, in the occupation and use of the property and management of its business, the Company exercised such reasonable care as a person of ordinary prudence and caution would exercise under the circumstances, it was not liable for any damages; and that if the Company did not use reasonable care in the construction of the smokestacks on the engine house or repair shop; the plaintiff was only entitled to recover interest for three years on the difference between the value of the property, as it would have been if the defendant's smokestacks had been carefully constructed, and the actual value as reduced by the smoke from them; that the defendant was entitled to construct and use the side track across D Street; and that the plaintiff could not recover, being a Corporation, for any inconvenience which members of the congregation assembled in its [326] church might suffer from the noise and offensive odors occasioned by defendant's engines and shops.

The court refused to give these instructions, and the jury found for the plaintiff $4,500 damages, and the judgment entered thereon was affirmed at the General Term of the Supreme Court of the District. To review that judgment the defendant brought the case here on a writ of error.

Mr. **Enoch Totten,** for plaintiff in error:

The Act of March 18, 1869, fixed the terminus at the junction of West Ninth and South C Streets and Virginia Avenue. This being the end of the road, the statute must have been passed with the expectation in the legislative mind, that depots, stations, engine houses and other works would be constructed at or near that point. Power to construct and maintain a railroad necessarily includes power to build depots, stations, side tracks, engine houses, switches, repair shops, etc., etc. *Toll Bridge Co.* v. *R. R. Co.*, 17 Conn., 454; *Black* v. *R. R. Co.*, 58 Pa., 249; *R. R. Co.* v. *Speer*, 56 Pa., 325; *Turnpike Co.* v. *R. R. Co.*, 2 Harr. N. J., 314.

To require the Company to locate its engine

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house or repair shop beyond the limits of this city, would not be reasonable. The power of determining whether such works are necessary and expedient, and where they shall be erected, is by the statute confided to the president and board of directors of the Company, and when they have once exercised that power in good faith, their judgment is not reviewable, but is conclusive on all authority in this district, except that of Congress. *Ford* v. *R. R. Co.*, 14 Wis., 609; *R. R. Co.* v. *Kip*, 46 N. Y., 546; *Giesy* v. *R. R. Co.*, 4 Ohio St., 308; *Brainard* v. *Clapp*, 10 Cush., 6; *Curtis* v. *R. R. Co.*, 14 Allen, 55; Pierce, R. R., 148, 160, 494; *Hawley* v. *Steele*, 6 Ch. Div., 521.

No action will lie and no recovery can be had for doing that which the law authorizes the party to do, and that cannot be adjudged a nuisance and be held unlawful, which the law declares to be lawful. *R. R. Co.* v *Young*, 33 Pa., 175; *Renwick* v. *Morris*, 3 Hill, 621; *Bridge Co.* v. *Kirk*, 46 Pa., 112; *Northern Tr. Co.* v. *Chicago*, 99 U. S., 635 (XXV., 336); Ang. Highw., sec. 287; Ad. Torts, sec. 1040; *Porter* v. *R. R. Co.*, 33 Mo., 128; *Navigation Co.* v. *Coons*, 6 Watts & S., 101; *Henry* v. *Pittsburg Bridge Co.*, 8 Watts & S., 85; *Radcliff* v. *Brooklyn*, 4 N. Y., 195; *Bellinger* v. *R. R. Co.*, 23 N. Y., 42; *Moyer* v. *R. R. Co.*, 38 N. Y., 351.

The case of *Hatch* v. *R. R. Co.*, 25 Vt., 49, is a leading and well considered case on this subject. It distinctly holds that a railroad company, operating a railroad under the authority of an Act of the Legislature, is not liable for necessary consequential damages to premises not taken by the Company. See, also, *R. R. Co.* v. *Speer*, 56 Pa., 325; and *Black River Imp. Co.* v. *La Crosse B. & Tr. Co.*, Sup. Ct. Wis., 1882, N. W. Reporter, 443.

The public streets of the City of Washington are owned and held by the United States in absolute fee simple.

Van Ness v. *Washington*, 4 Pet., 232.

The rule adopted by the court below as to the measure of damages was erroneous.

Nothing can be recovered in this action for personal discomfort, inconvenience and annoyance, as such, which may have been suffered by the individual persons who happened to attend divine services at this church.

Sparhawk v. *R. R. Co.*, 54 Pa., 401; *Owen* v. *Henman*, 1 Watts & S., 548; *Williams' Case*, 5 Coke, 72.

The court on the trial committed an error very material and injurious to the defendant, by instructing the jury that the Company's works were permanent and not a mere temporary inconvenience. *Troy* v. *R. R. Co.*, 23 N. H., 101; Wood, Nuis., 889 sec. 856; *Stone Road* v. *R. R. Co.*, 51 N. Y., 578; *Worcester* v. *Mfg. Co.*, 41 Me., 159; *Troy* v. *R. R. Co.*, 23 N. H., 83.

The true rule of damages applicable to the case is the interest on the difference between the value of the use of the property, during the period covered by the action, with the damaging cause, and what it would have been without the damaging cause. See, Sedg. Damages, 550, 693, *n.*; *Francis* v. *Schoellkopf*, 53 N. Y., 152; *Ford* v. *R. R. Co.*, 14 Wis., 609; *Blesch* v. *R. R. Co.*, 43 Wis., 195; *Carl* v. *R. R. Co.*, 46 Wis., 625; *Ottawa Gas Co.* v. *Graham*, 28 Ill., 73.

Messrs. **J. J. Darlington, M. F. Morris** and *R. T. Merrick*, for defendant in error:

The Legislature cannot authorize a private nuisance.

R. R. Co. v. *Applegate*, 8 Dana, 301; *Masterson* v. *Short*, 7 Rob. (N. Y.), 299; *Robinson* v. *R. R. Co.*, 27 Barb., 513; *Fletcher* v. *R. R. Co.*, 25 Wend., 462; *Pumpelly* v. *Green Bay Co.*, 13 Wall., 166 (80 U. S., XX., 557); *Babcock* v. *N. J. Stock Yard Co.*, 20 N. J. Eq., 296; *Commonwealth* v. *Kidder*, 107 Mass., 188; *Luning* v. *State*, 2 Pinn. (Wis.), 215; *Crittenden* v. *Wilson*, 5 Cow., 165; *Brown* v. *R. R. Co.*, 12 N. Y., 491; *Tinsman* v. *R. R. Co.*, 2 Dutch., 149; *Ten Eyck* v. *Canal Co.*, 3 Harr. (N. J.), 201; *Sinnickson* v. *Johnson*, 2 Harr. (N. J.), 129; *Eastman* v. *Amoskeag Co.*, 44 N. H., 143; *Springfield* v. *R. R. Co.*, 4 Cush., 63; *Lee* v. *Pembroke Co.*, 57 Me., 481; *Hooker* v. *N. H. & Northampton Co.*, 14 Conn., 152; *S. C.*, 15 Conn., 312.

The cases of so-called legalized nuisances are without an exception cases of interference, under legislative sanction, with public highways or water-courses; and, in these cases, the courts have almost uniformly held that the immunity was from indictment for the public inconvenience, and not from liability for invasion and injury to private property.

Fletcher v. *R. R. Co.* (*supra*); *Stoughton* v. *State*, 5 Wis., 291; *Crittenden* v. *Wilson* (*supra*); *Robinson* v. *R. R. Co.* (*supra*); *Ten Eyck* v. *Canal Co.*, 3 Harr., 201; *Sinnickson* v. *Johnson*, 2 Harr., 129; *Eastman* v. *Amoskeag Co.*, 44 N. H., 143; *Lee* v. *Pembroke Co.*, 57 Me., 481; *Seneca Road Co.* v. *R. R. Co.*, 5 Hill, 170; *Turnpike Co.* v. *R. R. Co.*, 2 Harr. N. J., 314; *Hooker* v. *N. H. & Northampton Co.* (*supra*).

"Corporate powers can never be created by implication, nor extended by construction"

R. R. Co. v. *Comrs.*, 21 Pa., 22; Wood, Nuis., ch. on "Legalized Nuisances"; *Black* v. *Canal Co.*, 24 N. J. Eq., 455; *People* v. *Lambier*, 5 Den., 9; *Stormfeltz* v. *Manor Co.*, 18 Pa., 555; *Thomas* v. *R. R. Co.*, 101 U. S., 71 (XXV., 950); *Springfield* v. *R. R. Co.*, 4 Cush., 63; *Ottawa Gas Co.* v. *Graham*, 28 Ill., 73; *Story* v. *R. R. Co.*, 26 Alb. L. J., 373; *Bank* v. *Commonwealth*, 19 Pa., 152.

Mr. Justice **Field** delivered the opinion of the court:

If the facts are established which the evidence tended to prove, and from the verdict of the jury we must so infer, there can be no doubt of the right of the plaintiff to recover. The engine house and repair shop of the Railroad Company, as they were used, rendered it impossible for the plaintiff to occupy its building with any comfort as a place of public worship. The hammering in the shop, the rumbling of the engines passing in and out of the engine house, the blowing off of steam, the ringing of bells, the sounding of whistles and the smoke from the chimneys, with its cinders, dust and offensive odors, created a constant disturbance of the religious exercises of the church. The noise was often so great that the voice of the pastor while preaching could not be heard. The chimneys of the engine house being lower than the windows of the church, smoke and cinders sometimes entered the latter in such quantities as to cover the seats of the church with soot and soil the garments of the worshipers. Disagreeable odors, added to the noise, smoke and cinders, rendered the place not only uncomfort- [329]

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able but almost unendurable as a place of worship. As a consequence, the congregation decreased in numbers, and the Sunday School was less numerously attended than previously.

Plainly the engine house and repair shop, as they were used by the Railroad Company, were a nuisance in every sense of the term. They interfered with the enjoyment of property which was acquired by the plaintiff long before they were built, and was held as a place for religious exercises, for prayer and worship; and they disturbed and annoyed the congregation and Sunday School which assembled there on the Sabbath and on different evenings of the week. That it is a nuisance, which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrong-doer, and when the cause of the annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance. *Crump* v. *Lambert*, L. R., 3 Eq., 409.

The right of the plaintiff to recover for the annoyance and discomfort to its members in the use of its property, and the liability of the defendant to respond in damages for causing them, [330] are not affected by their corporate character. Private corporations are but associations of individuals united for some common purpose and permitted by the law to use a common name, and to change its members without a dissolution of the association. Whatever interferes with the comfortable use of their property, for the purposes of their formation, is as much the subject of complaint as though the members were united by some other than a corporate tie. Here the plaintiff, the Fifth Baptist Church, was incorporated that it might hold and use an edifice, erected by it, as a place of public worship for its members and those of similar faith meeting with them. Whatever prevents the comfortable use of the property for that purpose by the members of the Corporation, or those who, by its permission, unite with them in the church, is a disturbance and annoyance, as much so as if access by them to the church was impeded and rendered inconvenient and difficult. The purpose of the organization is thus thwarted. It is sufficient to maintain the action to show that the building of the plaintiff was thus rendered less valuable for the purposes to which it was devoted.

The liability of the defendant for the annoyance and discomfort caused is the same also as that of individuals for a similar wrong. The doctrine which formerly was sometimes asserted that an action will not lie against a corporation for a tort, is exploded. The same rule in that respect now applies to corporations as to individuals. They are equally responsible for injuries done in the course of their business by their servants. This is so well settled as not to require the citation of any authorities in its support.

It is no answer to the action of the plaintiff that the Railroad Company was authorized by Act of Congress to bring its track within the limits of the City of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, and that the engine house and repair shop in question were thus necessary and expedient; that they are skillfully constructed; that the chimneys of the engine house are higher than required by the building regulations of the city, and that as little smoke and noise are caused as the nature of the business in them will permit.

In the first place, the authority of the Com [331] pany to construct such works as it might deem necessary and expedient for the completion and maintenance of its road, did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the Act permitted it to place them immediately in front of the President's house or of the Capitol, or in the most densely populated locality. Indeed, the Corporation does assert a right to place its works upon property it may acquire anywhere in the city.

Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred.

Undoubtedly, a railway over the public highways of the District, including the streets of the City of Washington, may be authorized by Congress, and if when used with reasonable care it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation.

But the case at bar is not of that nature. It is a case of the use by the Railroad Company of its property in such an unreasonable way as to disturb and annoy the plaintiff in the occupation of its church to an extent rendering it uncomfortable as a place of worship. It admits, indeed, of grave doubt whether Congress could authorize the Company to occupy and use any premises within the city limits, in a way which [332] would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the Company from the liability to suit for damages or compensation, to which individuals acting without such authority would be subject under like circumstances. Without expressing any opinion on this point, it is sufficient to observe that such authority would not justify an invasion of others' property, to an extent which would amount to an entire deprivation of its use and enjoyment, without compensation to the owner. Nor could such authority be invoked to justify acts, creating physical discom-

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fort and annoyance to others in the use and enjoyment of their property, to a less extent than entire deprivation, if different places from those occupied could be used by the Corporation for its purposes, without causing such discomfort and annoyance.

The acts that a Legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large.

Thus, in *Sinnickson* v. *Johnsons*, 2 Harr. (N. J.), 151, it was held by the Supreme Court of New Jersey that an Act of the Legislature authorizing an individual to erect a dam across a navigable water constituted no defense to an action for damages for an overflow caused by the dam. "It may be lawful," said the court, "for him (the grantee of the power) and his assignees to execute this Act, so far as the public interests, the rights of navigation, fishing, etc., are concerned, and he may plead, and successfully plead, the Act to any indictment for a nuisance, or against any complaint for an infringement of the public right, but cannot plead it as a justification for a private injury which may result from the execution of the statute."

[333] In *Crittenden* v. *Wilson*, 5 Cow., 165, it was held by the Supreme Court of New York that an Act authorizing one to build a dam, on his own land, upon a creek or river which was a public highway, merely protected him from indictment for a nuisance. If, said the court, there had been no express provision, in the Act for the payment of damages, the defendant would still have been liable to pay them, and the effect of the grant was merely to authorize the defendant to erect a dam; as he might have done, if the stream had been his own, without a grant. In such a case he would have been responsible in damages for all the injury occasioned by it to others.

In *Brown* v. *R. R. Co.*, 12 N.Y., 491, the Company was sued for overflowing plaintiff's land by means of a cut through the banks of a stream which its road crossed. It pleaded authority by its charter to cross highways and streams, and that the cut in question was necessary to the construction and maintenance of the road. But it was held that the company was liable for damages caused. "It would be a great stretch," said the court, "upon the language, and an unwarrantable imputation upon the wisdom and justice of the Legislature, to hold that it imports an authority to cross the streams in such a manner as to be the cause of injury to others' adjoining property." And so the court adjudged that the Company was under the same obligation as a private owner of the land and stream, and he bridged it; and that the right granted to bridge the stream gave no immunity for damages which the excavation of its banks for that purpose might cause to others.

In *Commonwealth* v. *Kidder*, in the Supreme Court of Massachussetts, 107 Mass., 188, a statute of that State authorized the storage, keeping, manufacture and refining of crude petroleum or any of its products in detached and properly ventilated buildings, specially adapted to that purpose; and it was held that it did not justify the refining of petroleum at any place, where a necessary consequence of the manufacture was the emission of vapors which constitute a nuisance at common law by their unwholesome and offensive nature.

Numerous other decisions from the courts of [334] the several States might be cited in support of the position that the grant of powers and privileges to do certain things does not carry with it any immunity for private injuries which may result directly from the exercise of those powers and privileges.

If, as asserted by the defendant, the noise, smoke and odors, which are the cause of the discomfort and annoyance to the plaintiff, are no more than must necessarily arise from the nature of the business carried on with an engine house and workshop as ordinarily constructed, then the engine house and work shop should be so remodeled and changed in their structure as to prevent, if that be possible, the nuisance complained of; and, if that be not possible, they should be removed to some other place where, by their use, the plaintiff would not be thus annoyed and disturbed in the enjoyment of its property. There are many places in the city, sufficiently distant from the church to avoid all cause of complaint, and yet sufficiently near the station of the Company to answer its purposes.

There are many lawful and necessary occupations which, by the odors they engender, or the noise they create, are nuisances when carried on in the heart of a city, such as the slaughtering of cattle, the training of tallow, the burning of lime, and the like. Their presence near one's dwelling-house would often render it unfit for habitation. It is a wise police regulation, essential to the health and comfort of the inhabitants of a city, that they should be carried on outside of its limits. Slaughter-houses, lime-kilns and tallow furnaces are, therefore, generally removed from the occupied parts of a city, or located beyond its limits. No permission given to conduct such an occupation within the limits of a city would exempt the parties from liability for damages occasioned to others, however carefully they might conduct their business. *Fish* v. *Dodge*, 4 Den., 312.

The fact that the smokestacks of the engine-house were as high as the city regulations for chimneys required, is no answer to the action, if the stacks were too low to keep the smoke out of the plaintiff's church. In requiring that chimneys should have a certain height, the regulations did not prohibit their being made higher, nor could they release from liability if not made high enough. It is an actionable nui- [335] sance to build one's chimneys so low as to cause the smoke to enter his neighbor's house. If any adjudication is wanted for a rule so obvious, it will be found in the cases of *Sampson* v. *Smith*, 8 Sim., 272 and *Whitney* v. *Bartholomew*, 21 Conn., 213.

The instruction of the court as to the estimate of damages was correct. Mere depreciation of the property was not the only element for consideration. That might, indeed, be entirely disregarded. The plaintiff was entitled to recover

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because of the inconvenience and discomfort caused to the congregation assembled, thus necessarily tending to destroy the use of the building for the purposes for which it was erected and dedicated. The property might not be depreciated in its salable or market value, if the building had been entirely closed for those purposes by the noise, smoke and odors of the defendant's shops. It might then, perhaps, have brought in the market as great a price to be used for some other purpose. But, as the court below very properly said to the jury, the congregation had the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and it is the discomfort and annoyance in its use for those purposes which is the primary consideration in allowing damages. As with a blow on the face, there may be no arithmetical rule for the estimate of damages. There is, however, an injury, the extent of which the jury may measure.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—38 Hun, 164, 166; 21 N. W. Rep., 631; 136 Mass., 242.

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[336] UNITED STATES, *Plff.*,

v.

THOMAS AMBROSE.

(See S. C., Reporter's ed., 336-341.)

Construction of statute—division of opinion.

1. The words "declaration" and "certificate," in section 5392 of the Revised Statutes, are not used as terms of art or in any technical sense, but in the ordinary and popular sense to signify any statement of material matters of fact sworn to and subscribed by the party charged; the written statement and the oath of the party that it is true, all constitute the declaration or certificate of the statute.

2. On a certificate of division of opinion, we cannot consider a question which is not certified to us by the Judges of the Circuit Court.

[No. 240.]

Argued Apr. 10, 11, 1883. Decided Apr. 23, 1883.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of Ohio.

The history and facts of the case fully appear in the opinion of the court.

Mr. **S. F. Phillips**, *Solicitor-Gen.*, for plaintiff:

As the word "declaration" is not a term of art in section 5392, its meaning is to be taken from the ordinary dictionaries of our language, and of these Worcester defines it as an explicit and open statement.

In this, as one definition thereof, Bouvier and Abbott substantially agree: Tomlin and Burrill confine their explanation of it to that of the common law pleading so called.

I submit that the word "certificate" also is used only in its original sense, as a statement which makes certain some matter of public importance or public business, and at all events covers a paper given officially by the clerk of a court as to matters regularly transpiring in his office.

Messrs. **E. M. Johnson** and *George Hoadly*, for defendant:

Our contention is that the emolument returns, and the accounts are what they purport to be. That they are neither declarations nor certificates, but emolument returns and accounts.

1. Our first proposition is that the law of the United States did not vest in the District Judge, as such, before whom these instruments were sworn, the authority to administer an oath, and therefore that these were unsworn papers, and could not constitute in law a declaration or certificate, such as the statute contemplates.

2. Our next proposition is, that the instruments in question, in their essential character, are neither declarations nor certificates.

The principle governing questions of construction of this character, is the ordinary and familiar proposition that penal laws are to be construed strictly, to which this court gave its unqualified assent in *U. S.* v. *Wiltberger*, 5 Wheat., 85, and *U. S.* v. *Reese*, 92 U. S., 219 (XXIII., 565).

Mr. Justice **Miller** delivered the opinion of the court:

This case comes before us on a certificate of division of opinion between the Judges holding the Circuit Court for the Southern District of Ohio.

The defendant, who was clerk of the circuit and district courts for that district, was indicted for perjury in swearing before the District Judge to his emolument returns, and an account for services rendered for the United States. The indictment consists of four counts, framed under section 5392 of the Revised Statutes, namely:

"Every person who, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than $2,000, and by imprisonment at hard labor not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

In the first three counts of the indictment, after setting out the emolument returns, and their verification by oath of the defendant, the falsity of the accounts and the corrupt perjury of the defendant in swearing to them, each count closes with this language: [339]

"And so the grand jurors aforesaid, on their oaths and affirmations aforesaid, present that he, the said Thomas Ambrose, having taken the said oath, before the said officer who was competent to administer the same, that said written declaration by him so subscribed as aforesaid was true, willfully and contrary to said oath did then and there unlawfully subscribe said matters heretofore set forth, which were material and which he did not believe to be true, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

A demurrer was filed to the whole indictment, on the ground relied on here, also, that the paper to the truth of which defendant swears, as it is

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set forth in the indictment, is neither a *declaration*, as it is charged to be in the first three counts, nor a *certificate*, as charged in the last, within the meaning of those words in section 5392. And in regard to this question, as it applies to each count, the Judges of the court have sent us the following certificate:

"Circuit Court of the United States, Southern District of Ohio.

The United States } 1472. Indictment.
v. }
Thomas Ambrose. }

This cause coming on to be heard before the Honorable Noah H. Swayne and Honorable John Baxter, Judges of said court, sitting therein upon the demurrer of defendant to the indictment, certain questions thereupon occurred on said hearing to be decided by the court, to wit:

First. Whether the instrument set forth in the first count of indictment, and alleged therein to have been subscribed and sworn to by the defendant, was a written declaration within the meaning of section 5392 of the Revised Statutes of the United States.

Second. Whether the instrument set forth in the second count of the indictment, and alleged therein to have been subscribed and sworn to by the defendant, was a written declaration [340] within the meaning of section 5392 of the Revised Statutes of the United States.

Third. Whether the instrument set forth in the third count of indictment, and alleged therein to have been subscribed and sworn to by the defendant, was a written declaration within the meaning of section 5392 of the Revised Statutes of the United States.

Fourth. Whether the instrument set forth in the fourth count of the indictment, and alleged therein to have been subscribed and sworn to by the defendant, was a written certificate within the meaning of section 5392 of the Revised Statutes of the United States.

Upon which said questions the Judges aforesaid were divided in opinion.

It is thereupon ordered that the said points of disagreement, stated as above, under the direction of said Judges, be certified under the seal of the court to the Supreme Court of the United States at their next session."

We do not think the words *declaration* and *certificate*, as used in the section of the Revised Statutes on which this indictment is founded, are used as terms of art, or in any technical sense, but are used in the ordinary and popular sense to signify any statement of material matters of fact sworn to and subscribed by the party charged.

Indeed, the word "declaration," as a word of art in the law, is generally used to signify the plea by which a plaintiff in a suit at law sets out his cause of action, as the word "complaint" is in the same sense the technical name of a bill in chancery.

The fact that in many Acts of Congress cited by counsel that body has used the word to signify a statement in writing, whether sworn to or not, as the foundation in many cases of official action, or as preliminary to the assertion of rights by the party who makes the declaration, is far from proving that the use of the word in the Act concerning perjury is limited to these cases. The inference is strong the other way, for the word is used in the cases cited in regard to so many and such diverse transactions, that it can, in view of them all, have no other meaning than what is attached to it in ordinary use. And in all these instances it is equivalent to a [341] statement of facts material to the matter in hand.

The paper or statement of the emolument account, the falsity of which is the foundation of the charge, is set out, and if in the charging clause of the indictment it is described by a word equally applicable to other instruments, no harm can come to defendant, since he is precisely informed as to the identical writing which is alleged to be false, and which he swore to be true. Nor can he be misled in any way, because what he says in that writing is, in the correct use of language, his sworn declaration on that subject.

But the perjury in all such cases consists in the oath by which the party indicted swears to the truth of some matter, and this oath may be said to be the false statement of the statute. Or, in another sense, it may be said that the written statement and the oath of the party that it is true, all constitute the *declaration* or *certificate* of the statute, for the falsity of which he is chargeable with perjury and liable to punishment. The previously prepared writing, his oath to its truth, or the whole taken together, is, in our opinion, a declaration of the party within the meaning of the statute, and may be so well described in the indictment.

We are quite satisfied that, as set forth in this indictment, these are material matters under the statute, and if defendant did not believe them to be true when he swore to and subscribed the statement that they were true, that he is guilty of perjury, as declared in section 5392, and we think the word "declaration" correctly defines such statement. The same rule of construction is applicable to the word "certificate" used in the statute.

It is attempted in argument to raise the question whether the Judge of the district court had authority to administer the oath in which the perjury was committed.

But it is clear that no such question is certified to us by the Judges of the Circuit Court, and we cannot consider it. *U. S.* v. *Briggs*, 5 How., 208; *Dennistoun* v. *Stewart*, 18 How., 568 [59 U. S., XV., 490].

We answer all the questions submitted to us in the affirmative, and it will be so certified to the Circuit Court.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WILLIAM H. ELLIS, Master, AND ROBERT [342]
A. STEWART AND JOHN STEWART,
Owners of the ship TORNADO, *Appts.*,
v.
ATLANTIC MUTUAL INSURANCE COMPANY OF NEW YORK ET AL.

(See S. C., "*The Tornado*," Reporter's ed., 342-352.)

Contract of affreightment, when dissolved by ship being disabled.

*Where a vessel, before she breaks ground for a voyage, is so injured by fire that the cost of her re-

*Head note by *Mr. Justice* BLATCHFORD.

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pairs would exceed her value when repaired, and she is rendered unseaworthy and incapable of earning freight, a contract of affreightment for the carriage of cotton by her to a foreign port, evidenced by a bill of lading, containing the usual and customary exceptions, and providing for the payment of the freight money on the delivery of the cotton at that port, is thereby dissolved, so that the shipper is not liable for any part of the freight money, nor for any of the expenses paid by the vessel for compressing and stowing the cotton.

[No. 237.]

Argued Apr. 6, 9, 1883. Decided Apr. 30, 1883.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The history and facts of the case appear in the opinion of the court.

Messrs. **Thomas J. Semmes** and *Richard De Gray*, for appellants:

"The ship-owner has a right to hold a cargo once shipped on board his vessel, and to carry it to its destination, although circumstances may occur which will cause great delay, and perhaps great diminution of value."

Pars. Adm. & Ship., Vol. I, pp. 158-9; see, also, *Clark* v. *Ins. Co.*, 2 Pick., 104; *Bartlett* v. *Carnley*, 6 Duer, 195; *Campbell* v. *Connor*, 70 N. Y., 424.

"It is now well settled that as soon as he has the goods on board, and perhaps as soon as he has taken charge of them, he has a right to retain them and carry them on."

1 Pars. Adm. & Ship., p. 179; *Hayes* v. *Campbell*, 55 Cal., 424; *Bulkley* v. *Cotton Co.*, 24 How., 392 (65 U. S., XVI., 601); *The Bird of Paradise*, 5 Wall., 555 (72 U. S., XVIII., 664); *Pearson* v. *Goschen*, 17 C. B. (N. S.), 370; *Hubbell* v. *Ins. Co.*, 74 N. Y., 251.

It is well settled that an actual loss of freight arises only when the circumstances are such as to render the ultimate earning of freight absolutely impossible or practically hopeless; as when the cargo itself is lost, or there are no means of forwarding it, in case of the loss of the vessel, or similar decisive circumstances.

Hubbell v. *Ins. Co.*, 74 N. Y., 252; *Shipton* v. *Thornton*, 9 Ad. & El., 834; *Kidston* v. *Ins. Co.*, L. R., 2 C. P., 357; *Hugg* v. *Ins. & Bkg. Co.*, 7 How., 595; *Hickie* v. *Rodocanachi*, 4 Hurl. & N., 455; *Jordan* v. *Ins. Co.*, 1 Story, 342; *McGaw* v. *Ins. Co.*, 23 Pick., 405; *Saltus* v. *Ins. Co.*, 14 Johns., 138; *Clark* v. *Ins. Co.*, 2 Pick., 104; 2 Pars. Mar. L., 388; *Lord* v. *Ins. Co.*, 10 Gray, 115.

Messrs. **P. Phillips, W. H. Phillips** and *J. McConnell*, for appellees:

Freight commences from the breaking of ground. The ship begins to earn when she begins to move, and we cannot introduce new principles.

Curling v. *Long*, 1 Bos. & P., 634; 3 Kent, Com. (marg.), 224; Macl. Mer. Ship., 455, 458; *Bailey* v. *Damon*, 3 Gray, 94.

"If the ship does not begin her voyage at all, does not break ground, no freight can be payable."

1 Pars. Adm. & Ship., 220; Abbott, 12th Lond. ed., 1881, p. 391; *Burgess* v. *Gun*, 3 Harr. & J., 225; Smith, Merc. L., 308; *Bailey* v. *Damon*, 3 Gray, 94.

[343] *Mr. Justice* **Blatchford** delivered the opinion of the court:

This is a libel in admiralty against the cargo of the ship Tornado, brought by the master and owners of that vessel, to recover freight money The district court and, on appeal, the circuit court, dismissed the libel. The libelants have appealed to this court. The material facts found by the circuit court are these: on the 24th of February, 1878, the ship, while moored at the wharf in New Orleans, and bound on a voyage to Liverpool, England, and before she had broken ground for said voyage, was discovered to be on fire in her hold. Her master had given bills of lading for the transportation from New Orleans to Liverpool, with the exceptions usual in bills of lading, of 5,195 bales of cotton, of which 5,008 had been put on board, one hundred sixty-four were on the levee, and twenty-three had not reached the levee. Water was pumped into the ship to extinguish the fire and, on the 26th, near six o'clock, P. M., being filled with water, she sank to the bottom of the river alongside of the wharf, a part of her bulwarks remaining above water. While so resting upon the bottom of the river, the ship, cargo and freight were, on the 27th, libeled in the district court, for salvage, by the New Harbor Protection Company, and about two o'clock P. M. of that day the marshal, by virtue of a warrant of seizure issued by said court on said libel, took possession of the ship and cargo. On the 28th, about noon, the ship was pumped out and raised alongside of the wharf, and the discharge of the cargo on board was commenced, all of it being damaged by water, and some of it by fire, three hundred thirty-six bales having been removed by the salvors in an undamaged condition before the ship sank but after the fire was discovered; but salvage was claimed and allowed on the entire cargo. On the same day, the proctor for the salvors filed in the district court a motion in writing, suggesting that the whole cargo then being discharged from the ship was greatly damaged by water and some of it by fire and water, and would in all probability have ultimately to be sold, being in an unfit condition to be sent to its destination, and an order of the court was thereupon made directing a sale of the cargo, by the marshal, upon the levee as it came out of the ship, on two days' advertisement, in such lots as might accumulate from day to day. On the [344] same day, an application was made to the court by the master of the ship, in which he represented that he was desirous and entitled to bond the ship and cargo, and asked for a rule upon the libelant to show cause on the next day, March 1, why the order to sell the cargo should not be rescinded, and the master be allowed to bond the cargo. On March 1 the rule came on for hearing. The proctor for the salvors, and counsel representing the insurers of the cargo, appeared and resisted the rescinding of the order of sale, and counsel appeared for the master, who filed a formal claim to the ship and cargo. On the trial of the rule, witnesses were examined orally before the Judge, among them various representatives of the underwriters on the cargo, who were called as witnesses by the proctor for the salvors, and who testified that if their interest were to be consulted they preferred that the cotton should be sold by the marshal as it came out of the ship, and that the master should not be permitted to bond the cotton. The counsel for the insurers of the cargo then asked leave to be heard on their behalf. To this the counsel for the master and claimant objected,

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and insisted that counsel for the underwriters on the cargo could not be heard until after the proof of abandonment to them by the owners of the cargo and acceptance of the abandonment. Thereupon, Mr. Palfrey, President of the Factors' and Traders' Insurance Company of New Orleans, which was one of the companies represented by said counsel, and one of the witnesses who had been called to the stand as above stated, was recalled by said counsel and testified that so far as his company was concerned the loss on the cargo had been paid or ordered to be paid, and said company had become the owner of the cotton insured by it, and abandonment thereof had been made and accepted by his company. After this said counsel was allowed to and did make an oral argument in behalf of the underwriters, in opposition to the motion to rescind the order to sell which had been obtained by the salvors, but no pleadings were filed in behalf of the underwriters. Upon the trial of the rule evidence was also taken, by order of the court, in relation to the condition of the cargo, and whether the same was or was not a total loss. On March 5, and before the district court had made [345] any decision or order on the rule to rescind the order for the sale of the cotton, a proctor representing underwriters at Lloyds, by leave of the court, filed an intervention for the interest of the insurers of the freight on the cargo, in which it was prayed that the order for the sale of the cargo be rescinded. This intervention was supported by affidavits filed by the interveners and by a brief of the proctor. Afterwards, on March 6, after consideration of the rule taken by the master of the ship to rescind the order of sale, and of the evidence and arguments thereon, and of the last named intervention, and of the affidavits and brief submitted therewith, the court ordered that the master be allowed to bond the ship and such of the cotton then stored in the levee steam cotton-press as was in good order, amounting to five hundred twenty-three bales, and that the remainder of the cargo on board the ship or upon the levee, which was more or less damaged, be sold by the marshal after three days' notice, and all questions of freight were reserved by the court, and the court appointed a trinity master to advise and assist in making sale of the cotton. On the 19th of March, the underwriters filed their claim, claiming all of the cargo, and procured an order from the Judge of the District Court to be entered on their claim, suspending the right given to the master, on the 6th of March, to bond such of the cotton as was stored in the levee cotton-press, to wit: about five hundred bales, until the further order of the court. On March 26, the master not having bonded the cotton, a rule was taken and duly served on him to show cause why the order of March 6, so far as it allowed him to bond a portion of the cotton, should not be rescinded and the movers of the rule, the insurers of the cargo, be allowed to bond the same. The rule was heard on March 27, the movers of the rule and the master being represented by their respective counsel, and was by the court made absolute, without opposition, and the order allowing the master to bond said portion of the cargo was rescinded, and the movers of the rule were allowed to bond the same.

On the 30th of March, the present libel was filed. The unsold cargo and the proceeds of that which had been sold were then in the custody of the marshal, in the suit for salvage. [346] The libel recites the proceedings above mentioned, and alleges that the cotton might have been picked, dried and rebaled, and sent to its destination and freight have been earned thereon, but that the application of the master to bond the cargo was refused, owing to the opposition of the libelant for salvage, and especially to the opposition of the underwriters on the cargo; and that, under the contract of carriage, it was the right as well as the duty and the desire of the libelants to pick, dry and rebale so much of the cotton as might require it, and which could easily have been done, and to carry it to its destination and earn the freight money for carrying it, which they had been unable to do because they had been denied the right to bond it, owing to the opposition of the libelant for salvage and of the underwriters on the cargo, resulting in the taking away of the cargo entirely from the master, in consequence of which the entire freight money agreed on became due, as well as money paid by the libelants for compressing and stowing the cargo in the vessel, and other expenses incident thereto, and for railroad charges, for all of which the libel claims a lien on the cargo and on the proceeds of sale.

The circuit court found the following further facts: the libelants paid for compressing the cargo before it was put on board and for stowing it on board, and other expenses incident thereto, $14,278.26. The gross freight on the cargo, had it been delivered at its destination in Liverpool, as required by the bills of lading, would have been £4,169.13.1. Of the cotton, five hundred twenty-three bales were in an undamaged and sound condition, being the twenty-three, the one hundred sixty-four and the three hundred thirty-six before mentioned. In consequence of the fire, and as a result thereof, the ship was so badly damaged that the cost of her repairs would exceed her value when repaired, and she was unseaworthy and incapable of carrying freight. The five hundred twenty-three bales were bonded by the underwriters and were appraised at the sum of $19,100. The gross proceeds of the sale of the damaged cotton amounted to $116,000. The purchaser at the marshal's sale shipped to Northern States, in the condition in which it came from the ship, 1,185 bales of the damaged cotton; and 2,896 bales more were picked, dried, rebaled [347] and shipped, part to Liverpool and the rest to Philadelphia. All the damaged cotton taken from the ship was unmerchantable cotton, even after it had been picked, dried and rebaled; that is, it could not be used for making cotton cloth, but could only be used for making felt hats, paper, wadding and such like articles, having lost, by the submersion and drying, a large part of its natural oil, its fiber being injured and its weight reduced.

On the facts so found, the circuit court held that the libelants had no lien on the cargo or its proceeds, for freight or for the money paid by them for compressing and stowing the cargo, and dismissed the libel.

The libelants seek to apply to the present case the principle applied where a voyage partly performed is interrupted by a disaster to the ship, namely, that the ship-owner has a lien on the cargo for the earning of the freight, and so has

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a right to carry the cargo forward by his vessel or some other conveyance, and deliver it and receive his full freight. As in the case of a disaster to the ship in the course of a voyage the whole freight is payable if, by the fault of the owner of the cargo, the master is prevented from forwarding the cargo from an intermediate port to its destination, it is contended in the present case that the libelants have a right to recover the whole agreed freight, because they had a right to send the cargo to Liverpool and earn full freight, and were prevented from doing so by the action of the underwriters, who became, by abandonment, the owners of the cargo. It is also contended that the owners had a right to repair the ship, even though the cost of repairing would exceed her value when repaired.

The law in regard to the respective rights and liabilities of shipper and ship-owner, where cargo has been carried for a part of a voyage, is nowhere better expressed than by *Lord* Ellenborough, in *Hunter* v. *Prinsep*, 10 East, 378, 394: "The ship-owners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the seas, or other unavoidable casualties; and the freighter undertakes that if the goods be delivered at the [348] place of their destination he will pay the stipulated freight; but it was only in that event, *viz.:* of their delivery at the place of destination, that he, the freighter, engages to pay anything. If the ship be disabled from completing her voyage, the ship-owner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded; unless the forwarding them be dispensed with, or unless there be some new bargain upon this subject. If the ship-owner will not forward them, the freighter is entitled to them without paying anything. One party, therefore, if he forward them, or be prevented or discharged from so doing, is entitled to his whole freight; and the other, if there be a refusal to forward them, is entitled to have them without paying any freight at all. The general property in the goods is in the freighter; the ship-owner has no right to withhold the possession from him, unless he has either earned his freight, or is going on to earn it. If no freight be earned and he decline proceeding to earn any, the freighter has a right to the possession." These remarks were made in regard to a voyage partly performed, and interrupted by a disaster, where freight money was claimed *pro rata itineris peracti*. But no case can be found in which freight money has been allowed, where the voyage was not commenced, and the ship was, by a disaster for which the shipper was not at all responsible, put into the situation of the vessel in this case after the contract of carriage was made.

In the present case, the ship was rendered unseaworthy by the fire and incapable of earning freight, and was so badly damaged that the cost of her repairs would exceed her value when repaired. There is no suggestion in the findings that there was any intention of repairing her, and on the facts found it must be presumed she would not have been repaired. All that could have been done, if the cargo had been bonded by the master or ship-owners, in regard to sending it forward, would have been to send it by another vessel. But, although the order of March 6 allowed the master to bond the five hundred twenty-three undamaged bales, and there was no [349] suspension of that order until the 19th of March, they were not bonded.

We are of opinion that, by the disaster which occurred before the ship had broken ground or commenced to earn freight, the circumstances with reference to which the contract of affreightment was entered into were so altered by the supervening of occurrences which it cannot be intended were within the contemplation of the parties in entering into the contract, that the shipper and the underwriters were absolved from all liability under the contract of affreightment. The contract had reference to a particular ship, to be in existence as a seaworthy vessel and capable of carrying cargo and earning freight and of entering on the voyage. All the fundamental conditions forming part of the contract of the ship-owner were wanting, at the time when the earning of freight could commence. In addition, as the result of the fire, and by no fault of the shipper, all but five hundred twenty-three bales of the cotton was rendered unmerchantable and put into such a condition that its owner might well hesitate to incur the expense of sending it to Liverpool. As to the undamaged cotton, the master had an opportunity for thirteen days to bond it, and failed to do so.

The money paid by the ship-owners for compressing and stowing the cotton, and for other expenses incident thereto, must be understood as having been included in the freight money, and to be re-imbursed out of that, and to be money for which, in any event, the shipper of the cotton would not have been liable in addition to the freight money. If the ship-owner was not entitled to the latter, he was not entitled to anything. He took, as to the expenses, the risk of losing them if he lost the freight money. So, the two are bound up together.

It is an inherent element in a contract of affreightment under a bill of lading, that the vessel shall enter on the voyage named, and begin the carriage of the goods shipped, or, as it is technically called, break ground, before a claim to freight money can arise, unless the shipper of the goods, the vessel remaining ready to enter on the voyage, undertakes to reclaim the goods. In the latter case, the circumstances under which the contract was entered into continuing substantially the same so far as respects the vessel, the shipper cannot reclaim the goods [350] without paying at least full freight. But, subject to this qualification, it is a principle of the maritime law, that if a ship does not begin her voyage at all, does not break ground, no freight can be payable. This was laid down and applied in the early case of *Curling* v. *Long*, 1 Bos. & P., 634. That case has never been overruled and no case holding to the contrary is cited or has been found. It is a case directly in point in two particulars, and it will be useful, therefore, briefly to examine it. Some hogsheads of sugar were shipped, under bills of lading, on a vessel while lying in a port in Jamaica, bound for London. Before the vessel sailed she was cut out by privateers and carried to sea, but was recaptured and taken into another port. Under a libel for salvage in the Ad-

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miralty Court of Jamaica the cargo was sold by order of the court, and the net proceeds were remitted to the defendants for the owners of the cargo. The ship-owners had expended money in lading the cargo, according to the usage of the Jamaica trade. They sued the defendants to recover the freight money or the expenses. It was held that they could not recover anything; that the inception of freight was breaking ground; and that the expenses incurred were to be re-imbursed in the freight money or not at all.

The case of *Jones* v. *Holm*, L. R. 2 Exch., 335, was a different case. By a charter-party, a vessel was to go to a specified port and take a specified cargo and deliver it at Liverpool for a specified freight. She went to the port and was partly laden, when she was so damaged by fire that she was scuttled. The cargo was injured and sold, except a small part, not on board, which was forwarded to Liverpool by the master. The vessel was repaired and tendered to take the remainder of the cargo. The charterer refused to supply more cargo, and the vessel obtained a cargo and carried it to England at a less freight than she would have earned for a full freight under the charter-party. In a suit to recover damages for a breach of the charter-party, it was held that the charterer was bound to complete the lading of the vessel.

The authority of the case of *Curling* v. *Long* is recognized in *Bailey* v. *Damon*, 3 Gray, 94; *Burgess* v. *Gun*, 3 Harr. & J., 225; *Clemson* v. [351] *Davidson*, 5 Binn., 392; and in various text books. 3 Kent, Com., 223; 1 Pars. Ship. & Adm., 220; Abb. Ship., 11th Lond. ed., 407; Macl. Ship., 2d ed., 458; Sm. Merc. L., 3d Am. ed., 400.

On principle, this case falls within the rule that where the stipulations of a contract are interdependent, a defendant cannot be sued for the non-performance of stipulations on his part which were dependent on conditions which the plaintiff has not performed. The ship-owner was entitled to freight only for carrying the cargo and delivering it at Liverpool, with the implied covenant that this particular vessel was to take it on board and enter on the voyage. Before that event occurred, this vessel was substantially put out of existence by no fault of the shipper, and he had and could have no benefit from the contract. He had a right, therefore, to treat the contract as rescinded, so far as any liability for freight was concerned. In *Taylor* v. *Caldwell*, 3 Best & Smith, 826, it is laid down as a rule that "In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied, that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance." The reason given for the rule is, that, without any express stipulation that the destruction of the person or thing shall excuse the performance, "That excuse is by law implied, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel." The rule was there applied to excuse the owner of a music hall, which had been burned, from fulfilling a contract to let the use of it. The principle was extended farther in *Appleby* v. *Myers*, L. R., 2 C. P., 651. There the plaintiffs contracted to erect certain machinery on the defendant's premises at specific prices for particular portions, and to keep it in repair for two years, the price to be paid upon completion of the whole. After some portions of the work had been finished, and others were in the course of completion, the premises, with all the machinery and materials thereon, were destroyed by an accidental fire. It was held that both parties were excused from the further performance of the contract, and that the plaintiffs were not entitled to sue in respect of [352] those portions of the work which had been completed, whether the materials used had become the property of the defendant or not. See, Benj. Sales, 3d. Am. ed., sec. 570; *Wells* v. *Calnan*, 107 Mass., 514, and cases there cited.

These principles are so well established that it is only necessary to refer to one case in this court, *Jones* v. *U. S.*, 96 U. S., 24 [XXIV., 644], which recognizes them, in which it is said: "Where an act is to be performed by the plaintiff before the accruing of the defendant's liability under his contract, the plaintiff must prove either his performance of such condition precedent, or an offer to perform it which the defendant rejected, or his readiness to fulfill the condition until the defendant discharged him from so doing, or prevented the execution of the matter which the contract required him to perform. * * * A contract may be so framed that the promises upon one side may be dependent on the promises upon the other, so that no action can be maintained, founded on the written contract, without showing that the plaintiff has performed, or at least has been ready, if allowed by the other party, to perform his own stipulations, which are a condition precedent to his right of action."

On a full consideration of the case, we are of opinion that the decree of the Circuit Court must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WILLIAM P. SINCLAIR AND SAMUEL G. SINCLAIR, Owners and Claimants of the SHIP CONNEMARA AND CARGO, *Appts.*,

v.

BEATRICE MORAN COOPER, Widow of JOSEPH COOPER, Deceased, Owner of the TUG JOSEPH COOPER, JR., and Natural Tutrix of Her Minor Children, EMMA, JOSEPH, HENRY and CECILIA COOPER, JOHN J. WILLIAMS, Master, ET AL.

(See S. C., "*The Connemara*," Reporter's ed., 352-360.)

Salvage service by rescue from fire—excessive decree.

*1. A ship, towed by a steam-tug down a river came to anchor in the evening, and the tug was lashed to her side. In the night, no watch having been set, a passenger on board of her was awakened

Head notes by *Mr. Justice* GRAY.

NOTE.—*What is salvage; who is a salvor; rates of salvage.* See *note* to Stratton v. Jarvis, 33 U. S. (8 Pet.). 4.

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by a smell of smoke arising from a fire, which had broken out in part of the cargo stowed in the poop, and which endangered the ship and cargo. He gave the alarm to the officers and crews of the ship and of the tug; and he and the officers, crew and passengers of the tug, working together, and by means of a steam-pump and hose upon the tug, and unaided by the officers and crew of the ship, put out the fire in twenty minutes. Held, that this was a salvage service, and that the passenger on board the ship, as well as the owner, officers, crew and passengers of the tug, might share in the salvage.

2. Under the Act of Congress of 16th of February, 1875, ch. 77, a decree of salvage by the circuit court is not to be altered by this court for excess in the amount awarded, unless the excess is so great that, upon any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case.

[No. 255.]

Argued Apr. 17, 1883. Decided Apr. 30, 1883.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The history and facts of the case appear in the opinion of the court.

Messrs. **P. Phillips** and **W. Hallett Phillips**, for appellants:

Joseph Cooper and crew are not entitled to salvage compensation, but only to a liberal remuneration *pro opere et labore.*

The Clifton, 3 Hagg. Adm., 117, cited in Abb., Ship. (marg.), 557.

This court defines the elements of salvage service to be: "Danger to property, value, risk of life, skill, labor and the duration of the service."

Post v. *Jones*, 19 How., 161 (60 U. S., XV., 622); *The Henry*, 2 Eng. L. & E., 565.

The service was performed by the tug and her crew, then in the employ of the ship.

It was long doubted whether a tug, while engaged in the service of a ship, could ever claim salvage.

It is well settled that when a tug is so engaged this will greatly diminish the *quantum* of reward.

James, Salvage, 40; Dr. Lushington, on "*The Wm. Brant, Jr.*," 2 Notes of Cas. supp., p. LXVII.

The main ingredient, danger, being absent in ordinary services rendered by tugs, large amounts should not be awarded.

The Birdie, 7 Blatchf., 243; Williams & Br., Adm., 100; *The Blackwell*, 10 Wall., 14 (77 U. S., XIX., 875).

The value of the ship and cargo should not constitute the main consideration in the case.

The Amerique, L. R., 6 P. C., App., 472.

The decree in favor of Evers, a passenger on The Connemara, is not sustainable.

3. Kent, Com., 246; *The Cranston*, 2 Hagg., 3; *The Clarita*, 23 Wall., 18 (90 U. S., XXIII., 152); *The Vrede*, 1 Lush., 322.

Messrs. **Charles W. Hornor**, *J. R. Beckwith* and *Richard DeGray*, for appellees.

Mr. Justice **Gray** delivered the opinion of the court:

This is a libel in admiralty by the owner, master and crew of the steam tow-boat Joseph Cooper, Jr., for salvage on the ship Connemara and cargo. Louis Wurtz and Henry Holser, passengers on the tow-boat, and John Evers, a passenger on the ship, were permitted to file intervening libels. The value of the ship and cargo was agreed to be $286,637. The district court awarded as salvage eight per cent on that value, or $18,930.96; and the owners and claim- [355]
ants of the ship appealed to the circuit court.

The circuit court found the following facts: on the 15th of April, 1879, the ship Connemara, being in the Port of New Orleans, with her cargo on board, consisting chiefly of pressed cotton, and bound on a voyage for Liverpool, England, engaged the tow-boat Joseph Cooper, Jr., to tow her to the mouth of the Mississippi River, and was by her towed about twenty-six miles down the river, and came to anchor about eight o'clock in the evening opposite the Belair plantation. About eleven o'clock at night, the ship, with the tow-boat lashed to her side, was lying with her bow to the current and her stern to the wind, which was blowing stiffly; no watch had been set; and the two mates and the boatswain of the ship were under the influence of liquor, but the captain and the rest of the crew were sober. Evers, a passenger on board the ship, being then asleep in the second mate's cabin, was awakened by a smoke of burning cotton, sprang from his berth, and gave the alarm to the officers and crews of the ship and of the tow-boat. The fire was not in the hold, but in the poop above the main deck, and near the door, which could be opened by raising the latch; and the fire, when discovered, was confined to three bales of cotton, a spare sail, and two coils of tarred rope. There were one hundred and twenty-seven bales of cotton stowed in the poop. The fire was not caused by the fault of the tow-boat, nor by any defect in her equipment or management. The tow-boat had on her deck a pump worked by steam, and hose long enough to reach the fire on the ship. As soon as the alarm was given, and by the exertions of the tow-boat's officers and crew, of her two passengers and of Evers, the hose was laid from the pump to the deck of the ship, and by their use of this pump and hose the fire was put out in fifteen or twenty minutes, without any damage to ship or cargo, beyond the burning of the sail and the two coils of rope, the partial burning of the three bales of cotton, and the charring of a part of the upper deck or roof of the poop. In extinguishing the fire, there was no serious risk of loss or damage to the tow-boat, or of injury to life or limb of any of the salvors. No efficient effort was made by the officers or the crew of [356]
the ship to extinguish the fire. The ship had on her deck, within fifteen feet of the fire, two tanks of water, holding four hundred gallons each, one of which was full and the other half full, with six buckets near the fire and seven above, and a pump by which water could have been pumped upon the upper deck. At the time of the fire, the steam-tug Harry Wright was lying about a quarter of a mile off; and there was a telegraph station on the Belair plantation, from which a dispatch could have been sent to the City of New Orleans for aid to put out the fire, and efficient aid might have reached the ship from the city in two hours and a half after notice. The agreed value, as aforesaid, of The Connemara and cargo, and the names and monthly wages of each of the officers and crew of The Joseph Cooper, Jr., were also stated in the findings of fact.

From these facts, the circuit court made and stated the following as conclusions of law: 1. The services rendered by the tow-boat Joseph Cooper, Jr., her officers and crew, and the three

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passengers, Wurtz, Holser and Evers, in the extinguishment of the fire on board the ship Connemara, were a salvage service. 2. A gross salvage on the ship and cargo of $14,198, or six per cent on the value thereof, should be allowed. 3. This salvage should be equally divided, half to the owner of the tow-boat and half to the salvors. 4. The moiety allowed to the salvors should be distributed among them in proportion to their monthly wages, the passengers Wurtz and Evers to rank as pilots, and Holser as a steersman.

A decree was entered accordingly, and the claimants appealed to this court. A motion to dismiss the appeal for want of jurisdiction was made and overruled at October Term, 1880. *The Connemara*, 108 U. S., 754 [XXVI., 322].

The errors assigned are: first, that the facts found do not constitute a salvage service; second, that if a salvage service, it is salvage of the lowest grade, and the amount allowed is exorbitant; third, that the amount allowed to John Evers, he being a passenger on board The Connemara, is not warranted by law.

[357] Neither of the grounds assigned will justify this court in reversing the decree.

If the fire, which had made such headway as to wholly consume the two coils of tarred rope and the spare sail, and to partly destroy three bales of the cotton stowed in the poop, had not been promptly discovered and extinguished, there was imminent danger that it would extend to the rest of that cotton and, fanned by the stiff breeze which was blowing lengthwise of the ship, destroy or greatly damage the ship and the whole cargo. Saving a ship from imminent danger of destruction by fire is as much a salvage service as saving her from other perils of the seas. *The Blackwell*, 10 Wall., 1 [77 U. S., XIX., 870]. The shortness of the time occupied in rescuing the ship from danger does not lessen the merit of the service. *The General Palmer*, 5 Notes of Cases, 159, *n.; The Syrian*, 2 Mar. Law Cas., 387; *Sonderburg* v. *Ocean Tow-boat Co.*, 3 Woods, 146. The danger being real and imminent, it is not necessary, in order to make out a salvage service, that escape by other means should be impossible. *Talbot* v. *Seeman*, 1 Cranch, 1, 42.

The fact that no serious risk was incurred on the part of the salvors does not change the nature of the service, although an important element in estimating its merit and the amount of the reward. As has been well said by *Mr. Justice* Curtis, "The relief of property from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligation to render assistance, and the consequent ultimate safety of the property, constitute a case of salvage. It may be a case of more or less merit, according to the degree of peril in which the property was, and the danger and difficulty of relieving it. But these circumstances affect the degree of the service, not its nature." *The Alphonso*, 1 Curt., C. C., 376, 378.

The contract of the tow-boat and her officers and crew was to tow the ship, and did not include the rendering of any salvage service, by putting out fire or otherwise. Such a service, which, by the use of the steam pump and engine of the tow-boat, rescued the ship from an unforeseen and extraordinary peril, gave the owner, as well as the officers and crew of the tow-boat, a right to salvage. *The William Brandt, Jr.*, 2 Notes of Cases, Supp. LXVII.; *The Saratoga*, Lush., 318; *The Minnehaha*, 15 Moore (P. C.), 133; *S. C.*, Lush., 335; *The Annapolis*, Lush., 355, 361, 372. And no doubt is or could be raised as to the right of the passengers on the tow-boat, whose exertions contributed to putting out the fire, to share in the salvage awarded to her officers and crew. *The Cora*, 2 Pet. Adm., 361; *S. C.*, 2 Wash. (C. C.), 80; *The Hope*, 3 Hagg. Adm., 423. [358]

Evers, the passenger on The Connemara, was also entitled to share in the salvage. A passenger cannot, indeed, recover salvage for every service which would support a claim by one in nowise connected with the ship. In the case of a common danger, it is the duty of every one on board the ship to give every assistance he can, by the use of all ordinary means in working and pumping the ship, to avert the danger. Yet a passenger is not, as the officers and crew are, bound to stand by the ship to the last; he may leave her at any time and seek his own safety; and for extraordinary services, and the use of extraordinary means, not furnished by the equipment of the ship herself, by which she is saved from imminent danger, he may have salvage. *Newman* v. *Walters*, 3 B. & P., 612; *The Branston*, 2 Hagg. Adm., 3, *n.; The Palacia*, 2 Hagg. Adm., 262, 269; *The Vrede*, Lush., 322; *The Pontiac*, 5 McLean, 359, 363; *The Great Eastern*, 2 Mar. Law Cas., 148; *S. C.*, 11 Law Times (N. S.), 516; 3 Kent, Com., 246. The services of Evers were of peculiar value, and involved the use of means outside the ship. His promptness and vigilance gave the alarm, which, by the supineness and neglect of the officers and crew of the ship, might not otherwise have been given in time to save her. This might not of itself have entitled him to reward; but beyond this he exerted himself, as if he had been one of the officers and crew of the tow-boat, in the use of the steam-pump and hose on board of her, by which the fire on the ship was effectually subdued.

It may also be observed that this case comes before us on the appeal of the owners of the ship; and that there is no controversy, either between Evers and the other salvors, or between the salvors who gave their personal exertions and the owners of the tow-boat whose machinery was used, as to the distribution of the salvage. [359]

The services performed being salvage services, the amount of salvage to be awarded, although stated by the circuit court in the form of a conclusion of law, is largely a matter of fact and discretion, which cannot be reduced to precise rules, but depends upon a consideration of all the circumstances of each case. *The Blaireau*, 2 Cranch, 240, 267; *The Adventure*, 8 Cranch, 221, 228; *The Emulous*, 1 Sum., 207, 213; *The Cora*, 2 Pet. Adm., 361, 375; *S. C.*, 2 Wash. (C. C.), 80; *Post* v. *Jones*, 19 How., 150, 161 [60 U. S., XV., 618, 622].

In *The Sybil*, 4 Wheat., 98, *Chief Justice* Marshall said, "It is almost impossible that different minds, contemplating the same subject, should not form different conclusions as to the amount of salvage to be decreed and the mode of distribution." And by the uniform course of decision in this court, during the period in which it had full jurisdiction to reverse decrees

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in admiralty upon both facts and law, as well as in the Judicial Committee of the Privy Council of England, exercising a like jurisdiction, the amount decreed below was never reduced, unless for some violation of just principles, or for clear and palpable mistake or gross over-allowance. *Hobart* v. *Drogan*, 10 Pet., 108, 119; *The Camanche*, 8 Wall., 448, 479 [75 U.S., XIX., 397, 405]; *The Neptune*, 12 Moore (P. C.), 346; *The Carrier Dove*, 2 Moore (P. C. N. S.), 243; *S. C.*, Brown. & Lush., 118; *The Fusilier*, 8 Moore (P. C. N. S.), 51; *S. C.*, Brown. & Lush., 341.

By the Act of Congress of 16th February, 1875, ch. 77, the appellate power of this court is restricted within narrower bounds; its authority to revise any decree in admiralty of the circuit court is limited to questions of law; and the finding of facts by that court is equivalent to a special verdict, or to facts found by the court in an action at law when a trial by jury is waived. *The Abbotsford*, 98 U. S., 440 [XXV., 168]; *The Francis Wright*, 105 U.S., 381 [XXVI., 1100]; *Sun Ins. Co.* v. *Ocean Ins. Co.* [*ante*, 337].

The effect of this change may be illustrated [360] by referring to the revisory power of the courts in actions at law tried by a jury. The facts are decided by the jury in the first instance. If the jury return a general verdict, clearly against the weight of evidence, or assessing exorbitant damages, the court in which the trial is had may set aside the verdict and order a new trial. But a court of error, to which the case is brought by bill of exceptions or appeal on matter of law only, cannot set aside the verdict, unless there is no evidence from which the conclusion of fact can be legally inferred. *Parks* v. *Ross*, 11 How., 362; *Schuchardt* v. *Allens*, 1 Wall., 359 [68 U. S., XVII., 642].

Before the Act of 1875, this court, upon an appeal in a case of salvage, gave the same weight and no more, to the decree of the court below, that a court of common law would allow to the verdict of a jury; and might revise that decree for manifest error in matter of fact, even if no violation of the just principles which should govern the subject was shown. *Post* v. *Jones* [*supra*]. Since the Act of 1875 [18 Stat. at L., 315], in cases of salvage, as in other admiralty cases, this court may revise the decree appealed from for matter of law, but for matter of law only; and should not alter the decree for the reason that the amount awarded appears to be too large, unless the excess is so great that, upon any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case.

In the present case, a vessel and cargo of great value were rescued from imminent danger by the energetic efforts of the salvors; and the amount of salvage awarded is less than one sixteenth of the value of the property saved. Although upon the circumstances of the case, so far as they can be brought before us by the summary of them in the findings of fact by the circuit court, we might have been better satisfied with an award of a smaller proportion, we cannot say that the amount awarded is so excessive as to violate any rule of law.

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 115.

ADRIATIC FIRE INSURANCE COMPANY ET AL., *Plffs. in Err.*, [361]
v.
JOHN P. TREADWELL.

(See S. C., Reporter's ed., 361-367.)

Joint promise, what is.

An agreement among several insurance companies to employ counsel and unite in defending certain actions, and contribute to pay the expenses *pro rata* does not import a joint promise of compensation from the companies to the counsel employed, nor make them jointly liable to him for his charges for defending such actions.

[No. 250.]

Argued Apr. 13, 1883. Decided Apr. 30, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

This action was brought in the court below, by the defendant in error, to recover the sum of $15,000 alleged to be due him for professional services as an attorney and counselor.

The trial below having resulted in a verdict and judgment in favor of the plaintiff for $8,293.92 including interest and costs, the defendants sued out this writ of error.

The history and facts of the case more fully appear in the opinion of the court.

Mr. **John E. Parsons**, for plaintiff in error:

1. In various forms of expression the agreement provides that the companies shall only be liable *pro rata*. This is defined to be in proportion to amount insured by each to the total amount insured by all. Such an agreement is several, not joint.

Ernst v. *Bartle*, 1 Johns. Cas., 319; *Ludlow* v. *McCrea*, 1 Wend., 228; *Peckham* v. *North Parish*, 16 Pick., 274; *Fell* v. *Goslin*, 11 Eng. L. & Eq., 554.

2. The committee had no authority outside of the agreement. Their agency was special. Where a special agency is created, the principals cannot be held to a larger liability than that which they have agreed to.

The Floyd Acceptances, 7 Wall., 666 (74 U. S., XIX., 169); *Martin* v. *Farnsworth*, 49 N. Y., 555.

3 No prudent insurance company would sign a different agreement. To do so might result in exposing a company whose insurance amounted to $2,500, the Lafayette Company, for example, to a liability without limit.

Nor is it answer to this, to say that either company, compelled to pay the whole expense incurred by the commitee would have a right of contribution against other companies. It was to protect against the necessity of resorting to claims for contribution, that the agreement was framed as it was. To sanction such a view of its practical effect, is to pervert it into a joint, instead of a several agreement.

Messrs. **Luther R. Marsh** and *William G. Wilson*, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

This action was brought by the defendant in error, to recover compensation for professional services as an attorney and counselor at law, rendered, as alleged, at the instance and request of the plaintiffs in error, and each of them, as well as of sundry other corporations not inhabit-

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ants of the Southern District of New York or of the State of New York, nor found therein, and, therefore, not joined, as defendants below, in and about the defense of certain suits brought against several of them in Massachusetts, but in which all had a common interest, and for which it is alleged these Companies, including the plaintiffs in error, jointly and severally promised to pay what said services were actually worth.

The cause was tried by a jury and resulted in a verdict and judgment for the plaintiff below, to reverse which, for errors of law alleged to have occurred in the rulings of the court during the trial and presented in a bill of exceptions, this writ of error is prosecuted.

The plaintiff below put in evidence an agreement in writing, signed by fifteen insurance companies, including the defendants, a copy of which is as follows:

"*In Re* Taylor, Randall & Company
v.
The St. Paul Fire & Marine Insurance Company *et al.*

The undersigned Insurance Companies, having policies outstanding issued to Taylor, Randall & Company, upon property at Central Wharf, Boston, upon which claims have been made [363] against said Companies, do, in consideration of one dollar, by each paid to the other, and divers other good and valuable considerations, mutually covenant and agree to and with each other as follows, that is to say: the said Companies will unite in resisting the claim made upon said policies, and on each thereof, and in the defense of any and all suits and legal proceedings that have been or may be instituted against any of said Companies upon any of said policies, and will, when and as required by the committee hereinafter mentioned, contribute to and pay the costs, fees and expenses of said suits and proceedings *pro rata*; that is to say, each Company shall pay such proportion of said costs, fees and expenses as the amount insured by said Company shall bear to the whole amount insured on said property by all the Companies subscribing to this agreement. The management and conduct of said resistance to said claims and defense of said suits and proceedings shall be and is fully intrusted to and devolved upon a committee to be composed of W. H. Brazier and James R. Lott, of the City of New York, Charles W. Sproat, of the City of Boston, L. S. Jordan, of the City of Boston, which committee shall have full power and authority to employ counsel and attorneys to appear for said Companies and each thereof, and defend said suits and legal proceedings, and to employ other persons for other services relative thereto, and to assess upon and demand and receive from such Companies, from time to time, as such committee shall deem proper, such sum or sums of money for the compensation of such counsel and attorneys, and such other persons, and all other expenses of such defense of said suits as said committee shall deem necessary and expedient, such assessment upon and payment by each of said Companies to be *pro rata* as above mentioned.

Each and every of said Companies shall fully and faithfully adhere to this agreement, and shall refrain from any act or proceeding in reference to such claims or suit, or the defense thereof, that can or may in anywise defeat, obstruct or interfere with the acts or proceedings of said committee relative thereto, and shall at all times furnish to said committee any and all papers, information and assistance in and about such management and conduct of such resistance and defense as may be in the possession or power of said Companies respectively, and as may be desired by said committee.

In witness whereof, the said Insurance Companies have subscribed this agreement, this 24th [364] day of April, 1874."

Prior to the execution of this agreement, suits had been commenced against some of the Companies, other than the plaintiffs in error, in Boston, in one of which the agreement itself is entitled; and the defendant in error had been employed to defend them. After the agreement had been signed, the committee named in it employed the defendant in error on behalf of all the Companies parties to it. He testified that the agreement was shown to him and that he accepted the invitation to become the attorney of the Companies. The employment was general, no special terms being fixed, and it is not questioned that it was with full knowledge of the agreement between the Companies, and according to the authority conferred by it upon the committee. The plaintiff below having proved the fact and value of the services rendered, rested his case, at the conclusion of which and afterwards again, after all the evidence had been put in, the defendants below requested the court to instruct the jury to find a verdict for the defendants, on the ground "That the agreement was not one under which any joint liability could be created; that the provisions of the agreement were specific, the parties to the agreement were only to pay severally and *pro rata* any amount that should become due under the agreement."

This instruction the court refused to give, and that refusal is now assigned for error.

The committee appointed by the agreement between the Insurance Companies, were special agents only for the purposes and within the limits declared in it. They had no authority to bind their principals beyond its import, and the limits of that authority were made known to the defendant in error when he accepted employment from them. Whatever authority to bind the Companies in making that employment, had been conferred upon them by the agreement, they in fact exerted. So that the question to be determined is, whether that agreement conferred upon the committee authority to bind the Companies jointly, or jointly and severally, to pay the expenses of the litigation; or, whether they became liable, severally only, [365] each for its proper proportion.

The contract, it will be observed, is between the Companies. No other person is a party. The promises are between them severally. Each binds itself to each of the others. There is no joint undertaking or promise, on the part of all, to anyone else. They "mutually covenant and agree to and with each other." They do agree, indeed, that they "Will unite in resisting the claim made upon said policies, and on each thereof, and in the defense of any and all suits and legal proceedings that have been or may be instituted against any of said Companies upon any of said policies;" but, as to the obligation of payment

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on that account, its nature and extent, the agreement is, that they "Will, when and as required by the committee hereinafter mentioned, contribute to and pay the costs, fees and expenses of said suits and proceedings *pro rata;* that is to say, each Company shall pay such proportion of said costs, fees and expenses as the amount insured by said Company shall bear to the whole amount insured on said property by all the companies subscribing to this agreement." These expressions leave no doubt as to the intention of the parties in regard to the limit of their several liabilities as between themselves.

The management and conduct of this common defense was intrusted to and devolved upon a committee of named persons; and the powers and rights of that committee are expressly defined. They are given full power and authority to employ counsel and attorneys to appear for said Companies and each thereof, and defend said suits and legal proceedings, and to employ other persons for other services relative thereto. They are thus constituted the agents, for the purposes named, of the parties to the contract, and whatever they do within the terms of that agency, which, of course, is not general, but special, binds the parties according to their agreement. The committee is not a party to the agreement, but derives its powers from it and has rights under it, chiefly the right of re-imbursement for expenses and indemnity for obligations legitimately incurred. This right would be implied, if it were not expressed; but if the mode and measure of it are expressly declared, no implication can enlarge its limits. It is, in [366] fact, expressly defined. The committee have, by the further provisions of the agreement, also full power and authority "To assess upon and demand and receive from such Companies, from time to time, as such committee shall deem proper, such sum or sums of money for the compensation of such counsel and attorneys, and such other persons, and all other expenses of such defense of said suits as said committee shall deem necessary and expedient, such assessment upon and payment by each of said Companies to be *pro rata*, as above mentioned." It is very clear, we think, from this language, that for any advances made by the committee for the expenses of the defense, or for any indemnity against any personal liability they may have incurred in conducting it, they could have no personal recourse upon the Companies except by way of assessment upon them severally, each for its own proportion, according to the ratio fixed by the agreement. Such proportion could be enforced by action against each delinquent Company. There is no ground on which the Companies could be made jointly responsible, so that any one or more could be required to make good the default of any of the rest. The fund for the payment of all the obligations contemplated by the agreement is limited, in express terms, to be raised in the mode pointed out in it by a *pro rata* assessment upon each for its individual share.

Such being the relation between the several Companies and the committee, those employed by the latter for the purposes of the agreement can have no greater rights than such as grow out of it. The agency being special, those who claim under it are bound by its limitations; and in the present case the defendant in error, it is admitted, had actual knowledge of them. So that, though the employment by the committee established a privity between him and the parties to the contract, giving him a right to treat the Companies directly as his principals and employers, nevertheless it must be taken to be only to the extent of the authority of the committee under the agreement, and subject to the limitations imposed by it upon the liability of the Companies. He must be considered as relying, if he did not stipulate for the individual [367] liability of the members of the committee, upon their power to raise the fund for the payment of his compensation by the assessment under the agreement; which, being made, he would have a right to enforce; or which, if denied to him wrongfully, would entitle him to his action, as if it had been made, or against the committee for not making it. But there is no ground on which he can claim that the employment of the committee imports a joint promise of compensation from the Companies, in the face of the express restrictions upon the power of the committee to bind them otherwise than severally, each in proportion to its interest. The defendant in error is and can be in no better position by reason of the employment by the committee, under the agreement between the Companies, than the committee would have been if they had made the advances required, or than he would have been if he had been a direct party to that agreement, employed by the Companies according to its terms. There is not only nothing in the agreement from which it could be inferred that the Companies were to be sureties for each other, but that inference is expressly negatived by the declaration, according to which each is to be liable for its own separate and proportionate part.

Similar reasoning, leading to like conclusions upon analogous facts, is to be found in many reported cases. We select as illustrations, the following: *Peckham* v. *N. Haverhill*, 16 Pick., 274; *Ludlow* v. *McCrea*, 1 Wend., 228; *Ernst* v. *Bartle*, 1 Johns. Cas., 319, *Howe* v. *Handley*, 25 Me., 116; *Gibson* v. *Lupton*, 9 Bing., 297; *Fell* v. *Goslin*, 21 L. J. (N. S.), Exch., 145.

In our opinion, the court below should have instructed the jury, as requested by the plaintiffs in error, to render a verdict for the defendants below, on the ground that no joint liability had been proven; *and its declining to do so was error, for which the judgment is reversed, with directions to grant a new trial, and it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

E. R. MATTHEWS, Exr. of NARCISSA SCRUGGS, Deceased, AND E. R. MATTHEWS AND JAMES MATTHEWS, Sureties, *Appts.*, [368]

v.

MEMPHIS AND CHARLESTON RAILROAD COMPANY AND JAMES H. VISER.

(See S. C., "*Scruggs' Exr.*, v. *Memphis and Charleston Railroad Company*," Reporter's ed., 368-378.)

Accounting for rents and profits—lien on separate funds—satisfaction of—receiver, when unnecessary.

1. Where a decree establishes a lien for a certain

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amount upon real estate in favor of the party in possession, such party being insolvent, on proceeding to collect the decree with interest, may be compelled by bill in equity to account for and credit on the decree the value of the rents and occupancy of the property since the decree was rendered.

2. Where there are in the hands of the court two funds, the principal and the interest of a decree, and one person has a lien on the interest, and the demand of another is payable out of either principal or interest, a court of equity will direct the payment of the lien of the former out of the interest.

3. Where the interest on a decree represents the income of certain real property, a court of equity having jurisdiction over the enforcement of the decree, may satisfy liens on such income out of such interest.

4. The appointment of a receiver is unnecessary and impracticable, where the property is a decree of the court, of which a receiver could not take possession, but which is virtually in the hands of the court.

[No. 116.]

Submitted Mar. 13, 1883. Decided Apr. 30, 1883.

APPEAL from the District Court of the United States for the Northern District of Mississippi.

The history and facts appear in the

Statement of the case by *Mr. Justice* **Woods:**

On January 8, 1872, a decree was rendered by the Chancery Court of Alcorn County, in the State of Mississippi, in favor of Narcissa Scruggs, one of the appellants, against the [369] Memphis and Charleston Railroad Company, for the sum of $31,666.66, and interest thereon from January 21, 1871. This decree was, on December 14, 1874, affirmed, on appeal, by the Supreme Court of Mississippi, and a decree rendered against the Railroad Company and the sureties on its appeal bond for the amount of the decree of the Chancery Court of Alcorn County, and interest thereon, and $1,588.33 damages, the whole to bear interest until paid.

The transactions which gave rise to the litigation which resulted in this decree were as follows: on July 7, 1857, John W. Scruggs, the husband of said Narcissa, made a contract in writing with the Railroad Company, by which he agreed to erect on its land at Corinth, Mississippi, which was one of the stations on the Company's road, a railroad hotel, and conduct it in a manner acceptable to the Railroad Company, and pay the Company an annual ground rent of $250. It was provided that, should the Railroad Company at any time become dissatisfied with the manner in which the hotel was carried on, the right was reserved to it to take possession thereof by paying Scruggs its value; and if Scruggs became dissatisfied with the schedule or management of the Company, he reserved the right to surrender the improvements put by him on the land, and to require the Company to pay their value at the time of surrender.

Scruggs erected a hotel building according to the contract, and kept therein a boarding-house for the officers and *employés* of the Railroad Company, and a house of refreshment for travelers, until April 21, 1871. About that time, he conveyed the hotel building and other improvements by him put upon the land, and his leasehold in the land, to his wife, Narcissa. On the day just mentioned, Scruggs and his wife and the president of the Railroad Company agreed with each other that the lease should cease and determine, and the property should be surrendered to the Railroad Company. And as there was some dispute between the parties in reference to the construction of the contract of July 7, 1857, they agreed to submit to arbitrators to decide upon the legal construction of said agreement, and the value of said improvements, and the amount which should be paid therefor by the Railroad Company to Mrs. Scruggs upon the surrender of the premises. [370] All other questions arising under said agreement, whether as to the rights of the party to recover damages or otherwise, were expressly reserved. It was further agreed that the award of the arbitrators should be entered as a decree of the Chancery Court of Alcorn County.

The arbitrators on April 21, 1871, made their award as follows:

"The Memphis and Charleston Railroad Company shall pay to the said Narcissa Scruggs the sum of $31,666.66, in full payment of all the improvements placed on the ground occupied by the Scruggs House on the grounds of said Company, at Corinth, Mississippi, and on payment of said sum of money, the said Narcissa Scruggs shall deliver possession of said hotel to said Railroad Company.

We do further decide and decree, that the true construction of the contract is, that by its terms J. W. Scruggs acquires a perpetual lease on the ground occupied by the said hotel on the payment of the sum of $250 per annum rent, and subject to be defeated by the Memphis and Charleston Railroad Company only on the condition that Scruggs failed to keep a first rate eating-house, and by the said J. W. Scruggs, on condition that said Memphis and Charleston Railroad failed to use said hotel as an eating-house.

We do further determine, that from the evidence in the case and the articles of submission and contract, that the sum to be paid by the Memphis and Charleston Railroad Company to said Narcissa Scruggs, is, as heretofore mentioned, the value of the property surrendered to the Memphis and Charleston Railroad Company."

The Railroad Company refused to pay the award or to take possession of the property. Whereupon, on May 2, 1871, Narcissa Scruggs filed her bill in the Chancery Court of Alcorn County to enforce the performance of the award. After the bringing of the bill, the counsel of the parties filed in the case an agreement in writing, as follows:

"In the above case it is agreed that the amount due to the defendant as ground-rent for [371] the land upon which the Corinth Hotel is built, as specified in the lease to J. W. Scruggs, was not included in the award by the arbitration; and it is agreed that the amount due for the same for said rent shall be deducted from whatever amount may be found to be due by the award of said arbitrators; and that the said Scruggs shall be permitted to set off as against said rents, any amount due him by said Railroad for board of *employés*, etc., the said amount to be adjusted by reference to the Master of the Chancery Court."

The litigation commenced by this bill resulted in the decree of the Supreme Court of Mississippi above mentioned. In the meantime, to wit: on August 13, 1871, John W. Scruggs had died.

On January 8, 1875, upon an attempt by Mrs.

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Scruggs to enforce the payment of this decree by execution, the bill in the present case was filed by the Railroad Company in the Chancery Court of Alcorn County. The bill averred that the decree of the Alcorn Chancery Court above mentioned, which was affirmed by the Supreme Court of Mississippi, established a debt in favor of Mrs. Scruggs against the Railroad Company for $31,666.66, with interest from April 21, 1871, and fixed that date for the surrender of the premises by Mrs. Scruggs to the Railroad Company and gave her a lien on the premises for the payment of the decree, and upon failure of the Railroad Company to pay the same within thirty days ordered a sale of the property, and that the decree left Mrs. Scruggs as a mortgagee in possession until the sum above mentioned was paid. The bill further averred that the decree should be reduced by the ground rents due the Railroad Company up to April 21, 1871, and for the use and occupancy, rents and profits of said premises, from that date up to the filing of the bill, which had been enjoyed and received by Mrs. Scruggs, amounting in all to the sum of $25,000. The bill averred that Mrs. Scruggs had caused an execution to be issued against the Railroad Company and the sureties on its appeal bond to enforce collection of the entire decree; that she was insolvent, and if allowed to collect the decree in full, the credit to which the Railroad Company was entitled [372] would be a total loss. The prayer of the bill was for an injunction to restrain proceedings on the execution, and for a reference to a master to report the amount due the Railroad Company for ground rents up to April 21, 1871, and the amount of rents of the premises received by Mrs. Scruggs from that date to the date of the master's report, and that the amount reported by the master as due the Railroad Company for ground and other rents might be credited on the decree.

An injunction was allowed as prayed for. Mrs. Scruggs answered the bill, admitting her retention of the possession of the property, but denied her liability for rents, and averred that she was not only entitled to the rents but also to the amount of the decree and the penalty adjudged by the Supreme Court, and interest on both, and set up said decree as *res judicata* and conclusive in her favor.

At this stage of the cause it was, on petition of the Railroad Company, removed to the District Court of the United States for the Northern District of Mississippi.

Upon motion made to the district court, the injunction allowed by the state court was modified so as to restrain the collection of only $20,000 of the decree, and Mrs. Scruggs was required to give, and did give, a refunding bond in the sum of $10,000, for the repayment of any sum which might on final hearing be decreed against her. An execution having issued to collect the residue of the decree, less the said $20,000, the Railroad Company paid the marshal $19,217.

On September 24, 1875, the Railroad Company filed its amended bill and bill of interpleader, in which it averred that one J. H. Viser claimed to have a lien on the decree in favor of Mrs. Scruggs against the Railroad Company, and it brought into court the sum of $2,510, the residue of the decree, not enjoined or not paid to the marshal, and made Viser and Mrs. Scruggs defendants, and prayed that the rights of all parties might be settled and determined.

On December 24, 1875, the district court decreed as follows: that the Railroad Company is entitled to have credited on the amount awarded and decreed, by the Supreme Court of the State, "The reasonable rents which she," Mrs. Scruggs, had "actually received or might [373] have received by prudent management, or for any period she actually, by herself or agent, occupied the hotel and property at Corinth, from May 11, 1871, forward to the date of the receivers taking possession under a former order of this court," and ordered a reference to a master to report the amount with which the decree should be credited by reason of the rents received, and the use and occupancy of said premises by Mrs. Scruggs.

On the next day the court decreed that Viser was entitled to $1,882 of the $2,510 paid in by the Railroad Company on filing its bill of interpleader, that being the amount of a judgment recovered by him against Mrs. Scruggs, and for the payment of which the Railroad Company had been duly summoned as garnishee.

Upon the coming in of the master's report, the court refused to deduct from the decree, in favor of Mrs. Scruggs, any sum for ground-rents due the Railroad Company, and having reduced the amount of rent reported by the master as due from Mrs. Scruggs, applied the residue as a credit upon said decree, and as the result of such application found that there was due from Mrs. Scruggs to the Railroad Company on the refunding bond the sum of $179, for which it rendered a decree in favor of the Railroad Company against Mrs. Scruggs and the sureties on said bond, and also rendered a decree in favor of Viser against the same parties for $3,807.27.

From this decree, Mrs. Scruggs and E. R. Matthews and James Matthews, the sureties on the refunding bond, have appealed to this court.

Mrs. Scruggs now complains of the decree, so far as it concerns the Railroad Company, on the sole ground that it directed the value of the rents and occupancy of the hotel and improvements to be credited upon the decree in her [374] favor against the Railroad Company.

She also insists that the decree against her, in favor of Viser, was erroneous, for reasons which will be found stated in the opinion of the court.

Messrs. **H. P. Branham**, *J. R. Chalmers* and *David P. Lewis*, for appellants.

Messrs. **D. H. Poston**, and *W. Y. C. Humes*, for the Memphis and Charleston Railroad Company, appellee.

Mr. **S. F. Phillips**, for Viser, appellee.

Mr. Justice **Woods** delivered the opinion of the court:

The contention of the appellant is, that having obtained a decree for the value of the hotel and improvements built by John W. Scruggs upon the lands of the Railroad Company, with damages for the appeal, and interest, to be paid upon the surrender by her of the hotel and improvements to the Railroad Company, she was entitled to the payment of her decree with interest, and as long as the Railroad Company failed to pay the decree, was not chargeable

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with the rents or the value of the occupancy of the premises while she retained possession.

We cannot assent to this claim. It appears from the agreement to submit to arbitrators, that both parties, the Railroad Company on the one hand, and John W. Scruggs and Narcissa, his wife, to whom he had conveyed his leasehold and improvements, on the other, had agreed that the property should be surrendered to the Railroad Company, and that, in pursuance of the original contract between John W. Scruggs and the Railroad Company, the latter was to pay the value of the improvements. It was mainly to fix the value of these improvements that the reference to arbitrators was made, and it was agreed that on the payment of the sum so fixed Scruggs and his wife should surrender the property to the Railroad Company, and the amount so fixed should "be a lien on said property."

The arbitrators decided that on the payment of the sum awarded by them, Mrs. Scruggs should deliver the possession of the hotel to the Railroad Company.

In her bill filed to enforce this award, Mrs. Scruggs prays that the Railroad Company may be compelled to pay the award, and that "her lien for the same in said property may be enforced."

The court in which her bill was filed made a decree to the effect that Mrs. Scruggs had a lien on the property for the amount of said award, with interest thereon from January 21, 1871, ordered its payment within thirty days, and in default of payment, directed that the [375] property should be sold and the proceeds applied to the payment of the amount due on the award. This decree was in all respects affirmed by the Supreme Court of Mississippi.

We think that upon these facts Mrs. Scruggs must in equity be treated as if she was a mortgagee in possession. All the parties and the Chancery and Supreme Courts have treated the sum awarded Mrs. Scruggs as a lien upon the property, and it was decreed and no one disputed that she was entitled to retain possession until her lien was discharged.

Treating her as a mortgagee in possession, she is accountable for the net rents and profits of the estate. If her possession was by tenant, she is accountable for such net rents and profits as she could with reasonable diligence have received. *Moore* v. *Degraw*, 1 Halst. Ch., 346; *Benham* v. *Rowe*, 2 Cal., 387; *Kellogg* v. *Rockwell*, 19 Conn., 446; *Harrison* v. *Wyse*, 24 Conn., 1; *Reitenbaugh* v. *Ludwick*, 31 Pa. St., 131; *Breckenridge* v. *Brooks*, 2 A. K. Marsh. 335; *Tharp* v. *Feltz*, 6 B. Mon., 6; *Anthony* v. *Rogers*, 20 Mo., 281.

There is no equity in the contention of Mrs. Scruggs, that she should receive interest on the debt secured by her lien, and not account for the rents and profits of the property on which her lien rested while it was in her possession.

She says that the Railroad Company might have had immediate possession by paying the amount of the award. So any mortgagee in possession might say that the mortgagor could take possession on paying off the mortgage debt, but this does not excuse the mortgagee from accounting for the rents and profits of the mortgaged property received by him.

It appears that the Railroad Company had ground for refusing to pay the sum awarded by the arbitrators as the value of the property. The only question submitted to the arbitrators was the true construction of the contract between John W. Scruggs and the Railroad Company, and the value of the property, or rather, as the arbitrators understood it, the value of the improvements placed by John W. Scruggs on the land of the Railroad Company. They were not authorized to adjust and settle the accounts between the Railroad Company and Scruggs. When, therefore, Mrs. Scruggs filed her bill to enforce the award, it was admitted by her coun- [376] sel that the matter of the ground-rent was not included in the award, and that the same ought to be deducted from the amount awarded by the arbitrators, and that she should be permitted to set off as against such rents any amount due by the Railroad Company for board of *employés*, the said amount to be adjusted by reference to the master of the court.

The award did not, therefore, settle the controversy between the parties. The Railroad Company was justified in refusing to pay the award until the deductions therefrom, to which it was admitted that it was entitled, should be ascertained, and in defending the suit brought by Mrs. Scruggs to enforce the payment of the entire award. While this litigation was pending, the rents and profits actually received in cash by her were $10,514, and she herself occupied the premises in person for two years.

The court below found that there was due the Railroad Company, by reason of rents incurred by Mrs. Scruggs and the occupancy of the premises by her, the sum of $17,414.50. The testimony in the record fully sustains this finding. As Mrs. Scruggs insisted that she should have interest on the amount decreed her by the Chancery and Supreme Courts of Mississippi, she was not entitled also to claim the rents of the premises.

The case, therefore, stands thus: the Railroad Company was indebted to Mrs. Scruggs in the sum of $31,666, which was a lien upon the premises, and Mrs. Scruggs was in possession. On the other hand, the amount of the decree and interest, it was admitted, were subject to be reduced by the ground-rents due to the Railroad Company. Mrs. Scruggs, who was shown to be insolvent, was proceeding to collect by execution the full amount of her decree, with interest; the Railroad Company was compelled, in order to protect itself from loss, to file the bill in this case to have the decree credited with the amount due for the ground rents. While this litigation was pending, Mrs. Scruggs received in cash, rents to the amount of $10,514, and occupied the premises herself two years.

She was clearly liable to account for the rents received by her, and for a reasonable rental while the premises were actually occupied by her. The court below did not charge her with a dollar for which she was not accountable. So [377] far, therefore, as the decree relates to the controversy between her and the Railroad Company, it is a just and proper decree.

It remains to consider that part of the decree by which the debt claimed by J. H. Viser was ordered to be paid out of the money due from the Railroad Company on the decree in favor of Mrs. Scruggs.

After the bill of interpleader, filed by the

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Railroad Company, Viser filed his cross-bill against the Company and Mrs. Scruggs, in which he alleged that, on May 11, 1869, John W. Scruggs and Narcissa, his wife, executed to him a mortgage upon the leasehold and improvements thereon, known as the Scruggs House, of which said Narcissa was then the owner, to secure a note dated the same day as the mortgage, made by them for the payment to him of $5,000 twelve months after date, and prayed that the Railroad Company might be compelled to pay to him, out of the moneys due from it to Mrs. Scruggs, the amount due him on said note and mortgage. This relief was resisted by Mrs. Scruggs on the ground that, at the date of the note and mortgage, she was a *feme covert* and incompetent, under the law of Mississippi, to incumber her property for her own or her husbands debts.

In the suit which Mrs. Scruggs brought in the Chancery Court of Alcorn County to enforce the award of the arbitrators, Viser, who had been made a party defendant, had filed his answer and cross-bill, setting up said note and insisting that the mortgage given to secure it was a lien on said property. Upon appeal to the Supreme Court of Mississippi, that court decided that the mortgage was a good lien on the income of the property covered thereby. *Viser* v. *Scruggs*, 49 Miss., 705.

The property covered by the mortgage was represented by the decree rendered in favor of Mrs. Scruggs against the Railroad Company for $31,666. The income of the decree represented by the interest was, as appears by the report of the master, ample to pay the demand of Viser.

There was no application of the income until the court made the final decree in this case. There were then two funds, the principal and the interest of the decree. Viser had a lien on [378] the interest, and the demand of the Railroad Company was payable out of either principal or interest. Following, therefore, the practice of courts of equity in marshaling securities, *Aldrich* v. *Cooper*, 8 Ves., 382, the court directed the payment of Viser's lien out of the interest. In doing this, no injustice was suffered by Mrs. Scruggs. The method adopted for calculating the amount due on the decree was according to the established rules in such cases. The debt due Viser was clearly proven. It was payable out of a fund which in effect was in possession of the court, and the court was right in ordering it to be paid.

It is contended for Mrs. Scruggs that the debt of Viser could only be satisfied by laying hold of the *corpus* of the property by a receiver and through him collecting the income and applying it. But in this case there was no necessity for a receiver for the property and its income was virtually in the hands of the court. The appointment of a receiver was, under the circumstances of the case, unnecessary and impracticable. The property was a decree of court, of which a receiver could not take possession.

Complaint is made by appellants because the decree of the circuit court for the payment of Viser's demand was rendered, not only against Mrs. Scruggs, but against the sureties on the refunding bond given by her. It is said that the bond was payable to the Railroad Company and the court was not justified in rendering a decree in favor of Viser against the sureties.

The bond took the place of $10,000 which was virtually in possession of the court, to do with as justice and equity might require. The court disposed of the sum payable on the bond as if it had been so much money in the registry of the court. It is true the bond was payable to the Railroad Company. But the amount decreed to be paid to Viser was deducted from the sum due the Railroad Company on the refunding bond, and the appellants have no ground of complaint.

We are of opinion that the decree of the Circuit Court was in all respects right and it must, therefore, be affirmed.

Mr. Justice **Field** and *Mr. Justice* **Matthews** did not sit in this case, and took no part in its decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

THOMAS BOESE, as Receiver of the Property of WM. H. LOCKE, *Plff in Errr.*, [379]
v.
WM. KING, JOHN M. GOETCHIUS AND EDWARD E. POOR, Assignees of the Property and Effects of WM. H. LOCKE.

(See S. C., Reporter's ed., 379-388.)

A general assignment, an act of bankruptcy—effect of assignment on title—intent to delay creditors.

1. Under the Bankrupt Act of 1867, an assignment of one's property, to be equally distributed among his creditors under a state statute, constituted itself an act of bankruptcy for which, upon proper proceedings, he could be adjudged a bankrupt, and the property wrested from his assignees for administration in the bankruptcy court.

2. The assignment was sufficient to pass the title from the assignor to his assignees, and was not void as between the parties thereto, simply because it provided for the distribution of the proceeds of the property in pursuance of a statute, none of the provisions of which were then in force.

3. except as against proceedings instituted under the Bankrupt Act, an assignment for the benefit of creditors made without intent to hinder, delay or defraud creditors, is valid, at least for the purpose of securing an equal distribution of the estate among creditors, and the assignees can hold the proceeds of such property deposited by them in another State, against a receiver of the debtor's property appointed in that State.

[No. 235.]

Argued Apr. 5, 6, 1883. Decided Apr. 30, 1883.

IN ERROR to the Supreme Court of the State of New York.

The history and facts of the case fully appear in the opinion of the court.

Mr. **C. Brainbridge Smith**, for plaintiff in error.

Messrs. **M. W. Divine** and *A. P. Whitehead*, for defendants in error.

NOTE.—*Assignment with preferences; when valid; when not.* See *note* to Marbury v. Brooks, 20 U. S. (7 Wheat.), 556.

Bankrupt and insolvent laws of State, constitutionality of; U. S. Statute suspends state bankrupt laws; discharge in foreign country, no bar. See *note* to Sturges v. Crowninshield, 17 U. S. (4 Wheat.), 122.

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Mr. Justice **Harlan** delivered the opinion of the court:

We are to consider in this case whether the final judgment of the Court of Appeals of New York has deprived plaintiff in error of any right, title, or privilege under the Constitution or laws of the United States.

This question arises out of the following facts, which are embodied in a special finding made by the court of original jurisdiction:

[380] By deed of assignment executed and delivered September 25, 1873, Wm. H. Locke, a citizen of New Jersey, transferred and conveyed to Wm. King, John M. Goetchius and Edward E. Poor, and the survivor of them and their and his heirs and assigns, all of his property of every kind and description, except such as was exempt by law from execution, "In trust to take possession of and collect and to sell and dispose of the same at public or private sale in their discretion, and to distribute the proceeds to and among the creditors of the said Wm. H. Locke, in proportion to their several just demands, pursuant to the statutes in such case made and provided, and on the further trust to pay the surplus, if any there be, after fully satisfying and paying the said creditors and all proper costs and charges, to the said Wm. H. Locke."

Although the deed does not, in terms refer to any particular statute, it may be taken—the fact being so found—that the intention of Locke and the assignors was to have a distribution made among the creditors of the former, in conformity with the requirements of an Act of the Legislature of New Jersey, passed April 16, 1846, entitled "An Act to Secure to Creditors an Equal and Just Division of the Estates of Debtors Who Convey to Assignees for the Benefit of Creditors."

That Act provides, among other things, that every conveyance or assignment by a debtor, of his estate, real or personal or both, in trust, to an assignee for the benefit of creditors, shall be made for their equal benefit in proportion to their several demands to the net amount that shall come to the hands of the assignee for distribution; and all preferences of one creditor over another, or whereby one shall be first paid or have a greater proportion in respect to his claim than another, shall be deemed fraudulent and void, excepting mortgage and judgment creditors, when the judgment has not been by confession for the purpose of preferring creditors (sec. 1); further, that the debtor shall annex to his assignment an inventory, under oath or affirmation, of all of his property, together with a list of his creditors, and the amount of their respective claims, such inventory not, however, to be conclusive as to the quantity of the debtor's estate, and the assignee to be entitled to any other property, belonging to the debtor at the time of the assignment, and comprehended within its general terms (sec. 2). Other sections [381] provide for public notice by the assignee of the assignment; for the presentation of claims of creditors; for filing by the assignee, under oath, of a true inventory and valuation of the estate; for the execution by him of a bond in double the amount of such inventory or valuation; for the recording of such bond; for the filing with the clerk, of the court of common pleas of the county of the debtor's residence, within three months after the date of the assignment, of a list of all such creditors as claim to be such, and the amount of their demands, first making it known by advertisement that all claims against the estate must be made as prescribed in the statute, or be forever barred from coming in for a dividend of said estate, otherwise than as provided; for the right of the assignee or any creditor or person interested to accept to the allowance of any claim presented; for the adjudication of such exceptions; for fair and equal dividends from time to time among the creditors of the assets in proportion to their respective claims, and for a final accounting by the assignee in the orphan's court of the county; such settlement and adjudication to be conclusive on all parties, except for assets which may afterwards come to hand, or for frauds or apparent error. Secs. 3–7.

The Act further provides:

"Sec. 11. If any creditor shall not exhibit his, her or their claims within the term of three months as aforesaid, such claim shall be barred of a dividend unless the estate shall prove sufficient after the debts exhibited and allowed are fully satisfied, or such creditor shall find some other estate not accounted for by the assignee or assignees before distribution, in which case such barred creditor shall be entitled to a ratable proportion therefrom.

Sec. 12. Whenever any assignee or assignees, as aforesaid, shall sell any real estate of such debtor or debtors as is conveyed in trust as aforesaid, he or they shall proceed to advertise and sell the same in manner as is now or may hereafter be prescribed in the case of an executor or administrator directed to sell lands by an order of the orphan's court for the payment of the debts of the testator or intestate.

Sec. 13. Every assignee, as aforesaid, shall have as full power and authority to dispose of [382] all estate, real and personal, assigned, as the said debtor or debtors had at the time of the assignment, and to sue for and recover in the proper name of such assignee or assignees, everything belonging or appertaining to said estate, real or personal, of said debtor or debtors, and shall have full power and authority to refer to arbitration, settle and compound and to agree with any person concerning the same, and to redeem all mortgages and conditional contracts, and generally to act and do whatever the said debtor or debtors might have lawfully done in the premises.

Sec. 14. Nothing in this Act shall be taken or understood as discharging said debtor or debtors from liabilities to their creditors who may not choose to exhibit their claims either in regard to the persons of such debtors or to any estate, real or personal not assigned as aforesaid, but with respect to the creditors who shall come in under said assignment and exhibit their demands as aforesaid for a dividend, they shall be wholly barred from having afterwards any action or suit at law or equity against such debtors or their representatives, unless on the trial of such action or hearing in equity the said creditor shall prove fraud in the said debtor or debtors with respect to the said assignment, or concealing his estate, real or personal, whether in possession, held in trust, or otherwise."

The estate which came into the hands of the assignees was converted into money in New Jersey the amount being nearly $200,000, and

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the proceeds for the convenience of the assignees were deposited in a bank in the City of New York. No proceedings in bankruptcy were ever taken against Locke.

On the 3d day of February, 1876, William Pickhardt and Adolph Kutroff recovered a judgment against Locke in the Supreme Court of the City and County of New York for $3,086.85. Upon that judgment, execution was issued and returned unsatisfied. Subsequently, May 27, 1876, in certain proceedings, before one of the Judges of that court, supplementary to the return of execution, Thomas Boese, plaintiff in error, was appointed Receiver of the property of Locke, and having executed a bond for the faithful discharge of the duties of his trust, he obtained an order from the same court giving him authority, as Receiver, to bring an action against the assignees of Locke. Thereupon, June 9, 1876, he commenced this action. It proceeds upon these grounds: 1. That the indebtedness from Locke to Pickhardt and Kutroff arose in New York, where they reside, before the making of said assignment; 2. That the Statute of New Jersey with reference to or under which said assignment was made was, by force of the Bankruptcy Act of 1867 [14 Stat. at L., 517], suspended and of no effect; 3. That the assignment was fraudulent and void by the laws of New Jersey, in that it was made with the intent upon the part of Locke to hinder, delay and defraud his creditors, and in that he had a large amount of money and other property which he fraudulently retained to his own use and did not surrender to the assignees.

[383]

The prayer of the complaint, the allegations of which were fully met by answer, was for judgment against the defendants; that the assignments be adjudged fraudulent and void; and that the defendants be required to account to plaintiff for all the property and money received or to which they are entitled under and by virtue of said assignment. It was conceded at the hearing that defendants had in their hands, of the proceeds of the sale of the assigned property, an amount sufficient to pay the judgment of Pickhardt and Kutroff.

The Supreme Court of New York, both in General and Special Term, sustained the action and gave judgment against the assignees in favor of Boese, as Receiver, for the amount of the demand of Pickhardt and Kutroff. But in the Court of Appeals that judgment was reversed, with directions to enter judgment for the defendants.

We dismiss from consideration all suggestions, in the pleadings, of actual fraud upon the part either of Locke or of his assignees. The court of original jurisdiction found as a fact, and upon that basis the case was considered by the Court of Appeals, that the assignment was executed and delivered by the former and accepted by the latter in good faith and without any purpose to hinder, delay or defraud any creditor of Locke. It is further found as a fact that the assignment was made with the intent, *bona fide*, to make an equal distribution of the proceeds of the trust estate among creditors, in conformity with the local statute. The Supreme Court of New York ruled that the Statute of New Jersey was in its nature and effect, a bankrupt law, and the power conferred upon Congress to establish a uniform system of bankruptcy, having been exercised by the passage of the Act of 1867, the latter Act wholly suspended the operation of the local statute as to all cases within its purview; consequently, it was held, the assignment was not valid for any purpose. The Court of Appeals, recognizing the paramount nature of the Bankrupt Act of Congress, and assuming that the 14th section of the New Jersey Statute, relating to the effect upon the creditors' claim of accepting a dividend, was inconsistent with that Act and, therefore, inoperative, adjudged that other portions of the local statute which provided for the equal distribution of the debtor's property among his creditors, and regulated the general conduct of the assignee, were not inconsistent with, nor were they necessarily suspended by the Act of 1867; further, that the New Jersey Statute did not create the right to make voluntary assignments for the equal benefit of creditors, but was only restrictive of a previously existing right, and imposed, for the benefit of creditors, salutary safeguards around its exercise; consequently, had the whole of the New Jersey Statute been superseded, the right of a debtor to make a voluntary assignment would still have existed. The assignment, as a transfer of the debtor's property, was, therefore, upheld as in harmony with the general object and purposes of the Bankrupt Act, unassailable by reason merely of the fact that some of the provisions of the local statute may have been suspended by the Act of 1867.

[385]

In the view which we take of the case it is unnecessary to consider all of the questions covered by the opinion of the state court and discussed here by counsel. Especially it is not necessary to determine whether the Bankrupt Act of 1867 suspended or superseded all of the provisions of the New Jersey Statute. Undoubtedly the local statute was, from the date of the passage of the Bankrupt Act, inoperative in so far as it provided for the discharge of the debtor from future liability to creditors who came in under the assignment and participated in the distribution of the proceeds of the assigned property. It is equally clear, we think, that the assignment by Locke, of his entire property, to be disposed of as prescribed by the Statute of New Jersey and, therefore, independently of the bankruptcy court, constituted itself an act of bankruptcy, for which, upon the petition of a creditor, filed in proper time, Locke could have been adjudged a bankrupt, and the property wrested from his assignees for administration in the bankruptcy court. *In re Burt*, 1 Dill., 440; *In Re Goldschmidt*, 8 Bk. Reg., 168; *In re Smith*, 3 Bank Reg., 377. The claim of Pickhardt and Kutroff existed at the time of the assignment. The way was, therefore, open for them, by timely action, to secure the control and management of the assigned property by that court for the equal benefit of all the creditors of Locke. But they elected to lie by until after the expiration of the time within which the assignment could be attacked under the provisions of the Bankrupt Act; and now seek, by this suit, in the name of the plaintiff in error, to secure an advantage or preference over all others; this, notwithstanding the assignment was made without any intent to hinder, de-

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lay or defraud creditors. In order to obtain that advantage or preference, the plaintiff in error relies on the paramount force of the Bankrupt Act, the primary object of which, as this court has frequently announced, was to secure equal-
[386] ity among the creditors of a bankrupt. *Mayer* v. *Hellman*, 91 U. S., 501 [XXIII., 378]; *Reed* v. *McIntyre*, 98 U. S., 509 [XXV., 172]; *Buchanan* v. *Smith*, 16 Wall., 277 [83 U. S., XXI., 280]. It can hardly be that a court is obliged, in vindication of an Act of Congress, to lend its aid to those who, neglecting or refusing to avail themselves of its provisions, seek to accomplish ends inconsistent with that equality among creditors which those provisions were designed to secure. If it should be assumed, for the purposes of this case, that the Statute of New Jersey was, as to each and all of its provisions, suspended when the Bankrupt Act of 1867 was passed, it does not follow that the assignment by Locke was ineffectual for every purpose. Certainly, that instrument was sufficient to pass the title from Locke to his assignees. It was good as between them, at least until Locke in some appropriate mode, or by some proper proceedings, manifested a right to have it set aside or canceled upon the ground of a mutual mistake in supposing that the local Statute of 1846 was inoperative. And in the absence of proceedings in the bankruptcy court impeaching the assignment, and so long as Locke did not object, the assignees had authority to sell the property and distribute the proceeds among all the creditors, disregarding so much of the deed of assignment as required the assignees, in the distribution of the proceeds, to conform to the local statute. The assignment was not void as between the debtor and the assignees simply because it provided for the distribution of the proceeds of the property in pursuance of a statute, none of the provisions of which, it is claimed, were then in force. Had this suit been framed for the purpose of compelling the assignees to account to all the creditors for the proceeds of the sale of the property committed to their hands, without discrimination against those who did not recognize the assignment and exhibit their demands within the time and mode prescribed by the New Jersey Statute, a wholly different question would have been presented for determination. It has been framed mainly upon the idea that by reason of the mistake of Locke and his assignees in supposing that the property could be administered under the provisions of the local Statute of 1846, even while the Bankrupt Act was in force, the title did not pass for the benefit of the creditors according to
[387] their respective legal rights. In this view, as has been indicated, we do not concur.

We are of opinion that, except as against proceedings instituted under the Bankrupt Act for the purpose of securing the administration of the property in the bankruptcy court, the assignment, having been made without intent to hinder, delay or defraud creditors, was valid, for at least the purpose of securing an equal distribution of the estate among all the creditors of Locke in proportion to their several demands. *Reed* v. *McIntyre*, 98 U. S., 509 [XXV., 172], and consequently, we adjudge only that the plaintiff in error is not entitled, by reason of any conflict between the local statute and the Bankrupt Act of 1867, or by force of the before mentioned judgment and the proceedings thereunder, to the possession of the assigned property or of its proceeds, as against the assignees, or to a priority of claim for the benefit of Pickhardt and Kutroff upon such proceeds.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Matthews**, dissenting:

Mr. Justice **Miller**, *Mr. Justice* **Gray**, *Mr. Justice* **Blatchford**, and myself, are unable to agree with the opinion and judgment of the court in this case. The grounds of our dissent may be very generally and concisely stated as follows:

The New Jersey Statute of April 16, 1846, the validity and effect of which are in question, is an insolvent or bankrupt law, which provides for the administration of the assets of debtors who make assignments of all their assets to trustees for creditors, and for their discharge from liabilities to creditors sharing in the distribution. It was accordingly in conflict with the national Bankrupt Act of 1867 [14 Stat. at L., 517] when the latter took effect, and from that time became suspended and without force until the repeal of the Act of Congress. It is conceded that the 14th section, which provides for the discharge of the debtor, is void by reason of this conflict and, in our opinion, this carries with it the entire statute. For the statute is an entirety, and to take away the distinctive feature contained in the 14th section destroys the system. It is not an independent [388] provision, but an inseparable part of the scheme contained in the law.

This being so, the assignment in the present case must be regarded as unlawful and void as to creditors, for it was made in view of this statute and to be administered under it. Such is the express recital of the instrument and the finding of the fact by the court. It is as if the provisions of the Act had been embodied in it and it had declared expressly that it was executed with the proviso that no distribution should be made of any part of the debtor's estate to any creditor, except upon condition of the release of the unpaid portion of his claim.

It is not possible, we think, to treat the assignment as though the law of the State in view of which it was made, and subject to the provisions of which it was intended to operate, had never existed, or had been repealed before its execution; because there is no reason to believe that, in that state of the case, the debtor would have made an assignment on such terms. To do so is to construct for him a contract which he did not make and which there is no evidence that he intended to make. It must be regarded, then, as a proceeding under the Statute of New Jersey, and as such, with that statute, made void, as to creditors, by the national Bankrupt Act of 1867. Otherwise that uniform rule as to bankruptcies, which it was the policy of the Constitution and of the Act of Congress, pursuant to it, to provide, would be defeated. No title under it, therefore, could pass to the defendants in error, and the judgment creditors who acquired a lien upon the fund in their hands were by law entitled to appropriate it, as the property of their debtor, to the payment of their claims.

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For these reasons we are of opinion that the judgment of the Court of Appeals of New York should be reversed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[401] In the Matter of the Application of THE DEVOE MANUFACTURING COMPANY, for a Writ of Prohibition.

(See S. C., Reporter's ed., 401-417.)

District Courts, jurisdiction of—territorial limits—boundary between States—boundaries of judicial district.

*1. The District Court of the United States for the District of New Jersey has jurisdiction of a suit in admiralty, *in personam*, against a New York Corporation, where it acquires such jurisdiction by the seizure, under process of attachment, of a vessel belonging to such Corporation, when such vessel is afloat in the Kill van Kull, between Staten Island and New Jersey, at the end of a dock at Bayonne, New Jersey, at a place at least 300 feet below high water mark, and nearly the same distance below low water mark, and is fastened to said dock by means of a line running from the vessel and attached to spiles on the dock.

2. A vessel so situated is within the territorial limits of the State of New Jersey and of the District of New Jersey, and is not within the territorial limits of the State of New York, or of the Eastern District of New York.

3. The subject-matter of the dispute as to boundary between New York and New Jersey explained, and the settlement as to the same made by the agreement of September 16, 1833, between the two States, as set forth in, and consented to by, the Act of Congress of June 28, 1834, ch. 126, 4 Stat. at L., 708, interpreted.

4. When Congress enacts that a judicial district shall consist of a State, the boundaries of the district vary afterwards as those of the State vary.

[No. 18, Orig.]

Submitted Apr. 9, 1883. Decided May 7, 1883.

PETITION for a writ of prohibition.

The history and facts of the case fully appear in the opinion of the court.

Mr. **Henry J. Scudder**, for petitioner:

The office of the writ of prohibition is to prevent an unlawful assumption of jurisdiction; it lies to a court of admiralty, only when that court is acting in excess of its jurisdiction.

Ex parte Gordon, 104 U. S., 516 (XXVI., 814); *Ex parte Easton*, 95 U. S., 77 (XXIV., 376).

The respondent or petitioner has no redress by appeal. If it appear in order to try the merits of the action, it confesses jurisdiction; appearing specially to deny jurisdiction only, it is met by an order denying its motion for relief from the cognizance of the court, and has no appeal from that order.

Toland v. *Sprague*, 12 Pet., 330.

In constituting the States of New Jersey and New York respectively, districts, the Legislature designed to conform these districts to the then understood and recognized jurisdictional limits of the two States.

The jurisdiction of the State of New York in 1789 extended to low water mark along the Jersey shore, including the Kill van Kull, and the District of New York was co-extensive with such jurisdictional limits of the State.

The grant by James must be treated as a royal grant, and nothing held by intendment against it or in favor of the grantee.

Martin v. *Waddell*, 16 Pet., 367.

None of the States enlarged its territorial limits over those in its provincial character by the mere operation of independence from the sovereignty of the mother country, and the rule applied to New Jersey by the U. S. Circuit Court in *Corfield* v. *Coryell*, 4 Wash. (C. C.), 371, as to the Delaware Bay and River is applicable to the eastern shore of the State, upon the waters of the Kill van Kull and Hudson River.

Handly v. *Anthony*, 5 Wheat., 374.

The limits of New Jersey as a Province was recognized by the authorities of that State as the shore or low water mark of the waters of the Hudson and New York Bay so-called, inclusive of the Kill van Kull, and continued so to be recognized until the beginning of the present century.

State v. *Babcock*, 1 Vroom, 32.

The jurisdiction of the State of New York, therefore, in 1789, covered the place of the seizure under consideration here, and the District of New York equally covered it; and unless some change has been effected by the National Legislation in the extent of that district, it still embraces it and the District Court of New Jersey has no jurisdiction over it.

State legislation cannot affect the territorial extent of the federal districts; and hence, whatever has been done by the respective Districts of New York and New Jersey, can engage attention only so far as Congress may have determined such acts to be capable of forming the foundations of its definitions of districts.

Congress, however, has not changed the limits of the District of New Jersey.

Mr. **Franklin A. Wilcox**, *contra*, cited the following authorities:

Hall v. *Devoe Mfg. Co.*, 14 Fed. Rep., 183; *The L. W. Eaton*, 9 Ben., 289; *People* v. *R. R. Co.*, 42 N. Y., 291; *State* v. *Babcock*, 1 Vroom, 30.

Mr. Justice **Blatchford** delivered the opinion of the court: [404]

The question involved in this case is as to the territorial jurisdiction of the District Court of the United States for the District of New Jersey. In April, 1882, a libel in admiralty, *in personam*, for damages growing out of a collision, was filed in that court against The Devoe Manufacturing Company, a New York Corporation. In October, 1882, process was issued by the the court to the marshal, commanding him to cite the respondent if it should be found in the district and, if it could not be there found, to attach its goods and chattels within the district. On this process, the marshal seized a tug belonging to the Corporation and made return that he had attached the tug, as its property. At the time of the seizure, the tug was afloat in the Kill van Kull, between Staten Island and New Jersey, at the end of a dock at Bayonne, New Jersey, at a place at least 300 feet below high water mark and nearly the same distance below low water mark, and about half a mile from the entrance of the Kill into the Bay of New York, and was fastened to the dock by means of a line or fastening running from the tug and attached to spiles on the dock, and was lying close up to the dock. The respondent, insisting that the tug, when seized, was within the exclusive ju-

*Head notes by *Mr. Justice* BLATCHFORD.

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risdiction of the Eastern District of New York and not within the jurisdiction of the District of New Jersey, applied to the court to set aside the service of the process. The court denied the application, holding that the tug, being, when seized, fastened to a wharf or pier on the western side of the Kill van Kull, was within the exclusive jurisdiction of the District of New Jersey. The respondent now applies to this court to issue a writ of prohibition to the District Court, restraining it from exercising the jurisdiction so asserted.

By section 2 of the Act of September 24, 1789, "To establish the judicial courts of the United States," ch. 20, 1 Stat. at L., 73, the United States were divided "into thirteen districts, to be limited and called as follows: * * * one to consist of the State of New York, and to be called New York District; one to consist of the [405] State of New Jersey, and to be called New Jersey District," and by section 3, a court called a district court was created in each of said districts, and, by section 9, exclusive original cognizance was given to such district courts, of all civil causes of admiralty and maritime jurisdiction, within their respective districts. By these provisions, the territorial limits of the respective States of New York and New Jersey were made the territorial limits of the respective judicial Districts of New York and New Jersey.

By section 1 of the Act of April 9, 1814, ch., 49, 3 Stat. at L., 120, it was enacted that the State of New York "Shall be and the same is hereby divided into two districts, in manner following, to wit: the Counties of Rensselaer, Albany, Schenectady, Schoharie and Delaware, together with all that part of the said State lying south of the said above mentioned counties, shall compose one district, to be called the Southern District of New York; and all the remaining part of the said State shall compose another district, to be called the Northern District of New York." By virtue of this Act, all that part of the State of New York which was bounded on the line between New York and New Jersey fell within the Southern District of New York. The boundary line between the States still formed the boundary line of jurisdiction between the districts.

By section 3 of the Act of April 3, 1818, ch., 82, 3 Stat. at L., 414, the Counties of Albany, Rensselaer, Schenectady, Schoharie and Delaware were transferred from the Southern District of New York, to the Northern District of New York, but the boundaries of the Southern District of New York were otherwise not altered.

A dispute existed for a long time between the States of New York and New Jersey respecting the boundary line between them as to property and jurisdiction. The history and circumstances of this dispute, some particulars of which are to be found in the reports of the cases of *State* v. *Babcock*, 1 Vroom [30 N. J. L.], 29; *People* v. *R. R. Co.*, 42 N. Y., 283; and *Hall* v. *Devoe Mfg. Co.*, 14 Fed. Rep., 183, are not material to the determination of this case, in the view we take of it, any further than to show [406] what was the subject-matter of the dispute. For the purpose of having it settled, the State of New Jersey filed a bill in equity in this court against the State of New York, in February, 1829. That bill sets forth the patent of March 12, 1664, from Charles the Second to the Duke of York; the conveyance of lease and release by the Duke of York, of June 24, 1664, to Lord Berkeley and Sir George Carteret, of land constituting the State of New Jersey; the division of the land, by various conveyances, into East New Jersey and West New Jersey, its settlement and the institution of proprietary governments therein, which continued until May, 1702, when the proprietors surrendered their right of government to Queen Anne; and the union of the two divisions into one Province and government, under the Crown of England, which continued until July 4, 1776. The bill sets forth that the Hudson River was, by the said grants, the dividing boundary between New Jersey and New York, and New Jersey was bounded on her eastern shores by the waters formed by the confluence of the Hudson and East Rivers and also by the waters of Staten Island Sound or Kill van Kull or Arthur Kull, which sound is distinct from Hudson River or Bay; that, soon after the grant to Berkeley and Carteret, the inhabitants of East New Jersey proceeded to use the waters of the Hudson and sound adjoining the New Jersey shore, for the purposes of fishing, navigation, wharfing and other purposes, and erected docks and piers at Jersey City and Hoboken, and on the shores of the Hudson, and far beyond low water mark, without interruption from the inhabitants or public authorities of New York, and the citizens of New Jersey had always exercised full and absolute right and enjoyment over the River Hudson and the other adjoining waters to the midway or channel thereof, and also a common right of navigation and use over the whole of the river and dividing waters in common with the State of New York; that, by the fair construction of the said grants and by the principles of public law, New Jersey is entitled to the exclusive jurisdiction and property of and over the waters of the Hudson River from the 41st degree of latitude to the Bay of New York, to the *filum aquæ*, or middle of the river, and to the midway or channel of the Bay of New York and the whole of [407] Staten Island Sound, together with the land covered by the water of the river, bay and sound, in the like extent; that, while the said two States were Colonies, New York became wrongfully possessed of Staten Island and the other small islands in the dividing waters between the two States; that the possession thus acquired by New York had been since acquiesced in, New York insisting that her possession of said islands had established her title; that New York has no other pretense of title to said islands but adverse possession; that, as such possession has been uniformly confined in its exercise to the fast land thereof, the title of New Jersey to the whole waters of the Staten Island Sound remains clear and absolute in New Jersey, according to the terms of said grants; that, though the people of the State of New York formerly recognized the rights and jurisdiction of New Jersey as so set forth, they had lately asserted an absolute and exclusive right of property, jurisdiction and sovereignty over all the waters of the Hudson River and Bay and Staten Island Sound, and that quite up to high water mark on the New Jersey shore, and, by late public statutes, had extended the west lines of her counties lying opposite to New Jersey, on the east

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side of the Hudson River, to the west bank of the river, and had enforced the said unjust pretension by enacting that penalties should be imposed on any person who should execute, or attempt to execute, civil or criminal process on any part of the dividing waters by virtue of any other authority than her own laws; that, under color of said statutes, her officers had occasionally executed process on the west side of Hudson River and on the wharves so erected on the west bank of the river, within the territory and jurisdiction of New Jersey; that New York pretends that all that part of said tract of country granted to the Duke of York, and which he did not convey to Berkeley and Carteret, remained in him; that no part of Hudson River was granted to Berkeley and Carteret; and that, when New York became an independent State, all the said domain of the Duke of York, with the Hudson River and the other dividing waters, vested in full propriety and sovereignty in New York, and that New York has [408] always claimed and possessed the same accordingly; that New Jersey insists that, in the grants to Berkeley and Carteret, the equal use and property of the River Hudson and Sound is expressly and in terms conveyed to them and, accordingly, Berkeley and Carteret and their grantees and assigns before the Revolution, and New Jersey, as one of the United States, since the Revolution, had always claimed, exercised, occupied, and enjoyed right, title and jurisdiction, as well over the territory as the waters of Hudson River and Bay, equal in extent to those used and exercised by New York; that the citizens of New Jersey, both before and since the Revolution, under the authority, jurisdiction and control, as well of the colonial as of the state government of New Jersey, had, ever since the first settlement of the Colony, used, occupied and enjoyed the territory and waters of the Hudson River and Bay and Staten Island Sound, and all other dividing waters between the said States, by building and constructing docks and wharves thereon extending far below low water mark on the westerly shores thereof, by locating and appropriating several fisheries therein, and exercising the rights of common fishery in other parts thereof, by locating and appropriating oyster grounds therein and planting them with oysters under rights derived from New Jersey, and by navigating the same with her ships and vessels, which would, at pleasure, lie at anchor in the Hudson River, Bay and Sound, and also by the docks and wharves so constructed under the authority and jurisdiction of New Jersey, without interruption, and by various other acts and uses; that, even though said grants may not have conveyed any right of property in said river, yet, inasmuch as no part of said river was ever granted to the Colony of New York, it remained in the Duke of York until his accession to the throne of England, in 1685, when said river became re-annexed to the Crown by his accession thereto, and remained a royal river until the American Revolution and, upon the independence of New York and New Jersey being achieved, this public navigable river became the common boundary of the two States, with a right of property and jurisdiction in each to the midway thereof; that, at the time of the said grants to the Duke of York and from [409] him to Berkeley and Carteret, and for many years after, the general understanding of all parties interested in the subject-matter of those grants was, that no part of the waters of the Hudson River belonged to New York; but said river, so far as respected the Colony of New York, her counties and the City of New York especially, was the mere natural boundary of the said Colony, in which no right of property existed or could exist; that all the ancient grants made by the Duke of York to individuals, while he remained a Duke and after he became the King, or by the colonial government established by him in the State of New York, are limited to low water mark on the east side of the Hudson River; that the first charter to the City of New York, made in 1686, gives the city boundary and assigns to it all Manhattan Island as far as low water mark; that the Colonial Legislature of New York, by an Act passed in 1691, revised the previous Act or Ordinance laying off several counties in New York, and the county boundaries fixed by the said Revised Statutes were prescribed and based upon the principle that New York had no claim to the waters on the New Jersey side of the Hudson, the City and County of New York and the Counties of Westchester and Dutchess being expressly located on the east bank of the Hudson; and that New Jersey had uniformly resisted and opposed said encroachments and pretensions of New York from their first existence. The bill prays that the eastern boundary line between New Jersey and New York may be ascertained and established; that the rights of property, jurisdiction and sovereignty of New Jersey may be confirmed to the *filum aquæ* or middle of Hudson River, from the 41st degree of north latitude on said river through the whole line of the eastern shore of New Jersey, as far as said river washes and bounds New Jersey, down to the Bay of New York and to the channel or midway of the said bay, and to all the waters and the land they cover lying between the New Jersey shore and Staten Island, and all other waters washing the southern shores of New Jersey within and above the Narrows; that New Jersey may be quieted in the full and free enjoyment of her property, jurisdiction and sovereignty in said waters; and that the right, title, jurisdic- [410] tion and sovereignty of New Jersey in and over the same, as part of her public domain, may be confirmed and established by the decree of this court.

The averments made by New Jersey in said bill show what claims she made, and what her understanding was as to the claims made by New York, and as to the assertion of claims theretofore by the respective States. It is alleged by the counsel for the applicant that, in early colonial times, the waters surrounding Staten Island were regarded as the waters of the Hudson River, and Staten Island was regarded as lying in the waters of the Hudson River; that, in the grant to Berkeley and Carteret, New Jersey was bounded on the east, partly by the main sea and partly by the Hudson River; that the same boundary was contained in the subsequent grant of East Jersey to Carteret; that, in 1682 and again in 1709, the Legislature of East Jersey, by statute, bounded Bergen County, the site of the present dispute, on the Bay and the Hudson River; that such legislation of New Jersey as to the boundary of Ber-

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gen County remained unchanged until 1807; that the Montgomerie charter to the City of New York, in 1730, expressed the jurisdiction of that city as extending "to low water mark on the west side of the North River, or so far as the limits of our said province extend there;" and that the boundaries of New York were asserted by it, in its Revised Statutes of 1830, to embrace the waters of Kill van Kull to low water mark on the New Jersey side.

The matters in dispute between the two States as to boundary being those thus set forth, the dispute was brought to a close by an agreement or compact entered into on the 16th of September, 1833, between commissioners appointed by the two States, which agreement was confirmed by the Legislatures of the two States respectively. The consent of the Congress of the United States was given to said agreement, "And to each and every part and article thereof," by an Act approved June 28, 1834, ch. 126, 4 Stat. at L., 708. That Act sets forth the agreement at length. The first five articles of it, which are all that are important here, are as follows:

"Article First. The boundary line between [411] the two States of New York and New Jersey, from a point in the middle of Hudson River, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned.

Article Second. The State of New York shall retain its present jurisdiction of and over Bedlow's and Ellis' Islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that State.

Article Third. The State of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the Bay of New York; and of and over all the waters of Hudson River lying west of Manhattan Island and to the south of the mouth of Spuytenduyvel Creek; and of and over the lands covered by the said waters to the low water mark on the westerly or New Jersey side thereof; subject to the following rights of property and of jurisdiction of the State of New Jersey, that is to say:

1. The State of New Jersey shall have the exclusive right of property in and to the land under water lying west of the middle of the Bay of New York, and west of the middle of that part of the Hudson River which lies between Manhattan Island and New Jersey.

2. The State of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks and improvements, made and to be made on the shore of the said State; and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the State of New York, which now exist or which may hereafter be passed.

3. The State of New Jersey shall have the exclusive right of regulating the fisheries on the westerly side of the middle of the said waters; *Provided*, That the navigation be not obstructed or hindered.

Article Fourth. The State of New York shall have exclusive jurisdiction of and over the waters of the Kill van Kull between Staten Island and New Jersey to the westernmost end of Shooter's Island in respect to such quarantine [412] laws, and laws relating to passengers, as now exist or may hereafter be passed under the authority of that State, and for executing the same; and the said State shall also have exclusive jurisdiction, for the like purposes, of and over the waters of the sound from the westernmost end of Shooter's Island to Woodbridge Creek, as to all vessels bound to any port in the said State of New York.

Article Fifth. The State of New Jersey shall have and enjoy exclusive jurisdiction of and over all the waters of the sound between Staten Island and New Jersey lying south of Woodbridge Creek, and of and over all the waters of Raritan Bay lying westward of a line drawn from the lighthouse at Prince's Bay to the mouth of Mattavan Creek; subject to the following rights of property and of jurisdiction of the State of New York, that is to say:

1. The State of New York shall have the exclusive right of property in and to the land under water lying between the middle of the said waters and Staten Island.

2. The State of New York shall have the exclusive jurisdiction of and over the wharves, docks and improvements made and to be made on the shore of Staten Island, and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the State of New Jersey, which now exist or which may hereafter be passed.

3. The State of New York shall have the exclusive right of regulating the fisheries between the shore of Staten Island and the middle of the said waters; *Provided*, That the navigation of the said waters be not obstructed or hindered."

The Act of June 28, 1834, provides that nothing contained in said agreement "Shall be construed to impair, or in any manner affect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement."

It is apparent, from the terms of the various provisions of the agreement, that it is an agreement settling the territorial limits and jurisdiction of the two States in respect to the waters between them, from a point in the middle of the Hudson River, in the forty-first degree of [413] north latitude, to the sea. The boundary line is declared to be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, except as afterwards otherwise particularly mentioned. What may be the effect of the exception, whether it affects the boundary line itself, or only amounts to a concession of extraterritorial jurisdiction to the one State and the other, beyond the territorial boundary, is not necessary to be decided in the present case. For, in either view, it is clear that the waters in which the tug was lying when she was seized, were within the boundaries of the State of New

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Jersey. The only jurisdiction given to the State of New York, beyond the boundary line specified in article first, over the waters of the Kill van Kull, is that specified in article fourth, by which it is declared that "The State of New York shall have exclusive jurisdiction of and over the waters of the Kill van Kull between Staten Island and New Jersey, to the westernmost end of Shooter's Island in respect to such quarantine laws, and laws relating to passengers, as now exist or may hereafter be passed under the authority of that State, and for executing the same." The rest of that article relates to Staten Island Sound west of Shooter's Island, and has no reference to this case. The jurisdiction thus conceded to New York is, clearly, a limited one, and cannot, in any view, be regarded as altering the general boundary line; and as the tug, when seized, was on the New Jersey side of that line, she was within the State of New Jersey, not because she was fastened to a dock on the shore of New Jersey, but because she was within that part of the waters between Staten Island and New Jersey which, by article first of the agreement, is set apart to New Jersey.

Being thus within the State of New Jersey, was the tug within the District of New Jersey and within the territorial jurisdiction of the District Court of the United States for the District of New Jersey? We are all of the opinion that, when the Act of Congress of 1789 declared that the New Jersey District should consist of the State of New Jersey, it intended that any territory, land or water, which should at any [414] time, with the express assent of Congress, form part of that State, should form part of the District of New Jersey. By sections 530 and 531 of the Revised Statutes, the State of New Jersey constitutes a judicial district. The intention is, that the boundary of the district shall be coterminous with the boundary of the State. The same thing is true as to the Southern District of New York, and as to the district across the water at the *locus in quo*, which is the Eastern District of New York. That district was created by the Act of February 25, 1865, ch. 54, 13 Stat. at L., 438, to consist of "The Counties of Kings, Queens, Suffolk and Richmond, in the State of New York, with the waters thereof." By section 541 of the Revised Statutes, the Northern District of New York is defined as including the Counties of Albany, Rensselaer, Schoharie and Delaware, with all the counties north (and west) of them; the Eastern District as including "The Counties of Richmond, Kings, Queens and Suffolk, with the waters thereof;" and the Southern District as including "the residue of said State, with the waters thereof." It is consonant with the convenience and habits of the people, that when any place is within the limits and jurisdiction of a State, it should not be joined to the whole or a part of another State, as to the jurisdiction of the courts of the Federal Government; and it is not to be presumed, in view of the terms of the statutes on the subject, and of the necessity for the consent of Congress to all compacts between the States, that such separation can be intended unless clearly expressed. Where Congress declares that such a judicial district shall consist of such a State, and afterwards the boundary of the State is so lawfully altered as to include or exclude a particular piece of territory, it is a reasonable construction to say, that the judicial district shall, *ipso facto*, without further legislation by Congress, expand or contract accordingly. When the State of Massachusetts ceded to the State of New York, in 1853, its sovereignty and jurisdiction over the District of Boston Corner, and the latter State accepted the same, and Congress consented to such cession and annexation, Act of Jan. 3, 1855, ch. 20, 10 Stat. at L., 602, there was no special transfer by Congress of the annexed territory from the District of Massachusetts to the Southern District of New York, but it fell within that [415] district by becoming a part of Columbia County, in the State of New York.

The provision in the Act of June 28, 1834, that nothing in the agreement between New York and New Jersey shall impair "Any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement," is well satisfied without construing it as applying to the then existing jurisdiction of any particular court of the United States. Article second of the agreement provides that "The State of New York shall retain its present jurisdiction of and over Bedlow's and Ellis' Islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that State." Other articles of the agreement provide for the exclusive jurisdiction of New York or New Jersey over specified waters. In giving consent to the agreement, and "each and every part and article thereof," Congress was consenting, apparently, as against any rights of jurisdiction which the United States then had, to the exclusive jurisdictions of New York and New Jersey, respectively, over the islands and waters referred to. Hence, for abundant caution, the clause in question was added. New York had, by an Act passed February 15, 1800, 1 R. L., 189, ceded to the United States jurisdiction over "All that certain island called Bedlow's Island, bounded on all sides by the waters of the Hudson River, all that certain island called Oyster Island," known afterwards and now as Ellis' Island, "bounded on all sides by the waters of the Hudson River," and also Governor's Island, reserving to the State the right to serve and execute, on those Islands respectively, civil or criminal process issuing under the authority of the State.

Reference is made to article 6 of the Amendments of the Constitution, which provides that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law;" and it is suggested that the boundaries of a district could not be ascertained by law, if they were left to change with such local changes as coterminous States might agree upon with [416] each other as to their respective boundaries and limits. Article 6 was one of ten articles proposed by the first Congress, as Amendments to the Constitution, on the 25th of September, 1789, the day after the Judiciary Act was approved, providing that the New York District should consist of the State of New York, and the New Jersey District of the State of New Jersey, and defining and ascertaining by law all

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the other districts which it established, solely by naming the several States as districts. There were two disputes as to boundary, existing at that time, between Massachusetts and Rhode Island, both of them running back to colonial times, one respecting the northern boundary of Rhode Island, and the other respecting the eastern boundary of Rhode Island. The particulars of the first dispute appear in the record of a suit in equity brought in this court by *R. I.* v. *Mass.*, in 1832, 12 Pet., 657, to settle such northern boundary. In December, 1845, by a decree of this court, the bill in the suit was dismissed on the merits, and the northern boundary of Rhode Island was established on the line claimed by Massachusetts. In 1854, Massachusetts filed a bill in equity, in this court, against Rhode Island, to settle said eastern boundary. A conventional boundary line, different from that claimed by either State, was agreed upon and sanctioned by Congress, by an Act approved February 9, 1859, ch. 28, 11 Stat. at L., 382, and established by a decree of this court made December 16, 1861, to take effect March 1, 1862. The Act of Congress declared that the new line should be taken and deemed to be, for all purposes affecting the jurisdiction of the United States, or of any department of the government thereof, the true line of boundary between Massachusetts and Rhode Island. In the latter case, as in the present one, the boundary between the two disputing States was settled on a line different from that claimed by either. The Judiciary Act defined the State as the district, not the State as either party to the dispute claimed it to be; and the effect of the change of state boundary in the present case, on the limits of judicial districts, must be held to be as potent as that in the case of *Massachusetts and Rhode Island*, notwithstanding the affirmative provision, in the Act in the latter case, as to the jurisdiction of the United States and of the departments of its government. Congress has always left judicial districts to be confined within state limits. Of course, the district, as a place of trial must be ascertained by law before the crime is committed, and a person charged with a crime cannot be tried for it in a district which did not include, when the crime was committed, the place where it was committed. Whether a change in the boundary of a State, and thus of a district, after the commission of a crime and before a trial for it, would have the effect of preventing a trial in any district, is a question which must be decided when it shall arise. The mode adopted by Congress, of ascertaining districts by law, in such manner that their boundaries shall change as the boundaries of the States change, is one at least sufficient and convenient for practical purposes in all cases except where a person charged with crime, and placed on trial in a particular district, may be able to establish that his rights under article 6 of the Amendments of the Constitution are being violated.

[417]

Views not in harmony with those above set forth were expressed by the District Court for the Southern District of New York in the case of *U. S.* v. *The Julia Lawrence*, and the case of *The L. W. Eaton*, 9 Ben., 289. The former case was decided by *Judge* Betts, in 1860, and from that time forward the District Court for the Southern District of New York exercised its jurisdiction on the view that that jurisdiction was not to be governed by the provisions of the agreement between New York and New Jersey. Our attention has not been called to any case before the present one where a Federal Court in New Jersey has passed on the question of the limits of the District of New Jersey, as affected by that agreement. There being thus a conflict of interpretation between the judicial authorities of the two districts, as to the question of the territorial jurisdiction of those districts, it is important that the effect of the agreement between the two States on that jurisdiction should be clearly defined. This we have endeavored to do. *The result is, that the application for the writ of prohibition must be denied.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 176.

GEORGE HENRY WARREN ET AL., *Appts.*, [389]

v.

WILLIAM KING, OHIO AND MISSISSIPPI RAILWAY COMPANY, ALLAN CAMPBELL, FARMERS' LOAN AND TRUST COMPANY ET AL.

(See S. C., Reporter's ed., 389-400.)

Rights of preferred stockholders of railroad company.

*Certificates of preferred stock of the Ohio and Mississippi Railway Company were issued, containing the following language: "The preferred stock is to be and remain a first claim upon the property of the Company after its indebtedness, and the holder thereof shall be entitled to receive from the net earnings of the Company seven per cent per annum, payable semi-annually, and to have such interest paid in full, for each and every year, before any payment of dividend upon the common stock; and whenever the net earnings of the Corporation which shall be applied in payment of interest on the preferred stock and of dividends on the common stock shall be more than sufficient to pay both said interest of seven per cent on the preferred stock in full, and seven per cent dividend upon the common stock, for the year in which said net earnings are so applied, then the excess of such net earnings after such payments shall be divided upon the preferred and common shares equally, share by share;" held, that the preferred stockholders had no claim on the property superior to that of creditors under debts contracted by the Company subsequently to the issue of the preferred stock, and that their only valid claim was one to a priority over the holders of common stock.

[No. 268.]

Argued Apr. 24, 1883. Decided May 7, 1883.

APPEAL from the Circuit Court of the United States for the District of Indiana.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **Grosvenor P. Lowrey** and *John K. Porter*, for appellants.

Messrs. **E. M. Johnson, Benj. Harrison,**

*Head note by *Mr. Justice* BLATCHFORD.

NOTE.—*Preferred stock; its issue; rights of holders of.*

Preferred stock entitles its holders to a priority of dividends over holders of common shares. *Re* London India Rubber Co., 5 Law R. Eq., 519; Burt v. Rattle, 31 Ohio St., 116; Taft v. Hartford, etc., R. R.

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George Hoadley and *Edward Colston*, for King *et al.*, appellees.

Mr. **Wheeler H. Peckham**, for Campbell, appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

In November, 1876, William King and others, holders of second mortgage bonds and of Springfield Division bonds of the Ohio and Mississippi Railway Company, filed a bill in the Circuit Court of the United States for the District of Indiana, to foreclose two mortgages on the property of the Company, subject to a first mortgage. In August, 1877, Allan Campbell, a [390] defendant in that suit and trustee of one of the two mortgages, called the second mortgage, and also of the first mortgage, filed a bill and a cross-bill in the same court, to foreclose those two mortgages. In January, 1879, the two suits were consolidated. In December, 1879, George Henry Warren and others, as owners of preferred stock of the Company, having been made parties defendant to the consolidated suit, filed a cross-bill. To this cross-bill, a general demurrer for want of equity was interposed. The court sustained the demurrer, and entered a decree dismissing the cross-bill for want of equity. *King* v. *R. R. Co.*, 2 Fed. Rep., 36. From this decree, the plaintiffs in that bill have appealed to this court.

The sole question involved is, whether the preferred stockholders are entitled to have their shares of stock declared to be a lien on the property of the Company next after the first mortgage. As the question arises on demurrer, the allegations of the cross-bill are to be taken as true. The Ohio and Mississippi Railroad Company, having been incorporated by Indiana in February, 1848, was incorporated by Ohio in March, 1849, and by Illinois in February, 1851. Under a second mortgage made by it in January, 1854, all the property and franchises of the Illinois Company were sold, on a foreclosure of that mortgage, in June, 1862, to the Ohio and Mississippi Railroad Company, an Illinois Corporation created in February, 1861, for the purpose of purchasing the property and franchises of the Illinois Corporation of February, 1851. The property and franchises of the Indiana and Ohio Corporations were sold, under judicial decrees, in January, 1867, subject to certain mortgage debt recited in the decrees, to Allan Campbell and others, "trustees of creditors and stockholders of said Ohio and Mississippi Railroad Company (Eastern Division)." This trust was created by an instrument in writing dated December 15, 1858, and known as the "Trust agreement of creditors and stockholders of the Ohio and Mississippi Railroad Company of Indiana and Ohio." By it, Allan Campbell and others were created trustees, for the purpose of providing for and protecting claims of judgment creditors and other persons holding liens on the [391] property and franchises of the Company, and also certain holders of unliquidated demands against it, and also the interests of the stockholders of the Company. Such interests of the creditors and stockholders became vested in the trustees from time to time, so that on the 14th of September, 1867, they were the owners, subject to the terms of the trust agreement, of the rights, claims and interests of all the creditors and stockholders of the Company in its property and franchises, except those existing under a first mortgage made in May, 1853. The trustees issued, in exchange for the interests they so acquired, certificates in two classes, preferred and common. Under an amendment made in April, 1863, to the trust agreement, the trustees purchased, for the benefit of the trust and the persons interested therein under the agreement of December, 1858, all the stock and a portion of the bonds of the Illinois Company of 1851, sometimes called the Western Division. On the 14th of September, 1867, the certificate holders, by an instrument known as "Amendments to the trust agreement of December, 1858," resolved that the trustees had made the purchase of January, 1867, for the benefit of those interested in the trust agreement of December, 1858, and had, in virtue of the Amendment of April, 1863, purchased all the stock and a portion of the bonds of the Illinois Company of 1851; that, by such purchases, the whole road from Cincinnati to St. Louis had become the property of the trust, subject only to outstanding mortgages; that it was the intention of all parties interested in the trust to form a new corporation, to which the entire property of the trust might be transferred, in accordance with the original agreement, such property to consist of all the rights and interests in the railroad in the three States; that the capital stock of the new

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Co., 8 R. I., 335; Bailey v. Han., etc., R. R. Co. 84 U. S., XXI., 611; affg. 1 Dill., 174.

Without express authority by statute or consent of the common shareholder the corporation has no power to issue preferred stock. March v. Eastern R. R. Co., 43 N. H., 516; Bates v. Androscoggin Ry. Co., 49 Me., 491; Prouty v. Mich., etc., R. R. Co., 1 Hun, 655; Kent v. Quicksilver Min. Co., 12 Hun, 58; Jones v. Terre Haute, etc., R. R. Co., 57 N. Y., 196; Hoyt v. Quicksilver Min. Co., 78 N. Y., 159; S. C., 9 Week. Dig., 187; affg. 17 Hun, 169; Curry v. Scott, 54 Pa. St., 270; Sturges v. E. Un. Ry. Co., 7 De Gex, M. & G., 158; Matthews v. Gt. Northern Ry. Co., 28 L. J. Ch., 375; Green's Brice, Ultra Vires, 145; Hutton v. Scarborough Cliff Hotel Co., 2 Drew & Sm. 521.

It has been held that where the power exists it must be exercised solely for the purpose of obtaining capital. Herals v. Gt. Westn. Ry. Co., 3 L. R. Ch., 292; Henry v. Gt. Northern Ry. Co., 4 K. & J., 1; 27 L. J. Ch., 1; Corry v. Londonderry, etc., Ry. Co., 29 Beav., 263; 3 L. J. Ch., 290; Coates v. Nottingham Water Works Co., 30 Beav., 86.

Interest or dividends on preferred shares can only be paid out of profits actually earned; any agreement to the contrary is opposed to public policy and void. Lockhart v. Van Alstyne, 31 Mich., 76; S. C., 18 Am. Rep., 156; Macdougall v. Jersey Imp. Hotel Co., 2 Hem. & M., 528; Pittsburgh, etc., R. R. Co. v. Alleghany Co., 63 Pa. St., 126; Thompson v. Erie Ry. Co., 42 How. Pr., 68; S. C., 11 Abb. Pr. N. S., 188.

Under a power to issue a certain number of shares of preferred stock, the stockholders cannot by resolution authorize the issue of a greater number. Melhado v. Hamilton W. N., 28 L. T. N. S., 578; 29 L. T. N. S., 364.

The court will leave dividends on common stock largely to the discretion of the director, but will inquire into the affairs of the company and require the payment of the current profits or net earnings on preferred stock, according to the terms of the agreement, when justice may require. Bailey v. Han., etc., R. R. Co., 84 U. S., XXI., 611; affg. 1 Dill., 174; St. John v. Erie Ry. Co., 89 U. S., XXII., 743; affg. 10 Blatch., 271; Bates v. Androscoggin, etc., R. R. Co., 49 Me., 491; Williston v. Mich., etc., R. R. Co., 13 Allen, 400; Barnard v. Vt. & Mass. R. R. Co., 7 Allen, 512; McLaughlin v. Detroit, etc., R. R. Co., 8 Mich., 100; Thompson v. Erie, etc., R. R. Co., 45 N. Y., 468; Prouty v. Mich., etc., R. R. Co., 1 Hun, 655; West Chester, etc., R. R. Co. v. Jackson, 77 Pa. St., 321; Rutland R. R. Co. v. Thrall, 35 Vt., 536.

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Corporation should consist of 35,000 shares of preferred stock and 200,000 shares of common stock, being in all $23,500,000 of stock, which should be issued and distributed to the owners of trustees' certificates registered on the books of the trust, as follows, namely: to owners of preferred certificates, preferred full paid stock, for the amount of such preferred certificates, at the rate of one share of preferred stock for [392] every $100 of preferred certificates; that it should be declared upon the face of said preferred stock that it is to be and remain a first claim upon the property of the Corporation after its indebtedness; that the holders thereof shall be entitled to receive from the net earnings of the Company seven per cent per annum upon the amount of said stock, payable semi-annually, "And to have such interest paid in full, for each and every year, before any payment of dividend upon the common stock of said Corporation, and that whenever the net earnings of the Corporation which shall be applied in payment of interest on the preferred stock and of dividends on the common stock shall be more than sufficient to pay both said interest of 7 per cent on the preferred stock in full, and 7 per cent dividend upon the common stock, for the year in which said net earnings are so applied, then the excess of such net earnings, after such payments, shall be divided upon the preferred and common stock equally, share by share;" that the common stock should be issued to holders of common certificates at the same rate; that the new Corporation should be authorized to create a new mortgage on its entire property, consisting of three hundred and forty miles of railroad from Cincinnati to St. Louis, and upon the contemplated improvements thereon, for an amount not exceeding $6,000,000, $4,000,000 whereof should be used exclusively to take up the then outstanding bonds issued under the mortgages theretofore created on said road; that, if a branch should be built to Louisville, the new Corporation might increase the preferred stock at the rate of $10,000 for each mile in length of such branch, and the $6,000,000 mortgage to the amount of $15,000 for each mile of such branch; and that holders of the outstanding bonds of the old Company, both eastern and western divisions, and holders of bonds to be issued by the new Corporation, should be entitled to one vote for each $100 of bonds so held, at all stockholders' meetings, and on all affairs of the Corporation.

Under statutes of Indiana and Ohio, Allan Campbell and others, as such trustees, became a Corporation in those States by the name of the Ohio and Mississippi Railway Company. Its capital stock was fixed at 35,000 shares, of $100 each, of preferred stock, and 200,000 shares, of [393] $100 each, of common stock, and provision was made, in the certificate of incorporation, for increasing its preferred stock in an amount not exceeding $10,000 a mile for each mile of a branch to Louisville. In November, 1867, the Illinois Company and the Indiana and Ohio Company were consolidated under the name of the Ohio and Mississippi Railway Company, by articles of consolidation which provided for issuing preferred and common capital stock of the consolidated Company to the extent above stated, and that the consolidated Corporation should be authorized to create a new mortgage on the road for $6,000,000, of which $4,000,000 should be appropriated and used to take up the then existing mortgage bonds on the property, and should have "All such further powers and rights as are conferred and contemplated in certain amendments adopted by the certificate holders at a meeting held by them on the 14th day of September, A. D. 1867, of an agreement dated December 15th, A. D. 1858, of the creditors and stockholders of the Ohio and Mississippi Railroad Company of Indiana and Ohio, said agreement representing a trust which, at the date of said amendments, embodied the entire ownership of the property of both said companies so consolidated."

The consolidated Company issued preferred stock to the amount of 35,000 shares, upon certificates in the following form:

"Ohio and Mississippi Railway Company.
Reorganized and consolidated 1867.
Preferred stock.

This is to certify that————is entitled to————shares of the preferred capital stock of the Ohio and Mississippi Railway Company, of $100 each, transferable only on the books of said Company, in the City of New York, in person or by attorney, on the surrender of this certificate. The preferred stock is to be and remain a first claim upon the property of the Corporation after its indebtedness, and the holder thereof shall be entitled to receive from the net earnings of the Company seven per cent per annum, payable semi-annually, and to have such interest paid in full, for each and every year, before any payment of dividend upon the common stock; and whenever the net earnings of [394] the Corporation which shall be applied in payment of interest on the preferred stock and of dividends on the common stock shall be more than sufficient to pay both said interest of seven per cent on the preferred stock in full, and seven per cent dividend upon the common stock, for the year in which said net earnings are so applied, then the excess of such net earnings after such payments shall be divided upon the preferred and common shares equally, share by share."

These preferred shares were issued in exchange for the trustees' preferred certificates, in pursuance of the resolutions of September 14, 1867.

The cross-bill alleges that the certificate holders, by the resolutions of September 14, 1867, intended and declared that the preferred stock to be issued should give to its holders not only a preference in respect to dividends over the common stock, but also the preference of a specific and continuing lien and security upon the property of the new Corporation, next after the then existing mortgage indebtedness; that it was in accordance with and in execution of this intention that the certificate holders further resolved that it should be declared upon the face of the certificates of such preferred stock that it should be and remain a first claim upon the property of the Corporation after its indebtedness; that the indebtedness referred to in the resolutions, and in the preferred stock certificates, was such indebtedness only as should arise under the $6,000,000 mortgage, that amount being designed to represent, and having been authorized for the purpose of taking up and canceling, the indebtedness existing at the time of

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the consolidation on the property of the two consolidating Companies; and that the consolidated Company, under the articles of consolidation, became bound to perform the provisions of the amendments of September, 1867, to the trust agreement, as to preferred stock, and the securing the same on the property of the consolidated Company, to the full intent thereof.

Besides the preferred stock to the amount of $3,500,000, further preferred stock, in the above form, to the amount of $800,000, was issued on [395] the building of the Louisville branch. The plaintiffs in the cross-bill, as owners of shares of such preferred stock, aver that they, in common with the other preferred stockholders, had and have a lien and security and first claim upon all the property and franchises of the consolidated Company which existed at the time of the original issue of such preferred stock, in or about the year 1867, next after and subject only to the indebtedness under the $6,000,000 mortgage, as authorized by said articles of consolidation, as representing and designed to cover and cancel the only indebtedness on either of the consolidated roads which was outstanding at the time of such consolidation, and are entitled to the payment of interest, as stipulated in the certificate, out of such net earnings of the Company as may remain after payment of interest on first mortgage bonds, and in priority and preference to the payment of any interest or indebtedness under any mortgage subsequent in date to the first mortgage, that being a mortgage executed in December, 1867, under which bonds to the amount of about $6,800,000 have been issued. Under the so-called second mortgage, issued in March, 1871, and sought to be foreclosed in the original suit, $4,000,000 of bonds have been issued. The other mortgage sought to be foreclosed in the original suit is called the Springfield Division mortgage, and was executed in January, 1875, to secure $3,000,000 of bonds.

The bill prays for a decree that such preferred stockholders are entitled, as such, to, and have always had, a specific and continuing lien and security and first claim upon, and in all the property and franchises of the Company, next after, and subject only to, the interest and security therein which is given under the first mortgage of December, 1867, and have been and are entitled to receive seven per cent interest upon their shares, out of the net earnings of the Company remaining after the payment of interest to the holders of the first mortgage bonds. It also prays that, in any decree of foreclosure of either of the mortgages so sought to be foreclosed, the rights of the preferred stockholders may be declared to be a lien and security on the property and franchises of the Company next after that secured by the first mortgage of De- [396] cember, 1867; that, in case of foreclosure of the first mortgage, all surplus, after the satisfaction of claims thereunder, be applied, first, to payment in full, or *pro rata*, of the par value of their shares, to the preferred stockholders; and that, in case of foreclosure of either the second mortgage or the Springfield Division mortgage, the decree therein shall provide that any sale, in either of such cases, shall be subject to not only the amount due under the first mortgage, but also, and next in order, to the amount at par of the preferred stock, with all unpaid interest due thereon, at seven per cent.

The rights of the holders of preferred stock in this case must be determined by the language of the stock certificate. That is exactly the same as the language of the written instruments which preceded the issuing of the certificates. The shares are shares of the capital stock of the Company, though shares with different privileges from shares of the common stock. The certificate declares the quality of the preferred stock in two respects: 1, its relation to the property of the Company; 2, its relation to the net earnings.

As to the property, it is declared that the preferred stock is to be and remain a first claim on the property of the Company after its indebtedness. But it is stock and part of the capital stock, with the characteristics of capital stock. One of such characteristics is, that no part of the property of a corporation shall go to reimburse the principal of capital stock until all the debts of the Corporation have been paid. It would require the clearest language to admit of the application of a different rule to any capital stock. Section 5 of the Statute of Indiana of June 15, 1852, "establishing provisions respecting corporations" (1 Davis' Stat., 369), enacted as follows: "If any part of the capital stock of such company shall be withdrawn and refunded to the stockholders before the payment of all the debts of the Company, all the stockholders of such Company shall be jointly and severally liable for the payment of such debts." The railroad law of Indiana, of March 3, 1865, 1 Davis' Stat., 730, entitled, "An Act to Authorize, Regulate and Confirm the Sale of [397] Railroads, to Enable Purchasers of the Same to Form Corporations and to Exercise Corporate Powers, and to Define Their Rights, Powers and Privileges, to Enable Such Corporations to Purchase and Construct Connecting and Branch Roads, and to Operate and Maintain the Same," under which law this Company was reorganized, provided, in section 5, that the Corporation should have power to "Make preferred stock, make and establish preference in respect to dividends in favor of one or more classes of stock over and above other classes, and secure the same, in such order and manner and to such extent, as said Corporation may deem expedient;" and section 20 of the general law of Indiana of May 11, 1852, providing for the incorporation of railroad companies (1 Davis' Stat., 706), provided that a corporation organized under it might issue "A preferred stock to an amount not exceeding one half of the amount of its capital, with such priority over the remaining stock of such company, in the payment of dividends, as the directors of such company may determine, and shall be approved by a majority of the stockholders." It would be difficult to say that these statutory provisions allowed any preference in shares of capital stock, except a preference among classes of shares, or any preference of any class of shareholders over creditors. It is not to be supposed that those engaged in reorganizing this Company intended to violate the law of Indiana, or the general principles of law applicable to private corporations. Nor is there anything to show that they did. The language of the cer-

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tificate is entirely satisfied by referring it to a priority in rank of the preferred stock over the common stock, to a first claim of the preferred stock on the property of the Corporation, after its indebtedness should be paid, when there should be moneys to be divided among stockholders, a claim which should be first as compared with the claim of other stock. Claims of stockholders, as such, on the *corpus* of the property of the company in which they are stockholders, do not arise until the debts of the company are paid. Until then, the shares confer rights merely as regards profits and voting power.

[398] It is urged, for the appellants, that the expression "after its indebtedness" means, next after the indebtedness then existing or then authorized; that the preferred stock was issued to the holders of preferred certificates, owners of the property, as a *quasi* purchase money mortgage on its sale; and that they intended to preserve their position except as to the new $6,000,000 mortgage, because they authorized that and did not authorize any other. It is very certain that at best the words "after its indebtedness" are, by themselves, ambiguous on their face, and are as capable of being applied to future indebtedness as of being limited to then existing indebtedness. Under the general rules applicable to the position of the stockholders of a corporation, as regards its creditors, a claim of the kind here made should rest on clear, and not doubtful language. But the provision which follows, as to the rights of the preferred stock in the net earnings of the Company, leaves no doubt as to the meaning of the whole. There is a unity of right in the claim of the preferred stock on the property of the Company, and in the title of its holder to receive a share of the net earnings of that property. His proprietorship in those earnings is a right to receive from them so much a year, if earned, before the common stock receives any dividend therefrom, and when the two classes of stock have each received the same specified amount out of the year's net earnings, he has the right to share equally in the surplus with the holder of common stock. Thus he can have no income on his stock unless there are net earnings. Those net earnings are what is left after paying current expenses and interest on debt and everything else which the stockholders, preferred and common, as a body corporate, are liable to pay. The holders of preferred stock have the same relation, by virtue of the certificate, to the *corpus* of the property, which they have to its net earnings. Their position in regard to both is one inferior to that of all creditors. They are not preferred as to re-imbursement of principal, or as to a right to net earnings, over anyone but the holders of common stock. The interest to be paid to them is not to be paid absolutely, as to a creditor, but only out of net earnings, the same fund out of which the dividends on com-
[399] mon stock are to be paid. Though called interest, it is really a dividend, because to be paid on stock and out of net profits. There was no restriction on the creation of future indebtedness and, necessarily the net earnings of future business would be ascertained in reference to such future indebtedness and the interest on it; and the words "its indebtedness," in the same sentence, naturally mean "its future indebtedness," in reference to which the net earnings subsequently treated of are to be ascertained. Creditors may resort to the body of their debtor's property for interest as well as principal. But these holders of preferred stock are limited, for any income or interest, to the net earnings. There is nothing in the certificate which clothes them with a single attribute of a creditor, while it specially gives them, as stockholders, an equal interest with the common stockholders in the excess of net earnings in each year after paying therefrom seven per cent on each share of stock, preferred and common.

Whatever position the holders of preferred certificates occupied before they accepted preferred stock, whatever special rights of lien they had, they became corporators, proprietors, shareholders and abandoned the position of creditors, and took up towards existing and future creditors the same position which every stockholder in a corporation occupies towards existing and future creditors. His chance of gain, by the operations of the corporation, throws on him, as respects creditors, the entire risk of the loss of his share of the capital, which must go to satisfy the creditors in case of misfortune. He cannot be both creditor and debtor, by virtue of his ownership of stock. In this case, all the parties holding trustees' certificates united to form the new corporation, and converted themselves into stockholders in it.

It seems very clear, that if the trustees, representing the holders of trustees' certificates, had gone on and operated the road for them, not organizing a new company, any debts contracted by the trustees in the business would have had priority over the claims of the holders of such certificates. So, in becoming stockholders in the new company, with the right to vote as to its management and to share in its earnings, they must have intended to allow, through the [400] Corporation, a priority of like debts over their claims as stockholders.

The same principles must govern the present case which were applied by this court in *St. John* v. *Erie R. Co.*, 22 Wall., 136 [89 U. S., XXII., 743], where creditors took preferred stock. It was held that they ceased to be creditors and could be regarded only as stockholders, with a chance for dividends out of net earnings and the power of voting, and a priority over holders of common stock, but not a priority over debts subsequently contracted.

Much stress is laid on the averment in the cross-bill, that the existence of the preferred stock and of the certificates therefor and of their contents was known to the trustees under the subsequent mortgages before those mortgages were made, and to the bondholders under those mortgages before they became such; and it is urged that the assent of the preferred stockholders to the creation of the subsequent mortgages should have been obtained. The answer to this view is, that the preferred stockholders had no rights which made their assent necessary to the validity, as against them, of the mortgages in question; and that, represented as they were by the Corporation and its directors, the act of making the mortgages was a sufficient assent of the preferred stockholders, if assent were necessary, there being no allegation in the cross-bill inconsistent with the fact, that the issuing of the mortgages was known to, and

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participated in and sanctioned by, those who were holders of the preferred stock when the mortgages were created.

As to the claim that the appellants, if they have no priority over the second mortgage, have, at all events, as against the Company, a lien next after the second mortgage, on the property not covered by the Springfield Division mortgage, and have, in any aspect of the case, a valid claim on the surplus assets of the Company, after paying its debts, superior to the claim of the common stockholders, it is sufficient to say, that we do not deem it proper that those questions should be disposed of on a demurrer to this cross-bill, as they can be raised and decided under the answer which these appellants have filed as defendants in the consolidated suit.

The decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[418] MORTON E. POST, *Plff. in Errr.*,

v.

JOHN B. PEARSON.

(See S. C., Reporter's ed., 418-422.)

Agreement, parties to—effect of decision on demurrer.

*1. An agreement in writing, between "W., superintendent of the Keets Mining Company, parties of the first part, and P., party of the second part," by which "the said parties of the first part" agree to deliver at P.'s mill, ore from the Keets Mine (owned by the company) to be crushed and milled by P.; and signed by "W., Supt. Keets Mining Company," and by P., is the contract of the company.

2. An order sustaining a defendant's demurrer, and giving the plaintiff leave to amend, does not preclude the plaintiff from renewing, or the court from entertaining, the same question of law upon the subsequent trial on an amended complaint.

[No. 294.]

Submitted Apr. 26, 1883. Decided May 7, 1883.

IN ERROR to the Supreme Court of the Territory of Dakota.

The history and facts of the case appear in the opinion of the court.

Messrs. **R. T. Merrick, M. F. Morris** and *William R. Steele*, for plaintiff in error:

There is no proof, anywhere in the record, that Post either authorized the execution of the written contract introduced into the case, or subsequently ratified it. The proof is merely that he was a member of a partnership known as the "Keets Mining Company"; that, as such member, he received a portion of the proceeds of the contract, knowing whence they came; that Whitney, who made the contract, was superintendent of the Keets Mining Company; and that the contract was understood by both Whitney and Pearson to have been made for the benfit of the company, and not for the individual benefit of Whitney.

The liability of Post can be sustained only upon proof that Whitney, in the execution of the contract, was authorized to bind him. Even if there were such proof, and the authority was fully proved, the instrument itself is inadmissible in evidence, because it is not executed in such manner as to bind the principal.

Story, Ag., sec. 148; Story, Cont., sec. 222; *Stackpole* v. *Arnold*, 11 Mass., 27; *Ins. Co.* v. *Covell*, 8 Met., 442.

It makes no difference that the person signing the contract signs as agent, or with any other *descriptio personæ;* it is still his own contract, and not that of the principal whom he may have intended to bind. This is held universally by all the authorities.

Stone v. *Wood*, 7 Cow., 453; *Bank* v. *Monteath*, 1 Den., 402; *Seaver* v. *Coburn*, 10 Cush., 324; *Jones* v. *Littledale*, 6 Ad. & El., 486; *Mages* v. *Atkinson*, 2 Mees. & W., 440; *Higgins* v. *Senior*, 8 Mees. & W., 834; *Appleton* v. *Binks*, 5 East, 148; *Duvall* v. *Craig*, 2 Wheat., 56; *Tippets* v. *Walker*, 4 Mass., 595; *Forster* v. *Fuller*, 6 Mass., 58; *White* v. *Skinner*, 13 Johns., 307; *Ellwell* v. *Shaw*, 16 Mass., 42; *Smith* v. *Morse*, 9 Wall., 76 (76 U. S., XIX., 597).

It does not alter the case that Whitney and Post were partners, as one partner cannot bind his co-partnership by an instrument of writing under seal at least, without his assent to it.

The second ground of complaint on behalf of the plaintiff in error is, that the matter in controversy had been adjudicated in the territorial district court by the decision upon the demurrer.

That a decision upon demurrer, if it involves the merits of the case, is just as final as any other decision, is beyond question.

It is also true, that "A decision given in the progress of a case, whether right or wrong, is the law of the case in which it is given, and binding upon the parties."

Rector v. *Danley*, 14 Ark., 304; *Cole* v. *Clark*, 3 Wis., 328; *Deslonde* v. *Darrington*, 29 Ala., 92; *Thomas* v. *Doub*, 1 Md., 252; *Lucas* v. *San Francisco*, 28 Cal., 591.

Messrs. **J. W. Smith** and *Van Cise & Wilson*, for defendant in error:

A judgment rendered upon the insufficiency of the declaration and not upon the merits of the case, is no bar.

Wilbur v. *Gilmore*, 21 Pick., 250; *Jordan* v. *Siefert*, 126 Mass., 25.

In no sense was the ruling on the demurrer a bar. It was not a judgment; it was not final; plaintiff could not have appealed from it.

Cruger v. *Douglass*, 2 N. Y., 571; *Colman* v. *Dixon*, 50 N. Y., 572; *Ferris* v. *Aspinwall*, 10 Abb. (N. S.), 137; *Adams* v. *Fox*, 27 N. Y., 640.

The instrument did not require to be sealed and it is to be treated as the written evidence of a simple contract; the seal adds nothing to it.

Evans v. *Wells*, 22 Wend., 325; *Stowell* v. *Eldred*, 39 Wis., 625; *Gibson* v. *Warden*, 14 Wall., 244 (81 U. S., XX., 797); *Worrall* v. *Munn*, 5 N. Y., 229; *Lawrence* v. *Taylor*, 5 Hill, 113; *Skinner* v. *Dayton*, 19 Johns., 554; *Randall* v. *Van Vechten*, 19 Johns., 60; *Damon* v. *Granby*, 2 Pick., 352; *Bank* v. *Patterson*, 7 Cranch, 299.

But this distinction is unimportant, in view of the fact that, in Dakota, all distinctions between sealed and unsealed instruments are abolished.

Civil Code, Dakota, sec. 925.

Mr. Justice **Gray** delivered the opinion of the court:

*Head notes by *Mr. Justice* GRAY.

NOTE.—*When promissory notes, executed by an officer, bind the corporation; when the officer.* See *note* to Hitchcock v. Buchanan, 105 U. S., XXVI., 1078.

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This is an action brought in an inferior court of Dakota Territory, by John B. Pearson against Alvin W. Whitney and Morton E. Post, copartners under the name of the Keets Mining Company.

Annexed to the complaint was a copy of a contract under seal, entitled "Memorandum of an agreement made and entered into this 16th day of July, 1877, at Central City, Dakota, by and between A. W. Whitney, Superintendent of the Keets Mining Company, parties of the first part, and J. B. Pearson, party of the second part;" and by which "the said parties of the first part" agree to deliver at Pearson's mill in Central City, gold-bearing ore from the Keets mine from time to time, in quantities sufficient to constantly supply the working capacity of the mill of about thirty tons daily; and also agree to pay the sum of $9 for each ton crushed and milled; and Pearson agrees to run his mill constantly upon that ore for a term of ninety days from the date of the contract; and which is signed and sealed as follows:

"A. W. Whitney, [Seal.]
Supt. Keets Mining Co., [Seal.]
John B. Pearson. [Seal.]"

[419] The complaint set forth the terms of the contract, and alleged the plaintiff's performance and readiness to perform, and the defendant's neglect and refusal to deliver ore as agreed, or to pay for crushing and milling what they did deliver.

The defendant, Post, demurred to the complaint, because he was not shown to be a party to the contract sued on, and because sufficient facts were not stated to constitute a cause of action against him. The inferior court sustained the demurrer, and gave the plaintiff leave to amend his complaint.

The plaintiff then filed an amended complaint, not alleging the contract to have been in writing, but setting forth its terms, and alleging the other facts substantially as in the original complaint. The defendants answered; Post denying all the allegations of the amended complaint, and Whitney admitting the making of the contract and denying the other allegations.

At the trial, the written contract was admitted in evidence, without objection; it appeared that it was made by the parties thereto, and that Whitney, in making it, acted in behalf and for the benefit of the Keets Mining Company, of which he was the superintendent, and was understood by the plaintiff so to act; and that Whitney, as such superintendent, afterwards broke the contract, to the damage of the plaintiff.

The plaintiff, against the objection of Post, and for the purpose of showing that Post was one of the real parties in interest and a participant in the results of the contract, and that Whitney acted merely as the agent of himself and Post as principals, was permitted to introduce oral evidence that Post was an owner of the Keets mine, and a copartner with Whitney, under the name of the Keets Mining Company, in the business of working the mine and having the ore from it crushed, and as such copartner received a large portion of the proceeds of the contract, knowing whence they came.

The court also declined to rule and instruct the jury, as Post requested, that the order sustaining his demurrer to the original complaint prevented a recovery against him in this action. Post alleged exceptions to both rulings, and the jury returned a verdict for the plaintiff, upon which judgment was rendered. On appeal, that [420] judgment was affirmed by the Supreme Court of the Territory. See, 2 Dak., 220. Post sued out this writ of error.

It is unnecessary to consider whether, if this were to be treated as a contract under seal, it could be held to be upon its face the contract of the Keets Mining Company, and not of Whitney only, or whether the oral testimony would have been admissible to charge Post; because, by the Civil Code of Dakota, "all distinctions between sealed and unsealed instruments are abolished," and "any instrument within the [422] scope of his authority, by which an agent intends to bind his principal, does bind him, if such intent is plainly inferable from the instrument itself." Civil Code of Dakota of 1877, secs. 925, 1373.

By the subject-matter of this contract, which is the delivery and milling of ore from the Keets mine; by the description of Whitney, both in the body of the contract and in the signature, as superintendent of the Keets Mining Company; and by the use of the words "parties of the first part," which are applicable to a company and not to a single individual, the contract made by the hand of Whitney clearly appears upon its face to have been intended to bind and, therefore, did bind the company; and, upon proof that Post was a partner in the company, bound him. *Whitney* v. *Wyman*, 101 U. S., 392 [XXV., 1050]; *Hitchcock* v. *Buchanan*, 105 U. S., 416 [XXVI., 1078]; *Goodenough* v. *Thayer*, 132 Mass., 152.

The order sustaining Post's demurrer to the original complaint gave the plaintiff leave to amend, and did not preclude the plaintiff from renewing nor the court from entertaining the same question of law upon a fuller development of the facts at the trial on the amended complaint. *Calder* v. *Haynes*, 7 Allen, 387.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

W. J. HAWKINS AND WALTER CLARK, Assignees in Bankruptcy of the Estate and Effects of THOMAS P. DEVEREUX, Deceased, a Bankrupt; WALTER CLARK AND JOHN DEVEREUX, as Trustees of the Estate of the Said THOMAS P. DEVEREUX, *Appts.*,

v.

GRINFILL BLAKE ET AL.

(See S. C., Reporter's ed., 422-436.)

New party to action—land when chargeable with legacies.

1. It is not error, on the execution of the mandate of this court to permit a third person to become a party and set up rights not embraced in the former decree, where it was done by consent of all parties.

2. Where one acting, though wrongfully, as executor of a will, appropriates the general personal estate to his own use to pay legacies charged upon his land, the land will, in equity, remain chargeable with the deficiency in the general personal estate thus created by him.

[No. 261.]

Argued Apr. 19 20, 1883. Decided May 7, 1883.

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APPEAL from the Circuit Court of the United States for the Eastern District of North Carolina.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **A. S. Merrimon,** *T. C. Fuller* and *Walter Clark*, for appellants:

An appeal lies, when this court having decided a cause on a former appeal, sends its mandate to the circuit court, and the latter court has failed to observe and pursue the mandate of this court:

The Lady Pike, 96 U. S., 461 (XXIV., 672); *Stewart* v. *Salamon*, 97 U. S., 361 (XXIV., 1044); *Humphrey* v. *Baker*, 103 U. S., 736 (XXVI., 456).

The circuit court must obey the mandate from this court, and it has no power to rehear the case or resettle the rights of the parties, or to modify in any respect, what this court has established or affirmed. The power of the court in such case only extends to the execution of the mandate.

Ex parte Sibbald, 12 Pet., 492; *Skillern* v. *May*, 6 Cranch, 267; *Ex parte R. R. Co.*, 1 Wall., 69 (68 U. S., XVII., 514); *Ex parte Morris*, 9 Wall., 605 (76 U. S., XIX., 799); *Durant* v. *Essex Co.*, 101 U. S., 555 (XXV., 961); *Stewart* v. *Salamon* (*supra*); *Humphrey* v. *Baker* (*supra*); *Chaires* v. *U. S.*, 3 How., 611; *West* v. *Brashear*, 14 Pet., 51; *Mitchel* v. *U. S.*, 15 Pet., 52; *R. R. Co.* v. *Soutter*, 2 Wall., 510 (69 U. S., XVII., 900).

Messrs. **S. F. Phillips, Fabius H. Busbee** and *John W. Hinsdale*, for appellees.

Mr. Justice **Matthews** delivered the opinion of the court:

A former appeal in this cause was disposed of by this court by a decision reported in *Blake* v. *Hawkins*, 98 U. S., 315 [XXV., 139], to which reference is made for a full statement of the case as then presented. The final decree of the circuit court, there reviewed, was reversed, and the cause was remanded with directions to take further proceedings and enter a decree in accordance with the opinion of the court as then declared.

The subsequent proceedings and decree, upon the mandate of this court, are now brought here for review, on the ground that they do not, in several particulars, conform to that mandate.

A brief statement of the case will suffice to explain and adjust the remaining controversy:

The complainants below were the appellants from the first decree, and are now appellees. They are, of the next of kin of Frances Devereux, entitled to a share of the residue of her personal estate undisposed of by her will. The object of the bill was to obtain an account of that estate from Thomas P. Devereux, as executor *de son tort*, including a fund, being part [424] of a sum of $50,000 originally charged upon real estate conveyed to Thomas P. Devereux by Frances Devereux, in case she should appoint the same by will or otherwise, and which, it was claimed by the complainants, she had appointed by her will to her executors. The estate of Thomas P. Devereux passed, by his bankruptcy, to assignees and trustees, including the lands on which the fund in question, alleged to have been the subject of the appointment, had been charged. These assignees and trustees were defendants below, and are now appellants.

The charge upon the lands conveyed to Thomas P. Devereux included an annuity, during the life of Frances Devereux, payable to herself, of $3,000, being six per cent on the principal sum; and as to the principal sum, the language of the deed was "That the said Thomas P. Devereux, his heirs or assigns, shall invest for or pay to the said Frances, at such times, in such proportions and in such manner and form as she shall direct and require, to and for her own sole and separate use, and subject to her own disposal by will, deed or writings in nature thereof, or otherwise, to all intents and purposes (notwithstanding her coverture) as if she were a *feme sole* and unmarried, the sum of $50,000; but if the said sum of money or any part thereof shall remain unpaid, or shall not be invested during her life, and if the said Frances shall not by deed or will or writing in nature thereof, or by some other act give, grant, dispose or direct any payment, investment or application of the same, then the said sum of money or so much thereof as shall remain not paid, given, granted, disposed or directed to be invested, paid or applied, shall be considered as lapsing and the charge thereof as extinguished for the benefit of the said Thomas."

In her will, among other bequests, was one of $7,500 to Thomas P. Devereux, in trust, to apply the income on the same annually to the payment of certain annuities and charities therein specified. There was no residuary clause.

Thomas P. Devereux, though named as executor in his mother's will, did not qualify as such; but, after her death, paid off the legacies mentioned and took possession of a large part of her personal estate, so as to become chargeable therefor as executor *de son tort*.

The estate of Frances Devereux is represented by an administrator *de bonis non* with the will annexed.

The decree of the circuit court in 1874, which was the subject of the former appeal, declared, [425] among other things:

1. That Frances Devereux did not by her last will appoint the fund of $50,000, charged upon the land, "To be part of her general personal estate in the hands of her executors; nor appoint the said fund at all, except so far as it is necessary to resort to the same to pay off the pecuniary legacies bequeathed by her in her said will, after exhausting for that purpose what remains of her personal assets, after payment of her debts and general expenses and the costs of administering her estate."

2. That the complainants were not entitled to any account of the fund of $50,000, except for the purpose of determining the amount in arrears of the annuity of $3,000 during the lifetime of Thomas Devereux, unexpended, of which unexpended balance, and of the remainder of her personal estate which came to the hands of Thomas P. Devereux, they are entitled to an account.

3. That, in taking that account, the assignees in bankruptcy are entitled to be credited with the amounts which Thomas P. Devereux expended in purchasing the pecuniary legacies bequeathed by Frances Devereux.

A statement of that account was agreed upon, which showed that, at the date of his bankruptcy, May 31, 1868, Thomas P. Devereux was

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chargeable with $41,633 of the general personal assets of his mother's estate, after payment of debts, funeral expenses and costs of administration, including interest to that date; and that he was entitled to credit for $39,466.58, which included interest to the same date, for the amount expended by him in payment or purchase of the pecuniary legacies under the will, leaving a balance due from him of $2,166.42, of which the complainants were entitled to one third, or $722.14 for which, accordingly, a decree was entered in their favor.

In reversing this decree, this court said, 98 U. S., 328 [XXV., 142], "Whether, if the fund which remained in the hands of Thomas P. Devereux at the death of the testatrix had exceeded the sum required to pay the legacies given by her will, that is to say: the sum of [426] $28,500, the will would have been a complete execution of the power, covering the whole fund, or only a partial appointment of so much as was needed to pay those legacies, it is unnecessary for us now to decide. In the view which we take of the other questions involved in the case, that fund had been reduced so far that there was not more than enough remaining subject to the power to pay the sums bequeathed by the will. The execution was therefore complete, and it appointed the whole fund to the executors of this will, who took it under the appointment as part of the personal estate of the appointor."

There was, therefore, error in the decree of the circuit court, so far as it adjudged that the testatrix, Frances Devereux, did not appoint to her executors the fund over which she had the power of appointment, "Except so far as it is necessary to resort to the same to pay off the pecuniary legacies bequeathed by her in her said will, after exhausting for that purpose what remains of her general assets after payment of her debts and funeral expenses and the costs of administering her estate."

After noticing and disposing of other assignments of error, not material now to be repeated, the judgment of the court concludes as follows:

"Our conclusion, therefore, is, after reviewing the whole case, that there has been no error committed, except the single one which we first noticed. For that, however, the decree of the circuit court must be reversed and the case sent back, with instructions to direct a new accounting and to enter a decree in conformity with this opinion."

The mandate of this court was entered of record in the circuit court at the June Term, 1879; and thereupon Louisa N. Taylor filed her petition praying to be made a party, for the purpose of asserting her right to receive the value of two annuities to which she claimed to be entitled, one of $50 per annum out of the fund of $7,500 bequeathed to Thomas P. Devereux in trust for herself and others; and one of $150 per annum, which, by the will of Frances Devereux, was directed to be paid out of funds arising from the sale of certain slaves and a house and lot in Chapel Hill, it being alleged in her petition [427] that Thomas P. Devereux had sold the house and lot, received the proceeds, and converted the slaves to his own use.

Service of this petition was accepted, and it was agreed that it might be heard at the same term, if practicable. The assignees in bankruptcy filed their answer to it, pleading the Statute of Limitations, alleging that the fund of $7,500 had been raised, and that the lands of Thomas P. Devereux were discharged from its payment, denying that the $150 annuity was a charge on those lands, but upon the house and lot in Chapel Hill, which sold for only $45, and the slaves, which it is alleged were not sold by Thomas P. Devereux, but lost by the result of the war, etc.

It was thereupon agreed by the parties to waive the taking of the account ordered by the mandate of this court; and that "The balance charged on the land of Thomas P. Devereux, and which Mrs. Frances Devereux had not disposed of during her life, and which by her will she appointed to her executors, was on the third (3d) of June, 1849, the date of her death, the sum of ($21,527.67) twenty-one thousand five hundred and twenty-seven dollars and sixty-seven cents."

The facts in regard to the legacy of $7,500 to Thomas P. Devereux in trust, and the interest therein of Louisa N. Taylor, were also agreed upon.

It was further agreed that a certain account D, theretofore taken, of the general personal assets of Frances Devereux, filed at June Term, 1874, was correct, except that the assignees in bankruptcy insisted on an exception, to the extent that Thomas P. Devereux is chargeable only with one half the value of the slaves, being $9,995.50, with interest thereon to the amount of $9,823.57, instead of with the full amount charged; while the complainants insisted that the correctness of that account had been finally agreed to and settled at the June Term, 1874, but that otherwise the account was in all respects correct.

At the November Term, 1879, the final decree was made, from which the present appeal is taken. The first seven of the declarations in that decree specifically follow the mandate of [428] this court, and the agreement of the parties as to the state of the accounts, overruling the exception of the assignees in bankruptcy to the account D, charging Thomas P. Devereux with the value of all the slaves which came to his hands after the death of Mrs. Devereux; and in this, we think, there is no error.

The decree then proceeds as follows:

"8. It is further declared that the said Thomas P. Devereux never raised and appropriated the $7,500 appointed to him in trust by the will of the said Frances out of his lands conveyed to him by the aforesaid deed of July 3, 1839, and that all the annuitants provided for by said appointment of $7,500 are dead or have abandoned their claims, except Louisa N. Taylor, who is still living; and that none of said annuities have been paid since the first day of January, 1863, except the annuity to the said Louisa N. Taylor, which was paid by said Thomas P. Devereux up to the first day of January, 1867; and the court doth declare that there is a resulting trust for one third of said sum of $7,500, and interest thereon from the first day of January, 1863, to the plaintiffs, subject, however, to the said Louisa N. Taylor's claim for the value of her annuity of $50 per annum, one third of which value falls upon the plaintiff's share of said resulting trust; which said claims of the said Louisa N. and the said plaintiffs are first liens upon the lands of the said Thomas P.

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Devereux or the proceeds thereof in the hands of the defendants, in the relative order in which said claims are last herein stated, and are to be first paid in full by the defendants with and out of the proceeds of said lands.

9. It is further declared that the said Thomas P. Devereux, before November, 1852, purchased up all the other pecuniary legacies bequeathed by the will of the said Frances, and after said purchase, and before the day and date last aforesaid, converted to his own use all the general personal assets of the said Frances specified in section 7 of this decree as amounting, on the 31st day of May, 1868, to forty-one thousand six hundred and thirty-three dollars ($41,633), claiming the same to belong to him to satisfy the said pecuniary legacies and the aforementioned sum of $7,500; and the court doth declare that the annuity of $150 per an- [429] num bequeathed by the will of the said Frances to the said Louisa N. Taylor was and is a first lien on said sum of $41,633 of general assets, and ought to have been first paid thereout, and that the plaintiffs ought to have been paid one third of said sum of general assets, subject to the burden of one third of the annuity of $150 per annum to the said Louisa N. Taylor; and that the said pecuniary legacies purchased by the said Thomas P. Devereux as aforesaid, and the aforesaid sum of $7,500, ought to have been paid out of the fund charged and appointed by the last will and testament of the said Frances Devereux on and out of the lands of the said Thomas P. Devereux, and the money to satisfy the same ought to have been raised on and out of said lands, and that said lands were exonerated from said burden by the use by the said Thomas P. Devereux, of the general personal assets aforesaid, whereby the plaintiffs have become entitled to have their aforesaid one third of said general personal assets, burdened as aforesaid, paid out of the proceeds of said lands in the hands of the defendants, and the said Louisa N. Taylor has become entitled to have the value of her aforesaid annuity of $150 per annum paid to her out of the said proceeds of the said lands, and in preference to the said claim of the plaintiffs; and it is declared by the court here that the last aforesaid claim of the said Louisa N. Taylor is a third lien upon the said proceeds of lands in the hands of the defendants, and the last aforesaid claim of the plaintiffs is a fourth lien on the same, and that both of said claims are to be paid by the defendants out of said proceeds in the relative order in which the same are next hereinbefore stated in full, if the said proceeds shall be sufficient to pay both of the same in full, and if not sufficient then the claim of the said Louisa N. is to be paid in full, and the claim of the plaintiffs shall be paid as far as said proceeds shall extend to satisfy the same.

10. All the parties, plaintiff and defendant, having at June Term, A. D. 1879, of this court filed an agreement in writing waiving any further account, and ascertaining the balance charged on the lands of Thomas P. Devereux for the benefit of Frances Devereux at the date of her decease, in the words and figures following, to wit:

'In this cause the mandate from the Supreme Court of the U. S. is filed, and to avoid the expense and delay incident to taking the account ordered and directed herein by the decision and decree of said court, and because from the ac- [430] counts already heretofore taken in this cause the parties are able to ascertain by agreement all the results necessary for the final determination of this cause, without the new accounting directed by said decree of Supreme Court, by consent of all the parties, plaintiff and defendant, herein, all further account herein is waived, and it is agreed that the balance charged on the land of Thomas P. Devereux, and which Mrs. F. Devereux had not disposed of during her life, and which, by her will, she appointed to her executors, was, on the 3d day of June, 1849, the date of her death, the sum of twenty-one thousand five hundred and twenty-seven dollars and sixty-seven cents ($21,527.67).'

11. And the said Louisa N. Taylor having, at June Term, 1879, of this court filed a petition to be made a party to this cause and to assert her rights in the premises, and having at said Term, by the consent of all the parties, plaintiff and defendant, herein been made a party hereto, and it appearing to the court that said Louisa N. Taylor, on the 26th of March, 1869, before the register in bankruptcy proved and filed her claim on account of the legacy hereinbefore named against the estate of said bankrupt, Thomas P. Devereux, as a debt secured by lien on the lands of the said Thomas P. Devereux, to the amount of $2,926.12, with interest, and the plaintiffs having here in open court assented to the payment of said claim in the manner specified and directed in this decree, the court doth declare that there is now due to the said Louisa N. Taylor upon the $50 annuity, the sum of $1,196.45, with interest on $726.53, from Nov. 24, 1879, and upon the $150 annuity, the sum of $3,413.40, with interest on $2,179.59, from Nov. 24, 1879, charged as hereinbefore declared.

And thereupon, it being obvious to the court that a new reference and further account in the premises is entirely useless and unnecessary, it is finally ordered, adjudged and decreed that the said Louisa N. Taylor recover of the defendants, William J. Hawkins and Walter Clark, assignees in bankruptcy of the estate and effects of Thomas P. Devereux, deceased, a bankrupt, and of the said Walter Clark and the defendant, Jno. Devereux, substituted trustees for Thomas P. Devereux, deceased, under the deed for the Pollock land, of July 3, 1839, the sum of ($1,196.45) eleven hundred and ninety-six dollars and forty-five cents, with interest on $726.53 thereof, from 24th November, 1879, until paid, to be paid and satisfied out of the pro- [431] ceeds of the sales of the said Pollock lands, in their hands, respectively, first, and in preference to all other claims against said proceeds; and that the plaintiffs, Grinfill Blake and Elizabeth J., his wife, and Jno. Townsend and Georgiana P., his wife, do recover of the said defendants, Hawkins, Clark and Devereux, assignees and trustees as aforesaid, the sum of ($4,569.73) forty-five hundred and sixty-nine dollars and seventy-three cents, with interest on $2,468.34 thereof from the 24th November, 1879, until paid, to be paid out of said proceeds of said sales of said Pollock lands in their hands, respectively, and next in order of preference.

And that the said Louisa N. Taylor do re-

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cover of the said defendants, Hawkins, Clark and Devereux, assignees and trustees as aforesaid, the sum of ($3,413.40) three thousand four hundred and thirteen dollars and forty cents, with interest on ($2,179.59) twenty-one hundred and seventy-nine dollars and fifty-nine cents thereof from the 24th November, 1879, until paid, to be paid and satisfied out of said proceeds of said sales of said Pollock lands in their hands, respectively, and next in order of preference.

And that the plaintiffs, Grinfill Blake and Elizabeth J., his wife, and Jno. Townsend and Georgiana P., his wife, do recover of the said defendants Hawkins, Clark and Devereux, trustees and assignees as aforesaid ($21,200.46) twenty-one thousand two hundred dollars and forty-six cents, with interest on $13,877.66 thereof from the 24th day of November, 1879, until paid, to be paid and satisfied out of the said proceeds of the said sales of the said Pollock lands in their hands, respectively, and in the event that said proceeds shall prove sufficient to pay and satisfy said last mentioned sum in full, and if said proceeds shall not prove sufficient, then as far as said proceeds shall extend to satisfy the same.

That the costs in this cause incurred, to be taxed by the clerk, be paid by the said defendants, assignees and trustees as aforesaid, with and out of said proceeds of said sales of said Pollock lands in full and without reference to the satisfaction of the four foregoing sums adjudged to be paid out of such proceeds."

It is now objected to this decree that it is not warranted by the mandate of this court, in execution of which only it could be properly made; and that if the matters decreed were open under the mandate, they were adjudged erroneously.

[432] It is said, in the first place, that it was error to permit Louisa N. Taylor to become a party and set up rights not embraced in the former decree. The obvious answer to this objection is, that it was done by consent of all parties, as appears by the record. And there is no ground on which the decree in her favor can be impugned. Her annuity of $50 per annum was expressly payable out of the legacy to Thomas P. Devereux in trust, in respect to which his assignees cannot be heard to say that his land has been relieved of the charge by which the fund was to be raised, when, in point of fact, the fund never has been raised. As to the annuity of $150, although payable out of a fund expressly designated, it was a demonstrative legacy, payable, in default of that fund, out of general assets, and entitled, therefore, to the benefit of the fund of $50,000, converted by the appointment into general personal estate, and, as part of that, chargeable on the land as hereafter shown. 2 Wms. Exrs., pt. 3, b. 3, ch. 2, sec. 3, p. [1160] 6th Am. ed., 1252.

It is next objected that the circuit court below erred in charging the amount found due to the appellees, as next of kin, entitled to share the undisposed residue of the estate of Frances Devereux, from the estate of Thomas P. Devereux, upon his real estate conveyed to him by his mother. It is claimed that this part of the decree is not justified by the mandate, and is erroneous on principle.

But this view, in our opinion, cannot be sustained. The very point of our former decision was, that the appellees were entitled to an account of the fund of $50,000, or so much of it as remained, as part of the personal estate of Mrs. Frances Devereux, by virtue of her will, construed as an appointment. The language of the opinion was, 98 U. S., 328 [XXV., 142]: "We conclude, therefore, that Mrs. Devereux's will was an execution of the power and an appointment of the fund to her executors. It converted the fund into her own estate, at least to the extent of $28,500, if there was so much of it remaining." It is conceded that the proper amount of this fund, according to the agreement of the parties, has been brought into account, [433] and that the balance decreed in favor of the appellees is the true amount due to them from the estate of Thomas P. Devereux. This is so, because the personal estate of Mrs. Frances Devereux has been increased, in the account by the addition of the balance of this fund, according to the mandate of this court.

But that fund is still uncollected and is a lien on the lands of Thomas P. Devereux in the hands of his assignees and trustees. Why should not the security go with the debt? The debt is the principal and the security an incident, which necessarily attends it. It certainly was not the intention of this court, in its former order, to separate them. And when it reversed the decree of the circuit court in order to award to the appellees the benefit of the fund appointed by the will of Mrs. Devereux, to become part of her personal estate, it meant also to give them the benefit of any security for its collection and payment that appointment furnished.

And that such security existed, by way of lien and charge upon the land, in virtue of the appointment, and inures to the benefit of the appellees, as entitled to share in the general personal estate of the testatrix, is necessarily involved in the former judgment of this court. For that judgment did not proceed, as seems to be claimed, on the ground that the appointment of that fund by the will was merely to the legatees, or to the use of the legatees, under the will, so that when their legacies, were satisfied, no matter by what means, the land was discharged of its lien. On the contrary, that judgment proceeded on the ground, that the will was an appointment of what remained of the fund of $50,000 as a charge upon the land, to the executor of the testatrix, so as to convert that fund into part of the general personal estate of the testatrix, thereby subjecting it, as part of that estate, to the claims of all persons entitled to share in its distribution, it being the intention of the testatrix, as expressly deduced by this court from the provisions of the will, to provide a fund in the hands of her executors, in addition to the personal estate in possession, adequate to redeem the legacies given by the will, so as to exonerate that estate from their pay- [434] ment. That fund was not a trust, merely in aid of the general assets, to enable the latter to meet the payment of the legacies. That was the error of the circuit court in its first decree, for which it was reversed. It was, on the other hand, as declared by this court, "An appointment of the whole fund to the executors of the will, who took it under the appointment as part of the personal estate." And that means, just what the decree now under review declares, that it is appointed to be raised by a sale of the

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land on which it is charged, to be paid into the estate of the testatrix, for the purpose of being distributed to the appellees, as being the parties entitled.

Not only was this fund charged upon the real estate of Thos. P. Devereux appointed to his executors, so as to become part of the general personal estate of Mrs. Frances Devereux, so that in law the whole, including the undisposed of residue, became liable to distribution as one trust fund for creditors, legatees and distributees, in the order of legal priority, but that order of priority was changed by the will, as declared by this court, so as to make the fund charged on the land and appointed by the will the primary fund for the payment of the legacies, so as to authorize those entitled to the general personal estate, as in this case, the next of kin entitled to the undisposed of residue, to require that, for the purpose of paying these legacies, the specific fund charged on the land and appointed by the will should be first exhausted before resorting to the general assets of the testatrix. This court expressly so declared in its judgment on the former appeal. It said, 98 U. S., 327 [XXV., 141]: "Turning now to the will we have before us, two things are evident. The first is that the testatrix did not intend that the pecuniary legacies given for charitable purposes and to pay annuities should be satisfied out of her own personal property." After specifying the disposition made of her personal estate in possession, the opinion proceeds: "Thus it appears that, while she gave pecuniary legacies amounting in the aggregate to more than [435] $23,500, she carefully withdrew from any positive application to their payment the personal estate she owned in her own right."

Notwithstanding this, Thomas P. Devereux, acting, though wrongfully, as executor of this will, and chargeable as such, appropriates the general personal estate to his own use, to re-imburse himself the amount which he had expended in paying or purchasing the legacies; and thus charges them upon the general assets, in violation of the intention of the will and the rights of the parties who by law were entitled to share in that estate. Why are not the next of kin now entitled to stand in the place of those legatees, in respect to the fund out of which they should have been paid? Upon the familiar principle of marshaling assets by means of subrogation, when a party, having a right to resort to two funds to the detriment of another, entitled to be paid out of but one, has been satisfied out of the latter, the fund thus exonerated will in equity be subjected to the payment of the postponed claim. This is such a case. For it is immaterial that Thomas P. Devereux did not use the specific property received by him out of the estate of Frances Devereux for the purpose of paying or purchasing the legacies entitled to payment out of the fund charged on his land, because he has received credit, with the assent of the parties and by the decree of the court, in his account of the general assets of that estate, for the amount paid by him on account of the legacies. How can he say, after that, that his real estate has been discharged of the lien by his payment of the legacies? The deficiency in the general personal estate thus created by him for the purpose of exonerating his land, is, in equity, something more than a personal claim against him. It is entitled to be supplied out of the securities that attended the claims which it was created to satisfy, and these securities are in equity considered as subsisting for that purpose. As against Thomas P. Devereux himself, if he were in being and in his own right defending against this claim of the appellees, the case would be too clear for argument. What greater rights have his assignees in bankruptcy, representing his general creditors? They have come into possession of this [436] real estate, but only with the title by which he held it, subject to the specific equity now asserted against it; and in their hands, as trustees, it must be held and applied to subserve the purposes to which in equity it is devoted. Those purposes, in our opinion, are correctly set forth in the decree of the Circuit Court; and

It is, accordingly, affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

SAMUEL CLARK, General Treasurer of the STATE OF RHODE ISLAND, AND STATE OF RHODE ISLAND, *Appts.*,

v.

GEORGE M. BARNARD ET AL., Assignees in Bankruptcy of BOSTON, HARTFORD AND ERIE RAILROAD COMPANY.

(See S. C., Reporter's ed., 436-461).

Immunity of State from suit, waiver of—railroad, when corporation of a State—penalty of bond—forfeiture for breach of covenants—mitigation of penalty in equity.

1. The immunity from suit, belonging to a State, which is protected by the Constitution, is a personal privilege which it may waive at pleasure, so that in a suit, otherwise well brought, in which a State has sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States is a voluntary submission to its jurisdiction.

2. A railroad corporation of one State which purchases the franchises and railroad of another corporation situated in another State, and is authorized by a statute of the latter State, to have, use and enjoy all the rights, privileges and powers possessed, and is made subject to all the duties and liabilities imposed upon the latter corporation, becomes in respect to its railroad in such other State, a corporation in and of that State.

3. An intention to treat the sum named in a bond as a penalty to secure the performance of the condition, and to be discharged on payment of damages arising from non-performance, cannot be inferred as a rule of law, or a conclusive presumption, from the mere form of the obligation.

4. Courts of equity will not interfere in cases of forfeiture for the breach of covenants and conditions where there cannot be any just compensation decreed for the breach.

5. Where a statute requires a railroad corporation to give a bond in a certain sum conditioned that such corporation will complete its road within a fixed time, if the railroad shall not be built within the time limited, the corporation must pay to the State, absolutely and for its own use, the sum named in the bond, and courts of equity will not interfere to mitigate the penalty or forfeiture.

[No. 266.]

Argued Apr. 20, 23, 1883. Decided May 7, 1883.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

In the year 1864 the directors of the Boston, Hartford and Erie R. R. Co., a corporation,

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chartered by the States of Massachusetts and Connecticut, applied to the General Assembly of Rhode Island for authority to build about seven miles of railroad within the limits of that State.

The Assembly passed the Act prayed for, in 1869, but provided that it should not go into effect unless the said railroad company, within a certain time, should deposit in the office of the General Treasurer of Rhode Island, its bond in the sum of $100,000, that it would complete said road before Jan. 1, 1872.

The bond was duly executed and filed, and as surety the road delivered a certificate of indebtedness of the City of Boston, for the sum of $100,000. This certificate was accepted as satisfactory security within the Act.

The company became a bankrupt in 1870, and the road was not built.

This bill was filed in the court below, by the assignees of the company, against the City of Boston and Samuel Clark, General Treasurer of Rhode Island, alleging that the bond had not been given within the time limited; that the directors had no power to give the bond; that the company had no power to accept the Act; that the plaintiffs as assignees had a right to the pledge, and praying that the money should be ordered to be paid to them.

Clark demurred to the bill for want of jurisdiction and of equity. The demurrer was overruled, and Clark thereupon filed his answer.

The case was then heard upon the bill, answer of Clark, and an agreed statement of facts, and the court entered an interlocutory decree which required the City of Boston to pay the money into the registry of the court; ordered evidence to be taken in relation to any claim for damages by reason of any breach of the bond to the State of Rhode Island; and reserved all questions of damages to the final hearing.

Rhode Island, without prejudice to the demurrer of Clark, its General Treasurer, now filed a claim to the fund in the registry of the court.

Upon the final hearing of the cause, the court held that the $100,000 was not liquidated damages, and that no legal damages had been proved; and entered a final decree directing that the fund in the registry of the court be paid over to the complainants. Whereupon Clark, and the State, appealed to this court.

A much fuller statement and history of the case appear in the opinion of the court.

Messrs. **Charles Hart, William G. Roelker,** *A. Paine* and *John F. Tobey,* for appellants:

The circuit court should have dismissed the cause as against the respondent Clark, for want of jurisdiction; inasmuch as it is apparent on the face of the record that this is, in substance and effect, a suit against Rhode Island.

Gov. of Ga. v. *Madrazo,* 1 Pet., 110; *Davis* v. *Gray,* 16 Wall., 203, 221 (83 U. S., XXI., 447, 453); *State* v. *Doyle,* 40 Wis., 210, 211.

The contract was not *ultra vires.*

Whether the Boston, Hartford and Erie Railroad Company had authority, under its Connecticut Act of incorporation, to accept the Rhode Island Act and build the road is immaterial, because the company had long been incorporated in Rhode Island.

R. I., Acts of Gen. Assem., Jan. Sess., 1865.

The sum of $100,000 named in the bond was intended by way of fixed or stipulated penalty under the statute or as liquidated damages; and not as a penal sum as security for any damages which the State might suffer in consequence of the breach of the bond.

Where the parties, instead of securing the performance of the agreement by a penalty, have fixed upon a certain sum by way of liquidated damages, to be paid in the event of the non-performance of the agreement, a court of equity, except in certain cases of waste, which will be noticed hereafter, refuses to interfere in restraining the recovery of such damages. On this point, see *Preble* v. *Boghurst,* 1 Swanst., 318, *n.; Sainter* v. *Ferguson,* 1 Macn. & G., 286; (S. C.), 14 Jur., 255; *Coles* v. *Sims,* 5 DeG. M. & G., 1; (S. C.), 18 Jur., 683, 685; *Skinner* v. *Dayton,* 2 Johns. Ch., 535; *S. C.,* 17 Johns., 357; *Livingston* v. *Tompkins,* 4 Johns. Ch., 425; *Walker* v. *Wheeler,* 2 Conn., 299; 2 Story, Eq. Jur. par., 1318; 2 Dan. Ch. Pr., 1658.

The cases which might properly be cited to show that the damages in this case should be liquidated damages, are so numerous, that it is difficult to make a selection.

We cite the following among the English cases:

Ponsonby v. *Adams,* 2 Bro. P. C., 430; *Rolfe* v. *Peterson,* 2 Bro. P. C., 436; *Lowe* v. *Peers,* 4 Burr., 2229; *Barton* v. *Glover,* 1 Holt, *N. P.,* 43 and *n.; Astley* v. *Weldon,* 2 Bos. & P., 346; *Reilly* v. *Jones,* 1 Bing., 302; *Crisdee* v. *Bolton,* 3 Car. & P., 240; *Fletcher* v. *Dyche,* 2 T. R., 32; *Peachy* v. *Somerset,* 1 Str., 447; *Croft* v. *Goldsmid,* 24 Beav., 312; *Bonsall* v. *Byrne,* Irish R. I. C. L., 573; *Wood* v. *Wade,* 2 Stark. *N. P.,* 167; *Lea* v. *Whitaker,* L. R., 8 C. P., 70.

And out of the numerous American cases we cite the following:

White v. *Dingley,* 4 Mass., 433; *Pierce* v. *Fuller,* 8 Mass., 223; *Hodges* v. *King,* 7 Met., 583; *Chase* v. *Allen,* 13 Gray, 42; *Lynde* v. *Thompson,* 2 Allen, 456; *Hall* v. *Crowley,* 5 Allen, 304; *Mead* v. *Wheeler,* 13 N. H., 351; *Tingley* v. *Cutler,* 7 Conn., 291; *Dakin* v. *Williams,* 17 Wend., 447; *Harris* v. *Hardy,* 3 Hill, 393; *Slosson* v. *Beadle,* 7 Johns., 72; *Phelan* v. *R. R. Co.,* 1 Lans., 258; *Cotheal* v. *Talmadge,* 1 E. D. Smith, 576; *Bagley* v. *Peddie,* 16 N. Y., 469; *Mott* v. *Mott,* 11 Barb., 127; *Mundy* v. *Culver,* 18 Barb., 336. *Brinkerhoff* v. *Olp, Exr.,* 35 Barb., 27; *Faunce* v. *Burke,* 16 Pa., 469; *Powell* v. *Burroughs,* 54 Pa., 329; *Lange* v. *Werk,* 2 Ohio St., 520; *Hamilton* v. *Overton,* 6 Blackf., 206; *Huff* v. *Lawlor,* 45 Ind., 80; *Pierce* v. *Jung,* 10 Wis., 30; *Ryan* v. *Martin,* 16 Wis., 57; *Morse* v. *Rathburn,* 42 Mo., 594; *Cal. Nav. Co.* v. *Wright,* 6 Cal., 258; *Fisk* v. *Fowler,* 10 Cal., 512; *People* v. *Love,* 19 Cal., 676; *Watts* v. *Sheppard,* 2 Ala., 425.

The following are cases of bonds where the courts have examined this question:

Miller v. *Elliott,* 1 Ind., 484; *Smith* v. *Smith,* 4 Wend., 468; *Fisk* v. *Fowler,* 10 Cal., 512; *Fletcher* v. *Dyke,* 2 T. R., 32; *Mercer* v. *Irving,* El. Bl. & El., 563; *Chase* v. *Allen,* 13 Gray, 42; *Cotheal* v. *Talmadge,* 9 N. Y., 551; *Hodges* v. *King,* 7 Met., 583; *Roy* v. *Beaufort,* 2 Atk., 190.

We submit that the case is not to be governed by the ordinary rules respecting damages under contracts between private parties, but that the sum of $100,000 is a penalty or forfeiture

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inflicted by the sovereign power for a breach of its laws.

The case falls within the principle of the decisions in:

U. S. v. *Hatch*, 1 Paine, 336; *U.S.* v. *Montell*, Taney (C. C.), 47; *Benson* v. *Gibson*, 3 Atk., 395; *Treasurer* v. *Patten*, 1 Root, 260.

Messrs. **Robert L. Bishop, John C. Gray** and *John C. Ropes*, for appellees:

This court has jurisdiction of the case. Even if Clark had been described as Treasurer, the suit would not have been against the State. Still less will it be so, when he is sued simply as an individual.

Osborn v. *Bank*, 9 Wheat., 738, 857, 858; *Davis* v. *Gray*, 16 Wall., 203, 220 [83 U. S., XXI., 447, 453); *The Arlington Case U. S.* v. *Lee*, *ante*, 171); *Gov. of Ga.* v. *Madrazo*, 1 Pet., 110, 122, 123; *U. S.* v. *Peters*, 5 Cranch, 115; *The Siren*, 7 Wall., 152 (74 U. S., XIX., 129); *The Davis*, 10 Wall., 15 (77 U. S., XIX., 875).

The plaintiffs could have recovered in this suit, even if the State had not appeared.

A. G. v. *Baliol College*, 9 Mod., 409; *Osborn* v. *U. S. Bank*, 9 Wheat., 738, 846, 847; *Davis* v. *Gray* (*supra*).

But the State has appeared voluntarily and claimed the fund, and has thereby submitted itself to the jurisdiction of the court.

Brunswick v. *Hanover*, 6 Beav., 1, 39.

A corporation chartered in one State cannot do acts in another State, which are not authorized by the charter, although they are permitted by such other State. "A corporation created by statute can exercise no powers and has no rights, except such as are expressly given or necessarily implied."

Huntington v. *Savings Bk.*, 96 U. S., 388, 393 (XXIV., 777, 778).

A corporation can make no contracts and do no acts, either within or without the State, which creates it, except such as are authorized by its charter.

Bank v. *Earle*, 13 Pet., 519, 588, 589; *R. R. Co.* v. *Speer*, 56 Pa., 325; *Pierce* v. *Crompton*, 13 R. I., 312, Sup. Ct. R. I., Index decisions March T., 1881, p. 18.

The reason why acts done without authority outside of the incorporating State are *ultra vires*, is precisely the same as the reason why acts done inside of the State without authority are *ultra vires*, namely: that the capital stock of the corporation is in the nature of a trust fund.

Upton v. *Tribilcock*, 91 U. S., 45-48 (XXIII., 203-205); *Great Eastern R. Co.* v. *Turner*, L. R. 8 Ch., 149; see, also, *Pearce* v. *R. R. Co.*, 21 How., 441 (62 U. S., XVI., 184); *E. Anglian R. Co.* v. *Eastern Counties R. Co.*, 11 C. B., 775, 812; *Ashbury R. C. & I. Co.* v. *Riche*, L. R. 7 H. L., 653.

Making railroad communication between Boston and Providence was not within the scope of the charter or the several powers given to carry out that scope, and was *ultra vires*.

Eastern Counties Ry. Co. v. *Hawkes*, 5 H. L. Cas., 331; *Pearce* v. *R. R. Co.* (*supra*); *Hood* v. *R. R. Co.*, 22 Conn., 502; *Penn. D. & M. Steam Nav. Co.* v. *Dandridge*, 8 Gill & J., 248; *East Anglian R. Co.* v. *Eastern Counties R. Co.* (*supra*).

Rhode Island can recover on the bond in question, if valid, only the damage it proves it has really sustained from the failure to build the road.

The obligation imposed by a bond is, that the obligor is bound for the damages caused by the breach of the condition, to an amount not exceeding the penal sum.

Equity construed a bond according to the original intent, to be an obligation to perform the condition, and accordingly held that the obligee was entitled to a decree directing the obligor to specifically perform the act set forth in the condition.

Anonymous, Mosely, 37; *Holtham* v. *Ryland*, 1 Eq. Cas. Abr., 18 pl., 8; *Parks* v. *Wilson*, 10 Mod., 515, 517, 518; *Hobson* v. *Trevor*, 2 P. Wms., 191; *Sloman* v. *Walter*, 1 Bro. (C. C.), 418, 419; see, also, *Blake* v. *E. I. Co.*, Finch, 117, 118; *Tull* v. *Ryland*, 1 Ch. Cas., 183; *Benson* v. *Gibson*, 3 Atk., 395; *Hardy* v. *Martin*, 1 Cox, 27; *S. C.*, 1 Bro. (C. C.), 419, *note*; *Sloman* v. *Walter*, 1 Bro. (C. C.), 418; *Errington* v. *Aynerly*, 2 Bro. (C. C.), 341; *Bertie* v. *Falkland*, 3 Ch. Cas., 129; *Marks* v. *Marks*, Prec. Ch., 486; *Hill* v. *Barclay*, 16 Ves., 402; 18 Ves., 56; *Reynolds* v. *Pitt*, 19 Ves., 134; *Peachy* v. *Somerset*, 1 Str., 447.

There are no late cases in equity on bonds, because the doctrine of equity has been taken up into the common law by virtue of statutes, of which 8 & 9 Wm. III., ch. II., sec. 8, was the first.

In 1790, it was settled that the main object of the statute being to relieve obligors, *Savile* v. *Jackson*, 13 Price, 715; *Smith* v. *Bond*, 10 Bing., 125, it was to be construed liberally and to be compulsory, *Hardy* v. *Bern*, cited in 5 T. R., 636; *Roles* v. *Rosewell*, 5 T. R., 538; and to include all bonds, except those against which courts could relieve under other statutes without the intervention of a jury. *Roberts* v. *Marlett*, 2 Wms. Saund., 187, ed. of 1845, *n.* 2; *Collins* v. *Collins*, 2 Burr., 820; *Welch* v. *Ireland*, 6 East, 613; Leake, Cont., 144, 1083.

The practical effect of this statute was to adopt the rule in equity, and was concisely stated by *Baron* Parke in *Beckham* v. *Drake*, 2 H. L., 579, 629: "That statute in effect makes the bond a security only for the damages really sustained."

The several States, including Rhode Island, have passed statutes in substance like the English statute. It is unnecessary to consider them particularly, because the U. S. R. S., sec. 961, is explicit and to the same effect.

Accordingly, neither in England nor America, neither in equity nor under the statutes, has the penalty of a bond been considered as liquidated damages.

Equity has in some cases refused to interfere, not because the penalty is liquidated damages, but because the penalty is the punishment imposed for committing a crime.

Benson v. *Gibson*, 3 Atk., 395; *Treasurer* v. *Patton*, 1 Root, 260; *U. S.* v. *Montell*, Taney, 47.

In some cases the obligee has been allowed to recover a sum equal to the penalty; not because the penalty was liquidated damages, but because the condition provided that such sum should be paid as liquidated damages.

Fletcher v. *Dyke*, 2 T. R., 32; *Mercer* v. *Irving*, El Bl. & El., 563; *Cotheal* v. *Talmadge*, 9 N. Y., 551; *Smith* v. *Smith*, 4 Wend., 468; *Bagley* v. *Peddie*, 16 N. Y., 469; *Chase* v. *Allen*, 13

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Gray, 42; *Leary* v. *Laffin*, 101 Mass., 334; *Hodges* v. *King*, 7 Met., 583; *Gowen* v. *Gerrish*, 15 Me., 273.

In conclusion, therefore, it is clear that, from a period at least as early as the year 1650, down to the present time, bonds have constituted a distinct class of instruments, the effect of which, like the effect of a conveyance to A and his heirs, is always the same.

Consequently, if in a particular case parties have expressed their obligation in the form of a bond, their liability is thereby determined to be an obligation to perform the condition, or pay the damages actually sustained from non-performance thereof.

Mr. Justice **Matthews** delivered the opinion of the court:

The appellees, who were complainants below, filed their bill in equity, as assignees in bankruptcy of the Boston, Hartford and Erie Railroad Company, against Samuel Clark, General Treasurer of the State of Rhode Island, and the City of Boston, and Frederick U. Tracey, its Treasurer. The bill alleged that the Boston, Hartford and Erie Railroad Company was a corporation created by the States of Connecticut and Massachusetts for the purpose of building, acquiring and operating a railroad from Boston in Massachusetts to Willimantic in Connecticut, and from Providence in Rhode Island to Willimantic, and from Willimantic through Waterbury to the state line of Connecticut, and thence to Fishkill in New York; that the directors of the company, without authority from the corporation or by law, applied to the Legislature of Rhode Island in 1869 and obtained the passage of an Act entitled "An Act in Addition to an Act to Ratify and Confirm the Sale of the Hartford, Providence and Fishkill Railroad to the Boston, Hartford and Erie Railroad Company," by which the company was authorized to locate and construct a railroad in extension of its line of railroad purchased of the Hartford, Providence and Fishkill Railroad Company, commencing at its depot in Providence, thence running to the easterly line of the State in or near the Village of Valley Falls, to meet and [443] connect with a Massachusetts railroad extending through North Attleborough from Boston, so as to make a continuous line of railroad, in a northerly and southerly direction, between Providence and Boston; that this Act contained a provision in the following terms: "This Act shall not go into effect unless the said Boston, Hartford and Erie Railroad Company shall, within ninety days from the rising of this General Assembly, deposit in the office of the General Treasurer its bond, with sureties satisfactory to the Governor of this State, in the sum of $100,000, that they will complete their said road before the first day of January, A. D. 1872;" that this condition was not complied with, and that the said Act therefore never took effect and is wholly null and void; that after the passage of the Act, the directors and officers of the corporation, without authority and in abuse of their trust and duty, filed with one Samuel Parker, then the General Treasurer of Rhode Island, a a paper, purporting to be the bond of the corporation, but without sureties, and fraudulently took of the funds of the corporation the sum of $100,000 and deposited the same with the city treasurer of Boston, in exchange for the obligation of that city, a copy of which is as follows:

"Temporary Loans, City of Boston.

$100,000. No. 6.

This certifies that, for value received, there will be due from the City of Boston, payable at the office of the city treasurer, on demand, after the first day of December next, to the General Treasurer of the State of Rhode Island, or order, the sum of $100,000, with interest at the rate of seven per cent per annum, in current funds.

This loan being authorized by an order of the city council passed the 9th day of June, 1869, to anticipate the income of the present financial year.

Interest will not be allowed after this note is due.

June 28, 1869. Alfred T. Turner, *Auditor*.

Fred. U. Tracey, *Treasurer*. Nath'l B. Shurtliff, *Mayor*."

That the directors and officers of the company, without consideration and without authority, deposited this certificate and obligation with the said Parker, who received the same without warrant of law, and thereupon held the same to the use of the railroad company; that the corporation never accepted the Act of the Legislature recited; that the railroad authorized thereby has never been built nor any work done thereon, nor has the State of Rhode Island, nor any citizen thereof, suffered any damage or loss by reason thereof; that the General Assembly of Rhode Island considered that the filing of the certificate and obligation of the City of Boston was not a compliance with the Act, and did not ratify the taking of the same till after the bankruptcy of the railroad company; that said bankruptcy was adjudicated on October 21, 1870, and the complainants became assignees in bankruptcy of said company from that date, and entitled to the money represented by the said certificate; that Samuel Parker having died, the respondent Clark succeeded him as General Treasurer of Rhode Island, and came into possession of the said certificate, which, it is alleged, however, he holds wrongfully, and in his individual and not his official capacity, and to the use of the complainants, but which, nevertheless, he threatens to collect and withhold from them the proceeds thereof. [444]

The prayer of the bill is, "That the said respondent Clark may be decreed to have no right, title or interest in or to the said paper writing A, or in or to the said money so deposited with the said respondent Tracey, or to any part thereof, and that he may be decreed to assign and deliver over the said paper A to your orators, and may be enjoined and restrained from presenting the same to the said respondent Tracey, or to the said City of Boston, or from receiving any money or payment whatsoever thereon, or therefor or any part thereof, or from receiving or holding the said sum of $100,000, or any part thereof, from the said respondent Tracey, or the said City of Boston, and that the said respondent Tracey and the said City of Boston may be decreed to pay over to your orators, as assignees as aforesaid, the said sum of $100,000, with interest thereon, and may be enjoined and restrained from paying the same or any part thereof, or any money on account thereof, to the said respondent Samuel Clark, the General Treasurer of the State of Rhode Island, and [445]

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that your orators may have such other and further relief as to Your Honors shall seem meet, and as the nature and circumstances of the case shall require."

To this bill a demurrer was filed by Clark, for want of jurisdiction, on the ground that it was in substance a suit by citizens of one State, against the State of Rhode Island. This demurrer was overruled. Clark then filed his answer, denying the material allegations of the bill, asserting that the transaction was with the State of Rhode Island, through the Treasurer in his official capacity, and insisting upon the immunity of the State from suit by citizens of other States as a defense. The cause came on for hearing upon the pleadings and proofs, when an interlocutory decree was passed, April 15, 1878, ordering the payment of the money due from the City of Boston upon the loan certificate into the registry of the court, with liberty to the defendant Clark to take and file evidence in support of any claim for damages by reason of the breach of the bond of the Boston, Hartford and Erie Railroad Company to the State of Rhode Island; and further ordering, that on final hearing, and upon filing in court the certificate of indebtedness, the General Treasurer of the State of Rhode Island should have and recover of the said sum in the registry such portion or the whole thereof as should amount to the sum, if any, for which any surety might or for which the principal obligor in said bond would be liable, upon the evidence, either for any penalty or damages by reason of the nonperformance and breach of the conditions of said bond.

On May 3, 1878, the City of Boston paid into court the sum of $100,000, and, in addition, the interest accrued to December 1, 1869, and subsequently, on February 25, 1880, an additional amount for interest in full.

On March 17, 1880, the following claim of the State of Rhode Island was filed by the allowance of the court as of April 15, 1878, after the entry of the interlocutory decree of that [446] date: "And now comes the State of Rhode Island, by the undersigned, the same counsel who have appeared for the defendant Clark, General Treasurer of said State, and without prejudice to the demurrer of said General Treasurer, claims the fund in the registry of the court." This was signed by counsel.

On final hearing, the fund was awarded to the appellees; and from that decree Clark, General Treasurer of the State of Rhode Island, and the State of Rhode Island appealed. The State itself is a party to the appeal bond, which recites that the State of Rhode Island was an intervener and claimant of the fund in court, and that a decree was rendered against it as such.

The bond, executed and delivered by the Boston, Hartford and Erie Railroad Company to the State of Rhode Island, is as follows:

"Know all men by these presents, that the Boston, Hartford and Erie Railroad Company, a corporation created by the General Assembly of the State of Connecticut, is held and firmly bound to the State of Rhode Island and Providence Plantations in the sum of $100,000, to be paid to said State of Rhode Island and Providence Plantations; to which payment, well and truly to be made, the said corporation doth bind itself and its successors firmly by these presents.

The condition of the aforewritten obligation is such, that whereas, by an Act of the General Assembly of said State of Rhode Island, entitled 'An Act in Addition to an Act Entitled "An Act to Ratify and Confirm the Sale of the Hartford, Providence and Fishkill Railroad to the Boston, Hartford and Erie Railroad Company," passed at the January Session, 1869, said Boston, Hartford and Erie Railroad Company are authorized and empowered to locate, lay out and construct a railroad, in extension of their line of railroad purchased of the Hartford, Providence and Fishkill Railroad Company, commencing at a point in their said purchased railroad at or near their freight depot in the City of Providence, thence running westerly and northerly by a line westerly of the state's prison, a little easterly of the Rhode Island Locomotive Works, and thence by nearly a straight line and crossing or running near to Leonard's Pond, and thence passing between the Villages of Pawtucket and Lonsdale, and over and above [447] the Providence and Worcester Railroad; thence continuing to the easterly line of the State, in or near the Village of Valley Falls:

Now, therefore, if said Boston, Hartford and Erie Railroad Company shall complete their said railroad before the first day of January, A. D. 1872, then the aforewritten obligation shall be void; otherwise be and remain in full force and effect.

In testimony whereof, said Boston, Hartford and Erie Railroad Company have caused this instrument to be signed by John S. Eldridge, its president, and its corporate seal to be thereto affixed, this twenty-third day of June, 1869.

[L. S.] Boston, Hartford and Erie R. R. Co.,
By John S. Eldridge, *President.*
Executed in presence of—
Samuel Currey,
H. S. Barry."

The testimony taken in the cause pursuant to the interlocutory decree, it is admitted, failed to prove any damage or loss occasioned to the State of Rhode Island, or to any of its citizens or inhabitants, by reason of the failure of the Railroad Company to comply with the conditions of this bond.

The first question for determination on this appeal is that of jurisdiction, raised first by the demurrer and afterwards by the answer of Clark, General Treasurer of the State of Rhode Island, on the ground that the suit was in effect brought against a State by citizens of another State, contrary to the Eleventh Amendment to the Constitution of the United States.

We are relieved, however, from its consideration by the voluntary appearance of the State in intervening as a claimant of the fund in court. The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, those courts are always open to it as a suitor in

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[448] controversies between it and citizens of other States. In the present case, the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the State and the appellees to the fund, to which both claimed title. The case differs from that of *Ga.* v. *Jesup* [*ante*, 216], where the State expressly declined to become a party to the suit and appeared only to protest against the exercise of jurisdiction by the court. The circumstance that the appearance of the State was entered without prejudice to the demurrer of Clark, the General Treasurer, does not affect the result. For that demurrer could not reach beyond the question of the right to sue Clark by reason of his official character, which became insignificant when the State made itself a party; and in point of fact, the bill was framed to avoid the objection, by charging Clark as a wrong-doer in his individual capacity. For the groundwork of the bill, whether it be regarded as directed against the officer or the State, is, that the transaction throughout was void, as *ultra vires* the corporation. And this presents the next question to be considered.

That question arises and is to be determined upon the following statement of facts:

The Boston, Hartford and Erie Railroad Company was originally created a corporation by the laws of Connecticut. Its charter conferred authority upon it in these terms: "Said Boston, Hartford and Erie Railroad Company may purchase * * * the franchise, the whole or any part of the railway or railway property of any railroad company, located in whole or in part in this State, whose line or a portion of whose line of railway, constructed or chartered, now forms part of a railway line from the harbor of Boston, passing through Thompson to Willimantic, and from Providence through Willimantic to Hartford, Waterbury and thence toward the North River, with the purpose of [449] reaching a point at or near Fishkill, in the State of New York; * * * and said Boston, Hartford and Erie Railroad Company may make any lawful contract with any other railway company with which the track of said railroad may connect, in relation to the business or property of the same; and may take lease of any railroad, or may lease their railway to, or may make joint stock with, any connecting railway company in the line of and forming a necessary part of and running in the same general direction as, their said route, and between its terminal points."

In pursuance of this authority, the Boston, Hartford and Erie Railroad Company purchased the franchises and railroad of the Hartford, Providence and Fishkill Railroad Company. This latter company was a consolidated corporation, deriving its existence and powers from the laws, both of Connecticut and Rhode Island, whose road, as defined in the Acts of incorporation, constituted a line within the general description contained in the section from the charter of the Boston, Hartford and Erie Railroad Company, already quoted. By a subsequent Act of the Legislature of Rhode Island, the sale and transfer of the Hartford, Providence and Fishkill Railroad, its property and franchises, to the Boston, Hartford and Erie Railroad Company was ratified and confirmed, so far as said railroad was situated in that State; and it was thereupon further enacted, that the "Said Boston, Hartford and Erie Railroad Company, by that name, shall and may have, use, exercise and enjoy all the rights, privileges and powers heretofore granted and belonging to said Hartford, Providence and Fishkill Railroad Company, and be subject to all the duties and liabilities imposed upon the same by its charter and the general laws of this State."

The Hartford, Providence and Fishkill Railroad Company was, without question, so far as it owned and operated a railroad within the State of Rhode Island, a corporation in and of that State; and the Boston, Hartford and Erie Railroad Company became its legal successor in that State, as owner of its property, and exercising its franchises therein, and became, therefore, in respect to its railroad in Rhode Island, a corporation in and of that State.

Thereafter, in January, 1869, the Legislature [450] of Rhode Island passed the Act out of which the present litigation has grown, entitled "An Act in Addition to an Act Entitled 'An Act to Ratify and Confirm the Sale of the Hartford, Providence and Fishkill Railroad to the Boston, Hartford and Erie Railroad Company.'" In its 1st section it is enacted as follows:

"The Boston, Hartford and Erie Railroad Company, a corporation created by the General Assembly of the State of Connecticut, are hereby authorized and empowered to locate, lay out and construct a railroad in extension of their line of railroad by them purchased of the Hartford, Providence and Fishkill Railroad Company, commencing at a point in its said purchased railroad at or near its freight depot in the City of Providence, thence running westerly and northerly by a line westerly of the state prison, a little easterly of the Rhode Island Locomotive Works, and thence by nearly a straight line, and crossing or running near to Leonard's Pond (so called), and thence passing between the Villages of Pawtucket and Lonsdale, and over and above the Providence and Worcester Railroad; thence continuing to the easterly line of the State in or near the village of Valley Falls, there to meet and connect with a railroad extending westerly through North Attleborough, from the direction of Boston, authorized by the Commonwealth of Massachusetts."

The 8th section of the Act is as follows:

"Said railroad, when the same shall have been constructed, shall be managed and protected in all respects according to the provisions of and be subject to an Act entitled 'An Act to Incorporate the Providence and Plainfield Railroad Company,' and the several Acts in addition to and amendment thereof, and the general laws of the State."

The Act thus referred to as the Act to incorporate the Providence and Plainfield Railroad Company, was the charter of the corporation by that name, in the State of Rhode Island, that, by consolidation with a Connecticut company, formed the Hartford, Providence and Fishkill Railroad Company.

The 12th section of the Act, recited in the [451] complainant's bill, is as follows:

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"This Act shall not go into effect unless the said Boston, Hartford and Erie Railroad Company shall, within ninety days from the rising of this General Assembly, deposit in the office of the General Treasurer its bond, with sureties satisfactory to the Governor of this State, in the sum of $100,000, that it will complete its said road before the first day of January, A.D. 1872."

This Act of the Legislature of Rhode Island was duly accepted by the stockholders of the Boston, Hartford and Erie Railroad Company; the bond required by the 12th section, as already set out, was executed and delivered; and the certificate of indebtedness, in lieu of sureties, was given by the company and accepted by the State.

It is now argued by counsel for the appellees, that the party which, in all these transactions, was dealing with the State of Rhode Island was the Boston, Hartford and Erie Railroad Company in its character as a corporation of the State of Connecticut; that, as such, it had no power, under the charter granted by that State, to build or own a railroad directly connecting Boston and Providence, nor had it, as such, any capacity to receive a grant of such a franchise; that, consequently, everything done or attempted in that behalf was *ultra vires* and void.

But the Boston, Hartford and Erie Railroad Company was also a corporation of Rhode Island. As such, it owned and operated a railroad within that State, and had received and exercised franchises under its laws, to which it was in all respects subject. It was the assignee of the road and rights connected therewith, formerly belonging to the Hartford, Providence and Fishkill Railroad Company; and it was this corporation, dwelling and acting in Rhode Island, that the Legislature, by the Act in question, authorized to exercise the additional powers it conferred.

If it had had no previous existence as a corporation under the laws of Rhode Island, it would have become such by virtue of the Act in question. For although as a Connecticut corporation, it may have had no capacity to act or exist in Rhode Island for these purposes, and no capacity by virtue of its Connecticut charter, to accept and exercise any franchises not contemplated by it, yet the natural persons, who were corporators, might as well be a corporation in Rhode Island as in Connecticut; and, by accepting charters from both States, could well become a corporate body, by the same name, and acting through the same organization, officers and agencies, in each, with such faculties in the two jurisdictions as they might severally confer. The same association of natural persons would thus be constituted into two distinct corporate entities in the two States, acting in each according to the powers locally bestowed, as distinctly as though they had nothing in common either as to name, capital or membership. Such was in fact the case in regard to this company, so that in Rhode Island it was exclusively a corporation of that State, subject to its laws and competent to do within its territory whatever its legislation might authorize. "Nor do we see any reason," as was said by this court, *Mr. Justice* Swayne delivering its opinion, in *R. R. Co.* v. *Harris*, 12 Wall., 65-82 [79 U. S., XX., 354-358], "why one State may not make a corporation of another State, as there organized and conducted, a corporation of its own, *quoad* any property within its territorial jurisdiction. That this may be done was distinctly held in *R. R. Co.* v. *Wheeler*, 1 Black, 297 [66 U. S., XVII., 133]." The same view was taken in *R. Co.* v. *Whitton*, 13 Wall., 270 [80 U. S., XX., 571]; in *R. R. Co.* v. *Vance*, 96 U. S., 459 [XXIV., 756]; and in *R. R. Co.* v. *Alabama* [*ante*, 518], decided at the present Term. The question of the powers of the Boston, Hartford and Erie Railroad Company, as a corporation in Rhode Island, and of the legal effect of its acts and transactions performed in that State, is to be determined exclusively by the laws of that State, and not by those of Connecticut, which have no force beyond its own territory. It results, therefore, that the doctrine of *ultra vires*, as here urged by the appellees, has no place in this controversy.

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It is, however, urged on behalf of the appellees, and this was the ground on which the decree below proceeded, that the obligation required by the statute and given by the company, was a bond, in the penal sum of $100,000, conditioned that the company would completely build its road within the period limited, upon which no recovery can be had, except for such damages as may be shown to have resulted to the State of Rhode Island from the breach of its condition; that no damage on that account is proven, it being in fact admitted that none actually resulted; that the certificate of indebtedness and the fund which has arisen from its payment, were pledged merely, in lieu of sureties, as collateral security for the satisfaction of the bond; and that, consequently, the claim of the State of Rhode Island against it having thus failed, that fund reverts to the appellees.

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The proposition of counsel for the appellees, as stated by them, is that, "From a period at least as early as the year 1650 down to the present time, bonds have constituted a distinct class of instruments, the effect of which is always the same, in the same sense that the effect of a conveyance to A and his heirs is always the same. Such is the rule of equity. Such was the effect of the statutes. Consequently, if in a particular case, parties have expressed their obligation in the form of a bond, their liability is thereby determined to be an obligation to perform the condition or pay the damages actually sustained from non-performance thereof;" and as a statement of the rule, they cite the following passage, 2 Sedgwick, Damages, 7th ed., 259, *n.*; "Of course, in this class of agreements, as in all others, when the contract takes the ordinary form of a penal bond, the sum fixed will invariably be regarded as a penalty; and this might well be put, at the present day, on the ground of intention, as derived from the writing itself, for this form of instrument is in such common use that persons who resort to it must be held to have in view its legal consequences."

While this may be accepted as a sufficiently accurate statement of the general rule, as to bonds with conditions, designed as an indemnity between private persons for non-performance of a collateral agreement, yet, in respect to such cases, it cannot be considered as universally true. "It is often a doubtful question," said the Supreme Judicial Court of Massachusetts in *Hodges* v. *King*, 7 Met., 583-587, "whether the sum stipulated to be paid on the non-performance of a condition is in the nature of a penalty,

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or is the amount settled by the parties for the purpose of making that certain which would be otherwise uncertain. * * * The bond has, indeed, a condition; but that is a matter of form and cannot turn that into a penalty which, but for the form, is an agreement to pay a precise sum under certain circumstances." So that it cannot correctly be said to be true, in all such cases, that the intention to treat the sum named in the bond as a penalty to secure the performance of the condition, and to be discharged on payment of damages arising from non-performance, can be inferred as a rule of law, or a conclusive presumption, from the mere form of the obligation.

Originally, at law, in case of breach of the condition of a bond, the amount recoverable was that named in the obligation. So that, if the condition is impossible either in itself or in law, the obligation remains absolute. As "If a man be bound in an obligation, etc., with condition that if the obligor do go from the Church of St. Peter in Westminster to the Church of St. Peter in Rome within three hours, that then the obligation shall be void. The condition is void and impossible, and the obligation standeth good." So, again, if the condition is against a maxim or rule in law, as, "If a man be bound with a condition to enfeoff his wife, the condition is void and against law, because it is against the maxim in law, and yet the bond is good." Co. Litt., 206 *b*. So, where the condition is possible at the date of the instrument and becomes impossible subsequently, the obligation does not become thereby discharged, unless the impossibility of performance was the act of God, or of the law, or of the obligee. Accordingly, it was held by this court in *Taylor* v. *Tuinior*, 16 Wall., 366 [83 U. S., XXI., 287], that when a person arrested in one State on a criminal charge, and released under his own and [455] his bail's recognizance, that he will appear on a day fixed and abide the order and judgment of the court, on process from which, he has been arrested, goes into another State, and while there, is, on the requisition of the Governor of a third State, for a crime committed in it, delivered up, and is convicted and imprisoned in such third State, the condition of the recognizance has not become impossible by act of law so as to discharge the bail; "The law which renders the performance impossible, and therefore excuses failure, must be a law operative in the State when the obligation was assumed and obligatory in its effects upon her authorities."

The ground, nature and limits of the jurisdiction of courts of equity to relieve against penalties in such instruments is well stated by *Mr. Justice* Story, in this language:

"In short, the general principle now adopted is that, wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory and, therefore, as intended only to secure the due performance thereof or the damage really incurred by the non-performance. In every such case, the true test generally, if not universally, by which to ascertain whether relief can or cannot be had in equity, is to consider whether compensation can be made or not. If it cannot be made, then courts of equity will not interfere. If it can be made, then, if the penalty is to secure the mere payment of money, courts of equity will relieve the party, upon paying the principal and interest. If it is to secure the performance of some collateral act or undertaking, then courts of equity will retain the bill, and will direct an issue of *quantum damnificatus;* and when the amount of damages is ascertained by a jury, upon the trial of such an issue, they will grant relief upon payment of such damages." Eq. Jur., sec. 1314.

And Mr. Adams, in his treatise on Equity, 6th Am. ed., 107, says, on the same subject:

"The equity for relief against enforcement of penalties originates in the rule which formerly prevailed at law, that, on breach of a contract secured by penalty, the full penalty might be enforced, without regard to the damage sustained. The court of chancery, in treating con- [456] tracts as matters for specific performance, was naturally led to the conclusion that the annexation of a penalty did not alter their character; and, in accordance with this view, would not, on the one hand, permit the contracting party to evade performance by paying the penalty; and, on the other hand, would restrain proceedings to enforce the penalty on a subsequent performance of the contract itself, *viz.:* in the case of a debt, on payment of principal, interest and costs; or in that of any other contract, on re-imbursement of the actual damage sustained."

It has accordingly been uniformly held, in cases too numerous for citation, that courts of equity will not interfere in cases of forfeiture for the breach of covenant and conditions where there cannot be any just compensation decreed for the breach; for, as was said by *Lord Chancellor* Macclesfield, in *Peachy* v. *Duke of Somerset*, 1 Str., 447, *S. C.*, Prec. Ch., 568, 2 Eq. Cas. Abr., 227, "It is the recompense that gives this court a handle to grant relief."

The application of this principle becomes more manifest in cases where a public interest or policy supervenes, as where, for non-compliance by stockholders in corporations engaged in undertakings of a public nature, with the terms of payment of installments due on account of their shares, by which a forfeiture of the stock and of all previous payments thereon has been incurred and declared, the courts refuse to grant relief. *Sparks* v. *Proprs. of Liverpool Waterworks Co.*, 13 Ves., 428; *Prendergast* v. *Turton*, 1 Younge & C. (Ch.), 98; *Naylor* v. *South Devon R. Co.*, 1 DeGex & S., 32; *Ludlow* v. *Dutch Rhenish R. Co.*, 21 Beav., 43.

In the case of *Sparks* v. *Proprietors of Liverpool Waterworks Co.*, 13 Ves., 433, Sir Wm. Grant, M. R., said: "The parties might contract upon any terms they thought fit, and might impose terms as arbitrary as they pleased. It is essential to such transactions. This struck me as not like the case of individuals. If this species of equity is open to parties engaged in these undertakings, they could not be carried on. * * * Why is not this equity open to contractors for government loans? Why may not they [457] come here to be relieved when they have failed in making their deposit? And if they could have relief, how could government go on? It would be just as difficult for these undertakings to go on. If compensation cannot be effectually made it ought not to be attempted."

Accordingly, where any penalty or forfeiture

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is imposed by statute upon the doing or omission of a certain act, there courts of equity will not interfere to mitigate the penalty or forfeiture, if incurred, for it would be in contravention of the direct expression of the legislative will. Story, Eq. Jur., sec. 1326. *Lord Chancellor* Macclesfield said, in *Peachy* v. *Duke of Somerset*, 1 Str., 447: "Cases of agreements and conditions of the party and of the law are certainly to be distinguished. You can never say the law has determined hardly, but you may that the party has made a hard bargain." In *Powell* v. *Redfield*, 4 Blatchf., 45, an application was made in equity to restrain suits upon a bond given in pursuance of the revenue laws of the United States, which was denied on the ground that a court of equity had no right to interfere and, by injunction or decree, to virtually repeal the express provisions of a positive statute, or defeat their operation in the particular case. In *Benson* v. *Gibson*, 3 Atk., 395, *Lord* Hardwicke said: "Nor is it like the case of bonds given as a security not to defraud the revenue, because there, where a person is guilty of a breach, it is considered in law as a crime, and this court will not relieve for that reason." The case of *Treasurer* v. *Patten*, 1 Root, 260, was an action for the penalty of a bond given to oblige the defendant to observe the laws respecting excise, in which there was a verdict for the plaintiff and the £200 penalty. Defendant moved the court, says the report, to chancer said bond. "By the court: there is no power short of the Legislature can do it; for it is the sum prescribed by an Act of the Legislature."

[458] So in *Keating* v. *Sparrow*, 1 Ball & B., 367, the *Lord Chancellor* Manners said: "It has been argued on the part of the plaintiff that this court leans against forfeiture, if the party can be compensated; and that he can in this case, where interest and septennial fines may be given to the landlord. That principle is applicable to cases of contract between the parties, but not to the provisions of an Act of Parliament or conditions in law."

The fact that the obligation is in the form of a bond to the State does not make its penalty less a statutory forfeiture, and so outside the jurisdiction of a court of equity. In the case of *U. S.* v. *Montell*, Taney, 47, it was held that the sum secured by a bond with sureties, under the Act of Congress of December 31, 1792, ch. 45, sec. 7 [1 Stat. at L., 290], conditioned that the registry of a vessel should be used solely for the vessel for which it is granted, and should not be disposed of to any person whatsoever; and if the vessel be lost, or prevented by disaster from returning to the port, and the registry shall be preserved, or if the vessel be sold, that the registry shall be delivered up to the collector, is a penalty for forfeiture inflicted by the sovereign power for a breach of its laws, not a liquidated amount of damages due under a contract, but a fixed and certain punishment for an offense, and not the less so because security is taken before the offense is committed in order to secure the payment of the fine if the law should be violated. *Chief Justice* Taney, in his opinion, said:

"Penalties and forfeitures imposed by statute are not usually provided for by bond and security given in advance. The sum recovered from Montell is recovered upon a contract; the action was brought upon a contract; and was not and could not have been brought in any of those forms which are usually necessary for the recovery of fines or forfeitures imposed by law. Yet this sum was, in truth, forfeited by Montell, by reason of his violation of a duty imposed by the Act of Congress; it was a specific penalty upon the owner and master, for the commission of a particular offense against the policy of that law. And although the amount was secured by bond given for the performance of the duty, yet this duty was a part of the same [459] policy with other duties mentioned in the Act and for which other penalties are inflicted. * * *

It certainly is not to be regarded as a bond with a collateral condition, in which the jury are to assess the damages which the United States shall prove that they have sustained; for, according to that construction, the amount of damages would not depend upon the amount of the penalty described in the section, which is graduated according to the size of the vessel, but would depend upon the discretion of different juries, and larger damages might be given where the penalty was only $400, than in a case where the penalty was $2,000.

This, obviously, is not the intention of the law; and the United States are entitled to recover the whole sum, for which the party is bound, if any one of the conditions are broken. Besides, how could the United States prove any particular amount of damages to have been sustained by them in a suit on this bond? What do they lose? It would be difficult, we think, by any course of proof or any process of reasoning, to show that the United States had sustained any particular amount of damages in a case of this description, or to adopt any rule by which the damages could be measured by a jury, or be liquidated by agreement between the parties.

The sum, for which the parties are to become bound, is manifestly a penalty or forfeiture, inflicted by the sovereign power for a breach of its laws.

It is not a liquidated amount of damages due upon a contract, but a fixed and certain punishment for an offense. And it is not the less a penalty and a punishment, because security is taken before the offense is committed, in order to secure the payment of the fine if the law should be violated."

Recurring now to the particular circumstances of the present case, with a view to the application of these principles and decisions, we are satisfied that the proper solution of the question now under examination is to be found in two principal considerations.

The first of these is, that it was not intended by the parties, the State of Rhode Island on the one hand, and the Boston, Hartford and Erie Railroad Company on the other, that the obligation given and accepted should be for an in- [460] demnity against any loss or damage expected to be suffered by the State, in the event that the railroad company should fail to build the railroad as required. It is found as a fact that no such loss or damage has in fact ensued. It is equally plain that none could possibly have arisen. The security is not to be extended to any supposed damage to private interests legally affected by the process of constructing the

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work. All damage of this kind to private persons was carefully provided for in other parts of the Act. As to the State itself, the real party to the arrangement and contract, it could gain nothing in its political and sovereign character by the construction of the road, it could lose nothing by the default. If it could be supposed as possible that the State had in view the public interests of commerce and trade in the construction of the proposed railroad, and meant to provide for loss and damage to them by reason of its failure, the obvious answer is that no computation and assessment of actual damages on that account would be practicable, leaving as the alternative that the State, in fixing the penalty of the bond in the statute, had established its own measure of the public loss. The question of damages and compensation was not, because it could not have been, in contemplation of the parties. There was no room for supposing that there could be any. To assume that the statute required this bond and security in this sense, in full view of the legal conclusion which it is said necessarily flows from its form, and that in the event contemplated, of the failure to build the road, all that remained to be done was that the State should hand back canceled the obligation and security it had been at such pains to exact, is to put upon the transaction an interpretation altogether inadmissible. It would have been, upon such an assumption, a vain and senseless thing, and however private persons may be sometimes supposed to act improvidently, we are not to put such constructions, when it is legally possible to avoid them, upon the deliberate and solemn acts and transactions of a sovereign power, acting through the forms of legislation. The conclusion, in our opinion, cannot be resisted that the intention of the parties in the transaction in question was [461] that, if the railroad should not be built within the time limited, the corporation should pay to the State, absolutely and for its own use, the sum named in the bond and secured by the deposited certificate of indebtedness. The supposition is not open that the penalty was prescribed merely *in terrorem*, to secure punctuality in performance, with the reserved intention of permitting subsequent performance to condone the default, for a distinct section of the statute (sec. 9) declares that in case of failure to complete the road within the time limited, the Act itself should be void and of no effect.

In the second place, we think that the sum named in the statute is imposed by it as a statutory penalty for the non-performance of a statutory duty. The obligation required is that the railroad company shall give a bond, with satisfactory security, that they will obey the law, that they will complete their road as required by it. The language evidently means that, in case they fail to do so, they shall forfeit and pay the sum named; and in order to insure its payment, additional parties to the bond, as sureties, are required. It is admitted, that if it does not mean this, it does not mean anything, and we have already said that we are not at liberty to adopt that alternative. We must construe it, *Ut res magis valeat quam pereat;* and the rule of strictness, in the construction of penal statutes, does not require an interpretation which defeats the very object of the law. The State of Rhode Island was dealing with one of its own corporations, and it had perfect right to act upon its own policy and prescribe its own terms, as conditions of powers and privileges sought from its authority.

For these reasons the decree of the Circuit Court is reversed and the cause is remanded, with instructions to enter a decree in favor of the State of Rhode Island for the sum of $100,000, payable out of the fund in court, with so much interest thereon, if any, as has accrued on that sum since the first day of January, 1872, which is the date when the amount became due and it is, accordingly, so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 452.

ROBERT L. DOWNTON, *Appt.*,
v.
YAEGER MILLING COMPANY.

(See S. C., "*Downton v. Yeager Milling Company*," Reporter's ed., 466-477.)

Prior publication to defeat patent.

Prior printed publications which describe the process covered by a patent, so fully and clearly as to enable persons skilled in the art to which the invention relates, to carry on the process, will defeat a patent obtained for such process.

[No. 257.]

Argued Apr. 17, 18, 1883. Decided May 7, 1883.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri. The history and facts appear in the

Statement of the case by *Mr. Justice* **Woods:**

The appellant was the complainant in the circuit court. He filed his bill to restrain the infringement by the appellee of certain letters patent, for which he made an application on March 20, 1875, and which were issued to him on April 20th following, for an improvement in processes of manufacturing middlings flour.

The state of the art and the purpose of the improvement which the patent was intended to cover, are set forth in the specification, as follows:

"This invention has for its aim the better working or manipulating of grain particles known as middlings, for their reduction into meal or flour.

To fully set forth the advantages that this process possesses, over any of the various processes previously known and in use, it will be [467] necessary to briefly describe the manufacture as now practiced.

It is customary, under the ordinary mode of milling, to separate and purify the middlings by the action of air alone, or air and bolting-cloth combined; then to convey the purified product to millstones to be ground to a sufficient fineness to admit of the passage of the middlings flour through the meshes of the bolting-cloth, which is used as a finishing preparer between the stones and the flour barrels or sacks receiving the finished product. In some cases, the middlings that are not sufficiently reduced to go through the meshes of the cloth, pass through the ends of the flour bolts, and are brought back

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onto some of the various purifiers, and subjected to repurification. This process requires much careful manipulation, and even then the yellow germ and pellicle of the grain will be so torn and pulverized by the stones that loose portions of the same will pass through the meshes of the bolting-cloth into the flour with injurious effect. The reason why the germ and pellicle is so torn, is that millstones are composed of two disks; one revolving, the other stationary, receiving the material to be ground at the eye or center of the stones, and compelling it by centrifugal force to escape at the skirt or periphery of the stones, passing alternately over face and furrow until it reaches the periphery, where it is discharged. Such action comminutes the germs and forms specks that cannot be removed by the purifiers and are, therefore, ground in with the flour.

In the manufacture of middlings flour, the action of stones on the middlings is not different from their action on grain, but in the wheat-stones the germ ends and bran are not sufficiently comminuted by one grinding to pass through the meshes of the cloth used for the flour known to the trade as 'first run.' I propose to arrest and remove such germ matter and bran particles by my improved process before they reach the second grind on the middlings stones, by placing between the purifiers or separators and middlings stones one or more sets of rolls, which will operate to reduce the large middlings by a bruising or crushing action, while they simply flatten out the intermixed germs and bran. Any of the various purifiers or separators in public use may be employed. A second important advantage or result of this improved process is the production of a large yield [468] of high grade flour. The large middlings or glutinous particles of the grain require more grinding than do the finer and more starchy particles removed at the head or first part of the purifiers; and when ground together, as is generally the case with small mills, and frequently the case with large mills, the meal is considerably heated in the grinding, owing to the miller's requiring the middlings meal to be of uniform fineness. The disposition and fineness of the small middlings cause them to 'flour' quicker than the large middlings, therefore the grinding is unequal, as, in order for the large glutinous middlings to be ground enough, the small starch middlings must be ground too much. This impairs the quality of the flour by deadening it, as well as by reducing the germs and bran to such an extent as to cause them to pass through the cloth. Some mills, therefore, run the coarsest middlings to a lower grade of flour.

It is plain that with an intermediate reduction, by the flattening rolls working on the large middlings as above set forth, the comminution of the middlings under the stones is rendered more equal, and a larger percentage of high grade flour can be made.

I will now describe briefly my mode of milling, referring, for illustrations, to the accompanying drawing, in which

Figure 1 is a general side view, partly in section, showing an apparatus, or a series of machines, comprising a section of my purifier A; and Fig. 2 is a like view of the same apparatus, in part, illustrating the employment of any other purifier, A^2.

Naturally the germs and bran are kept with the large and valuable middlings or particles of grain by the bolting-cloth of the purifying machines or flour-bolts till they reach certain parts, where the middlings are subjected to strong currents of air to remove light bran-flakes and fuzzy matter. The partially-freed middlings are now passed from the purifier A, or A^2, between rolls or uniformly rotating surfaces, B, where the good middlings particles, being more brittle, are reduced to small granules, or to flour, while the germ and heavy bran matter, being of a soft, plastic nature, is flattened out, so that on passing it into a reciprocating or revolving bolt, C, clothed with suitable cloth, the flouring matter is thoroughly removed through the meshes of the cloth in a fit state of purity to pass to the stones D to be reground as usual, and the injurious germs and refuse matter are arrested, so as to be run off into suitable receptacles."

The claim was stated as follows: [469]

"The following is claimed as new, namely:

The herein described process of manufacturing middlings flour by passing the middlings, after their discharge from a purifier, through or between rolls, and subsequently bolting and grinding the same for the purposes set forth."

The answer of defendant set up, among other things, as matter of defense, want of novelty, and vagueness and uncertainty in the specifications and drawings filed by the patentee to describe his invention.

The circuit court sustained both these defenses and dismissed the bill. The appeal of complainant has brought up this decree for review.

Messrs. **George Harding** and **W. G. Rainey**, for appellant.

Messrs. **F. W. Cotzhausen** and **Robert H. Parkinson**, for appellee.

Mr. Justice **Woods** delivered the opinion of the court:

A grain of wheat may be described generally as follows: it consists of a pellicle or outside covering known as bran, an inner envelope consisting of cells and their contents of gluten and phosphates, the most nutritious portion of the berry, and an interior white mass composed mainly of starch and albuminoid matter, extending to the heart of the berry. At one end of the berry, under an irregularly curved surface layer of bran, technically called the shield, is the embryo or germ. The germ is a yellow, waxy substance, and the bran is consistent and tough. It has always been the aim of good milling to separate, as completely as possible, the bran and germ from the other contents of the berry, because they not only gave color to the flour, but rendered it more liable to sour.

The main purpose of the improvement described in appellant's letters patent was to accomplish this result by removing the bran and germ from the coarse middlings, leaving only those parts of the grain from which pure white flour could be produced. The improvement consisted in a process and did not cover the several devices by which the process was carried on.

The process was as follows: coarse middlings, [470] from which the fluffy matter had been eliminated by a well known contrivance known as

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a purifier, were passed between one or more sets of rolls which reduced the large middlings to a greater degree of fineness, but flattened out the tough and waxy germs and bran. After the middlings with the intermixed germs and bran particles, had been passed between the rolls, they were carried to a bolting-cloth. This allowed the comminuted middlings to pass through its meshes, whence they were carried to the stones to be reground as usual, but the germs and bran particles having been flattened and their surfaces enlarged by the rolls, could not get through the bolting-cloth, and were carried to the end of the bolt, and then run off into suitable receptacles.

It will be observed that all the separate parts of this process are old. The use of purifiers on middlings to take out the fluffy particles, the use of rolls to comminute middlings, the use of bolting-cloths to separate the bran and germs from the flour, and the use of stones to regrind middlings, all long antedate the patent of the appellant.

The only field left for invention, therefore, was either a new order in which the different parts of the process were to be applied, or some new method of using some one or more of the devices by which the process was accomplished, or both these combined, so as to produce some new product, or some old product in a cheaper or otherwise more advantageous method. It is claimed for the appellant that his invention consists "In interjecting in the old modes, after the purifier, a pair of smooth rolls of equal diameter and running at equal speed, and then rebolting the product and regrinding the middlings" which pass through the bolting-cloth.

We are to inquire whether the defense relied on in this case, that the invention claimed as his own by the appellant, had been described in a printed publication before his invention thereof had been made out.

By section 24 of the Act of 1870 [16 Stat. at L., 198], it was provided that any person who had invented any new and useful art, machine, manufacture or composition of matter not known [471] or used by others in this country, "And not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof," might obtain a patent therefor.

In construing the words "described in any printed publication in this or any foreign country," as they were used in reference to the same subject in section 7 of the Act of 1836, 5 Stat. at L., 117, this court, in the case of *Seymour* v. *Osborne*, 11 Wall., 516 [78 U. S., XX., 33], said: "Patented inventions cannot be superseded by the mere introduction of a foreign publication of the kind, unless the description and drawings contain and exhibit a substantial representation of the patented improvement in such full, clear and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct and practice the invention as they would be enabled to do if the information was derived from a prior patent."

So in *Cohn* v. *Corset Co.*, 93 U. S., 366 [XXIII., 907], *Mr. Justice* Strong, speaking for the court, said: "It must be admitted that unless the earlier printed and published description does exhibit the later patented invention in such a full and intelligible manner as to enable persons skilled in the art, to which the invention is related, to comprehend it without assistance from the patent or to make it or repeat the process claimed, it is insufficient to invalidate the patent."

Applying strictly the rule thus laid down, we are of opinion that the defense of prior publication has been made out.

After a careful consideration of the evidence in the record, we are forced to the conclusion that the method of making flour, set forth in the specification of appellant's patent, was fully and clearly described in a printed publication before the invention thereof by the appellant, and that his patent therefor is, consequently, void. We refer to a German work put in evidence by the defendant, entitled *Die Mehlfabrication*, by Frederick Kick, published at Leipsic, in 1871. We take the following extracts from a translation of this book, "Part IV., Rough [472] Grinding With Roll Mills:"

"In the successive process of grit, or high milling, the grain is crushed in its first passage through between the stones, that is, broken into parts of different sizes, groats.

In the disintegrating process, which follows next, flour, dust, middlings, partings and breakings are obtained. With each of these substances, classified according to size, particles of the hull of the same size are mixed, or still adhere to the particles of the grist. By this method of crushing with stones, a partial splitting up of the hull is unavoidable, and the flour obtained from such rough grinding is mixed with particles of bran, even from decorticated wheat, and is, therefore, discolored.

If one were able wholly to prevent the disintegrating of the particles of the hull, the flour produced by rough grinding would be white.

This, however, is never fully accomplished; but there is, on the one hand, a way to diminish the friability of the hull, by moistening; on the other hand many sorts of wheat, under similar treatment, exhibit this difficulty to a less extent and, therefore, produce white flour, *viz.*: soft wheat; or, finally, machines are employed which, in the process of rough grinding, break up the hull to a less degree, as is the case with roll mills.

The roll mills operate partly by crushing, and partly by grinding. They produce breakings, which then pass to the stones for grinding into flour. The surfaces of the rolls are smoother than those of the stones, and the hull is, therefore, less torn. Of course the disintegrating by means of rolls is not appropriate for every kind of wheat. If soft, mild wheat is passed through the rolls, it leaves the rolls in a flat, compressed condition; whereas, with the same treatment, hard (Hungarian) wheat is reduced to fragments, and so regularly broken.

The action of the rolls evidently depends upon their relative position (their distance apart); it also depends on the condition of their surfaces (whether smooth or channeled); and then again on their relative motion, *viz.*: whether both rolls have like or different velocities.

If the rolls are so far apart that the wheat sustains only a moderate pressure, and if they are smooth, then only a breaking of the grain occurs in the direction of the crease. The berry is thereby divided into two longitudinal [473]

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halves, of which many still cohere at the back, thus resembling an open book.

In case the rolls are closer together, then, with soft wheat a flattening takes place, and the middlings obtained therefrom are very clean or free from bran. Hard wheat is much more considerably reduced, and a proper breaking is effected. * * * Rolls with smooth surfaces operate more by compression, those with fluted surfaces more in a cracking or breaking manner. In order to give the rolls at the same time a triturating effect, they are made to revolve with different velocities.

Two, three pairs of rolls may be arranged one above another. By the first pair 'coarse breakings' are produced; by the second 'first breakings,' etc. Hence, the application of three pairs of rolls permits a gradual disintegration during a single passage of the grain through the roll mill. * * * There are (as we shall explain hereafter) certain varieties of middlings in which the but partially broken germs constitute thirty or forty per cent of the entire mass, and which being yellow granules, give to the entire mass of grit, with which they are intermixed, a yellowish appearance.

Now, if this kind of middlings is passed through properly adjusted rolls the tough germs are only flattened, while the other granules are broken and can be easily separated by sifting. Instead of a pair of rolls, a single roll operating against an adjustable segment of stone or iron may be used. By this latter method, the substance ground is much more subjected to trituration. The particles already reduced continue to rub against each other and against the working parts of the machine, until they finally pass out, in consequence whereof the advantages above mentioned of the roll mills are greatly neutralized."

We have, in this publication, an accurate description of the process covered by appellant's patent.

We have the rolls used for the identical purpose therein set forth, namely: to reduce the middlings and to flatten out the germs, so that they can be separated by bolting or sifting, thus preparing the middlings to be again ground and reduced to middlings flour.

Appellant insists, however, that the process [474] described by Kick is not applied to purified middlings and, therefore, differs from his.

But it appears from the well known state of the art, that ever since purifiers were invented, it has been the practice to purify middlings before reducing them, so that whenever the grinding of middlings is mentioned, graded and purified middlings are understood. The process of purifying, in case of gradual reduction, is as elementary as bolting, and follows every reduction of the material. When, therefore, Kick speaks of passing middlings through the rolls for another reduction, he must be understood to mean purified middlings. But the evidence in the record clearly shows that the action of the rolls, and their effect upon the product of the mill, would be the same whether purified or unpurified middlings, or even wheat were used.

Appellant further insists that his process differs from that described by Kick, because the rolls mentioned by the latter run at an equal speed. This contention is founded on a misapprehension. The extract from Kick's work expressly says that "The action of the rolls evidently depends * * * on their relative motion, *viz.*: whether both rolls have like or different velocities." Rolls, therefore, with the same or different velocities could be used in the process described by Kick. His method included both.

We are also of opinion that the process which appellant claims as his invention was also clearly described as early as the year 1847, in a publication called Anglo-American and Swiss Science Milling, by Christian Wilhelm Fritzsch, published at Leipsic by Gustav Brauns. This description of the process of manufacturing flour is illustrated by drawings, which make it perfectly clear that the different parts of the process of the appellant were anticipated and publicly printed more than twenty-five years before the appellant, according to his own story, conceived the improvement described in his patent.

Fritzsch describes the process as follows:

"The advantages to be derived from the roll mill consists chiefly in this, that in operating them a considerable saving of power is achieved as compared with stone mills. Furthermore, [475] the flour produced is of excellent quality, both in whiteness and fineness.

Inasmuch as the wheat is ground in a dry state, the flour produced is especially adapted, with respect to durability, for transportation and storing.

The principle on which all said improvements turn, centers wholly and exclusively in a desire to effect the grinding of wheat, so that not only the largest possible quantity of good middlings flour is obtained, but also that this may be separated from the hull or bran in its original purity; or to express it in plainer words, to obtain the mealy interior substance without admixture of any part of the hull."

Then follows a description of the mill by which the reduction of the wheat to coarse middlings is effected:

"The rough ground product discharged from the mill (in which, besides middlings, flour has been produced) is thereupon most conveniently carried into the upper stories of the mill building by means of an elevator, and is then first transferred to a flour cylinder for the purpose of separating the flour. The remainder then goes upon a grit cylinder, where the material is assorted and separated from the hull in four different grades of middlings. The middlings thus obtained are thereupon likewise cleaned in the manner already described, and prepared for flouring.

The grinding of middlings takes place by a manipulation varying but little from the process of rough grinding, by means of a flouring mill, which together with the crushing mill above mentioned constitutes a set or run. We see this flouring mill upon our plate (fig. 8). Its construction is in the main like that of the other, only the difference that the upper pairs of rolls are not fluted, like those in figure 7, but have smooth turned surfaces and, consequently, no under layers (wedges). This under layer (wedge) is only used with the under pair of rolls, which are finely fluted.

The middlings ready for grinding are here also put into the hopper, as shown, and carried to the first, second and third pairs of rolls, in

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the manner described. The upper two pairs of rolls crush and triturate the middlings to the [476] utmost degree; therefore, it remains for the last lower pair of rolls to shake up the flour.

This product thus finely ground is now transferred to the cylinder bolt for separating the flour. The bran-like surplus is carried with the hulls to a stone mill, to be very completely ground out.

The grinding of middlings in the manner above described has many advantages in its favor, especially in this: that the hull particles still contained in the middlings are, by this process, not any longer decomposed or torn up, whereby the possibility of transfer of them into the flour is avoided."

In this description we have the purifying of the middlings by a purifier which is shown in the cut, then the passing of them between two pairs of smooth revolving rolls of equal diameter, which are in all respects like the rolls described in the specification of appellant's patent, and which necessarily perform the same function; then the disintegration, or shaking up as it is called, of the ribbons or sheets of the material which come from the second pair of rolls, by passing them through the third pair, which are fluted but are not allowed to touch each other, and then their transfer to the bolting cylinder, by which the flour is separated from the bran and germs.

The only difference between this process and that described in appellant's patent, is that the last two sets of rolls but one, mentioned in the process described by Fritzsch completely reduce the middlings to flour, while in the process under appellant's patent the middlings, after passing between the rolls and, being separated from the germs and bran, are again ground between stones; but the great feature of appellant's process, the flattening of the germs and pellicle by passing the middlings between rolls, is found in the method described by Fritzsch.

The advantages from the process described by Fritzsch are identical with those claimed for the process described in appellant's patent, first, a saving of power; second, the hull of the wheat (and necessarily the germ) is not disintegrated and torn up in passing between the rolls as it would be between the ordinary millstones, and can, therefore, be eliminated by the bolt; and third, the yield of high grade flour is [477] increased, and the flour produced is of excellent quality, both in whiteness and fineness and fitness for transportation and storing.

The printed publications relied on to defeat the appellant's patent describe the process covered thereby so fully and clearly as to enable persons skilled in the art to which the invention relates, to carry on the process. In fact, the description of the process in the printed publications is, to say the least, quite as precise, clear and intelligible as in the specification and claim of the patent.

The earliest date at which the appellant claims to have invented his improvement is stated by him as in 1872 or 1873. These publications, therefore, which antedate his invention, one by at least one year, and the other by twenty-five years, are fatal to the validity of the patent.

The decree of the Circuit Court which dismissed the bill must, therefore, be affirmed; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN J. MANNING ET AL., *Appts.*, [462]

v.

CAPE ANN ISINGLASS AND GLUE COMPANY ET AL.

(See S. C., Reporter's ed., 462-466.)

Public use of invention.

Public use of an invention with the consent of the inventor, for more than two years prior to the application for a patent, renders the patent void.

[No. 258.]

Argued Apr. 18, 19, 1883. Decided May 7, 1883.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The history and facts appear in the

Statement of the case by *Mr. Justice* **Woods:**

This was a suit brought by the appellants, John J. Manning and Caleb J. Norwood, to restrain the infringement by the appellees of letters patent dated January 7, 1873, issued to the appellants and W. N. Manning, as assignees of the inventor, James Manning. By the subsequent assignment of W. N. Manning, the appellants became vested with the title to the entire patent.

It is well known that the swimming bladders or sounds of certain fishes are largely composed of that variety of gelatine called isinglass. The sounds are usually found in the market in a dry and hard state. They are manufactured into isinglass by a mechanical operation, which consists in passing the macerated sounds successively between several sets of rollers, the first set kneading the sounds into a homogeneous sheet, and the subsequent sets squeezing and elongating the sheets into the ribbons of isinglass known to commerce. The invention covered by the patient sued on was for an improvement in the manufacture of isinglass from fish sounds.

The specification of the patent declared as follows:

"In the manufacture of ribbon isinglass from fish sounds it is customary to feed the softened and moist or macerated sounds to and between feed and compressing rollers, by which the viscid substance is compressed and joined and formed into a continuous sheet. Notwithstanding the constant application of cold water into the rolls, the substance adheres tenaciously to the roll and accumulates thereupon, and has to [463] be cut away therefrom, an operation which is very slow and laborious and productive of imperfect sheets.

My invention is designed to obviate the return of the adhering gelatinous substance to the action of the rolls before it is stripped therefrom, and to so strip it that the rolls may work continuously or without stoppage, the ribbon, as it is stopped, being again fed or guided by the operator into and between the rolls until sufficiently reduced or elongated for removal or

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for the action of other rolls set nearer together to produce a thinner ribbon.

To effect this result, I place at the side of each roll a scraper extending the whole length of the roll, and having an edge set up to the roll, so that the roll shall run just clear of it, which scraper or cleaner strips from the whole surface of the roll the adhering gelatine in the form of a sheet.

The invention consists in this method of passing the isinglass between hollow rolls, cooled by water thrown into the rolls, and then stripping the gelatinous matter from the rollers and returning it to the hopper to be again treated, the rollers being adjustable."

The claim was as follows:

"The herein described method of converting isinglass into sheets of any desired thickness by running it between hollow rolls into which cold water is thrown to cool the compressing surfaces, such rolls being preferably made adjustable to graduate the degree of compression, and the adhering sheets being removed from the rolls by stationary scrapers or cleaners and returned to the hopper as required.

One of the defenses set up in the answer and relied on was, that the improvement described in the patent had been in public use for more than two years before the patent was applied for.

The circuit court dismissed the bill on that ground. From its decree this appeal is prosecuted by the complainants.

Mr. **Thos. Wm. Clarke**, for appellant.

Messrs. **George L. Roberts** and *J. L. S. Roberts*, for appellees.

[464] *Mr. Justice* **Woods** delivered the opinion of the court:

We think that the defense, that the improvement described in the patent had been in public use for more than two years prior to the application therefor, is established by the testimony.

The appellants contend that the patent covers an improvement in the process of making isinglass. It is not contended that the patent covers the rolls between which the fish sounds are passed, or the keeping of the rolls cool by making them hollow and injecting a stream of cold water into the cavity, nor the automatic scrapers, but in the use of automatic scrapers applied to such rolls to prevent the isinglass from being carried through the rolls a second time without aeration.

The testimony shows that, as early as the year 1860, James Manning, the inventor, was engaged in the manufacture of isinglass at Ipswich, Mass., in copartnership with his brother-in-law, Caleb Norwood, under the name of Norwood & Manning. In that year Oliver C. Smith, a machinist at Salem, constructed for the firm a machine containing adjustable hollow water-cooled rolls, with stationary scrapers, substantially such as are described in the patent, for converting isinglass into sheets in the manner therein set forth. The use of this machine was continued down to the year 1867, when the firm of Norwood & Manning was dissolved. In the division of the assets of the firm between the partners, the machine with the scraper, made by Smith, fell to Norwood. He took into the business with him as a partner his son, Caleb J. Norwood, and continued it in the same factory from 1867 to 1870, using the machine with the stationary scraper which had been made by Smith.

James Manning, after the dissolution of the firm of Norwood & Manning, established an isinglass factory at Rockport, Mass., and procured to be constructed two machines similar to that disclosed in the patent. With this factory and machinery he set up in business his two sons, John J. Manning and William N. Manning, and they carried on the business of manufacturing isinglass, under the name of J. J. Manning & Brother, from the year 1868 until the testimony in this case was taken in 1877, using the two machines with scrapers above mentioned. James Manning, the inventor, had no interest in the business carried on by Norwood and his son after the dissolution of the firm of Norwood & Manning in 1867, nor in the business of J. J. Manning & Brother, carried on from 1868 until after the issue of the patent. [465]

Some attempt is made to show that the use of the machines in the factory of Caleb Norwood, from 1867 to 1870, was a secret and not a public use. But we think the testimony shows a use open to the public generally. But whether this be so or not is immaterial, for Norwood and his son were allowed by the inventor the unrestricted use of the patent during the period mentioned, without injunction of secrecy or other condition. This is sufficient to constitute a public use. *Egbert* v. *Lippmann*, 104 U. S., 333 [XXVI., 755].

The decided weight of the evidence shows that there was also a public use of the invention in the factories of J. J. Manning & Brother for more than four years prior to the application for the patent, namely: from 1868 to 1873.

It is also made clear by the testimony, not only that the machinery, but the process used by Norwood & Manning from 1860 to 1867, by Norwood & Son from 1867 to 1870, and by J. J. Manning & Brother from 1868 to 1873, and after that year, was substantially the same as that described in the patent. During all these years there was no material change, either in the machinery or the process. The use of the machinery and process was not, therefore, an experimental use. These conclusions of fact are fatal to the complainant's case.

It is the policy of the patent laws to forbid the issue of a patent for an invention which has been in public use before the application therefor. The Statute of 1836, 5 Stat. at L., 117, section 6, did not allow the issue of a patent when the invention had been in public use or on sale for any period, however short, with the consent or allowance of the inventor; and the Statute of 1870, 16 Stat. at L., 201, section 24: R. S., section 4886, does not allow the issue, when the invention had been in public use for more than two years prior to the application, either with or without the consent or allowance of the inventor. Under either of these statutes the patent relied on in this case was improvidently issued, for there was a public use, with the consent of the inventor, for more than two years prior to the application. The patent is therefore void. *McClurg* v. *Kingsland*, 1 How., 202; *Egbert* v. *Lippmann*, *ubi supra*; *Fruit Jar Co.* v. *Wright*, 94 U. S., 92 [XXIV., 68]; *Wor-* [466]

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ley v. *Tobacco Co.*, 104 U. S., 340 [XXVI., 821].

The decree of the Circuit Court was, therefore, right and must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

J. GROSS, *Plff. in Err.*,

v.

UNITED STATES MORTGAGE COMPANY.

(See S. C., Reporter's ed., 477-490.)

Opinion of state court, when may be examined to ascertain federal question—Illinois law, constitutional—state loans to corporations.

*1. The question considered as to when the opinion of the highest court of a State may be examined for the purpose of ascertaining whether the judgment involves the denial of any asserted right under the Constitution, laws or treaties of the United States.

2. In view of the statutory requirement that the Justices of the Supreme Court of Illinois shall file and spread at large upon the records of the court written opinions in all cases submitted to it, such opinions may be examined, in connection with other portions of the record, to ascertain whether the judgment or decree necessarily involves a federal question within the reviewing power of this court.

3. The Act of the General Assembly of Illinois, in force July 1, 1875, validating loans or investments previously made in that State by corporations of other States or countries authorized by their respective charters to invest or loan money, is not in conflict with the contract clause of the Federal Constitution, nor with that part of the Fourteenth Amendment forbidding a State from depriving any person of property without due process of law.

[No. 224.]

Submitted Apr. 2, 1883. Decided May 7, 1883.

IN ERROR to the Supreme Court of the State of Illinois.

The history and facts appear in the

[478] Statement of the case by *Mr. Justice* **Harlan:** Benjamin Lombard negotiated with the United States Mortgage Company, a Corporation of the State of New York, having its principal office and place of business in the City of New York, a loan of $50,000 in gold coin, to be used in the erection of buildings upon certain unimproved lots in the City of Chicago, of which he was the owner in fee. To secure the payment of that sum, with interest, at the rate of nine per cent per annum, payable semi-annually in gold coin, he executed—his wife joining him—August 22, 1872, to that Company, a mortgage upon the said premises, covenanting therein to pay the debt and interest; that the premises were clear of all incumbrances; that he would warrant and defend the same, suffering no impairment of the mortgage security; and that the mortgage should stand as security for any money paid for taxes or insurance. The mortgage provided that, if default was made in the payment of any interest installment, or there was a failure to pay the taxes or assessments on the premises, or keep any other covenant contained in the mortgage, the whole of the debt should become at once due at the option of the Mortgage Company, with the right in the latter to sell the property to the highest bidder after thirty days' advertisement in some paper published in Chicago. The mortgage also contained this clause: "It is understood and agreed that this mortgage is to be subject to the right of the city to take so much of said lots as shall be necessary for the opening of and extension of Dearborn Street, being thirty-six feet, more or less, off the west end of said premises; in which event any benefit which may accrue to the said party of the first part herein may be paid by the city to said party of the first part direct."

The mortgage, upon the day of its execution, was filed and recorded in the proper office.

On the 10th day of December, 1872, Lombard sold and conveyed with warranty the whole of the mortgaged premises, together with the buildings which had been erected thereon with the money borrowed from the United States Mortgage Company, to the National Life Insurance Company of Chicago, of which he was president and a principal stockholder. That conveyance was made expressly subject to the before [479] mentioned mortgage. The consideration was $100,178, a part of which was in the assumption of the debt due to the United States Mortgage Company. In part payment also of the purchase money, the insurance company executed and delivered to Lombard its promissory note for $12,278, drawn to its own order and by it indorsed in blank, payable three years after date, with interest payable semi-annually at the rate of ten per cent per annum. To secure the payment of the note, the insurance company, on the same day, executed and delivered to one J. L. Lombard, as trustee, a trust-deed with covenants of warranty, conveying the whole of said premises. That deed was duly recorded. Of that note and trust-deed Gross subsequently became the owner, the note coming into his possession with the indorsement only of the insurance company.

On or about March 17, 1873, by proper legal proceedings, thirty-five feet off the west end of said lots were condemned by the city for the purposes of a street. The sum of $10,952.73 was awarded as compensation for the ground so taken, and $15,897.84 were afterwards assessed as the value of the benefits to the remaining portion of the premises not taken for the purposes of the street.

Benjamin Lombard made default in the payment of interest due, on and after October 1, 1873, and failed to pay any taxes or assessments on the property after 1872. On the first day of January, 1874, the Mortgage Company elected to declare the whole debt due.

On or about June 1, 1874, the insurance company was duly adjudged a bankrupt, and an assignee thereof was appointed. Lombard was also declared a bankrupt. Neither he nor the insurance company left any known assets to meet their obligations.

By an Act of the General Assembly of Illinois, in force July 1, 1875, entitled "An Act to Enable Corporations in Other States and Countries to Lend Money in Illinois, and to Enforce Their Securities and to Acquire Title to Real Estate as Security," it was declared, among other things: "That any corporation formed under the laws of any other State or country, and authorized by its charter to invest or loan [480]

*Head notes by *Mr. Justice* HARLAN.

NOTE.—*What is "due process of law."* See *note* to Pearson v. Yewdall, 95 U. S., XXIV., 436.

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money, may invest or loan money in this State. And any such corporation that may have invested or lent money, as aforesaid, may have the same rights and powers for the recovery thereof, subject to the same penalties for usury, as private persons, citizens of this State; and when a sale is made under any judgment, decree, or power in a mortgage or deed, such corporation may purchase, in its corporate name, the property offered for sale, and become vested with the title wherever a natural person might do so in like cases; *Provided, however*, That all real estate so purchased by any such corporation, in satisfaction of any such liability or indebtedness, shall be offered at public auction, at least once every year, at the door of the court-house of the county wherein the same may be situated, or on the premises so to be sold; * * * and said real estate shall be sold whenever the price offered for it is not less than the claim of such corporation, including all interest, cost and other expenses; *And provided further*, That, in case such corporation shall not, within such period of five years, sell such lands, either at public or private sale, as aforesaid, it shall be the duty of the State's attorney to proceed by information, in the name of the people of the State of Illinois, against such corporation, in the circuit court of the county within which such land, so neglected to be sold, shall be situated, and such court shall have jurisdiction to hear and determine the fact, and to order the sale of such land or real estate, at such time and place, subject to such rules as the court shall establish," etc.

For the purpose of settling several conflicting claims in reference to this property, the assignee in bankruptcy of the insurance company brought this suit in the Superior Court of Cook County, Illinois, making the United States Mortgage Company, Gross, and others, defendants.

The principal questions in dispute between Gross and the Mortgage Company were: 1. Whether the latter acquired any valid interest or lien upon the premises as against Gross; and the court of original jurisdiction held that it did. 2. Whether Gross, as the owner and holder of the note for $12, 278, was entitled to receive the sum awarded as damages for that part of the property taken by the city, or whether the [481] Mortgage Company was entitled to it by reason of the terms of the mortgage. That question was ruled in favor of Gross.

Upon appeal to the highest court of Illinois, the judgment of the inferior state court was reversed and set aside, and the cause remanded "for such other and further proceedings as unto law and justice shall appertain, with directions to the superior court to enter a decree giving to appellants (the Mortgage Company) exclusively the amount found against the city as damages, and to Gross no part thereof." It was further adjudged that the Mortgage Company recover its costs. From that decree, this writ of error has been prosecuted.

Mr. **Thomas S. McClelland**, for plaintiff in error:

In the case at bar, the Supreme Court of Illinois has decided that the United States Mortgage Company could not take real estate security in Illinois, and that the mortgage in question was absolutely void.

On that question, this court will treat the ruling of the Illinois court as the law of this case, and no subsequent rulings of the Illinois court can be considered here.

Sibbald v. *U. S.*, 12 Pet., 488; *Tyler* v. *Magwire*, 17 Wall., 283 (84 U. S., XXI., 583), and cases cited; *Roberts* v. *Cooper*, 20 How., 467 (61 U. S., XV., 969); *Leese* v. *Clark*, 20 Cal., 416; *Phelan* v. *San Francisco*, 20 Cal., 40; *Chickering* v. *Failes*, 29 Ill., 294; *Rising* v. *Carr*, 70 Ill., 596; *R. R. Co.* v. *People*, 72 Ill., 82; *Johnson* v. *Von Kettler*, 84 Ill., 315; *Clearkies* v. *Mundell*, 4 Harr. & J., 497.

Irrespective of this rule of law, this court, in passing on local questions peculiar to the several States, will adopt the rulings of such state courts as are settled at and before the time the transaction occurred which is brought in review before this court; and subsequent decisions of the state court can have no force or effect upon such transactions.

Fairfield v. *Gallatin Co.*, 100 U. S., 52 (XXV., 546).

It is reserved to the States, either by statute or general policy, to determine whether foreign corporations shall do business therein.

Petroleum Co. v. *Weare*, 27 Ohio St., 351; *State* v. *Doyle*, 40 Wis., 175; *Doyle* v. *Ins. Co.*, 94 U. S., 535 (XXIV., 148); Whart. Confl. L., sec. 286; *Bank* v. *Earle*, 13 Pet., 589; *Runyan* v. *Coster*, 14 Pet., 129; Story, Confl. L., sec. 430; *Paul* v. *Va.*, 8 Wall., 168 (75 U. S., XIX., 357); *San Matteo Co.* v. *R. R. Co.*, 13 Fed. Rep., 747.

Such corporations as defendant in error were prohibited in Illinois by statute and general policy at the time it took its security.

Gen. Incorp. Law Ill., 1872, secs. 1, 26.

The contract of mortgage by Lombard to defendant in error being prohibited by statute, and against the manifest policy of the State, is a nullity.

Ins. Co. v. *Rosenthal*, 55 Ill., 91; *Carroll* v. *E. St. Louis*, 67 Ill., 577; *Starkweather* v. *Bible Society*, 72 Ill., 50; *U. S. Trust Co.* v. *Lee*, 73 Ill., 143.

The trust-deed of Gross is a contract and cannot be postponed to another lien by the Legislature.

Sinking Fund v. *Northern Bk.*, 1 Met., 174; *Mundy* v. *Monroe*, 1 Mich., 68.

The Act of July 1, 1875, and the decision of the Supreme Court of Illinois, construing it as retroactive and giving it the effect of curing the mortgage of August 22, 1872, are in conflict with article 1, section 10, and article 14, section 1, of the Constitution of the United States.

Cooley, Const. Lim., 4th ed., 472; *Thompson* v. *Morgan*, 6 Minn., 292; *Life Ins. & T. Co.* v. *Boykin*, 38 Ala., 510; *Dale* v. *Medcalf*, 9 Pa. St., 109; *Orton* v. *Noonan*, 23 Wis., 103; *Brinton* v. *Seevers*, 12 Iowa, 391; *Russell* v. *Ramsey*, 35 Ill., 363; *Conway* v. *Cable*, 37 Ill., 82; *Deininger* v. *McConnel*, 41 Ill., 228; *Rogers* v. *Higgins*, 48 Ill., 211; *Bronson* v. *Kinzie*, 1 How., 311; *Edwards* v. *Kearsey*, 96 U. S., 595 (XXIV., 793); *Brine* v. *Ins. Co.*, 96 U. S., 627 (XXIV., 858); *McCracken* v. *Hayward*, 2 How., 608; *Barings* v. *Dabney*, 19 Wall., 1 (86 U. S., XXII., 90); *Curran* v. *Ark.*, 15 How., 304; *Meighen* v. *Stong*, 6 Minn., 177; *Shonk* v. *Brown*, 61 Pa. St., 321; *Pearce* v. *Patton*, 7 B. Mon., 162; *McCarty* v. *Hoffman*, 23 Pa., 508; *Le Bois* v. *Bramell*, 4 How., 449; *Rose* v. *Sanderson*, 38 Ill., 247;

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Hunter v. *Hatch*, 45 Ill., 178; *Norman* v. *Heist*, 5 W. & S., 173; *Wright* v. *Hawkins*, 28 Tex., 452; *Sherwood* v. *Fleming*, 25 Tex. Supp., 408; *Williamson* v. *R. R. Co.*, 29 N. J. Eq., 311; *Smith* v. *Morse*, 2 Cal., 524; *Garnett* v. *Stockton*, 7 Humph., 84; *Ballard* v. *Ward*, 89 Pa., 358; *Bolton* v. *Johns*, 5 Pa., 145.

The law of the State where a contract is made is part of the contract, and a subsequent Act, changing the law to the prejudice of either party, is void.

Bronson v. *Kinzie*, 1 How., 311; *Brine* v. *Ins. Co.* (*supra*); *Edwards* v. *Kearzey* (*supra*); *Von Hoffman* v. *Quincy*, 4 Wall., 535 (71 U. S., XVIII., 403); *McCracken* v. *Hayward*, 2 How., 608; *Smoot* v. *Lafferty*, 2 Gilm., 383.

The remedy on such a contract cannot be taken away nor materially affected.

Edwards v. *Kearzey* (*supra*); *Gunn* v. *Barry*, 15 Wall., 610 (82 U. S., XXI., 212); *Bronson* v. *Kinzie*, 1 How., 311; *Mundy* v. *Monroe*, 1 Mich., 68; *Williamson* v. *R. R. Co.* (*supra*).

As to the construction of retrospective statutes, see:

Bruce v. *Schuyler*, 4 Gilm., 221; *Marsh* v. *Chesnut*, 14 Ill., 227; *Hatcher* v. *Toledo R. R Co.*, 62 Ill., 480; *In re Tuller*, 79 Ill., 99; *Garrett* v. *Wiggins*, 1 Scam., 336; *Thompson* v. *Alexander*, 11 Ill., 55; *Hopkins* v. *Jones*, 22 Ind., 310; *Hackley* v. *Sprague*, 10 Wend., 116; *Shonk* v. *Brown*, 61 Pa. St., 321; *Moore* v. *Phillips*, 7 Mees. & W., 536; *Moon* v. *Durden*, 2 Ex., 22.

Mr. **Wirt Dexter**, for defendant in error:

This court has no jurisdiction in this case.

Dugger v. *Bocock*, 104 U. S., 608 (XXVI., 848); *Bank* v. *Board of Liquidation*, 98 U. S., 142 (XXV., 115).

The sole question as to the original validity of the mortgage, presented by the record, is the general question whether a foreign corporation could take title to real estate in Illinois, by mortgage, to secure a loan of money.

The court held that mortgages do not tend to create perpetuities within the rule laid down in *Carroll* v. *E. St. Louis*, 67 Ill., 568, and that, therefore, mortgages to foreign corporations are not obnoxious to this rule.

Stevens v. *Pratt*, 101 Ill., 206; *Com. U. Assurance Co.* v. *Scammon*, 102 Ill., 46; *Christian Union* v. *Yount*, 101 U. S., 352 (XXV., 888).

These decisions are binding on this court, under its established rule of decision.

The contention of plaintiff in error, that the mortgage was originally void, is not sustained by evidence, and the question of law which it involves is not presented by the record.

The presumption is wholly in favor of the Mortgage Company.

Ins. Co. v. *Cutler*, 36 Mich., 261; *Ins. Co.* v. *Plummer*, 70 Me., 544; *Williams* v. *Cheney*, 3 Gray, 220; *Gelpcke* v. *Dubuque*, 1 Wall., 223 (68 U. S., XVII., 520); *Thompson* v. *Waters*, 25 Mich., 231.

We concede that it is reserved to the States to determine, either by statute or general policy, whether foreign corporations shall do business therein.

We also concede that whether or not the particular statute referred to was expressive of the general policy of the State to exclude corporations like the defendant in error, from doing business in the State, was a question of local law; and that, if that question has been settled by the decisions of the highest court of the State, those decisions are conclusive on this court. This rule of decision is firmly established in this court.

Nichols v. *Levy*, 5 Wall., 433 (72 U. S., XVIII., 596); *Van Rensselaer* v. *Kearney*, 11 How., 297; *Townsend* v. *Todd*, 91 U. S., 452 (XXIII., 413); *Williams* v. *Kirtland*, 13 Wall., 306 (80 U. S., XX., 683); *Post* v. *Supervisors*, 105 U. S., 667 (XXVI., 1204); *R. R. Co.* v. *Bank*, 102 U. S., 14 (XXVI., 61).

The Law of 1875 was retroactive, and cured any alleged invalidity of the mortgage.

The general principle is thus stated by *Judge* Cooley: "When such Acts (retrospective) go no further than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through some neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, the question which they suggest is one of policy, and not one of constitutional power."

Cooley, Const. Lim., 374, and cases cited; see, also, *Goshen* v. *Stonington*, 4 Conn., 210; *Beach* v. *Walker*, 6 Conn., 197; *State* v. *Newark*, 27 N. J. L. (3 Dutch.), 197; *Foster* v. *Bank*, 16 Mass., 245; *Cawerow* v. *Ins. Co.*, 52 Pa., 287; *Lane* v. *Nelson*, 79 Pa. St., 407; *Lewis* v. *McElvain*, 16 Ohio, 347; *Butler* v. *Toledo*, 5 Ohio St., 225.

The principle is a universal one that a purchaser who takes with notice of all the facts, stands in no better position than his vendor.

Lee v. *Getty*, 26 Ill., 80; *Shaw* v. *Beebe*, 35 Vt., 209; *Thistle* v. *Buford*, 50 Mo., 278; *Snodgrass* v. *Ricketts*, 13 Cal., 359; Wade, Notice, sec. 48.

We may add, in this connection, that it is well settled that a law which gives validity to a void contract does not impair the obligation of the contract.

Satterlee v. *Matheweson*, 2 Pet., 412; *Watson* v. *Mercer*, 8 Pet., 88.

Mr. Justice **Harlan** delivered the opinion of the court:

The first point to be considered relates to the jurisdiction of this court. In behalf of the defendant in error, it is insisted that it does not appear from the record that the decision of the Supreme Court of Illinois was adverse to any asserted right under the Constitution, laws or treaties of the United States, nor that the judgment or decree complained of could not have been passed without the determination of any such federal question. *Dugger* v. *Bocock*, 104 U. S., 608 [XXVI., 848]; *Murdock* v. *Memphis*, 20 Wall., 590 [87 U. S., XXII., 429]. This proposition depends upon the inquiry whether the opinion of the state court, which is made part of the transcript, can be examined for the purpose of ascertaining the grounds upon which that court based its final decree.

In *Gibson* v. *Chouteau*, 8 Wall., 317 [75 U. S., XIX., 317]; *Rector* v. *Ashley*, 6 Id., 142 [73 U. S., XVIII., 783], and *Williams* v. *Norris*, 12 Wheat., 117, it was ruled that the opinion of the state court constituted no part of the record, [485] for the purpose of determining whether this court will re-examine the final judgment or decree. And in *Parmelee* v. *Lawrence*, 11 Wall., 38 [78 U. S., XX., 49]—where the question arose as to the effect to be given to the certificate of

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the *Chief Justice* of the state court, showing that a federal question was raised and decided adversely to the party who brought the case here for review—it was said: "If this court should entertain jurisdiction upon a certificate alone, in the absence of any evidence of the question in the record, then the Supreme Court of the State can give the jurisdiction in every case where the question is made by counsel in argument." To the same effect are *Lawler* v. *Walker*, 14 How., 149, and *R. R. Co.* v. *Rock*, 4 Wall., 180 [71 U. S., XVIII., 382]. But in *Murdock* v. *Memphis*, 20 Wall., 633 [87 U. S., XXII., 443], the subject was again under consideration, by reason of the omission from the Act of 1867 [14 Stat. at L., 385], of that provision in the 25th section of the Act of 1789 [1 Stat. at L., 73], which restricted this court, when reviewing the final judgment or decree of the highest court of a State, to the consideration of such errors as appeared "on the face of the record." It was there said, that, in determining whether a federal question was raised and decided in the state court, "This court has been inclined to restrict its inquiries too much by this express limitation of the inquiry 'to the face of the record.'" "What was the record of a case," the court observed, speaking by *Mr. Justice* Miller, "was pretty well understood as a common law phrase at the time that statute was enacted. But the statutes of the States, and new modes of proceedings in those courts, have changed and confused the matter very much since that time. It is in reference to one of the necessities thus brought about, that this court long since determined to consider as part of the record the opinions delivered in such cases by the Supreme Court of Louisiana. *R. R. Co.* v. *Marshall*, 12 How., 165; *Cousin* v. *Blanc's Executor*, 19 Id., 202 [60 U. S., XV., 601]. And though we have repeatedly decided that the opinions of other state courts cannot be looked into to ascertain what was decided, we see no reason why, since [486] this restriction is removed, we should not so far examine those opinions, when properly authenticated, as may be useful in determining that question. We have been in the habit of receiving the certificate of the court, signed by its *Chief Justice* or presiding judge, on that point, though not as conclusive, and these opinions are quite as satisfactory, and may more properly be treated as part of the record than such certificates." The opinion of the state court in the present case is properly authenticated, and there is, in addition, the certificate of its *Chief Justice*, showing that the present plaintiff in error not only claimed that the deed of trust by the National Life Insurance Company gave, when executed, a lien superior to that asserted by the United States Mortgage Company under Lombard's mortgage, but that the Act of the Legislature of Illinois, in force July 1, 1875, in so far as it attempted to validate mortgages such as the one taken by that Company from Lombard, was in conflict, as well with the contract clause of the Constitution of the United States, as with that part of the 14th Amendment which prohibits a State from depriving a person of property without due process of law; further, that the latter claim was decided adversely to plaintiff in error.

We cannot, therefore, doubt that in the existing state of the law it is our duty to examine the opinion of the Supreme Court of Illinois, in connection with other portions of the record, for the purpose of ascertaining whether this writ of error properly raises any question determined by the state court adversely to a right, title or immunity, under the Constitution or laws of the United States and specially set up and claimed by the party who brings the writ. Any difficulty existing upon this subject is removed by that provision of the Revised Statutes of Illinois which requires, not only that the Justices of the Supreme Court of the State shall deliver and file written opinions in cases submitted to it, but that "such opinions shall also be spread at large upon the records of the court." Rev. Stat., Ill., 1874, p. 329, ch. 37, sec. 16. This statutory provision would seem to bring the case within the rule which permits an examination of the opinions of the Supreme Court [487] of Louisiana to ascertain whether the case was determined upon any ground necessarily involving a federal question within the reviewing power of this court.

The opinion of the state court (93 Ill., 483), in this case, shows that the decree is based upon these grounds: 1. That the laws of Illinois, in force when the mortgage of August 22, 1872, was executed, as well as its public policy, as disclosed in legislative enactments for many years, prohibited the United States Mortgage Company from taking mortgages upon real property, in that State, to secure the repayment of money loaned; consequently, that no title passed to it under or by virtue of that mortgage. 2. That such mortgage was, however, validated by the Act in force July 1, 1875. This last proposition was, as the opinion shows, contested in the state court by the present plaintiff in error, upon the grounds to which reference is made in the certificate of its *Chief Justice*.

We are here met by the suggestion that the decree can be sustained, apart from the validating Act of 1875, upon the ground that the mortgage of Lombard to the United States Mortgage Company was not inconsistent with the statutes of Illinois in force at the time of its execution, or with any public policy declared in the legislation of that State. This view is based upon *Stevens* v. *Pratt*, 101 Ill., 207, and *Assurance Co.* v. *Scammon*, 102 Ill., 46, determined subsequently to the decree in this case. Those cases directly involved the validity of mortgages upon real estate taken from other parties by the United States Mortgage Company prior to the Act of July 1, 1875. The decision in each of them was that a loan made by a foreign corporation, prior to that Act, to a citizen of Illinois, and secured by mortgage, was neither prohibited by any legislation of that State, nor contrary to its public policy, and that such mortgage could be foreclosed and the title to the mortgaged real estate thereby passed. So much of the opinion of the Supreme Court of Illinois in this case as held to the contrary was expressly declared in *Stevens* v. *Pratt* and *Assurance Co.* v. *Scammon* to be erroneous.

But it is contended, in behalf of plaintiff in error, that the decree below, in so far as it rests upon the invalidity of Lombard's mortgage is an adjudication, as between the parties to this [488] case, of a purely local question, of which, upon writ of error, we may not take cognizance; con-

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sequently, it is argued, this court, without reference to the later decisions of the state court, must determine the federal question here raised upon the basis established by that court in this case, *viz.*: that Lombard's mortgage was, when given, inoperative, under the local law, to pass title to the United States Mortgage Company. Without expressing any opinion as to the soundness of this position, and assuming, for the purposes of this case only, that Lombard's mortgage was, for the reasons given by the state court, invalid under the local law, we proceed to inquire whether the Act of 1875, in its application to that mortgage, is in conflict with any provision of the Constitution of the United States.

That the Act in question is not repugnant to the Constitution, as impairing the obligation of a contract is, in view of the settled doctrines of this court, entirely clear. Its original invalidity was placed by the court below upon the ground that the statutes and public policy of Illinois forbade a foreign corporation from taking a mortgage upon real property in that State to secure a loan of money. Whether that inhibition should be withdrawn was, so far at least as the immediate parties to the contract were concerned, a question of policy rather than of constitutional power. When the legislative department removed the inhibition imposed, as well by statute as by the public policy of the State, upon the execution of a contract like this, it cannot be said that such legislation, although retrospective in its operation, impaired the obligation of the contract. It rather enables the parties to enforce the contract which they intended to make. It is, in effect, a legislative declaration that the mortgagor shall not, in a suit to enforce the lien given by the mortgage, shield himself behind any statutory prohibition or public policy which prevented the mortgagee, at the date of the mortgage, from taking the title which was intended to be passed as security for the mortgage debt. We repeat here what was said in *Satterlee* v. *Matthewson*, 2 Pet., 412, and, in substance, in *Watson* v. *Mercer*, 8 Pet., 110, that "It is not easy to perceive how [489] a law, which gives validity to a void contract, can be said to impair the obligation of that contract." The doctrine of those cases was approved, at the present Term, in *Ewell* v. *Daggs* [*ante*, 682], when, speaking by *Mr. Justice* Matthews, it was said, touching legislation of this character, "That the right of a defendant to avoid his contract is given by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability he intended to incur."

But it is contended that, by his purchase, prior to the passage of the Act of 1875, of the note secured by the deed of trust given by the National Life Insurance Company, the plaintiff in error acquired a vested right of property, of which he could not, under the 14th Amendment of the Constitution, be deprived by subsequent legislation. We do not perceive that Gross was, by that Act, deprived of any substantial right of property. If, as held by the court below, in this case, the title to the real estate did not pass from Lombard at the date and by virtue of his mortgage, and if, because of its invalidity under the laws and public policy of the State, he was at liberty to convey a complete title to the insurance company, we have seen that the latter took the title subject to the mortgage and, in addition, expressly assumed to pay the amount of the debt due from Lombard to the Mortgage Company. Apart from the supposed inability of the Mortgage Company, resulting from the statutes and public policy of the State, to take title by mortgage to the premises, Lombard was personally liable to it for the money he had borrowed. He could not have escaped that personal liability upon the ground that the mortgage, in so far as it gave a lien upon the property was invalid. The claim of the Company against him for the money he obtained from it, was separable from, and wholly independent of, any lien [490] upon the premises and, as between Lombard and the insurance company, that personal liability of the former for the mortgage debt was protected by the very terms of the conveyance to the latter. If the acceptance of title, subject to the mortgage, did not, because of its invalidity, give a lien upon the premises, it is clear that Lombard, as against the insurance company, had, upon recognized principles of equity, a vendor's lien for so much of the purchase money as was equal to or was represented by the debt due from him to the Mortgage Company. Of the existence of that liability upon the part of Lombard, and of the agreement by the insurance company to protect him against it, Gross had notice from the deed of trust. He claims under the insurance company and can assert no right inconsistent with its obligation, as part of the purchase money, to meet Lombard's debt to the Mortgage Company. Without the Act of 1875, a court of equity, in enforcing a lien for the note held by Gross, could not have ignored the equitable lien which, as vendor, Lombard had for his protection against the mortgage debt, subject to which, as we have seen, he passed the title to the insurance company. The entire argument in behalf of Gross proceeds upon the erroneous ground that when he purchased the note in question there was no lien upon the property in favor of anyone for any amount whatever, except that given by the deed of trust to secure the note for $12,278. The effect, then, of the Act of 1875, was not to deprive Gross of any superior exclusive lien upon the premises. It only enabled the Mortgage Company to enforce the lien attempted to be given by the mortgage of 1872, rather than leave the property subject to a lien for a like amount in favor of Lombard, from whom the insurance company, under which Gross claims, purchased. This view, without presenting others leading to the same result, indicates that the Act of 1875 was not inconsistent with that clause of the Constitution of the United States which inhibits a State from depriving any person of property without due process of law.

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The federal question having been correctly determined, the decree is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 129.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, *Plff. in Err.*,

v.

LEOPOLD LUCHS.

(See S. C., Reporter's ed., 498-509.)

Construction of policy of life insurance—insurable interest—estimate of amount—misstatement.

1. Where a policy on the life of a person shows upon its face that it was applied for and the premium paid by another person, and that it was issued for his benefit, the words "the assured" in the policy apply to the person for whose benefit the policy was effected, and not to the party whose life was insured, and the former may sue upon it.
2. One partner has an insurable interest in the life of his copartner, who is indebted to him for his proportion of the capital of the concern.
3. The extent of a man's interest in the life of another depending upon a continuing partnership or the results of business transactions not yet completed, is, in the nature of things, uncertain, and in such cases all that can be required is that he had an actual interest, and that his estimate of the amount was made in good faith, without any purpose to deceive.
4. A misstatement of the cause of the death of a brother of the deceased in an answer in a previous application made by the person whose life was insured, cannot be incorporated into the policy.

[No. 203.]

Argued Apr. 4, 1883. Decided May 7, 1883.

IN ERROR to the Supreme Court of the District of Columbia.

This action was brought in the court below, by the defendant in error, on a policy of insurance for $5,000 on the life of Levi Dillenberg, deceased.

The trial resulted in a verdict and judgment for the plaintiff for the full amount of the policy, with costs. This judgment having been affirmed by the court in General Term, the defendant sued out this writ of error.

The principal facts of the case appear in the opinion of the court. It should, perhaps, be added that in the application, on which the policy in question was issued, no answer was given to the inquiry as to the cause of the death of Dillenberg's brother. In a previous application, the cause was stated to have been "accident," though in fact he had committed suicide.

There were nine instructions given by the court, five for the plaintiff and four for the defendant. They are briefly referred to in the opinion of this court, but as they deal entirely with the facts of the case, it is deemed unnecessary to set them out at length.

Mr. **Enoch Totten,** for plaintiff in error:

An action on this policy can only be maintained by the administrator of Dillenberg.

Hollis v. *Richardson*, 13 Gray, 392; *Burroughs* v. *Assurance Co.*, 97 Mass., 359; *Gould* v. *Emerson*, 99 Mass., 154; *Campbell* v. *Ins. Co.*, 98 Mass., 381; *Bailey* v. *Ins. Co.*, 114 Mass., 177; *Exchange Bk.* v. *Rice*, 107 Mass., 37.

Luchs had no insurable interest whatever in Dillenberg's life.

There is no judicial decision which declares that a partner has an insurable interest in the life of his copartner, solely by virtue of that relation. The rule supported by the greatest authority is, that there must be some well founded or reasonable expectation of a pecuniary advantage to be derived from the continuance of the life.

It has been held that the near relationship of father and son does not constitute an insurable interest in the son on the father's life, unless the son has a well founded or reasonable expectation of some pecuniary advantage to be derived from the continuance of the life of the father.

See, also, *Ins. Co.* v. *Hogan*, 80 Ill., 45; May, Ins., secs. 107, 398; *Cammack* v. *Lewis*, 15 Wall., 643 (82 U. S., XXI., 244); *Ins. Co.* v. *Sturgis*, 18 Kan., 93; *Stevens* v. *Warren*, 101 Mass., 504; *Ruse* v. *Ins. Co.*, 23 N. Y., 516; *Warnock* v. *Davis*, 104 U. S., 775 (XXVI., 924).

In *Lewis* v. *Ins. Co.*, 39 Conn., 104, it was held that the mere relationship of brother, without more, is not sufficient to support a life insurance policy.

The court instructed the jury that "Since, in the application upon which the policy in suit was issued, there is no answer to the questions, 'Brothers dead; age; cause of death', it follows that there is no warranty in respect of the information called for by said questions."

The reference in this application to the former application for information, makes that application a part of this one, and a false answer in that will be as fatal as if in this.

Rawls v. *Ins. Co.*, 27 N. Y., 294; Bliss, Life Ins., 78, 609, sec. 394 and sec. 57; *Hawkins* v. *U. S.*, 96 U.S., 694 (XXIV., 609); *Clark* v. *Ins. Co.*, 2 Wood. & M., 483; *Harvey* v. *U. S.*, 105 U. S., 671 (XXVI., 1206).

The plaintiff was bound to inform the Company of the fact that a brother of the assured had cut his own throat, and the court committed an error in refusing to so instruct the jury.

The concealment of so material a circumstance was a gross fraud upon the Company.

Bliss, Ins., sec. 56, p. 77, and authorities there cited; see, also, *Campbell* v. *Ins. Co.*, 98 Mass., 381.

An untrue allegation of a material fact, or a concealment of a material fact, will avoid the policy, although such allegation or concealment be the result of accident or negligence, and not of design.

Voee v. *Ins. Co.*, 6 Cush., 42; Bliss, Life Ins., 97; *Lindenau* v. *Desborough*, 8 B. & C., 586; *Smith* v. *Ins. Co.*, 49 N. Y., 211; *Hartman* v. *Ins. Co.*, 21 Pa., 466.

Mr. **A. S. Worthington,** for defendant in error:

Policies in substantially the same form were sued upon by the assured after the death of the insured in the following cases:

Ins. Co. v. *Francisco*, 17 Wall., 672 (84 U.S., XXI., 698); *Ins. Co.* v. *Wilkinson*, 13 Wall., 222 (80 U. S., XX., 617); *Ins. Co.* v. *Terry*, 15 Wall., 591 (82 U. S., XXI., 242).

Luchs had an insurable interest in Dillenberg's life.

NOTE.—*Insurance on life of another; who may have; interest necessary.* See *note* to Ætna L. Ins. Co. v. France, 94 U. S., XXIV., 287.

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Ins. Co. v. *Schaefer*, 94 U. S., 457 (XXIV., 251).

At the most, all that is necessary is, that the sum insured shall not bear such a disproportionate relation to the interest protected as to show on its face that the transaction is not a *bona fide* one.

Cammack v. *Lewis* 15 Wall., 643 (82 U. S., XXI., 244); *Ins. Co.* v. *Mowry*, 96 U. S., 544 (XXIV., 674); *Loomis* v. *Ins. Co.*, 6 Gray, 396; *Morrell* v. *Ins. Co.*, 10 Cush., 282; *Ins. Co.* v. *Johnson*, 24 N. J. L. (4 Zab.), 576.

It is argued that the delivery of the policy to Luchs was necessary to clothe him with any rights under it. It is submitted that the settled rule of law is against this proposition.

Neale v. *Molineux*, 2 Car. & K., 672; *Packard* v. *Ins. Co.*, 9 Mo. App., 470; *Ins. Co.* v. *Baum*, 29 Ind., 236; *Klein* v. *Ins. Co.*, 104 U. S., 88 (XXVI., 662).

Mr. Justice **Field** delivered the opinion of the court:

This was an action by Leopold Luchs on a policy of insurance upon the life of Levi Dillenberg, issued by the Connecticut Life Insurance Company in June, 1869. Luchs and Dillenberg were partners at the time in the business of buying and selling tobacco in the City of Washington. Their partnership was formed in October, 1866, each agreeing to contribute his services and one half of the capital. It was understood that the money of Dillenberg was then invested in mining stocks, and could not at once be obtained. Luchs accordingly furnished the entire capital, which was over $10,000. Dillenberg never contributed his portion, and about two years after the partnership was formed, his failure in this respect caused dissatisfaction and complaint. It was thereupon suggested by one Myers, who was employed by an agent of the Insurance Company, and who had been called in as an accountant to examine the books of the [503] concern, that, as a means of "adjusting the dispute or misunderstanding between the partners," a policy of insurance should be obtained upon the life of Dillenberg for the benefit of Luchs, and that Dillenberg should retire from the firm within a year afterwards. Nothing, however, was then done upon this suggestion, but in the following year the policy in suit was procured.

1. The first question presented is as to the right of Luchs to sue upon it. It is plain, from the parol evidence in the case, that it was the intention, both of Luchs and Dillenberg, that the policy should be procured for the benefit of Luchs.

The declaration, which is the application for the policy, begins with an averment that he, Luchs, is desirous of effecting an insurance upon the life of Dillenberg, and proceeds to state the latter's age, the condition of his health, the character of his habits, and that he, Luchs, has an interest in the life of Dillenberg to the amount of $10,000. The declaration is signed both by Luchs and Dillenberg, though it purports in every line to be the separate application of Luchs. It is accompanied by questions and answers, and to the first question, as to the name and residence of the person for whose benefit the insurance is proposed, the answer is "Leopold Luchs, Washington, D. C." The answers also are signed both by Luchs and Dillenberg.

The policy was issued and delivered to Dillenberg, and retained by him until after the dissolution of the partnership, when he handed it to Luchs, stating that he gave it to him to show that he intended to do what was right and fair with him, and requested him to pay the premiums on it, promising to refund the money. The first two premiums were paid by Dillenberg, the others by Luchs.

The difficulty in the question presented arises from the language of the policy. Omitting words not essential on this point, it reads as follows:

"This policy witnesseth, that the Connecticut Mutual Life Insurance Company, in consideration of the declarations and representations, made to them in the application for this insurance, and the sum of $125 to them in hand paid *by Leopold Luchs* * * * do assure the life of Levi Dillenberg. * * * And the said Company do hereby promise * * * the said *assured* * * * to pay * * * said sum *insured* to the said *assured*, his executors, administrators or assigns, within ninety days after due notice and proof of the death of the said Levi Dillenberg. [504]

It is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the *assured* upon the express conditions that in case the *said person whose life is hereby insured* shall pass beyond the settled limits, or the protection of the Government of the United States * * * this policy shall be null. It is also understood that if the proposal, answers and declaration made by the said Leopold Luchs, *which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith and warranty of which this agreement is made*, shall be found in any respect untrue, this policy shall be null and void, or in case the said *assured* shall not pay the said annual premiums * * * this policy shall cease.

It is further agreed that this policy shall not take effect * * * until the premium above named shall be actually paid * * * during the life of the *insured*."

The contention of the plaintiff is that the words "the assured" in the policy apply to the person for whose benefit the policy was effected, that is, Luchs, and not to the party whose life was insured.

There are undoubtedly instances where this distinction between the terms *assured* and *insured* is observed, though we do not find any judicial consideration of it. The application of either term to the party for whose benefit the insurance is effected, or to the party whose life is insured, has generally depended upon its collocation and context in the policy.

We are of opinion that, reading the policy here in connection with the declaration and the answers of Luchs, which form a part of it, and indicate the object of procuring it, the term assured must be held as applicable to him, for whose benefit it was effected.

The policy considered in *Ins. Co.* v. *France*, 94 U. S., 562 [XXIV., 268], gives some support to this view. There the policy was effected by a brother for a sister's benefit, and the term "assured" was held to apply to the [505] sister, for she recovered in a suit brought in connection with her husband on the policy. The attention of the court does not appear,

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however, to have been directed to that term. It may be said, also, that there could be little doubt as to its proper application in that case, as it was followed by the words "and *her* executors, administrators or assigns," thus limiting it to the sister. In other respects, the language is substantially identical with that of the policy under consideration.

2. The second question presented for our determination is, whether Luchs had an insurable interest in the life of Dillenberg. Upon this we have no doubt. Dillenberg was his partner and had not paid his promised proportion of the capital of the concern. At the time the policy was applied for, he was still in default; and although it might have turned out that the actual amount due, upon a settlement of accounts, was less than the promised proportion, it was not a matter definitely ascertained at the time. Besides what was thus due to him, Luchs was interested in having Dillenberg continue in the partnership. He had such an interest, therefore, as took from the policy anything of a wagering character.

As this court said in *Warnock* v. *Davis*, recently decided: "It is not easy to define with precision what will, in all cases, constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation. * * * But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured." 104 U. S., 779 [XXVI., 926].

Certainly Luchs had a pecuniary interest in the life of Dillenberg on two grounds: because he was his creditor and because he was his partner. [506] The continuance of the partnership and, of course, a continuance of Dillenberg's life, furnished a reasonable expectation of advantage to himself. It was in the expectation of such advantage that the partnership was formed and, of course, for the like expectation, was continued.

In *Morrell* v. *Ins. Co.*, 10 Cush., 282, a policy was taken out by the plaintiff upon the life of his brother, who was about going to California, on an agreement that the latter should pay to him one fourth of his earnings for the following year. In an action on the policy it was contended that the plaintiff had no insurable interest upon the life of the insured, but the court, after deciding that he had such an interest from the fact that he held a promissory note signed by the firm of which the insured was a partner, also said that it was strongly inclined to the opinion that the plaintiff had another interest in the life of the person insured. "He had," said the court, "a subsisting contract with that person, made on a valuable consideration, by which he was to receive one quarter part of his earnings in the mines of California for one year. Such an interest cannot, from its nature, be valued or apportioned. It was an interest upon which the policy attached. By the loss of his life within the year, the person whose life was insured lost the means of earning anything more, and the plaintiff was deprived of receiving his share of such earnings to an uncertain and indefinite amount."

In *Ins. Co.* v. *Johnson*, 4 Zab., 576, a policy was taken out by the plaintiff on the life of one Van Middlesworth for $1,000, one half payable to the plaintiff and the other half to Van Middlesworth. They belonged to an association called the New Brunswick and California Mining and Trading Company, the capital stock of which consisted of forty-five shares of $600 each. The company consisted partly of shareholding members and partly of active members, the shareholders being each required to furnish a substitute to proceed to the mines of the company. The plaintiff owned one share, advanced $600 of capital and procured Van Middlesworth to go out as his substitute, which he did and acted as his agent and substitute; and [507] the assets of the company having been divided in California, he received the plaintiff's share, and afterwards died, not having paid it over. By one of the articles of the association all treasures and all the proceeds of the labor of each member, and all profits, were to go into a general fund for the benefit of the association. To the action brought on the policy, it was objected that the plaintiff had no insurable interest in the life of the deceased. On this question the court said: "In the present case, Johnson had a direct interest in the life of his substitute, whose earnings were to constitute a part of the joint funds, of which he was entitled to his share; an interest fully equivalent to the interest of a wife in the life of her husband, of a child in that of a parent, or a sister in that of a brother. And at Van Middlesworth's death, although prior to that time the company had been virtually dissolved, he had an interest in him as his creditor to the extent of his share of the assets in his hands."

In *Bevin* v. *Ins. Co.*, 23 Conn., 244, the plaintiff had obtained a policy of insurance for $1,000 on the life of one Barstow, to whom he had advanced $350, besides articles of personal property, to enable him to go to California and there labor for one year, on an agreement that he would account to the plaintiff for one half of his gains. The court said that Barstow was the plaintiff's debtor and partner, giving to the plaintiff an interest in the continuance of his life, as by that means, through his skill and efforts, the plaintiff might expect not only to get back what he had advanced, but to acquire great gains and profits in the enterprise. "All the books," the court added, "hold this to be a sufficient interest to sustain a policy of insurance. As to the value of this interest, we think it must be held to be what the parties agreed to consider it in the policy. This was the sum asked for by the plaintiff, and which the defendants agreed to pay in case of death, and for which they were paid in the premiums given by the insured. The policy must, we think, be held to be a valued policy." And after referring to a policy of insurance obtained by a sister on [508] her brother's life, where no question seemed to have been made as to the amount, but only whether it was an interest which the law would

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recognize, the court said: "So, in every case, where a person on his own account insures the life of a relative, if the sum named in the policy is not to be the rule of damages, we inquire what is? The impossibility of satisfactorily going into the question in most cases, and especially where there is nothing to guide the inquiry, and everything is uncertain, would lead us to hold that a policy like this is a valued policy as most consistent with the understanding of the parties and the principles of law."

3. The third question presented for determination relates to alleged breaches of the warranty of the policy. It is alleged that the policy was issued upon the faith of certain statements and answers of the plaintiff which were untrue. These statements were, first, that the plaintiff had an interest in the life of Dillenberg to the amount of $10,000, when, in fact, he had no interest in it; and, second, that the cause of the death of one of the brothers of Dillenberg was accident, when, in fact, he had committed suicide.

As to the alleged breach of the warranty of the interest of the plaintiff in the life of Dillenberg there is this answer: the statement of the plaintiff as to the amount of his interest was, necessarily, conjectural. No one can affirm with absolute certainty that he has an interest to a definite sum in the life of another, where the interest depends upon the result of an existing partnership or other business transactions not yet terminated. The value of his interest in such cases will always be more or less a matter of opinion. The statement, in that regard, must, of necessity, be taken as a mere estimate. If, therefore, the plaintiff had an interest in the life of Dillenberg and his estimate was made in good faith, the declaration cannot be deemed untrue so as to constitute a breach of the warranty. The extent of a man's interest in the life of another, depending upon a continuing partnership or the results of business transactions not yet completed, is, in the nature of [509] things, uncertain, and in such cases all that can be required is that he had an actual interest, and that his estimate was made in good faith, without any purpose to deceive. See, *Bevin* v. *Ins. Co.*, cited above.

Here the plaintiff valued his interest and took out a policy for only half of the sum estimated. He did not procure the policy for any purpose of speculating upon the duration of the life of Dillenberg. From the finding of the jury we must take as true, that his representation was made in good faith upon an honest opinion as to the value of his interest.

As to the alleged misstatement of the cause of the death of a brother of the deceased, it is sufficient to observe that there is no allegation on this subject in the answers of the plaintiff, and the point is taken simply because, in an answer to a previous application, that statement was made. Such previous answer cannot be incorporated into the present policy. The reference to the previous application is made for the answer to a different inquiry.

There may be, as stated by counsel for the Company, some inconsistencies between the charges given at its request, and those given at the request of Luchs. The latter present all the disputed questions of fact to the jury, and if those granted at its request are erroneous, in so far as they differ, it is not for it to complain, as was well observed by counsel, that, while the Judge held Luchs within proper limits, itself was suffered to go beyond them.

Upon the whole record of the case, we find no error sufficient to justify a reversal of the judgment. It is, therefore, affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Plff. in Err.*, [491]

v.

FORTY-THREE GALLONS OF WHISKY, THIRTY-THREE FOX PELTS, AND OTHER PROPERTY, BERNARD LARIVIERE AND CLOVIS GUERIN, Claimants.

(See S. C., Reporter's ed., 491-498.)

Introduction of liquors into Indian territory—collection district.

1. Payment of the special internal revenue tax for selling liquors in a collection district which embraced Indian territory, does not exempt the person so paying from the penalties of the Act of 1834 for the unauthorized introduction of liquors into Indian territory.

2. The establishment of the collection district embracing the ceded territory, while providing for the collection of taxes on certain kinds of business, did not authorize nor was it intended to authorize business which was otherwise specifically forbidden.

3. The laws of Congress are always to be construed so as to conform to the provisions of a treaty, if it be possible without violence to their language.

[No. 272.]

Submitted Apr. 24, 1883. Decided May. 7, 1883.

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

The libel in this case was filed in the District Court, by the plaintiff in error, to enforce the forfeiture of certain spirituous liquors alleged to have been unlawfully introduced into the country ceded to the Chippewa Indians. A demurrer was filed by the claimants and sustained by the court, with judgment accordingly. This judgment was affirmed by the court below, and subsequently reversed by this court and the cause remanded for trial. XXIII., 846.

The trial in the District Court resulted in a verdict and judgment for the claimants. This judgment having been affirmed, on error, by the court below, the libelant sued out this writ of error.

The facts and a fuller history of the case appear in the opinion of the court.

Mr. **Wm. A. Maury,** *Asst. Atty-Gen.*, for plaintiff in error.

Mr. **C. K. Davis,** for defendants in error.

Mr. Justice **Field** delivered the opinion of the court:

By the Treaty between the Red Lake and Pembina Bands of Chippewa Indians and the United States, concluded on the 2d of October, 1863, those Indians ceded to the United States their right, title and interest to certain lands owned and claimed by them in the State of Minnesota and the Territory of Dakota. 13 Stat. at L., 667. The 7th article of the Treaty stipulated that the laws of the United States then in [492] force or that might thereafter be enacted, pro-

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hibiting the introduction and sale of spirituous liquors in the Indian country, should be in full force and effect throughout the country thereby ceded, until otherwise directed by Congress or the President of the United States. The 20th section of the Act of June 30, 1834, entitled "An Act to Regulate Trade and Intercourse with the Indian Tribes and to Preserve Peace on the Frontier," 4 Stat. at L., 729, as amended by the Act of March 15, 1864, 13 Stat. at L., 29, was in force when this Treaty was made; and it forbids anyone, under certain penalties, to sell or dispose of any spirituous liquors or wine to an Indian under the charge of an Indian superintendent or agent; or to introduce or to attempt to introduce them into the Indian country unless done by order of the War Department or of some authorized officer under it. And the section provides for the seizure and forfeiture of liquors thus introduced and the goods and property of the party violating the statute with which they are found. The following is the section as amended.

"Sec. 20. *And be it further enacted*, That, if any person shall sell, exchange, barter or dispose of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States, or shall introduce or attempt to introduce any spirituous liquor or wine into the Indian country, such person, on conviction thereof before the proper District or Circuit Court of the United States, shall be imprisoned for a period not exceeding two years, and shall be fined not more than $300; *Provided, however*, That it shall be a sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country if it be proved to be done by order of the War Department, or any officer duly authorized thereunto by the War Department. And if any superintendent of Indian affairs, Indian agent or sub-agent or commanding officer of a military post has reason to suspect or is informed that any white person or Indian is about to introduce or has introduced any spirituous liquor or wine into the Indian country, in violation of the provisions of this section, it shall be lawful for such superintendent, sub-agent or commanding officer to cause [493] the boats, stores, packages, wagons, sleds and other places of deposit of such person to be searched; and if any such liquor is found therein, the same, together with the boats, teams, wagons and sleds used in conveying the same, and also the goods, packages and peltries of such person, shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one half to the informer and the other half to the use of the United States; and if such person be a trader, his license shall be revoked and his bonds put in suit. And it shall, moreover, be the duty for any person in the service of the United States, or for any Indian, to take and destroy any ardent spirits or wine found in the Indian country, except such as may be introduced therein by the War Department. And in all cases arising under this Act Indians shall be competent witnesses."

Under this section, the present libel of information was filed in the District Court of the District of Minnesota, to enforce the forfeiture of certain spirituous liquors, which are particularly described, and other merchandise found with them at the time of seizure. In one of its counts the libel sets forth that Bernard Lariviere, a white person, late of the Village of Crookston, County of Polk, and State of Minnesota, did, on the 2d of February, 1874, unlawfully carry and introduce into the country ceded to the United States under the Treaty mentioned, namely: into the County of Polk, which is a part of the ceded country, the spirituous liquors described; that such introduction was in violation of the provisions of the 20th section of the Act of Congress above quoted; that he owned and at the time had in his possession with the liquors a quantity of goods, packages and peltries, a list of which is contained in a schedule annexed to the libel; that an Indian agent, duly appointed, having reason to suspect, and having been informed, that spirituous liquors had been introduced by Lariviere, caused his stores, packages and peltries to be searched, and there found the liquors mentioned, which he in consequence seized, together with the other goods. In another count, the libel sets forth substantially the same matters, with the addition that the liquors were introduced into the country ceded with intent to sell, dispose of and dis- [494] tribute the same among the bands and Tribes of Chippewa Indians then under the charge of the Indian agent, and frequenting the County of Polk and Village of Crookston, and living there or near the place.

To this libel, Lariviere and one Clovis Guerin appeared as claimants of the goods seized, and demurred to the libel on the ground that the court had no jurisdiction; that the property was never introduced into the Indian Territory, but, as appeared by the libel, was searched and seized in an organized county of the State of Minnesota, and hence that the seizure was without authority of law. The demurrer thus interposed was sustained by the district court, and judgment rendered against the United States, and this judgment was affirmed by the circuit court. The case was then brought to this court, where the judgment was reversed and the cause remanded, with directions to overrule the demurrer. Several important legal and constitutional questions were raised on the argument here, and it was held that Congress, under its constitutional power to regulate commerce with the Indian Tribes, may not only prohibit the introduction and sale of spirituous liquors in the Indian country, but extend such prohibition to territory in proximity to that occupied by Indians; that it is competent for the United States, in the exercise of the treaty making power, to stipulate in a treaty with an Indian Tribe that within the territory thereby ceded, the laws of the United States, then and thereafter enacted, prohibiting the introduction and sale of spirituous liquors in Indian country, shall be in full force and effect until otherwise directed by Congress or the President of the United States, and that a stipulation to that effect will operate *proprio vigore*, and be binding upon the courts, although the ceded territory is situated within an or ized county of a State. These conclusions are stated in a very clear and able opinion by *Mr. Justice* Davis, which is reported in 93 U.S., 188 [XXIII., 846].

When the case went back to the district court

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for trial, and the demurrer was overruled, the claimant, Lariviere, filed an answer to the libel containing inconsistent defenses. He first denied that he ever introduced into the ceded ter- [495] ritory the liquors as charged, and he claimed the property, except the liquors, as his; and as to those he disclaimed ownership. But, although denying their introduction, he averred that the acts charged against him were done under the authority of the War Department, and that the liquors were not introduced for the purpose of sale or in violation of any law or treaty. He subsequently amended this answer by adding an averment to the effect that the territory ceded under the Treaty mentioned, lay within the limits of a collection district under the United States internal revenue laws; that persons resident within it and within the County of Polk and at the Village of Crookston, engaged in the business of retailing spirituous liquors, had been assessed and required to pay taxes upon their business, and were thereby licensed to carry on that business and sell spirituous liquors in that county; and that he also had been thus assessed, taxed and licensed as a retail dealer, and that his license had never been revoked nor the tax paid for the same returned. The other claimant, Guerin, averred that the property seized, except the liquors, had been transferred to him as collateral security for a debt, and denied every traversable allegation in the information save the seizure by the Indian agent. On the trial, evidence was introduced by the Government tending to show that Lariviere introduced the liquors mentioned with the intent to sell them to Indians under the charge of the United States Indian agents, and also to show the circumstances of the seizure. Against the objection of the Government, Lariviere gave evidence of all the circumstances touching the assessment and collection of the internal revenue tax from him and other sellers of liquor by retail in the County of Polk. The court charged the jury that while the mere introduction of spirituous liquors in the ceded territory was *prima facie* evidence of an unlawful purpose, this evidence was neutralized by proof that the claimant held at the time a receipt of the Collector of Internal Revenue for the special tax required to be paid by a retail liquor dealer, and hence that the burden of proof was shifted on the Government to show that the liquors were introduced with the intent to sell them to the Indians. It also charged that "The uncontrc verted facts found for the defense were a license to Lariviere to take liquor to Crooks- [496] ton and gave him the right to do so, and that, for so doing, he was subject to no penalty under the national law." To this charge, an exception was taken. There was a verdict for the claimant, and judgment was entered thereon that the libel be dismissed. The case was then taken to the circuit court and the judgment of the district court was there affirmed. To review that judgment, the case is brought here.

The only question for our consideration, as thus seen, is whether Lariviere's payment of the special internal revenue tax for selling liquors in the collection district embraced by the ceded territory, exempted him from the penalties of the Act of 1864. We are clear that it did not. Congress never intended to interfere with the operation of the Treaty, nor to sanction the sale of liquors in any ceded territory, where an express stipulation provides that they shall not be sold. The evils resulting from the use of spirituous liquors are so many and so appalling that the Government has, from an early period of our history, labored to prevent their introduction among the Indians. In order more effectually to secure this result, laws prescribing severe penalties have been enacted, and authority has been vested in the Indian agents to arrest traffickers in the prohibited article, and to seize and confiscate their property found with it. It would require very clear expressions in any general legislation to authorize the inference that Congress purposed to depart from its long established policy in regard to a matter of such vital importance to the peace and to the material and moral well being of these wards of the Nation. There is also another consideration. The laws of Congress are always to be construed so as to conform to the provisions of a treaty, if it be possible to do so without violence to their language. This rule operates with special force where a conflict would lead to the abrogation of a stipulation in a treaty making a valuable cession to the United States.

The unauthorized introduction of liquors into the ceded territory constitutes the offense, although if they were not sold or given away, no injurious consequences would follow; but once allow their indiscriminate or general introduction and the law would be evaded without possibility of detection. The introduction is, therefore, forbidden, unless permitted by [497] the order of the War Department or of some officer authorized by it. The establishment of the collection district, embracing the ceded territory, whilst providing for the collection of taxes on certain kinds of business, did not authorize, nor was it intended to authorize, business which was otherwise specifically forbidden. The *License Tax Cases*, 5 Wall., 462 [72 U. S., XVIII., 497], do not conflict with, but rather support, this view. They merely decide that the licenses of the United States for selling liquors and dealing in lotteries exempted the party from the penalties of the revenue law to which he would otherwise be subjected. They gave no exemption from state laws or the taxes they imposed for the business carried on. They conferred no authority by themselves to carry on any business within a State. They were in the nature of taxes on the business which the State permitted. The court, speaking by *Chief Justice* Chase, said that if the licenses were to be regarded as giving authority to carry on the branches of business which they licensed, it might be difficult, if not impossible, to reconcile the granting of them with the Constitution. "But," he added, "it is not necessary to regard these laws as giving such authority. So far as they relate to trade within state limits they give none and can give none. They simply express the purpose of the Government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid. The power to tax is not questioned, nor the power to impose penalties for non-payment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax and implying nothing except that the licensee shall be sub-

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ject to no penalties under national law if he pays it." Though these cases are cited by the defendant they affirm the doctrine that the licenses under the then existing law, being designed merely to secure the payment of taxes to the United States, did not interfere with other legitimate regulations of business nor sanction it where otherwise prohibited.

The case of the *Cherokee Tobacco Tax*, 11 Wall., 616 [78 U. S., XX., 227], cannot be treated as authority against the conclusion we have reached. The decision only disposed of that case, as three of the Judges of the court did not [498] sit in it and two dissented from the judgment pronounced by the other four.

It follows, from the views expressed, that the judgment of the court below must be reversed and a new trial had; and it is so ordered.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[510] WESTERN PACIFIC RAILROAD COMPANY AND CHARLES McLAUGHLIN, *Appts.*,

v.

UNITED STATES.

(See S. C., 17 Otto, 526-529, and Reporter's ed. of 108 U. S., 510-513.)

Action to set aside patent—mineral lands—what are—subsequent discovery.

1. A decree in an action to set aside a patent of the United States for lands brought by the District Attorney will not be reversed on the ground that there is not sufficient evidence that the suit was instituted under the authority of the Attorney-General, where the objection was not raised below, and the case is argued here on behalf of the Government by the Assistant Attorney-General, who files a certified copy of the order of the Attorney-General, directing the district attorney to bring the suit.

2. A patent under the Acts of Congress granting to the Union Pacific, Central Pacific and Western Pacific R. R. Companies the alternate sections of public land within certain limits on each side of their respective roads, cannot be granted for mineral lands, which were excepted out of the grant.

3. A grantee in such a patent, who knows that the land is mineral land, is not an innocent purchaser.

4. Query. What is the nature and extent of minerals found, which will bring land within the designation of mineral land in the various Acts of Congress, in which it is excepted out of grants to railroad companies, and forbidden to be sold?

5. Query. When such land has been conveyed by the Government without knowledge by either party that it contains precious metals, will a subsequent discovery of such metals enable the Government to set aside the patent or the grant; and if so, what are the rights of innocent purchasers from the grantee, and what limitations exist upon the exercise of the Government's rights?

[No. 219.]

Argued Mar. 30, 1883. Decided May 7, 1883.

APPEAL from the Circuit Court of the United States for the District of California.

The bill in this case was filed in the court below, by the appellee, to set aside the patent conveying a certain tract of land.

The court below having entered a decree in favor of the complainant, the defendants appealed to this court.

The facts of the case are sufficiently stated by the court.

Mr. **Henry Beard**, for appellants.

Messrs. **Wm. A. Maury**, *Asst. Atty-Gen.*, and *S. F. Phillips*, *Solicitor-Gen.*, for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

John M. Coghlan, District Attorney of the United States for the District of California, on behalf of the United States, brought the bill in this case in the circuit court of that district against the Western Pacific Railroad Company and Charles McLaughlin, to set aside a patent of the United States conveying to the Railroad Company the northeast quarter of section 29, township one (1) north, range one (1) east, of Mount Diabolo meridian.

This patent was made under the Acts of Congress granting lands to the Union Pacific, Central Pacific and Western Pacific Railroad Companies, to aid in building a road from the Missouri River to the Pacific Ocean. [512]

The Acts of Congress granted to each Company the alternate sections within certain limits on each side of its road, and authorized the issue of patents for the same when the work was done and the sections ascertained. But they excepted out of this grant, among others, such sections or parts of sections as were mineral lands.

The bill in this case alleges, as the reason for vacating and setting aside the patent, that the quarter section in question is mineral land, that it was so at the time of the grant, and was known to be so when the patent issued, which was so issued without authority of law by inadvertence and mistake.

The patent itself is not in the record as an exhibit, nor as part of the evidence. The Western Pacific Railroad Company, to whom it was issued, though made defendant in the bill, was not served with the subpœna and did not appear. McLaughlin, the only defendant who did appear, defends as purchaser two degrees removed from the Company. Instead of a general replication to McLaughlin's answer, the reply is an amendment to the original bill.

The whole record is so imperfect and the case so obscurely presented, that we feel tempted to dismiss it.

Waiving, however, these objections, there is enough to enable us to consider the two principal errors assigned by appellant.

The first of these is, that there is no sufficient evidence that the suit was instituted under the authority of the Attorney-General, according to the principle established in the case of *U. S.* v. *Throckmorton*, 98 U. S., 61 [XXV., 93].

To this it may be answered that the objection was not raised in this case in the court below as it was in that; that the case is argued in this court on behalf of the Government by the Assistant Attorney-General, who files in the court a certified copy of the order of the Attorney-General directing the district attorney to bring the suit in the circuit court, as requested by the Secretary of the Interior.

We think the decree of that court, under these circumstances, can hardly be reversed now, on this ground, taken here for the first time. [512]

The other objection to the decree in favor of the United States is, that the evidence does not establish as a fact that the land in controversy was mineral land when the patent issued.

An examination of the evidence on this subject convinces us that the Circuit Judge was

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right in holding that it was. It is satisfactorily proven, as we think, that cinnabar, the mineral which carries quicksilver, was found there as early as 1863; that a man named Powell resided on the land and mined this cinnabar at that time, and in 1866 established some form of reduction works there; that these were on the ground when application for the patent was made by defendant, McLaughlin, as agent of the Western Pacific Railroad Company, and that these facts were known to him. He is not, therefore, an innocent purchaser. Concurring as we do with the circuit court in the result arising from the evidence, we do not deem it necessary to give in this opinion a detailed examination of it.

This being the first case of the kind in this court, a class of cases which may possibly be indefinitely multiplied, it is to be regretted that it was not more fully presented in the circuit court. Many interesting questions might arise in this class of cases not proper to be considered in this case. For instance: the nature and extent of mineral found in the land granted or patented which will bring it within the designation of *mineral land* in the various Acts of Congress, in which it is excepted out of grants to railroad companies and forbidden to be sold or preempted as ordinary or agricultural lands are.

Suppose that when such land has been conveyed by the Government it is afterwards discovered that it contains valuable deposits of the precious metals, unknown to the patentee or to the officers of the Government at the time of the conveyance, will such subsequent discovery enable the Government to sustain a suit to set aside the patent or the grant? If so, what are the rights of innocent purchasers from the grantee, and what limitations exist upon the exercise of the Government's right? *We can answer none of these questions here, and can only order that the decree below be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WASHINGTON AND GEORGETOWN RAILROAD COMPANY, *Appt.*, v. DISTRICT OF COLUMBIA.

(See S. C., Reporter's ed., 522-526.)

Assessment on street railroad company for paving street.

Where a street railroad company is by law bound to keep the space within its tracks and for two feet beyond them well paved, which part of the paving is more costly than that of the rest of the street, the extra and separable expense of such part of the paving should be assessed exclusively to the company; and such company is not entitled to be relieved from a tax for paving the street by paying the proportion thereof which the width which it is obliged to pave bears to the width of the whole street.

[No. 279.]

Argued Apr. 25, 1883. Decided May 7, 1883.

APPEAL from the Supreme Court of the District of Columbia.

The history and facts of the case appear in the opinion of the court.

Messrs. **Enoch Totten** and **W. D. Davidge**, for appellant.

Messrs. **A. G. Riddle** and **Francis Miller**, for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

This is an appeal from a decree of the Supreme Court of the District of Columbia dismissing the bill of appellant.

The questions presented by the appeal arise out of the execution of the Act of Congress of July 19, 1876, authorizing the repavement of Pennsylvania Avenue.

That Act created a commission, consisting of two officers of the engineer corps of the army and the architect of the Capitol, whose duty it was to contract for and superintend the work, and to decide upon the character of the material. It also declared in what proportion the expense of the work should be borne by the owners of property along the line of the avenue, namely: the United States, the District of Columbia, the private citizens, the Washington and Georgetown Railroad Company, whose track ran through the center of the avenue, and other [523] railroad companies whose tracks crossed the street at several places. So much of this apportionment of expenses as relates to the appellant is in these words:

"Sec. 3. That the cost of laying down said pavement shall be paid for in the following proportions and manner: the Washington and Georgetown Railroad Company shall bear all of the expense for that portion of the work lying between the exterior rails of the tracks of the road, and for a distance of two feet from and exterior to the track on each side thereof, and of keeping the same in repair; but the said Railroad Company, having conformed to the grade established by the commissioners, may use cobblestone or Belgian rock in paving their tracks, or the space between their tracks, as the commissioners shall direct." 19 Stat. at L., 93.

This is in strict conformity to the charter of the Company, passed in 1862, the 4th section of which enacts:

"That said Corporation hereby created shall be bound to keep said tracks, and for the space of two feet beyond the outer rail thereof, and also the space between the tracks, at all times well paved and in good order, without expense to the United States or to the Cities of Georgetown and Washington."

The 5th section requires the Company to conform its road to any change of the grade of the street; and the 6th, that the Act may at any time be altered, amended or repealed by Congress. 12 Stat. at L., 389.

The Act of 1876, under which the work of repaving was done, in section 4 provides "That assessments shall be made by the Commissioners of the District of Columbia upon the owners of said private property on said avenue and spaces and upon said Railroad Company respectively, provided in section 3 of this Act," and for the collection of the same by the collector of the District of Columbia.

It is also enacted that, on failure of the Railroad Company or any private citizen to pay such assessment, the commissioners of the District shall issue certificates, bearing ten per cent interest, payable within one year, which

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are made a lien on the property, under which it may be sold at the end of the year, if not paid. [524] The Railroad Company was assessed by the commissioners of the District in the sum of $19,886.69, whereas they charge that they are only liable for $12,207.27; and as the commissioners were about to issue a certificate for the larger amount, the Company paid or tendered the sum which they acknowledge to be due, and filed their bill in chancery to obtain an injunction as to the remainder.

This difference is owing to the fact that alongside of the exterior rails of the track the paving commissioners required a blue granite stone to be laid the whole length of the pavement, five inches in width and eight inches deep, and each stone about three feet long. This was charged wholly to the Company, as well as the remainder of the two feet next adjoining said track on the outside of the rails.

As regards this remainder the Company makes no objection, but they insist that the entire cost of all the paving on each side of their track to the sidewalk should be computed together, and the charge against the Company should be in the proportion which those two feet bear to the entire distance from each exterior rail to the sidewalk. As this string of stone paving is more costly than the Neufchatel and Trinidad material, which constitute the main body of the pavement, this would relieve the Company of a part of the cost of the two feet adjacent to their track. As a matter of strict justice, no reason can be seen for this proposition, for it is quite clear that the requirement of this string or curb of blue granite is wholly due to the existence of the tracks of the railroad in the middle of the street, and is also mainly, if not wholly, for the protection of the track alongside of which it is laid.

Nothing can be more just, than that the Company should pay for the work which its track alone makes necessary.

Nor is there any question that, if this stone was necessary in laying down this new pavement, for the security and durability of the track itself or of the pavement near the track, the Company was bound, by the 4th section of its charter, to pay the expense. That it was a judicious and proper thing to be done is scarcely controverted, and if it were, the testimony [525] shows very clearly that it was.

The only question, therefore, that remains, is whether Congress, in the distribution of the expense of this work of repaving the avenue, intended that this should be borne by the Company.

The language of Congress, on that subject, would seem to admit of no other construction. The 3d section, already cited, says: "The Washington and Georgetown Railroad Company shall bear *all* the expense for that portion of the work lying between the exterior rails of the tracks of the road, and for a distance of two feet from and exterior to the track on each side thereof, and of keeping the same in repair."

So far from relieving the Company of the duty which it accepted by its charter, the language re-enforces that obligation and makes its application to the repavement clear. The statute goes on to prescribe what the United States shall pay, and what the District of Columbia shall pay, and what individual owners shall pay; and the proportions in which these parties are to be charged have no relation to the part to be paid for by the Railroad Company, which is, in no case, a proportionate part of the street along which it runs, but *all* the expense of the work inside its rails, and for two feet exterior to this on each side. There is no room for apportionment here, and if, for so much of this two feet as is of the same material as the main surface of the street, which is separated from it by no visible line, the easiest mode of ascertaining its cost is to calculate its relation to the remainder of the pavement, that is no reason why this extra and separable expense of blue stone should not be assessed, as the law requires, exclusively to the Company.

But it is said that the paving commissioners adopted the rule of a general apportionment of all the expense, and reported to the commissioners of the District on that basis, as due from the Company, the smaller sum of $12,207.27, and that their report is conclusive.

The report thus made is nowhere in the statute made their special duty, nor are they anywhere authorized to make the final assessment. [526]

The report was merely a suggestion of their views for the action of the District commissioners.

On the other hand, by the express language of the Act, these latter commissioners are directed to make the assessment on which the parties are to pay, and on which, if they do not pay, a certificate shall be issued which becomes an interest bearing lien on their property.

Another source of complaint is, that in making the necessary excavations for the new pavement, it became necessary to support the track of the Company by underpinning, which cost $1,052.12, and was paid for by the paving commissioners. This work was wholly for the benefit of the Railroad Company. It was to prevent the track from falling or caving in while used during the progress of the work, and the city authorities might have left the Company to take care of itself. But as this might have delayed the work, or led to litigation, they wisely protected it while they worked. It seems to us a proper charge against the Company alone, as they alone were benefited, and their track made it necessary.

There is no error in the record, and the decree of the Supreme Court of the District is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

SARAH E. VANCE AND S. J. ZEIGLER, [514]
Her Husband, *Plffs. in Err.*,
v.
SARAH E. VANCE, EXTX. of the Succession of S. W. VANCE, Deceased, ET AL.

(See S. C., Reporter's ed., 514-522.)

Recording Act—limitations as to infants and married women.

1. A constitution and statute of a State which provides that tacit mortgages shall cease to have effect against third persons unless recorded within a stated reasonable time, does not impair the obligation of the contract in such cases, even as to minors; it is in its nature a statute of limitations.

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2. The exemptions from the operation of statutes of limitation usually accorded to infants and married women, do not rest upon any general doctrine of the law that they cannot be subjected to their action, but in every instance upon express language in those statutes giving them time after majority, or after cessation of coverture, to assert their rights.

[No. 280.]

Argued Apr. 25, 26, 1883. Decided May 7, 1883.

IN ERROR to the Supreme Court of the State of Louisiana.

This suit was brought in a state court of Louisiana, by a minor, after her emancipation and marriage, against the succession of her father and natural tutor, represented by his executrix.

A judgment was rendered in her favor, which recognized the existence of a tacit mortgage on all the lands owned by her tutor after the commencement of his tutorship. The Supreme Court of Louisiana affirmed the judgment of the lower court, on appeal, except as to the existence of the tacit mortgage and an allowance of compound interest; 32 La. Ann., 186; whereupon, the plaintiff sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **Charles W. Hornor** and *T. J. Durant*, for plaintiffs in error.

Mr. **E. M. Hudson** for *G. W. Sentell & Co.*, interveners, defendants in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of Louisiana.

In a proceeding in the State Court of Louisiana the plaintiff in error recovered a judgment against the defendant in error, as executrix of the succession of her husband, S. W. Vance, for the sum of about $75,000, due from him to plaintiff in error as her natural tutor. The sum thus found due was the result of an accounting concerning this tutorship during the period between October 15, 1859, and May 18, 1877.

Article 354 of the Civil Code of Louisiana, in force when this tutorship began, says: "The property of the tutor is tacitly mortgaged in favor of the minor from the day of the appointment of the tutor, as security for his administration, and for the responsibility which results from it."

The court of probate, which adjusted this account, decreed in favor of the plaintiff in error, that her mortgage privilege for the sums and interest found due her be recognized on all the lands owned by Samuel W. Vance, the deceased tutor, on and after the 15th day of October, 1859.

From this branch of the decree, certain creditors of the deceased tutor, who had been permitted to intervene, appealed to the Supreme Court of the State, and that court reversed the decree of the probate court by deciding against the existence of this mortgage privilege.

The ground on which this privilege was denied is found in Article 123 of the Constitution of the State of Louisiana, adopted in April, 1868, which is as follows:

"The General Assembly shall provide for the protection of the rights of married women to their dotal and paraphernal property, and for the registration of the same; but no mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated. The tacit mortgages and privileges now existing in this State shall cease to have effect against third persons after the 1st January, 1870, unless duly recorded. The General Assembly shall provide by law for the registration of all mortgages and privileges."

The Legislature did pass the Act of March 8, 1869, No. 95: "To carry into effect Article 123 of the Constitution, and to provide for recording all mortgages and privileges." Session Acts 1869, p. 114; section 11 reads: "That it shall be the duty of the clerks of the district [516] courts of the several parishes in this State to make out an abstract of the inventory of the property of all minors whose tutors have not been required by law to give bond for their tutorship, such abstract to describe the real property and give the full amount of the appraisement of all the property, both real and personal, and rights and credits, and to deposit such abstracts with the recorders of the several parishes, whose duty it shall be to record the same, as soon as received, in the mortgage book of their parish; such abstracts to be made out and deposited with the recorders by the first day of December, 1869, and recorded by the first day of January, 1870. This section to apply only to tutorship granted before the passage of this Act, and any failure of the clerks or recorders to perform the service required by this section shall subject them to any damages that such failure may cause any person, and shall further subject them to a fine of not less than $100 nor more than $1,000, for the benefit of the public school fund, to be recovered by the district attorney or district attorney *pro tem*, before any court of competent jurisdiction; such abstracts when recorded in any parish in which the tutor owns mortgageable property shall constitute a mortgage on the said tutor's property until the final settlement and discharge of the tutor; the fees for making out and recording such abstract shall be the same as the fees prescribed for the clerks and recorders for other similar services, and shall be paid on demand by the tutor, or, if the minors have arrived at the age of majority, by them, and if no responsible person can be found, then any property owned by the minors for whose benefit such services were performed shall be sold to pay the same, and if no person or property be found to pay the same, then the parish shall pay the same, and have recourse against the person or property of any person for whose benefit the services were performed."

The case comes to this court on the proposition, that, as thus construed, the Constitution and Statute of Louisiana impair the obligation of her contract with her tutor concerning his duty to account for her estate in his hands, and also violates the provision of section 1, article XIV. of the Amendments to the Constitution of the United States.

The view of the Supreme Court of Louisiana on this matter is very clearly presented in the [517] following extract from its opinion in the case.

"Waiving the question, which is certainly a debatable one, whether or not the obligations

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and mortgages existing against the natural tutor in favor of his ward arise or spring from contracts, we think the plaintiff's argument untenable, in that it assumes that article 123 destroyed or impaired plaintiff's mortgage obligation in the sense of the Constitution of the United States. Had the article simply declared the abolition and extinction *eo instanti* of all tacit mortgages, there would have been the case presented by plaintiff's argument. But it did nothing of the sort. It fixed a future day, reasonably distant, and declared that such mortgages would perempt, prescribe, or cease to exist as to third persons unless recorded by that date.

It is in its nature a statute of limitations. The right of the State to prescribe the time within which existing rights shall be prosecuted, and the means by and conditions on which they may be continued in force, is, we think, undoubted. Otherwise, where no term of prescription exists at the inception of a contract, it would continue in perpetuity, and all laws fixing a limitation upon it would be abortive. Now, it is elementary that the State may establish, alter, lengthen or shorten the period of prescription of existing rights, provided that a reasonable time be given in future for complying with the statute." See, Cooley, Const. Lim., p. 376; Story, Const., 236, sec. 1385.

These observations seem to us eminently just. The strong current of modern legislation and judicial opinion is against the enforcement of secret liens on property. And in regard to real property, every State in the Union has enacted statutes holding them void against subsequent creditors and purchasers, unless they have actual notice of their existence, or such constructive notice as arises from registration.

The Constitution of Louisiana introduced this principle and did it with due regard to existing contracts. It did not change, defeat nor impair the obligation of the tutor to perform that contract. It did not take away nor destroy the security which existed by way of lien on the tutor's property, nor as between the tutor and [518] the ward did it make any change whatever. But it said to the latter, "You have a secret lien, hidden from persons who are dealing every day with the tutor on the faith of this property, and in ignorance of your rights. We provide you a way of making those rights known by a public registration of them which all persons may examine, and of which all must take notice at their peril. We make it the duty of officers having charge of the offices where the evidence of your claim exists to make this registration. We make it your duty also to have it done. We give you a reasonable time after this Constitution is passed and after the enabling statute is passed to have this registration made. If it is not done within that time your debt remains a valid debt, your mortgage remains a valid mortgage, but it binds no one who acquires rights after that in ignorance of your mortgage, because you have not given the notice which the law required you to give."

We think that the law, in requiring of the owner of this tacit mortgage for the protection of innocent persons dealing with the obligor, to do this much to secure his own right, and protect those in ignorance of those rights, did not impair the obligation of the contract, since it gave ample time and opportunity to do what was required and what was eminently just to everybody.

The authorities in support of this view are ample.

Perhaps the case most directly in point is one in this court, namely: *Curtis* v. *Whitney*, 13 Wall., 68 [80 U. S., XX., 513].

That was a case like this, arising out of a statutory contract, to which the Legislature, by a law enacted after it was made, added, as in this, the duty of giving notice. Curtis purchased at a public sale, for delinquent taxes, a tract of land, and received from the proper officer a certificate, which by law authorized her to obtain a deed at the end of three years, if the land was not redeemed by paying the amount of the bid and interest.

After this sale and before the end of the three years, the State passed an Act, that where any person was found in the actual occupancy of the land, the deed should not issue unless a written notice had been served on the owner [519] of the land or on the occupant by the holder of the tax certificate at least three months prior thereto, and it was made applicable to past sales as well as future. Mrs. Curtis applied for and obtained her deed without giving this notice, and when she brought suit to quiet the title so acquired, the Supreme Court of Wisconsin decided her deed void for want of it.

The case was brought to this court on the ground that the Statute of Wisconsin requiring this notice impaired the obligation of the contract evidenced by the certificate of sale, but this court held that it did not. That the case is very like the one before us, is obvious. The court said: "That the statute is not void because it is retrospective, has been repeatedly held by this court, and the feature of the Act of 1867, which makes it applicable to certificates already issued for tax sales, does not of itself conflict with the Constitution of the United States. Nor does every statute which affects the value of a contract impair its obligations. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and by national legislation. For such legislation demanded by the public good, however it may retroact on contracts previously made, and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party, there is no restraint in the Federal Constitution, so long as the obligation of performance remains in full force. In the case before us the right of the plaintiff is not taken away, nor the time when she would be entitled to it, postponed. * * * The right to the money or the land remains, and can be enforced whenever the party gives the requisite legal notice. The authority of the Legislature to frame rules by which the right of redemption may be rendered effectual, cannot be questioned, and among the most appropriate and least burdensome of these is the notice required by statute."

In the case of *La.* v. *New Orleans*, 102 U. S., 203 [XXVI., 132], the Supreme Court of the State refused the relator a writ of *mandamus*, to enforce a levy of taxes to pay a judgment against the city, on which an execution had been issued and a return of *nulla bona* made. [520] The Supreme Court denied the writ because the relator had not registered his judgment with the

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proper officer of the city, under a statute which required such registry in order that proper levy of taxes might be made and judgments paid in their proper order.

The case was brought to this court on the proposition that the statute which was enacted after relator's contract was made, was an impairment of its obligation within the meaning of the Constitution of the United States.

But this court held that the registry of these judgments was "A convenient mode of informing the city authorities of the extent of the judgments, and that they have become executory, to the end that proper steps may be taken for their payment. It does not impair existing remedies."

In *Jackson* v. *Lamphire*, 3 Pet., 290, this court said: "It is within the undoubted power of State Legislatures to pass recording Acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same, whether the deed is dated before or after the recording Act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts. Such, too, is the power to pass Acts of limitation, and their effect. Reason and sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned."

And this language is reproduced with approval in the case of *Curtis* v. *Whitney*, above referred to.

The decisions in regard to the Statute of Limitation are full to the same purpose, and as the Supreme Court of Louisiana says, this is a statute of limitation, giving a reasonable time within which the holder of one of these secret liens may make it public, otherwise it will be void against subsequent purchasers and creditors without notice.

The case of *Terry* v. *Anderson*, 95 U. S., 628 [XXIV., 365] presents, in the terse language of the *Chief Justice* of this court, both the rule, the reason for it and the limitation which the constitutional provision implies. This court, he says, "Has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the enforcement of the action before the bar takes effect." [521]

He adds, in reference to the case then before the court, which was a South Carolina statute of limitation, passed since the civil war: "The business interests of the entire people of the State had been overwhelmed by a calamity common to all; society demanded that extraordinary efforts be made to get rid of old embarrassments, and permit a reorganization upon the basis of the new order of things. This clearly presented a case for legislative interference within the just inferences of constitutional limitations. For this purpose the obligations of old contracts could not be impaired, but their prompt enforcement could be insisted upon, or an abandonment claimed. That, as we think, has been done here, and no more." And *Jackson* v. *Lamphire*, is again cited with approval.

The same principle is asserted in the case of *Koshkonong* v. *Burton*, at the last Term, 104 U. S., 668 [XXVI., 886]. Other cases in this court are *Hawkins* v. *Barney's Lessee*, 5 Pet., 457; *Sohn* v. *Waterson*, 17 Wall., 596 [84 U. S., XXI., 737]; *Sturges* v. *Crowninshield*, 4 Wheat., 122.

It is urged that because the plaintiff in error was a minor when this law went into operation, it cannot affect her rights. But the Constitution of the United States, to which appeal is made in this case, gives to minors no special rights beyond others, and it was within the legislative competency of the State of Louisiana to make exceptions in their favor or not. The exemptions from the operation of statutes of limitation, usually accorded to infants and married women, do not rest upon any general doctrine of the law that they cannot be subjected to their action, but in every instance upon express language in those statutes giving them time after majority, or after cessation of coverture, to assert their rights. No such provision is made here for such exception, but, in place of it, the Legislature has made it the duty of the proper officer of the court to act for them. It was also the duty of the under tutor appointed in this case. [522]

If the foregoing considerations be sound, they answer also effectually the suggestion in regard to the Fourteenth Amendment of the Constitution of the United States.

We see no error in the record of the case of which this court has jurisdiction, and the decree of the Supreme Court of Louisiana is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 406.

Ex Parte:

In the Matter of HUNG HANG, *Petitioner.*

(See S. C., Reporter's ed., 552, 553.)

Writ of habeas corpus, *office of.*

This court has authority to issue the writ of *habeas corpus*, but except in cases affecting ambassadors, other public ministers, or consuls, and those in which a State is a party, it can only be done for a review of the judicial decision of some inferior officer or court.

[No. 11, Orig.]

Submitted Apr. 2, 1883. Decided May 7, 1883.

APPLICATION for a writ of *habeas corpus.* The case is sufficiently stated by the court.

Messrs. S. F. Phillips, Thomas Simons and **Hall McAllister**, for petitioner.

No opposing counsel appeared.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an application for a writ of *habeas corpus*, for the purpose of an inquiry into the legality of the detention of the petitioner, Hung Hang, a subject of the Emperor of China, by the chief of police, under a warrant for his arrest, issued by the police judge of the City and County of San Francisco, California, for a violation of an order or ordinance of the Board of Supervisors of such city and county, alleged to be in contravention of the Constitution and of a Treaty of the United States. [553]

It has long been settled that ordinarily this court cannot issue a writ of *habeas corpus* except

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under its appellate jurisdiction. *Ex parte Bollman*, 4 Cranch, 101; *Ex parte Watkins*, 7 Pet., 572; *Ex parte Yerger*, 8 Wall., 99 [75 U. S., XIX., 337]; *Ex parte Lange*, 18 Wall., 165 [85 U. S., XXI., 875]; *Ex parte Parks*, 93 U. S., 22 [XXIII., 788]; *Ex parte Virginia*, 100 U. S., 341 [XXV., 677]; *Ex parte Siebold*, Id., 374 [XXV., 718].

Section 751 of the Revised Statutes, which re-enacts a similar provision in the Judiciary Act of 1789, sec. 14, gives this court authority to issue the writ, but except in cases affecting ambassadors, other public ministers or consuls, and those in which a State is a party, it can only be done for a review of the judicial decision of some inferior officer or court. *This petition presents no such case. The writ is, consequently, denied.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[566] *Ex Parte:*

In the Matter of the BALTIMORE AND OHIO RAILROAD COMPANY, *Petitioner.*

(See S. C., Reporter's ed., 566, 567.)

Final judgment, what is—mandamus, *when not issuable.*

1. Where in an action of replevin, the circuit court quashed and vacated the writ and dismissed the action at the costs of the plaintiff, and awarded execution because it had no jurisdiction, this is a final judgment.
2. A writ of *mandamus* cannot issue to review a final judgment which is within our jurisdiction, and subject to review here on a writ of error. *Mandamus* cannot be used to perform the office of a writ of error.

[No. 15, Orig.]

Submitted Apr. 23, 1883. Decided May 7, 1883.

PETITION for a writ of *mandamus.*

The case is sufficiently stated by the court.

Mr. **John K. Cowen** and *Hugh L. Bond, Jr.*, for petitioner.

No opposing counsel.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This petition shows that the Baltimore and Ohio Railroad Company brought an action of replevin against John E. Hamilton in the Circuit Court of the United States for the Eastern District of Virginia, to recover the possession of certain railroad cars; that a summons for the defendant and a writ of replevin for the property were issued in the suit; that the defendant, Hamilton, was duly served with the summons; that the property sued for was taken by the marshal under the writ of replevin and delivered to the Company; that a declaration was filed, and that before pleading thereto, Hamilton appeared and moved to vacate the writ of replevin because the court had no jurisdiction to issue the same. This motion was heard, and thereupon the court ordered and adjudged "That said writ be quashed and vacated; and all proceedings subsequent to be of no avail;" and that the action "be dismissed at the costs of the plaintiff, for which execution may issue, etc."

[567] This is a final judgment in the action and, if the case is otherwise within our jurisdiction, subject to review here on a writ of error. Upon such a writ, the question of the right to maintain the action on which the case was adjudged below, if presented by the record, may be re-examined here. This being so, a writ of *mandamus* cannot issue. It has been often held that *mandamus* cannot be used to perform the office of a writ of error. *Ex parte Hoard*, 105 U. S., 580 [XXVI., 1177]; *Ex parte Loring*, 94 U. S., 419 [XXIV., 165].

In *Ex parte R. Co.*, 103 U. S., 796 [XXVI., 461], it was expressly decided that a writ of *mandamus* could not be used to bring up for review a judgment of the circuit court on a plea to the jurisdiction. That is practically what is asked in this case.

The writ is denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

NEAL RUGGLES, *Plff. in Err.*, *v.* PEOPLE OF THE STATE OF ILLINOIS.

(See S. C., Reporter's ed., 526-541.)

Grants of immunity from government control—railroad charges, when regulated by the State—conclusiveness of state rule—interpretation of charter.

1. Grants of immunity from legitimate governmental control are never to be presumed; on the contrary, the presumptions are all the other way.
2. When in a charter of a railroad company it is expressly declared that no by-law shall be made that is in conflict with the laws of the State, and that the rates of charge to be levied and collected for the conveyance of persons and property are to be regulated by by-laws, only such charges can be collected as are allowed by the laws of the State.
3. In such case, in the absence of direct legislation on the subject, the power of the directors over the rates is subject only to the common law limitation of reasonableness; but if the State establish a maximum of rates to be charged by railroad companies for the transportation of persons and property, the rates fixed by the directors must conform to its requirements.
4. When the words of a charter of incorporation are plain and interpret themselves, extrinsic facts will not be considered as bearing on their meaning.

[No. 135.]

Argued Mar. 9, 12, 1883. Decided May 7, 1883.

IN ERROR to the Supreme Court of the State of Illinois.

In March, 1873, Morgan Lewis, the complaining witness, demanded to be carried at the rate established by the Legislature of Illinois, three cents per mile, from Buda to Neponset, Illinois, points on the Chicago, Burlington and Quincy Railroad, tendering eighteen cents, being that amount, which the conductor, Neal Ruggles, refused, and demanded twenty cents, the regular fare established by the company. Lewis refused to pay more than the statutory fare, and thereupon Ruggles attempted to expel him from the train. Proceedings were instituted against the conductor, Ruggles, for assault and battery, and he was fined $10 and costs. The case was appealed to the Supreme Court of Illinois, where the judgment was affirmed (*Ruggles v. People*, 91 Ill., 256), and brought here on

NOTE.—*State control over railroads.* See *note to* Balt. & O. R. R. Co. v. Maryland, 88 U. S., XXII., 678.

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writ of error, with the following certificate:

"This certifies that in the determination of this case there was necessarily drawn in question the construction of that clause of the Constitution of the United States which prohibits a State from passing laws impairing the obligation of a contract. The plaintiff in error or appellant claimed that he was justified in the act for which he was prosecuted in the court below, by the charters of the Chicago, Burlington and Quincy Railroad Company, he being a conductor on the railroad of said company, and that said charters conceded to said company the right to fix the rates for the transportation of persons and property over and upon said road, and that said charters constituted a contract substantially guarantied and protected by the Constitution of the United States; and I certify that said claim was disallowed and decided adversely to said appellant, by the said Supreme Court, upon the ground that, by virtue of the provisions of a statute of the State of Illinois, passed subsequently to the granting of the charters of the said Chicago, Burlington and Quincy Railroad Company, a less rate of fare for transportation of persons and property upon said road had been established by state authority than the rate fixed by the company under authority of its charter, and that said statute controlled the charter of the company in regard to the rates of transportation over and upon said road, and that the provisions of said charters granting to said company the right to fix the rates for the transportation of persons and property over its road did not constitute a contract protected by the Constitution of the United States, but was subject to alteration and modification by the Legislature of Illinois, all of which is hereby duly certified, to the end that the said appellant may present the said question to the Supreme Court of the United States for adjudication.

Witness, the Hon. Pinkney H. Walker, Chief Justice of the Supreme Court of the State of Illinois, this 26th day of September, 1879.

P. H. Walker."

Messrs. **Wirt Dexter, Sidney Bartlett** and *O. H. Browning*, for plaintiff in error:

The only question in this case is, whether the charter granted to the Central Military Tract Railroad Company, now the Chicago, Burlington and Quincy, by the Legislature of Illinois, in 1852, contains such a contract between the State and the company as authorizes the company to establish its own rates of fare and freight, beyond interference by the State.

The solution of this question depends upon special legislation of a peculiar character, having but little relation to the class of general charters, which have been so frequent in the legislation of almost every State.

If a contract was made granting to the board of directors of the railway company the right to determine its own rates, the reasonableness of that contract cannot be assailed, for whatever it was competent for the parties to agree to is always in the law reasonable. The State gave our board the right to determine the rate and, when they have so determined, we do not charge an unreasonable, but a reasonable rate.

The power of the State to make binding contracts of this nature, is now recognized by all courts as one of the attributes of its sovereignty. *State Bk.* v. *Knoop*, 16 How., 369; *R. R. Corp.* v. *R. R. Co.* 2 Gray, 32; *Perrine* v. *Canal Co.*, 9 How., 172; *R. R. Co.* v. *Md.*, 21 Wall., 471 (88 U. S., XXII., 683); *Turnpike Co.* v. *Miller*, 5 Johns. Ch., 112; *Beekman* v. *R. R. Co.*, 3 Paige, 45.

The power to grant to corporations the absolute right to fix their own rates of toll, is expressly recognized by this court in the so-called *Granger Cases: R. R. Co.* v. *Iowa*,, 94 U. S., 161 (XXIV., 95); *Peik* v. *R. Co.*, 94 U. S., 176 (XXIV., 98); *R. R. Co.* v. *Blake*, 94 U. S., 180 (XXIV., 99).

We deny that the power to regulate the rates of freight of common carriers, as sustained by the courts, emanates from the police power.

The police power extends to all matters affecting the public health and public morals, and as a consequence all persons, natural or artificial, are subject to such rules and regulations as may, from time to time, be ordained and established for the preservation of health and morality.

Stone v. *Miss.*, 101 U. S., 814 (XXVI., 1079); *Beer Co.* v. *Mass.*, 97 U. S., 25 (XXIV., 989).

The theory of the *Munn Case* is, that the courts give to the voluntary act of the party its intended legal effect, and sustain and establish the right of the public to use the property thus dedicated for a reasonable rate, and to enforce its right by appropriate legislation as derived, not from the sovereign police power, but from the voluntary act of the owner of the property. But in the cases of *R. R. Co.* v. *Iowa* (*supra*), and *Peik* v. *R. R. Co.* (*supra*), this court held that where the contract of the State excluded the implied dedication the doctrine of the *Munn Case* had no application.

Grants of the kind under discussion are contracts within the constitutional provision prohibiting States from passing any law impairing the obligation thereof.

Binghamton Br., 3 Wall., 71 (70 U.S., XVIII., 142); *Holyoke Co.* v. *Lyman*, 15 Wall., 511 (82 U. S., XXI., 137); *Miller* v. *State*, 15 Wall., 488 (82 U. S., XXI., 101).

Messrs. **James McCartney,** *Atty-Gen. of Illinois*, **James K. Edsall** and *John B. Hawley*, for defendant in error:

All public grants are strictly construed. Nothing can be taken against the State by presumption or inference in a case like this, where the immunity claimed calls for an abridgement of the powers of government, or any restraint upon their exercise.

Del. R. R. Tax, 18 Wall., 206 (85 U. S., XXI., 888); *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420; *Bank* v. *Billings*, 4 Pet., 514; *U. S.* v. *Arredondo*, 6 Pet., 738; *R. R. Co.* v. *Briggs*, 2 Zab., 623; Sedg. Stat. and Const. Law, 595; *Ins. & T. Co.* v. *Debolt*, 16 How., 416, 435; *Easton Bk.* v. *Com.*, 10 Pa., 442.

Where any doubt exists as to the powers under a charter, those doubts must be resolved in favor of the State.

Fertilizer Co. v. *Hyde Park*, 97 U. S., 659 (XXIV., 1036); *Com.* v. *R. R. Co.*, 27 Pa., 339; *Thomas* v. *R. R. Co.*, 101 U. S., 71 (XXV., 950).

The charters of this railroad company do not give an exclusive power to the officers of the company to fix rates. The reservation of the police power to regulate, is in no way parted with.

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Private Laws of Ill., 1849, 82, 96, 99; 1847, 144; 1852, 36; *Jackson* v. *Lamphire*, 3 Pet., 280; *Bank* v. *Billings*, 4 Pet., 514; *Perrine* v. *Canal Co.*, 9 How., 172; *Head* v. *Ins. Co.*, 2 Cranch, 127; *Richmond R. R. Co.* v. *Louisa. R.R. Co.*, 13 How., 71; *Minturn* v. *Larue*, 23 How., 435 (64 U. S., XVI., 574); *Bk. of Augusta* v. *Earle*, 13 Pet., 519; *R. R. Co.* v. *Fuller*, 17 Wall., 560 (84 U. S., XXI., 710); *Fanning* v. *Gregoire*, 16 How., 524; *Binghamton Bridge Co.*, 3 Wall., 51 (70 U. S., XVIII., 137); *Turnpike Co.* v. *State*, 3 Wall., 210 (70 U. S., XVIII., 180); *Mills* v. *St. Clair Co.*, 8 How., 569; *Toledo Bk.* v. *Bond*, 1 Ohio St., 622; *Shorter* v. *Smith*, 9 Ga., 517; *State* v. *R. R. Co.*, 24 Tex., 80; *Spring Valley W. W.* v. *San Francisco*, 52 Cal., 111; *Collins* v. *Sherman*, 31 Miss., 679; *Turnpike Co.* v. *People*, 82 Ill., 174; *Thompson* v. *R. R. Co.*, 3 Sandf. Ch., 625; *M.B.Co.* v. *U.& S.R.R. Co.*, 6 Paige, 554; *Ex parte L. I. R. R. Co.*, 19 Wend., 37; *Tuckahoe C. Co.* v. *Tuckahoe R. R. Co.*, 11 Leigh, 42; *McIntyre* v. *Ingraham*, 35 Miss., 25; *Hartford B. Co.* v. *Union Ferry Co.*, 29 Conn., 210; Cooley, Const. Lim., 572.

The power of the Company to fix rates has annexed thereto the implied condition that such rates must be reasonable.

1 Hargrave, Law Tracts, pt. 2, ch. 6, p. 77; Hutch. Carr., sec. 447; *R. R. Co.* v. *People*, 67 Ill., 11; *Crouch* v. *Great N. Ry. Co.*, 11 Exch., 742; *Piddington* v. *S.E.Ry. Co.*, 94 E. C. L., 111, 118; *Allnutt* v. *Inglis*, 12 East, 527, 538; *R. R. Co.* v. *Blake*, 94 U. S., 180 (XXIV., 99); *R. R. Co.* v. *People*, 95 Ill., 313; *Ruggles* v. *People*, 91 Ill., 256, 265.

The power to determine what maximum rates are reasonable is a proper legislative function, and such rates may be prescribed by law.

Munn v. *Ill.*, 94 U. S., 133 (XXIV., 86); *Peik* v. *R. Co.*, 94 U. S., 165 (XXIV., 97); *R. R. Co.* v. *Blake* (*supra*).

Mr. Chief Justice **Waite** delivered the opinion of the court:

In the view we have taken of this case, the only question that need be considered is, whether the charter of the Central Military Tract Railroad Company, one of the Illinois Corporations which, through agreements of consolidation, are now represented by the Chicago, Burlington and Quincy Railroad Company, purports on its face to grant to the Company the right to fix the rates of fare and freight to be charged for the conveyance of persons and property on its railroad, free of all control by the State. If, on examination, we find that no such grant was intended, it will be unnecessary to decide whether one Legislature has the power to bind succeeding Legislatures by a contract to that effect.

[529] The provisions of the charter relied on to establish such a grant may be stated as follows:

On the 5th of November, 1849, an Act was passed by the General Assembly of Illinois "to provide for a general system of railroad incorporations." That Act contained the following provisions:

"Section 12. The directors of such company shall have power to make by laws for the management and disposition of stock, property and business affairs of such company, not inconsistent with the laws of this State, and prescribing the duties of officers, artificers and servants that may be employed, for the appointment of all officers for carrying on all the business within the object and purposes of such company.

"Section 21. Every such corporation shall possess the general powers and be subject to the general liabilities and restrictions expressed in the special powers following, that is to say:

* * * * * * * *

"8. To take, transport, carry and convey persons and property on their railroad, by the force and power of steam, of animals, or any mechanical powers, or by any combination of them, and receive tolls or compensation therefor.

* * * * * * * *

"10. To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for any passenger and his ordinary baggage shall not exceed three cents a mile, unless by special Act of the Legislature, and shall be subject to alteration as hereinafter provided.

* * * * * * * *

"Section 32. The Legislature may, when any such railroad shall be opened for use, from time to time, alter or reduce the rates of toll, fare, freight or other profits upon such road; but the same shall not, without the consent of the corporation, be so reduced as to produce with said profits less than fifteen per cent per annum on the capital actually paid in; nor, unless on an examination of the amounts received and expended, to be made by the Secretary of State, he shall ascertain that the net income divided by the company from all sources for the year [530] then last past shall have exceeded an annual income of fifteen per cent upon the capital of the corporation actually paid in."

On the 15th of February, 1851, another Act was passed to incorporate the Central Military Tract Railroad Company, for the purpose of building and using a railroad between certain designated points. Section 3 of that Act is as follows:

"Section 3. The said company is hereby created and incorporated for the purpose of organizing under an Act entitled 'An Act to Provide for a General System of Railroad Incorporations,' in force November 5, 1849, and in all things shall be governed by the provisions thereof, and shall be entitled to have and exercise the powers and privileges and be subject to the liabilities therein enumerated; *Provided*, That the foregoing corporation may attach themselves to and form a part of the Northern Cross Railroad Company, in such manner or on such terms as said companies shall agree."

On the 19th of June, 1852, another Act was passed "To amend an Act entitled 'An Act to Incorporate the Central Military Tract Railroad Company.'" The following are the parts of this amending Act on which, in our opinion, the case depends:

"Section 5. All the corporate powers of said company shall be vested in and exercised by a board of directors, and such officers and agents as they shall appoint. * * *

Section 6. The said company shall have power to make, ordain and establish all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this Act, and for the well ordering, regulating and se-

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curing the affairs, business and interest of the company; *Provided*, That the same be not repugnant to the Constitution and laws of the United States or of this State, or repugnant to this Act. The board of directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same, as they shall from time to time by their by-laws determine, and to levy and collect the same for the use of the said company. The transportation of persons and property, the width of track, and all other matters and things [531] respecting the use of said road, shall be in conformity to such rules and regulations as the said board of directors shall from time to time determine."

It is contended on the part of the company that this amending Act repeals clause 10 of section 21 as well as section 33 of the general railroad law, so far as they are applicable to the Central Military Tract Company, and that under section 6 of the amending Act the directors have absolute control of rates of fare and freight free of legislative interference. We deem it unnecessary to determine the question of repeal, because on full consideration we are satisfied that section 6 does not have the effect that is claimed for it.

Grants of immunity from legitimate governmental control are never to be presumed. On the contrary, the presumptions are all the other way, and unless an exemption is clearly established the Legislature is free to act on all subjects within its general jurisdiction, as the public interests may seem to require. As was said by *Chief Justice* Taney, speaking for the court, in *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 547, "It can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created." This is an elementary principle.

In *R. Co.* v. *Iowa*, 94 U. S., 155 [XXIV., 94]; *Peik* v. *R. Co.*, Id., 176 [XXIV., 98], and *R. R. Co.* v. *Blake*, Id., 180 [XXIV., 99], it was determined that "A State may limit the amount of charges by railroad companies for fares and freights, unless restrained by some contract in the charter." The right to a reversal of the present judgment rests on the question whether this company has any such restraining contract, and that depends on the effect to be given the amending section 6.

The company by its original charter was authorized to transport passengers and property and to receive compensation therefor. This, if there had been nothing more, would, under the rule stated in *Munn.* v. *Ill.*, 94 U. S., 113 [XXIV., 77], and the several railroad cases decided at [532] the same time, require the company to carry at reasonable rates, and leave the Legislature at liberty to fix the maximum of what would be reasonable. So that, laying aside the limitations of the old charter, the question here is whether the amending section relied on has the effect of taking away from the State this power of legislative regulation.

The amending section provides that the company "Shall have power to make, ordain and establish all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this Act, and for the well ordering, regulating and securing the affairs, business and interest of the company; *Provided*, That the same be not repugnant to the Constitution and laws of the United States, or of this State, or repugnant to this Act." By section 5, all the powers of the company were vested in and could be exercised by the directors. Clearly, under this authority no by-law can be established by the directors that does not conform to the laws of the State, and this, whether the laws were in force when the amended charter was granted or came into operation afterwards. The power of the company for the regulation of its own affairs was thus in express terms subjected to the legislative control of the State. The corporate power was a continuing one and intended for the ordering of the affairs of the company as circumstances might from time to time require. The reserved control by the State was also continuing in its nature and manifestly intended for the protection of the public whenever in the judgment of the Legislative Department of the Government the necessity should arise.

Then follows the special provision on which the claim of a contract is predicated. It is as follows:

"The board of directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same as they shall from time to time *by their by-laws determine*, and to levy and collect the same for the use of the company."

This is the form in which the power to charge and collect compensation for the carriage of persons and property was granted by the amended [533] charter. The rates must be fixed by by-laws and no by-law can be made that is at all repugnant to the laws of the State. The first paragraph of the section, with its proviso, prescribes generally what is necessary to the validity of a by-law, and the second allows the directors to fix rates by by-laws. It is undoubtedly true that the first paragraph neither adds to nor takes from the inherent power of a corporation to make by-laws for the regulation of its affairs, and that the proviso is nothing more than a legislative declaration of the principle of the common law that all by-laws must be reasonable, and not in conflict with the laws of the State. But the very fact that such a provision would have been implied, adds to the significance of its incorporation in express terms into the charter, and manifests a determination not to leave room for doubt as to the right of the State to use its legislative power if necessary for the regulation of the affairs of the corporation, at least, by the enactment of general laws applicable to all corporations of a like character and engaged in a like business. There is nothing which even in the remotest degree indicates that a by-law fixing rates is to be of a different character from those regulating the other business of the company. When, therefore, in a section of the charter which expressly declares that no by-law shall be made that is in conflict with the laws of the State, we find that the rates of charge to be levied and collected for the conveyance of persons and property are to be regulated by by-laws, the conclusion is irresistible that only such charges can be collected as are allowed by the laws of the State. This implies that in the absence of direct legislation on the subject, the power of the directors over the rates is subject

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only to the common law limitation of reasonableness, for in the absence of a statute or other appropriate indication of the legislative will, the common law forms part of the laws of the State to which the corporate by-laws must conform. But since, in the absence of some restraining contract, the State may establish a maximum of rates to be charged by railroad companies for the transportation of persons and property, it follows that when a maximum is so established the rates fixed by the directors [534] must conform to its requirements, otherwise the by-laws will be repugnant to the laws.

It is argued, however, that this cannot be the meaning of the amending Act, because, if the company had, under its old charter, the absolute right of fixing rates, subject only to a limit of three cents a mile on passengers, and the State had no power to interfere, except to keep the annual profits down to fifteen per cent per annum on the paid up capital, no one can believe it would have surrendered such a privilege and taken in lieu another so unfavorable as this. It is undoubtedly true, as was claimed in argument, and has been often said from the bench, that amendments to the charters of corporations are usually made at the solicitation of the corporations themselves, who cause the bills to be prepared and submitted to the Legislatures for enactment, and that, if there is doubt as to the construction of what is enacted, this fact may be resorted to in aid of interpretation. But Vattel's first general maxim of interpretation is that "It is not allowable to interpret what has no need of interpretation," and he continues: "When a deed is worded in clear and precise terms, when its meaning is evident and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but to elude it." Vattel, Law of Nations, 244. Here the words are plain and interpret themselves. The directors may establish such by-laws as they please, provided they are not repugnant to the Constitution and laws, and they may by their by-laws regulate the rates of fare and freight. As their by-laws must conform to the laws of the State, so must their rates. If the State had not the legislative power to regulate the charges of carriers for hire, the case would be different. But that question has been settled, and the amended charter which this company secured from the Legislature must be construed in the light of that established power.

Without, therefore, undertaking to determine what rights as to fares and freights were secured to the company under the old charter, nor whether more was gained by the other provisions of the new charter than was lost by the accept- [535] ance of section 6 as it was enacted, *we affirm the judgment.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Harlan**, concurring:

In *Munn* v. *Illinois*, 94 U. S., 123 [XXIV., 33], this court held that there was nothing in the Constitution of the United States which prevented the Legislature of Illinois from fixing, by statute, the maximum of charges for the storage of grain in warehouses at Chicago and other places in that State, where grain is stored in bulk, and in which the grain of different owners is mixed together, or in which the grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved. After quoting, with approval, the language of *Lord Chief Justice* Hale, that when private property is "affected with a public interest, it ceases to be *juris privati* only," the court proceeds: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to the control."

Immediately following that case is *R. Co.* v. *Iowa*, 94 U. S., 155 [XXIV., 94], which involved the validity of a statute of Iowa establishing "reasonable maximum rates of charges for the transportation of freights and passengers" on the different railroads of that State. Touching that case it may be observed that the court conceded that a railroad corporation might be protected by its charter against absolute legislative control as to rates of fare and freight, and that the power of the railroad corporation which there questioned the validity of the law of Iowa was, by its charter, made subject to such legislation as the Legislature might, from time to time, establish. "They (railroad corporations) are, therefore," said the court, "engaged in public employment affecting the public interest, and under the decision in *Munn* v. *Ill.*, subject to legislative control, *unless protected by their charters.* The Burlington and Missouri River Railroad Company, the benefit of whose charter the Chicago, Burlington and Quincy Railroad Company now claims, was organized under the general corporation law of Iowa, with power to contract, in reference to its business, the same as private individuals, and to establish by-laws and make all rules and regulations deemed expedient in relation to its affairs, but being *subject, nevertheless, at all times, to such rules and regulations as the General Assembly of Iowa might, from time to time, enact and provide.* This is, in substance, [536] its charter, and to that extent it is protected *as by a contract;* for it is now too late to contend that the charter of a corporation is not a contract within the meaning of that clause in the Constitution of the United States which prohibits a State from passing any law impairing the obligation of a contract. Whatever is granted is secured subject only to the limitations and reservations in the charter, or in the laws or constitutions which govern it."

In *Peik* v. *R. Co.*, 94 U. S., 165 [XXIV., 97], a similar statute of Wisconsin was sustained as within the power of its Legislature to enact. The court said: "In *Munn* v. *Illinois* and *R. R. Co.* v. *Iowa* [*supra*], we decided that the State may limit the amount of charges by railroad companies for fares and freight, *unless restrained by some contract*, even though their income may have been pledged as security for the payment of obligations incurred upon the faith of the charter." It was also said in that case: "When property has been clothed with a public inter-

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est, the Legislature may fix a limit to that which shall, in law, be reasonable for its use. This limit binds the courts as well as the people." The language last quoted, it must not be overlooked, was used in reference to a railroad charter granted under the Constitution of Wisconsin, which expressly provided that all Acts for the creation of corporations within the State "may be altered or repealed by the Legislature at any time after their passage."

In *R. R. Co.* v. *Blake*, 94 U. S., 180 [XXIV., 99], it was decided that, as there was nothing in the charter of the railroad company limiting the power of the State to regulate charges for freight and passengers, it was competent for the Legislature to require the company to carry on equal and reasonable terms; this, because, as the court ruled, it was incident to the occupation in which the corporation was engaged, and [537] for which it was created a carrier, to collect only a reasonable compensation for carriage. The Act was there held as adding nothing to, and taking nothing from, the grant as contained in the original charter.

These cases establish, among others, these principles: 1. That the charter of a railroad corporation is a contract within the meaning of the contract clause of the Federal Constitution. 2. That such corporation may be protected, by its charter, against absolute legislative control in the matter of rates for the carriage of passengers and freight. 3. That when the charter is granted subject to such regulations as the Legislature from time to time may provide, or subject to the authority of the Legislature to alter or repeal it, in either of such cases, the Legislature has the same power over rates or tolls that it had when the charter was granted. 4. In the absence of statutory regulations upon the subject, it is necessarily implied from the occupation of a railroad corporation that it shall exact only reasonable compensation for carriage.

How far these principles control the present case I proceed now to inquire:

The general railroad law of 1849 authorized railroad corporations created under it to regulate tolls and compensation for the transportation of passengers and property, subject to these restrictions: that compensation for a passenger and his ordinary baggage should not exceed three cents a mile, unless by special Act of the Legislature; further, that the Legislature may, from time to time, alter or reduce the rates of toll, fare, freight or other profits upon such railroad, provided the same should not, without the consent of the corporation, be so reduced as to produce with said profits less than fifteen per cent per annum on the capital actually paid in; nor unless, on an examination of the amounts received and expended, to be made by the Secretary of State, he shall ascertain that the net income derived by the company from all sources for the year then last past exceeded an annual income of fifteen per cent upon the capital so actually paid in.

The Act of February 15, 1851, incorporating the Central Military Tract Railroad Company, one of the constituent corporations which, by [538] consolidation, make the Chicago, Burlington and Quincy Railroad Company, and to the benefit of whose charter the latter is entitled, declares that it is created for the purpose of organizing under the general Law of 1849, "And in all things shall be governed by the provisions thereof, and shall be entitled to have and exercise the powers and privileges and be subject to the liabilities therein enumerated." The provisions of the Act of 1849, enumerating the powers and privileges to be enjoyed by and the liabilities imposed upon corporations organized thereunder, thus became a part of the charter of the Central Military Tract Railroad Company.

If the determination of this case turned solely upon the question whether the Act of 1871 establishing maximum charges for all railroads in Illinois deprived this company of any contract right declared or given by the Law of 1849, there would be no difficulty in affirming the judgment; for, in the first place, the amount tendered, in this case, to conductor Ruggles, and which he refused to accept as the entire compensation to be paid by Lewis, the passenger, was all that was allowed by the Act of 1871, and all that the company, in the absence of a special Act, was permitted by the Law of 1849 to collect; further, there is no evidence in the record that the passenger rates as established by the Act of 1871 will reduce the profits of the company below the aggregate amount which by its charter it was entitled to realize, and within which, the Legislature, by express reservation, could restrict it. But in behalf of appellant it is contended that by the 6th section of the Act of June 19, 1852, the corporation was invested with absolute control, through its directors, of the whole subject of rates; in other words, that the Legislature, in that section, removed the restriction in the Act of 1849 of three cents per mile for a passenger and his ordinary baggage and, by necessary implication, surrendered its power to make even the reduction provided for in that statute.

In this view, as to the construction of the Act of 1852, I do not concur. That Act is not absolutely inconsistent, upon the subject of rates, with the general Statute of 1849. They may stand together, and since repeals by implication are not favored, they should be so construed as, if possible, to make them both opera- [539] tive. The Statute of 1849 gave the corporation the general power, within a certain limit, of regulating tolls and compensation to be paid for the transportation of passengers and property. But it did not prescribe the particular mode by which the public should be informed as to the rates established. I incline to think that the purpose of the Act of 1852 was to declare, as a condition precedent to power in the directors to levy and collect tolls, that the rates should not be determined at the mere discretion of the company's superintendent or agents charged with the management of its business, but, keeping within the limits prescribed by the Law of 1849, should be fixed by the directors in the by-laws of the corporation. It should not be presumed that the Legislature intended by the general language of the Act of 1852 to abrogate the restrictions in the Act of 1849, and to surrender, as to the Central Military Tract Railroad Company, the powers reserved in the general law, to keep the profits of all railroad corporations created under it, as that one was, within fifteen per cent upon the capital actually paid in.

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But I do not concur in so much of the opinion of the court as seems to rest upon the ground that, apart from the Law of 1849, the question of tolls to be charged by the Central Military Tract Railroad Company was, under the Act of 1852, exclusively for legislative determination and, in no case, of judicial cognizance. The court holds that, testing the right of the company entirely by the latter Act (in other words, assuming that the 6th section of the Act of 1852 superseded all in the Act of 1849 upon the subject of rates) the judiciary may not inquire whether the rates established by the Legislature are less than reasonable compensation for the carriage of persons and property, that is, that the legislative determination is conclusive. I concede that the 6th section of the Act of 1852 does not place the subject of rates within the absolute control of the company, so as to authorize it to levy and collect tolls beyond what would afford proper remuneration for the services rendered; this, because, as already shown, the law implies, as incident to its business, that the company shall exact only reasonable tolls. But the [540] Legislature, by the 6th section of the Act of 1852, agreed that the *directors* might levy and collect such reasonable rates as *they* should, from time to time, establish by their by-laws. The introduction into that section of the special clause relating to rates, after and in connection with the general clause conferring power to make by-laws, rules and regulations, in reference to the affairs, business and interest of the company, not inconsistent with the laws of the State, was entirely unnecessary, and is meaningless, if not intended to assure those who put their means into the proposed road, that, as to the tolls to be levied and collected, they should be established by the directors within the limit of reasonableness, and not left to the uncontrolled discretion of the Legislature. In other words, the company has, putting aside the general Law of 1849, a contract with the State that it may, by its directors, establish, levy and *collect* reasonable tolls. The court holds, erroneously as I think, that no contract, in any view of the case, arises out of the Act of 1852, and that, consistently with its provisions, the judiciary cannot inquire whether the rates established by the board of directors are or are not reasonable. Although the rates fixed by the Legislature may be shown to be ruinously low, the judiciary cannot, according to the decision of the court, protect the company in the exercise of the power granted to it of establishing, levying and collecting reasonable tolls.

I am of opinion that if the Act of 1852 is to be regarded either alone or as superseding the Law of 1849, it constitutes a contract between the State and the company, whereby the latter acquired an exemption from absolute legislative control as to rates, and secured, beyond the power of the Legislature to withdraw, the right, through its directors, from time to time, within the limit of reasonableness, to establish rates of toll for the transportation of persons and property. If this be so, it results that all controversies involving rights under this contract must be adjusted, as in all other cases of contract, in the courts according to the established principles of law, and are not determinable by or wholly dependent upon the will of one of the parties. The company, or anyone acting by its authority, has the right to submit to the courts the question [541] whether rates prescribed by any subsequent Act of the Legislature, will give that reasonable compensation which the State agreed, in the Act of 1852, might be exacted by the company under by-laws established by its board of directors.

The Act of 1852 does not, I think, supersede the provisions of the general Law of 1849 upon the subject of rates. But since the company (if we look alone to the Act of 1852) has failed to show that the rates fixed in the Act of 1871 are unreasonable, and since, if the 32d section of the Act of 1849 is still in force, it does not appear that those rates would reduce the company's profits below the amount to which, by that section, they could be restricted by subsequent legislation, I concur in affirming the judgment.

Mr. Justice **Field**:

I concur in the judgment in this case solely on the ground that no proof was made that the rate prescribed by the Legislature was unreasonable. Under previous decisions of the court, the legislative rate is to be taken as presumptively reasonable.

I do not give any weight to *Munn* v. *Illinois* [94 U. S., 123, XXIV., 88]. My objections to the decision in that case were expressed at the time it was rendered, and they have been strengthened by subsequent reflection. Besides, that case does not relate to corporations or to common carriers.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Blatchford** did not sit in this case.

Cited—110 U. S., 321.

ILLINOIS CENTRAL RAILROAD COMPANY, *Plff. in Err.*,
v.
PEOPLE OF THE STATE OF ILLINOIS.

(See S. C., Reporter's ed., 541-543.)

Legislative power to regulate railroad charges.

This court, following the case of Ruggles v. Ill., *ante*, holds that the State of Illinois has not entered into a contract with a Railroad Corporation, the plaintiff in error, not to exercise the legislative power to regulate charges for the carriage of persons and property upon the railroad of the corporation.

[No. 241.]

Argued Apr. 11, 12, 1883. Decided May 7, 1883.

IN ERROR to the Supreme Court of the State of Illinois.

This action was brought in the Circuit Court of Douglas County, Illinois, in behalf of the defendants in error, by the Attorney-General of Illinois, under the Act of May 2, 1873, to prevent extortion and unjust discrimination in rates charged for the transportation of passengers and freight.

The case was submitted to the court upon an agreed statement of facts, from which it appears, that the defendant charged and collected the sum of $28.35 for the transportation of seventy barrels of salt from Chicago to Tuscola,

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said amount being $3.55 in excess of the maximum amount fixed by the Railroad and Warehouse Commissioners for said service in their schedule of rates. It also appeared that the sum charged conformed to the rate established by the Board of Directors of the defendant Company.

The court found for the plaintiffs and entered judgment for $1,000, as a penalty or fine under the law, against the Company.

This judgment having been affirmed, on appeal, by the court below, 95 Ill., 313, the defendant sued out this writ of error.

For some additional facts, see the opinion of the court, and the preceding and related case of *Ruggles* v. *People*, *ante*, 812, where also appears an abstract of the argument of counsel.

Messrs. **John N. Jewett** and **John A. Campbell**, for plaintiff in error.

Messrs. **James K. Edsall**, *James McCartney*, *Atty-Gen. of Illinois*, and *John B. Hawley*, for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This case, like that of *Ruggles* v. *Illinois* [*ante*, 812], just decided, presents the question whether the State of Illinois has entered into a contract with a Railroad Corporation not to exercise the legislative power to regulate charges for the carriage of persons and property upon the railroad of the Corporation. It is not necessary in this case, any more than it was in the other, to inquire whether the power of legislative regulation in this particular is one that can be bargained away, because here, as there, we are of opinion that no such thing was intended. The provision of the charter of the Illinois Central Railroad Company relied on, as showing a contract, is almost identical with that of the Central Military Tract Company considered in the *Ruggles Case*, and in the following words:

"Sec. 8. The said Company shall have power to make, ordain and establish all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this Act, and for the well ordering, regulating and securing the affairs, business and interests of the Company: *Provided*, That the same be not repugnant to the Constitution and laws of the United States or of this State, or repugnant to this Act. The Board of Directors shall have power to establish such rates of toll for the conveyance of persons and property upon the same as they shall from time to time by their by-laws direct and determine, and to levy and collect the same for the use of said Company. The transportation of persons and property, the width of track, the construction of wheels, the form and size of cars, the weight of loads, and all other matters and things respecting the use of said road and the conveyance of passengers and property, shall be in conformity to such rules and regulations as said Board of Directors shall from time to time determine. Nothing in this Act contained authorizes said corporation to make a location of their track within any city without the consent of common council of said city."

[543] *What was said in the other case as to the construction of section 6 of that charter is applicable to this, and, referring to the opinion in that case for the reasons, we affirm this judgment.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Field**:

I concur in the judgment in this case for the reason expressed for my concurrence in the decision of *Ruggles* v. *Illinois* [*ante*, 812].

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Harlan**, dissenting:

For the reasons stated in my dissenting opinion in *Ruggles* v. *Illinois* [*ante*, 812], I dissent from the opinion of the court, but concur in affirming the judgment.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Blatchford** took no part in the decision of this case.

PATRICK G. MEATH, *Appt.*,
v.
COUNTY OF PHILLIPS, STATE OF ARKANSAS.

(See S. C., Reporter's ed., 553–556.)

County indebtedness—taxes, when levied.

1. The drafts drawn by levee inspectors on the Levee Treasurer of the County of Phillips, Arkansas, under the authority of the Act of 1859, and the renewal bonds or script issued by the Clerk of the County under the Act of 1861, do not constitute an indebtedness of the County for which bonds of the County may be demanded under the Act of April 29, 1873; nor for which a money judgment or decree may be recovered against the County.

2. The county court of the County cannot be required to levy and impose taxes on the levee districts to pay the demands, when an action at law for the enforcement of the claims would have been barred by the Statute of Limitations.

[No. 229.]

Argued Apr. 4, 1883. *Decided May 7, 1883.*

APPEAL from the District Court of the United States for the Eastern District of Arkansas.

The bill in this case was filed in the court below, by the appellant, to enforce a claim alleged to be due him for the construction of certain levees, in pursuance of a contract with the County defendant.

The court below having entered a decree dismissing the bill, the complainant appealed to this court.

The facts of the case sufficiently appear in the opinion of the court.

Messrs. **S. F. Phillips**, *Geo. Gantt* and *Josiah Patterson*, for appellant.

No counsel appeared for the appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court: [554]

The first question presented by this appeal is, whether the drafts drawn by levee inspectors on the Levee Treasurer of the County of Phillips, under the authority of the Act of February 16, 1859, "To provide for making and repairing levees in Desha and Phillips Counties," and the renewal bonds or scrip issued by the County Clerk of the County under the provisions of the

NOTE.—*Relief denied in equity from lapse of time.* See *note* to Pratt v. Carroll, 12 U. S. (8 Cranch), 471.

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Act of January 15, 1861, to amend the Act of February 16, 1859, constitute an indebtedness of the County for which bonds of the County may be demanded under the Act of April 29, 1873, "To authorize certain counties to fund their outstanding indebtedness," or a money judgment or decree recovered against the county. To this question we have no hesitation in giving an answer in the negative. The Act of 1859 provided for the division of the overflowed lands of the Counties of Desha and Phillips into levee districts for the purpose of reclaiming the lands, and for the taxation of such lands to pay the expenses incurred in that behalf. The business was to be managed by levee inspectors, at first appointed by the County Court of the County, but afterwards elected by the voters of the several levee districts, and payments for work done or expenses incurred, were to be made by the drafts of the levee inspectors for the district on the levee treasurer appointed by the County Court of the County, to receive and disburse according to law all funds raised from levee taxes in the County. Only lands benefited by protection from overflow, by the levees, could be taxed. These lands were to be selected by a board of three freeholders appointed by the County Court of the County for each levee district, and valued for taxation by the levee inspector. The county court was then to levy a tax upon the property charged, to be collected like other taxes, and this tax, when collected, was to be paid over to the levee treasurer, to be by him disbursed on the drafts of the inspectors. The funds collected from each district were to be appropriated to the payment of the drafts of its own inspector. The bonds, scrip or drafts issued by the county clerk under the Act of 1861 were to be renewals of the inspector's drafts and created no new obligation. Any debt incurred in the levee work was clearly the [555] debt of the levee district, to be discharged through a tax levied by the county court for that special purpose. In this the county court acted, not as the representative of the County, but of the district. In effect, the county court and the sheriff of the County were made the officers and agents of the levee district for the levy and collection of the special tax which was required. This tax was not a county tax, but a district tax, levied and assessed under the authority of law by the county court. In levying the tax, the court acted for the district, not the County.

The cases of *Cass Co.* v. *Johnston*, 95 U. S., 360 [XXIV., 416], and *Davenport* v. *Dodge Co.*, 105 U. S., 237 [XXVI., 1018], presented entirely different facts. In the case of the County of Cass, the law provided in terms for an issue of bonds in the name of the county; and in that of the County of Davenport we construed the law to be in effect the same. Consequently, there were in those cases obligations of the counties payable out of special funds. Here, however, there was a manifest intention to bind the levee districts only by the obligations incurred, and not to make the County, in its political capacity, responsible for the payment of the debts that were created for levee purposes under these laws. The machinery of the County was to be used in the levy and collection of the special taxes required, but the County, as a county, was to be in no way involved. It follows that the prayer for a money decree against the County, as well as that for an exchange of the bonds authorized by the Act of 1873 for the orders or warrants held by the appellant, must be denied.

The next and only remaining question is, whether the County Court of the County can be required, in this suit, to levy and impose taxes on the levee districts to pay the demands. All the demands fell due on or before April 1, 1862. This suit was not brought until December 17, 1877. It was in effect conceded by the counsel for the appellant, that an action at law for the enforcement of the claims would have been barred in ten years from their maturity, adding only the time between December 1, 1862, and March 16, 1864, when the operation of the Statute of Limitations was suspended. This proceeding is in equity, but no sufficient reason is shown why the limitation of the statute should [556] not be applied. Without, therefore, considering any other objection to the bill and the relief that is asked, we hold that the suit, so far as it seeks to have the tax imposed by the county court, is barred by lapse of time.

The decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JAMES A. HAWLEY, County Clerk of LEE COUNTY, ILLINOIS, *Plff. in Err.*,
v.
UNITED STATES, *ex rel.* J. H. FAIRBANKS ET AL.

(See S. C., "*Hawley* v. *Fairbanks*," Reporter's ed., 543-552.)

Joinder of causes of action to give jurisdiction as to amount—mandamus—*town clerk, duty to assess tax to pay coupons—injunction.*

1. When distinct causes of action, in favor of distinct parties, are united in one suit, and distinct judgments are rendered for or against the several parties, their judgments cannot be joined to give this court jurisdiction.

2. Where several judgment plaintiffs united in an application to the circuit court for a *mandamus* to compel payment of judgments against a town on its bonds, two judgments in favor of one creditor, the aggregate amount of which including interest to the time the *mandamus* was awarded, exceeds $5,000, are sufficient in amount to give this court jurisdiction of the case.

3. Where the facts of the issue of bonds of a town and the liability of the town for the payment of the coupons have been judicially determined by a judgment of the circuit court, no further certificate from any town officer is necessary to compel a county clerk to discharge the duty of assessing a tax to pay it.

4. The right to the assessment, as well as the collection of the tax, follows as a matter of law from the establishment by such judgment of the liability of the town for the payment of the interest which it was agreed should be made by the assessment and collection of the tax.

5. An injunction against officers of the town before the judgment against the town was rendered for a tax, cannot stand in the way of the enforcement of the tax by the circuit court, to carry its judgment into execution.

[No. 263.]

Submitted Apr. 20, 1883. Decided May. 7, 1883.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The history and facts of the case appear in the opinion of the court.

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Messrs. **Thomas K. Edsall** and **John B. Hawley**, for plaintiff in error.

Messrs. **Thomas C. McClelland**, *Geo. A. Sanders*, *T. O. Mather* and *J. H. Fairbanks*, for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

On the 5th of April, 1872, the Town of Amboy, Lee County, Illinois, issued a series of bonds in payment of a subscription voted by the voters of the town to the capital stock of the Chicago and Rock River Railroad Company. Both the subscription and bonds were authorized by the charter of the railroad company, approved March 24, 1869.

Sections 12 and 13 of this charter, which alone need be considered, are as follows:

"Sec. 12. It shall be the duty of the clerk of any such city, town or township, in which a vote shall be given in favor of subscription, within ten days thereafter, to transmit to the county clerk of their counties a transcript or statement of the vote given, and the amount so voted to be subscribed, and the rate of interest to be paid; *Provided*, That, when elections shall [545] be held and bonds issued, as aforesaid, it shall be the duty of the clerk of such town or township to file with the county clerk of their respective counties, within ten days after the issuing of said bonds, certificates of the amount of bonds issued, and the rate of interest payable thereon, and number of each bond.

Sec. 13. It shall be the duty of the county clerk of said county, annually, after the execution and delivering of such bonds aforesaid, to compute and assess upon all the taxable property returned by the assessor of such city, town or township, a sum sufficient to pay the interest and costs of collection and disbursements upon all bonds so issued by the respective cities, towns or townships; which tax shall be extended upon the collector's books as other taxes are and, when collected, shall be paid to the treasurer of the county: and such city, town or township shall, when providing for the levying and collecting of other taxes, also assess upon the property of such city, town or township, any rate not exceeding three per cent in any one year, upon the assessment, to provide a fund for the redemption of the principal and interest of such bonds as or when they become due, said taxes to be levied and collected as other taxes are; but no tax shall be computed, assessed or collected, or any interest paid, to be applied upon said bonds, unless such bonds have been executed and delivered."

By an Act of the General Assembly of Illinois to fund and provide for the paying the railroad debts of counties, townships, cities and towns, passed and in force April 16, 1869, the holders of that class of securities were authorized to register them in the office of the auditor of public accounts of the State. Sections 4 and 5 of that Act are as follows:

"Sec. 4. When the bonds of any county, township, city or town shall be so registered, the State Auditor shall annually ascertain the amount of interest for the current year due and accrued and to accrue upon such bonds, and from the amount so ascertained he shall deduct the amount in the state treasury placed to the credit of such county, township, city or town, as herein provided and directed; and from the basis of the certificate of valuation of property heretofore provided to be transmitted to him, or, in case no such certificate shall be filed in his office, then upon the basis of the total assessment of such county, township, city or town, for the year next preceding, he shall estimate and de- [546] termine the rate per centum on the valuation of property within such county, township, city or town, requisite to meet and satisfy the amount of interest unprovided for, together with the ordinary cost, to the State, of collection and disbursement of the same, to be estimated by the auditor and treasurer, and shall make and transmit to the county clerk of such county, or to the proper officer or authority whose duty it is or shall be to prepare the estimates and books for the collection of state taxes in such county, township, city or town, a certificate stating such estimated requisite per centum for such purpose, to be filed in his office, and the same per centum shall thereupon be deemed added to and a part of the per centum which is or may be levied or provided by law for purposes of state revenue, and shall be so treated by such clerk, officer or authority, in making such estimates and books for the collection of taxes; and the said tax shall be collected with the state revenue, and all laws relating to the state revenue shall apply thereto, except as herein otherwise provided.

Sec. 5. The State shall be deemed the custodian only of the several taxes so collected and credited to such county, township, city or town, and shall not be deemed in any manner liable on account of any such bonds; but the tax and fund so collected shall be deemed pledged and appropriated to the payment of the interest and principal of the registered bonds herein provided for, until fully satisfied."

When the bonds of the Town of Amboy were issued, the town clerk did not transmit to the county clerk the statement required by section 12 of the charter of the railroad company, but the president of the company caused them to be registered in the office of the auditor of public accounts, in accordance with the provisions of the Act of 1869. During the years 1872 and 1878, the auditor made the proper certificate under the registry law for the taxes to meet the interest for those years, and the taxes were extended by the county clerk in due form on the tax collector's books, but before the collections were made, certain taxpayers of the town obtained from the Circuit Court of Lee County an injunction against the County Clerk, the county collector, and the town collector, restraining them from collecting the taxes that had already [547] been assessed, and also restraining the same parties and the auditor of public accounts of the State from taking any steps for the levy or collection of any other taxes to pay either the principal or the interest of the bonds.

After this injunction was obtained, the relators, Fairbanks, Skinner, Thomas and Wetmore, being severally holders and owners of certain of the bonds and coupons of the town, began separate suits against the town in the Circuit Court of the United States for the Northern District of Illinois, to recover the amounts due them, respectively, on their coupons. These suits resulted in a judgment on the 13th of March, 1878, in favor of Fairbanks for $2,449 damages and $36.12 costs; another, on the 24th of January,

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1878, in favor of Skinner, for $2,018.50 damages and $47.10 costs; another, on the 29th of November, 1875, in favor of Thomas, for $866 damages and $43.90 costs; and two others in favor of Wetmore, one on the 17th of December, 1875, for $3,836.14 and $50.40 costs, and the other, on the 20th of June, 1876, for $1,058.33 damages and $31.50 costs.

These several judgments remain unpaid and have all been duly audited and allowed by the auditing board of the town; but the town clerk, whose duty it is to certify to the County Clerk, on or before the second Tuesday in August in each year, the amount of taxes to be levied and collected to pay the charges against the town for the current year, refused to certify the judgments and kept himself concealed so as to avoid the process of the courts. The several plaintiffs then presented their respective judgments to the County Clerk, and demanded that he "Compute and assess upon all the taxable property in said Town of Amboy a sum sufficient to pay said judgments, and each and every of them, and interest on the same to the date of payment, and costs of suit in each case, together with the costs of collecting and disbursing such taxes, and to extend such taxes upon the collector's books of said Town of Amboy for the year 1879." This the County Clerk refused to do, and thereupon the several judgment plaintiffs united as relators in an application to the [548] Circuit Court of the United States for a *mandamus* requiring him to comply with their demands.

To this application the County Clerk answered, setting up defenses, as follows:

1. That the town clerk had never transmitted to the County Clerk the statement required by section 12 of the charter of the railroad company.

2. That the town clerk had never certified to the County Clerk the allowance of the judgments by the Board of Auditors of the town.

3. That all taxes to pay principal and interest on the bonds covered by the several judgments of the relators, certified by the auditor of public accounts under the registry law, had been duly extended on the tax collector's books, and their collection enjoined by the circuit court of the County; and,

4. That he had himself been enjoined by the circuit court of the county from extending any taxes whatever on the tax books, to pay the principal or interest of the bonds held by the relators.

Upon demurrer to this answer, judgment was given in the court below awarding a writ of *mandamus* directed to the County Clerk and commanding him to extend upon the tax collector's books of the town, for the year 1879, a sum sufficient to pay each of the several judgments held by the relators, particularly describing the judgments separately. To reverse that judgment this writ of error was brought.

We are met at the outset with a motion of the defendants in error to dismiss the writ in this case, on the ground that the several judgments proceeded upon below cannot be united to give us jurisdiction and the amount due on any one of them does not exceed $5,000. The rule is settled, as stated more than once at the present Term, that when distinct causes of action, in favor of distinct parties, are united in one suit, and distinct judgments are rendered for or against the several parties, their judgments cannot be joined to give us jurisdiction. *Ex parte R. R. Co.* [*ante*, 78]; *Farmer's L. and T. Co.* v. *Waterman* [*ante*, 115]; *Adams* v. *Crittenden* [*ante*, 99]; *Schwed* v. *Smith* [*ante*, 156]. In the present case distinct causes of action, in favor [549] of distinct parties, were united, for convenience and to save expense, in one suit, and distinct orders were made in favor of each one of the several judgment creditors. The proceeding was analogous to a creditor's bill brought by distinct creditors upon distinct judgments to reach the property of their common debtor. That was the case of *Schwed* v. *Smith*, *supra*, in which we held, following *Seaver* v. *Bigelow*, 5 Wall., 208 [72 U. S., XVIII., 595], that the amount due the several creditors could not be joined to give jurisdiction on an appeal by the defendants. In the present case the amount due the relators Fairbanks, Skinner and Thomas, respectively, does not exceed $5,000. *As to them, consequently, the writ must be dismissed.* But as to the relator Wetmore the case is different. She has two judgments, and the aggregate amount due her, including interest to the time the *mandamus* was awarded, exceeds $5,000. The matter in dispute with her, therefore, is sufficient for our jurisdiction, and the cause must be retained for adjudication in respect to her rights. This was the form of proceeding adopted in *Farmers' L. and T. Co.* v. *Waterman*, *supra*.

Proceeding, then, to the consideration of the case on its merits, we will take up the defenses relied on by the County Clerk in the order in which they have been stated:

1. As to the omission of the town clerk to certify the statement required by the 12th section of the charter.

By the judgment of the circuit court, for the enforcement of which the *mandamus* is asked, the fact of the issue of the bonds and the liability of the town for the payment of the coupons held by the judgment creditor, was judicially determined. Section 13 of the charter of the railroad company made it the duty of the County Clerk annually, after the issue of the bonds, to compute and assess on the taxable property in the town a sum sufficient to meet the interest as it matured, and provide a sum for the redemption of the principal. The statement of the town clerk under section 12 was not a condition precedent to the computation and assessment of the tax by the County Clerk. It was one way of informing the County Clerk of his [550] duty, but not necessarily the only way. The law obliged him to make the assessment in due course of business after the bonds were put out, and until they were paid in full. When, therefore, the judgments of the Circuit Court of the United States were presented to him, he was officially informed that the liability of the town for the payment of the coupons sued for had been judicially established, and it became his duty, under section 13, to compute the tax necessary to pay them, and put it in the way of collection. No further certificate from any town officer was necessary. The issue of the bonds, under which the judgment creditor claimed the right to a tax, was conclusively proven, and that was enough. There is nothing in *R. Co.* v. *County Clerk*, 74 Ill., 27, to the contrary of this. In that case the vote was for a donation by the

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town to be paid by a tax, and there was no other evidence of the obligation to levy the tax than the vote of the electors. Under such circumstances, there was reason for holding that the only legitimate evidence that could be produced to the County Clerk of the fact of the vote was the certificate, which had been specially provided for in the Act authorizing the donation to be made. Here, however, the bond carried on its face the declaration of the town that the holder was entitled to have the tax assessed and collected for its payment, and whatever was legitimate evidence of the issue of the bond was legitimate evidence of the duty of the clerk to act. The fact of the issue having been conclusively established by the judgment, the presentation of the exemplification of judgment to the County Clerk was all that was in law necessary to make it his duty to proceed.

2. As to the certificate of the town clerk that the judgments had been audited and allowed by the town auditors.

What has already been said is equally applicable to this branch of the case. The judgment established the legal right of the judgment creditor to have the tax specially provided for by section 13 of the charter of the company computed and assessed by the County Clerk without any further action of the town officers. After the issue of the bonds it became the positive duty of the County Clerk to compute and as-
[551] sess, in the regular course of business, to the extent that was necessary, the tax that had been contracted for to meet the liability thus incurred. It became, in legal effect, a part of the contract of the town that this should be done, and the judgment of the court establishing the contract was equivalent to a judicial determination that the tax must be levied by the County Clerk, unless the judgment was otherwise provided for. Whenever, therefore, it was made to appear to the County Clerk in any way that no other provision had been made, it was his duty under the law to proceed with the computation and assessment of the tax. The certificate of the town clerk that the judgment had been allowed by the board of auditors for payment through the means of the annual taxation would have been one way, and, perhaps, the most appropriate way of furnishing the information which the County Clerk needed, but it has nowhere been made the only lawful way. When, therefore, the town clerk refused to make and forward such a certificate, there was no legal impediment to the employment of some other means to give the County Clerk notice of what his duty required of him in the premises. The certificate of the town clerk was not in this case any more a condition precedent to the action of the County Clerk than it was under the requirements of section 12.

3. As to the certificate of the auditor of public accounts.

This, like the certificate of the town clerk, is only one way of informing the County Clerk of what his duty under section 13 requires. It is not any more than the certificate of the town clerk, an indispensable prerequisite to the action of the County Clerk.

4. As to the injunction.

The relator was not a party to the suit in which the injunction was obtained and, consequently, is not bound by it. Having established her right to the tax by the judgment of the circuit court in a suit to which the town in its corporate capacity was a party, she may use the power of that court to command the assessment and collection of the tax as a means of carrying the judgment into execution, notwithstanding what the taxpayers may have caused to be done in some proceeding to which the relator was not a party. The right to the compu- [552]
tation and assessment, as well as the collection of the tax, followed as a matter of law from the establishment of the liability of the town for the payment of the interest which it was agreed should be made by the assessment and collection of the tax. An injunction against the officers before the judgment against the town was rendered, cannot stand in the way of the enforcement of the tax by the circuit court to carry its judgment into execution.

The writ of error is dismissed as to the relators Fairbanks, Skinner and Thomas, and the judgment of the Circuit Court awarding the mandamus *in favor of Caroline C. Wetmore is affirmed. The cause is remanded, with leave to modify the judgment in such a way as to adapt the command of the writ of* mandamus *to the circumstances consequent on the delay caused by the pendency of the writ of error in this court.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

STATE OF LOUISIANA, *ex rel.* NEW ORLEANS GAS-LIGHT COMPANY, *Plff. in Err.*,
v.
COUNCIL OF THE CITY OF NEW ORLEANS, ISAAC W. PATTON, Mayor, ET AL.

(See S. C., Reporter's ed., 568-570.)

Form of judgment, when not ground of appeal.

Where the prayer of a petition for *mandamus* was that a city might be required to exhaust its powers of taxation, and continue so to do until relator's judgment is paid and satisfied, and a judgment was entered granting the writ in the exact form prayed for; the omission of the court to define in more exact terms the precise power to be exercised, is not ground for appeal to this court.

[No. 274.]

Submitted Apr. 25, 1883. Decided May 7, 1883.

IN ERROR to the Supreme Court of the State of Louisiana.

On the 18th June 1878, the relator recovered judgment in the Fourth District Court of New Orleans against the City of New Orleans, for the sum of $113,368.85, with interest, for lighting with gas the City and its public buildings.

The City having failed to provide for the payment of the judgment in its annual budget for the year 1879, the relator, on the 22d of September, 1879, applied to the said Fourth District Court for a *mandamus*, to compel the City to appropriate certain expected revenues to the payment of its floating debt, of which the judgment constituted a part. The scope of this application was enlarged by a supplemental petition, in which it is alleged that during the whole period embraced by the contracts aforesaid, the City had the power to levy taxes to

NOTE.—Mandamus *to compel city, town or county to levy tax to pay bonds or interest on bonds.* See *note* to The Mayor v. U. S., 76 U. S., XIX., 704.

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the extent of one and three quarters of one per cent, and that the limitation of the taxing power to one and one half per cent by the premium Bond Act, known as No. 81 of the year 1876, was inoperative and void, so far as it affected the rights of the relator, and the said Act impaired the obligation of the contracts aforesaid, in violation of the 10th section of article first of the Constitution of the United States.

The two petitions combined, contain a prayer that the city administrators include in the next annual budget of receipts, the expected revenues above referred to, and include in the next annual budget of expenses the aforesaid judgment of relator, and all judgments previously registered, and provide for their payment out of the expected revenues, and if necessary to exhaust their powers of taxation, and continue to do so until the judgment of the relator is paid.

The district court rendered a judgment, commanding the City officers to put the relator's judgment and all previously registered judgments on the next annual budget, and to provide for their payment, "In the order in which they are registered, through and by means of all taxes imposed, collected or held for current city expenses, not levied or collected in pursuance of law for some other specific purpose; and in order to insure a sufficient fund to provide for the payment of said judgments, to exhaust their powers of taxation, and continue to do so if necessary, until the judgment of the relator is paid and satisfied," and all other relief is denied.

This judgment was affirmed by the Supreme Court without change.

A rehearing, to have the judgment made more specific, was then asked and refused. Whereupon, the relator sued out this writ of error.

Messrs. **Thomas J. Semmes,** *Henry C. Miller* and *John Finney*, for plaintiff in error.

Messrs. **C. F. Buck** and *E. H. McCaleb*, for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

We have no jurisdiction in this case. No title, right, privilege or immunity set up or claimed by the relator under the Constitution of the United States has been denied him by the judgment of the court below. The prayer of the petition for *mandamus* was, among other things, that, in order to secure a sufficient fund to provide for the payment of certain judgments in favor of the relator against the City of New Orleans, the council of the city might be required, if necessary, to "Exhaust their powers of taxation, and continue so to do until relator's judgment is paid and satisfied." No request was made in the petition for a determination of the extent of the power of taxation for the purpose specified. A judgment was entered in the court of original jurisdiction granting the writ in the exact form prayed for. This judgment was affirmed by the Supreme Court of the State, on appeal. After the judgment of affirmance was entered, a rehearing was asked, in order that the judgment of the court of original jurisdiction might be made more clear and specific. This was refused. No right to any specific rate of taxation has been denied. That question has been left unsettled, and there was nothing in the pleadings which required the court to do more than it has done. As the judgment is for a writ requiring the council to do all it has in law the power to do to raise the money to pay the relator's demand, no right has been denied. While the court might have defined in more exact terms the precise power to be exercised, its omission to do so is not ground for appeal to our jurisdiction. [570]

It follows that the writ of error in this case must be dismissed for want of jurisdiction, and an order to that effect is made.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

JOHN W. SCARBOROUGH, Tutor of ALMIRA RICHARDSON, Minor and Only Child of MRS. SARAH RICHARDSON, Deceased, *Plff. in Err.*,

v.

JOHN FRANK PARGOUD.

(See S. C., Reporter's ed., 567, 568.)

Review of state judgment.

No judgment or decree of a state court can be reviewed in this court, unless the writ of error is brought within two years after the entry of the judgment. The writ of error is not brought in the legal meaning of the term, until it is filed in the court which rendered the judgment.

[No. 288.]

Submitted Apr. 26, 1883. Decided May 7, 1883.

IN ERROR to the Supreme Court of the State of Louisiana.

The case is sufficiently stated by the court.

Messrs. **J. W. Scarborough,** *Quinton Corwine* and *Talbot Stillman*, for plaintiff in error.

No counsel appeared for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The final decree in this case was rendered on the 13th of July, 1878, and while the writ of error was allowed by the *Chief Justice* of the Supreme Court of Louisiana, and a bond approved and citation signed on the 5th of July, 1880, the writ of error was not actually issued until the 14th, and the copy was not lodged in the clerk's office until the 16th of that month.

No judgment or decree of a state court can be reviewed in this court, unless the writ of error is brought within two years after the entry of the judgment. R. S., sec. 1008; *Cummings* v. *Jones*, 104 U. S., 419 [XXVI., 824]. In *Brooks* v. *Norris*, 11 How., 207, it was decided, *Chief Justice* Taney speaking for the court, that "The writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the Act of Congress must be calculated accordingly." This case is cited with approval in *Mussina* v. *Cavazos*, 6 Wall., 360 [73 U. S., XVIII., 812]. [568]

It follows that the writ of error in this case was not brought within the time limited by law, and we have, consequently, no jurisdiction. For that reason the writ is dismissed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—113 U. S., 83.

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THE STEAMSHIP BELGENLAND, ETC., *Appt.*, v. THEODORE JENSEN, Master, ETC.

(S. C., Reporter's ed., "*The Belgenland*" with *Ex parte* Warden, 157.)

Lien of decree on stipulators' property.

Where a decree was entered against stipulators and their principal under section 941 of the Revised Statutes which was stayed by a *supersedeas* bond on appeal, if the decree operates as a lien on the real estate of the stipulators, notwithstanding the appeal, it is an advantage the law gives the appellee for his security, with which this court will not interfere in advance of the hearing of the case on its merits.

[No. 788.]

Submitted Apr. 23, 1883. Decided May 7, 1883.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

After the denial by this court of the petition for a writ of *mandamus* in *Ex parte* Warden, *ante*, 685, the stipulators filed the present motion for relief from the operation of the decree of the court below, as a lien upon their real estate.

Mr. **Morton P. Henry**, for the stipulators, in support of motion.

Mr. **Henry Flanders**, for appellee, *contra*.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied. The decree appealed from was against the respondent and his stipulators. If the decree operates as a lien on the real estate of the stipulators, notwithstanding the appeal, it is an advantage the law gives the appellee for his security, with which we ought not to interfere in advance of the hearing of the case on its merits. Whether there is such a lien we do not decide. That is a question which is not presented to us for determination by the appeal.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[561] JOHN B. GIBSON, *Appt.* v. CHARLOTTE BRUCE.

(See S. C., Reporter's ed., 561-563).

Removal of causes.

A suit cannot be removed from a state court to the United States Circuit Court, under the Act of 1875, unless the requisite citizenship of the parties existed, both when the suit was begun and when the petition for removal is filed.

[No. 1081.]

Submitted under 32d Rule, Apr. 23, 1883. Decided May 7, 1883.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

On motions to advance, to dismiss or affirm.

This action was brought in the Superior Court of Cincinnati, by the appellee, to recover possession of and judgment upon certain promissory notes for sums amounting to $50,000.

After several Terms of said court had intervened, the defendant filed a petition for the removal of the cause into the court below. Subsequently, that court entered an order remanding the cause, on the ground that, at the time of filing the petition for the removal, the parties were both citizens of the State of Ohio, whereupon the defendant appealed to this court.

Mr. **T. D. Lincoln**, for appellee, in support of motion:

At the commencement of the suit, the plaintiff was a citizen of New York, but at the time of filing the petition for removal, and for seventeen months before, both parties were citizens of Ohio.

This precise question, so far as we can find, has never been determined by any court, except by *Judge* Baxter. 9 Fed. Rep., 540.

We do not find that the very question here now presented, has ever been before this court, though *Judge* Baxter, in his opinion, says that it has been twice presented in argument, once in *Ins. Co.* v. *Pechner*, 95 U. S., 185 (XXIV., 427), and again in *Bondurant* v. *Watson*, 103 U. S., 285 (XXVI., 449).

In the following cases it has been decided that the citizenship in different States must be shown at the time the suit was commenced, but in no one of them was there any intimation that such citizenship must not continue up to the time of the filing of the petition for removal.

Beede v. *Cheeney*, 5 Fed. Rep., 389; *Kaeiser* v. *R. R. Co.*, 6 Fed. Rep., 5; *Holden* v. *Ins. Co.*, 46 N. Y., 6; *Tapley* v. *Martin*, 116 Mass., 275; *Ind. R. W. Co.* v. *Risley*, 50 Ind., 64.

In the following cases it has been directly held that the citizenship, in different States, must be at the place of filing the petition for removal, and that it need not be alleged as of the commencement of the suit.

Wehl v. *Wald*, 17 Blatchf., 346; *McLean* v. *R. Co.*, 16 Blatchf., 317; *R. R. Co.* v. *McComb*, 9 Rep., 569; *Jackson* v. *Ins. Co.*, 3 Woods, 417; *Johnson* v. *Monell*, 1 Woolw., 397; *Curtin* v. *Decker*, 5 Fed. Rep., 386; *Ins. Co.* v. *Sattel*, 33 Ohio St., 280; *Jackson* v. *Ins. Co.*, 60 Ga. 427; *Nye* v. *R. Co.*, 24 Fun, 557; Dill. Rem. of Causes, sec. 72, p. 88; *McGinnity* v. *White*, 3 Dill., 354.

Messrs. **George Hoadley, E. M. Johnson, Edward Colston** and *Thomas McDougall*, for appellant, *contra*.

Mr. Chief Justice **Waite** delivered the opinion of the court:

In this case, the court below decided that under the Act of March 3, 1875, ch. 137 [18 Stat. at L., 470], there could not be a removal to the Circuit Court of the United States, of a suit in a state court between parties who were citizens of different States when the suit was begun, if when the petition for removal was filed the parties were all citizens of the same State. To reverse an order remanding a suit on that ground, this appeal was taken.

Under the Judiciary Act of 1789, sec. 12 [1 Stat. at L., 73], it was held in *Ins. Co.* v. *Pechner*, 95 U. S., 183 [XXIV., 427], that there could not be a removal unless the necessary citizenship existed when the suit was begun. That Act provided only for a removal on the application of the defendant when the plaintiff was a citizen of the State in which the suit was

NOTE.—*Removal of causes under Act of 1875; citizenship.* See *note* to Removal Cases, 100 U. S., XXV., 596.

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brought, and the defendant was required to file his petition for removal at the time of entering his appearance in the state court. Under such circumstances, changes of citizenship, after the suit was begun and before the time for applying for a removal, would not often occur.

The Act of 1875 is radically different from any which preceded it. Under that Act either party may petition for removal and neither party need be a citizen of the State in which the suit was brought. The material language is as follows:

[563] "That any suit of a civil nature at law or in equity, now pending or hereafter brought in any state court, * * * in which there shall be a controversy between citizens of different States, * * * either party may remove said suit into the Circuit Court of the United States for the proper district."

In order to obtain the removal, a petition therefor must be filed in the state court at or before the term at which the cause could be first tried, and before the trial. In the present case, the petition was not filed until nearly two years after the commencement of the suit.

The construction of the Act is by no means free from doubt, but on full consideration we are of opinion that the requirement of the old law, that the necessary citizenship should exist when the suit was brought, was not abolished. We cannot believe it was intended to allow a party to deprive a state court of the jurisdiction it has once rightfully acquired over him by changing his citizenship after a suit is begun, and that would be the effect of the law if the right of removal is made to depend only on the citizenship existing at the time a removal is applied for. But we are also of opinion that because of the extension of the time for applying for removal, and because neither party need be a citizen of the State in which the suit is brought and either party may apply, it was the intention to provide that the controversy should be between citizens of different States at the time of the removal. In this way, the jurisdiction of the Circuit Court of the United States will only attach when there shall be a controversy between citizens of different States at the time the suit is transferred, and the right to the transfer will depend on the citizenship, when the suit was begun and when the petition for removal is filed.

We, therefore, hold that a suit cannot be removed from a state court under the Act of 1875, unless the requisite citizenship of the parties exists both when the suit was begun and when the petition for removal is filed.

The order remanding the cause is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 360, 381.

Ex Parte:
In the Matter of TOM TONG, *Petitioner.*

(See S. C., Reporter's ed., 556-560.)

Jurisdiction on certificate of division of opinion —civil and criminal proceedings—habeas corpus *a civil proceeding.*

1. In a civil suit or proceeding, this court has no jurisdiction of a question certified on division of opinion, unless there has been a final judgment in the circuit court; but, if it is a criminal proceeding, it has before judgment.

2. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings.

3. When there is a criminal prosecution against one, a writ of *habeas corpus* which he has obtained to inquire into the legality of his detention thereon, is not a proceeding in that prosecution, but is a new suit to enforce a civil right.

4. Where a petitioner claims that the Constitution and a Treaty of the United States give him the right to his liberty, notwithstanding the charge that has been made against him, and he has obtained judicial process to enforce that right, the proceeding on his part is a civil proceeding, notwithstanding his object is, by means of it, to get released from custody under a criminal prosecution.

[No. 1230.]

Advanced and submitted Mar. 19, 1883. Decided May 7, 1883.

ON a certificate of division in opinion between the Judges of the Circuit Court for the District of California.

On January 16, 1883, Tom Tong, the petitioner, a native of China, and subject of the Emperor, petitioned the Circuit Court of the District of California for a writ of *habeas corpus*, alleging that he was in custody and unlawfully imprisoned and restrained of his liberty in contravention of the Constitution of the United States and of a certain Treaty entered into between the Emperor of China and the Government of the United States, of February 5, 1870, commonly known and called the Burlingame Treaty, 16 U. S. Stat. at L., 740, which unlawful restraint and imprisonment consisted in this: that, on or about Oct. 21, 1882, the board of supervisors of the City and County of San Francisco, passed a certain order known and designated as order No. 1691, regulating the licensing, establishment and maintenance of public laundries and public wash houses within certain limits in the City of San Francisco. That the ordinance was enacted, not for any legitimate police regulation or sanitary purpose, but for the purpose and with the intent of excluding the subjects of the Emperor from carrying on or conducting the business of a laundry within certain limits of said City of San Francisco; that he is ready and willing to pay the license fees provided by the ordinance of said board of supervisors, and to pay all lawful charges, taxes, licenses or assessments required by the laws of the State of California or the laws of the United States, in order to carry on and conduct the business of a laundry; that said board of supervisors will not grant nor permit any of the officers in the ordinance specified to grant to him any of the authorizations mentioned in it; that, while so unable to procure the authorizations mentioned and required by the ordinance, and while he was lawfully carrying on and conducting his business of laundry in said City and County of San Francisco, on the 15th of January, 1883, one James Galbraith filed a complaint in writing in the police judge's court in said City and County of San Francisco; that a warrant, in due form of law issued on said complaint and under and by virtue of such warrant, he is unlawfully imprisoned and restrained of his liberty, and he is now held in custody by Patrick Crowley, Chief of Police of said city and county.

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Upon this application a writ of *habeas corpus* was issued, and return thereto was made setting up that the petitioner was restrained and imprisoned under and by virtue of the warrant alleged in the application.

The case was then argued by counsel and submitted to the court, when the Circuit and District Judges, being opposed in opinion, certified that they were opposed upon the following points:

1. Whether, upon the facts stated in the petition filed in this case, a writ of *habeas corpus*, ought to have been issued by this court, according to the prayer of said petition.

2. Whether, upon the facts stated in the petition, and in return to the writ issued herein, said petitioner ought to be discharged from custody.

3. Whether, assuming said ordinance set out in the petition herein to be void, the petitioner is in custody in violation of the Constitution, or of a law or treaty of the United States within the meaning of section 753 of the Revised Statutes of the United States, and whether he ought to be discharged on that ground.

4. Whether, assuming said ordinance to be void, the court is forbidden to discharge the petitioner, by the provisions of section 753 of the Revised Statutes of the United States.

5. Whether the ordinance set out in the petition in this case is void, on the ground that it does not fix any terms or conditions, upon complying with which the petitioner and others similarly situated are entitled absolutely to a license to pursue their calling, but still leaves it in the discretion of the Board of Supervisors to pass or to refuse to pass a resolution granting a permit, or authorizing the issue of a license, the ordinance only allowing the board of supervisors to pass a resolution granting such permit, or authorizing the issue of a license, in its discretion, after the applicant has performed all the conditions prescribed by said ordinance, without making it obligatory upon the board to pass such resolution.

6. Whether the ordinance set out in the petition is void, on the ground that it is unreasonable in its requirements, or upon any other ground apparent upon the face of the ordinance, or appearing in the petition and return, or in the record herein.

Messrs. **S. F. Phillips, Hall McAllister** and *Thomas Simmons*, for petitioner:

1. The United States had constitutional power and authority to enter into the Treaty with the Emperor of China, already referred to, and that Treaty is the Supreme law of the land.

2. The Treaty guaranteed to the petitioner the right to exercise his vocation, and the ordinance in question is in violation of the provisions of the Treaty and the Constitution of the United States.

3. That, being held in custody for violation of the provisions of the ordinance, thus in contravention of the provisions of the Treaty, he is in custody in violation of the Constitution of the United States, and of the provisions of the Treaty.

4. That, being thus unlawfully restrained of his liberty, the circuit court had lawful jurisdiction to award the writ and discharge the petitioner.

Sec. 753, R. S.; *Ex parte Bridges*, 2 Woods (C. C.), 430; *In re Wong Yung Quy*, 6 Sawy., 242; *Ex parte Turner*, 3 Woods (C. C.), 610.

Messrs. **L. D. Latimer** and *J. D. Sullivan*, for respondent:

The facts stated in the petition did not justify the issuance of the writ.

Calder v. *Bull*, 3 Dall., 386; *Satterlee* v. *Matthewson*, 2 Pet., 380; *Jackson* v. *Lamphire*, 3 Pet., 289.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a writ of *habeas corpus* sued out of the Circuit Court of the United States for the District of California by the petitioner, Tom Tong, a subject of the Emperor of China, for the purpose of an inquiry into the legality of his detention by the chief of police of the City and County of San Francisco, for an alleged violation of an order or ordinance of the board of supervisors of such city and county regulating the licensing, etc., of public laundries, and the case comes here, before judgment below, on a certificate of division of opinion between the Judges holding the court as to certain questions which arose at the hearing. The allegation in the petition is that the order, for the violation of which the petitioner is held, is in contravention of the Constitution of the United States and of a Treaty between the United States and the Emperor of China.

A question which meets us at the outset is, [559] whether we have jurisdiction; and that depends on whether the proceeding is to be treated as civil or criminal. Section 650 of the Revised Statutes provides that whenever, in any civil suit or proceeding in a circuit court, there occurs a difference of opinion between the judges holding the court as to any matter to be decided, ruled or ordered, the opinion of the presiding judge shall prevail and be considered the opinion of the court for the time being; and section 652, that when final judgment or decree is rendered, the points of disagreement shall be certified and entered of record under the direction of the judges. That being done, the judgment or decree may, under the provisions of section 698, be brought here for review by writ of error or appeal, as the case may be.

By section 651 it is provided that whenever any question occurs on the trial or hearing of any criminal proceeding before a circuit court and the judges are divided in opinion, the point on which they disagree shall, during the same term, upon the request of either party, or of their counsel, be stated under the direction of the judges, and certified under the seal of the court to this court at its next session.

It follows, from these provisions of the statutes, that, if this is a civil suit or proceeding, we have no jurisdiction, as there has been no final judgment in the circuit court, but, if it is a criminal proceeding, we have.

The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes; but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are

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civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce [560] a civil right, which he claims, as against those who are holding him in custody, under the criminal process. If he fails to establish his right to his liberty, he may be detained for trial for the offense; but, if he succeeds, he must be discharged from custody. The proceeding is one, instituted by himself for his liberty, not by the government to punish him for his crime. This petitioner claims that the Constitution and a Treaty of the United States give him the right to his liberty, notwithstanding the charge that has been made against him, and he has obtained judicial process to enforce that right. Such a proceeding on his part is, in our opinion, a civil proceeding, notwithstanding his object is, by means of it, to get released from custody under a criminal prosecution. It was said by *Chief Justice* Marshall, speaking for the court, as long ago as *Ex parte Bollman*, 4 Cranch, 101: "The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts."

The questions that may be certified to us on a division of opinion before judgment are those which occur on the trial or hearing of a criminal proceeding before a circuit court. *It follows that we cannot take jurisdiction of the case in its present form and it is, consequently, remanded to the Circuit Court for further proceedings according to law.*

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Dissenting, *Mr. Justice* **Miller.**

Cited—110 U. S., 365.

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[564] NEW JERSEY ZINC COMPANY, *Plff. in Err.*,

v.

CHARLES W. TROTTER.

(See S. C., Reporter's ed., 564, 565.)

Jurisdiction as to amount—amount how estimated.

1. In an action of trespass for entering on lands and digging up and carrying away a quantity of ore, in which there were counts in the declaration *quare clausum fregit*, and *de bonis asportatis*, and neither party set up title, and the plaintiff recovers judgment for less than $5,000, this court has no jurisdiction on writ of error.

2. For the purpose of estimating the value on which the jurisdiction of this court depends, reference can only be had to the matter actually in dispute in the particular cause in which the judgment to be reviewed was rendered; the collateral effect of the judgment in another suit between the same or other parties, although it may operate as an estoppel therein, cannot be considered.

[No. 1244.]

Motion submitted Apr. 23, 1883. Decided May 7, 1883.

IN ERROR to the Circuit Court of the United States for the District of New Jersey.

The history and facts of the case appear in the opinion of the court.

On motions to dismiss for want of jurisdiction and to affirm.

Messrs. **Cortlandt Parker** and **Richard W. Parker,** for defendant in error, in support of motions.

Mr. **John Linn,** for plaintiff in error, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was an action of trespass brought by Trotter to recover damages of the New Jersey Zinc Company for entering on his lands and digging up and carrying away a quantity of franklinite ore. There were three counts in the declaration: two *quare clausum fregit*, and one *de bonis asportatis*. The plea was, not guilty. No other issue was raised by the pleadings. Neither party set up title, so that the only matter in dispute was the liability of the Zinc Company to pay for the ore which it was alleged had been wrongfully taken and carried away. Trotter [565] recovered a judgment for $3,320 damages and $752.25 costs of suit. From that judgment the Zinc Company brought this writ of error, which Trotter now moves to dismiss because the value of the matter in dispute does not exceed $5,000.

As we decided at the present Term, in *Hilton* v. *Dickinson* [*ante*, 688], our jurisdiction is determined by the value of the matter in dispute in this court, and the matter in dispute here in the present case is the judgment below for less than $5,000. It may be that the question actually litigated below related to the title of the parties to the land from which the ore in controversy was taken, and that the verdict will be conclusive on that question as an estoppel in some other case, but, as was also said at the present Term, in *Eigin* v. *Marshall* [*ante*, 249], for the purpose of estimating the value on which our jurisdiction depends, reference can only be had to the matter actually in dispute in the particular cause in which the judgment to be reviewed was rendered, and we are not permitted to consider the collateral effect of the judgment in another suit between the same or other parties. It is the money value of what has been actually adjudged in the cause that is to be taken into the account, not the probative force of the judgment in some other suit. Here the thing and the only thing adjudged is that the Zinc Company was guilty of the particular trespass complained of, and must pay Trotter $3,320 for the ore taken away. Had the Zinc Company pleaded title to the land from which the ore was taken, and issue had been joined on that plea, a different question would have been presented. In that way, the land might have been made the matter for adjudication, and thus the matter in dispute on the record. But, as this case stands, only the possession of Trotter and his right to the ore are involved. It may be that, in order to find possession in Trotter, the jury were compelled to find that he had title to the land, and that in this way the verdict and the judgment may estop the parties in another suit, but that will be a collateral, not the direct, effect of the judgment.

The motion to dismiss is granted.

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERM, 1883.

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT OCTOBER TERM, 1883.

[1] SAMUEL OSBORNE, Jr., *Plff. in Err.*,
v.
COUNTY OF ADAMS, IN THE STATE OF NEBRASKA.

(See S. C., Reporter's ed., 1, 2.)

County bonds, for what purposes issued.

A steam grist mill is not a work of internal improvement, within the meaning of the Statute of Nebraska, authorizing counties to issue bonds to aid in the construction of any work of internal improvement.

[No. 577.]

Petition filed May 7, 1883. Decided Oct. 15, 1883.

IN ERROR to the Circuit Court of the United States for the District of Nebraska.

The history and facts of the case appear in the opinion of the court.

On petition for a rehearing.

Messrs. **J. C. Corwin, Adna H. Bowen** and **John H. Ames,** for plaintiff in error.

Messrs. **John Doniphan** and **John M. Ragan,** for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This case was decided at the last Term of this court, and is reported in 106 U. S., 181 [*ante*, 129]. We there held that a steam grist mill was not a work of internal improvement, within the meaning of the Statute of Nebraska, approved February 15, 1869, authorizing counties, cities and precincts of organized counties "To issue bonds to aid in the construction of any railroad or other work of internal improvement." It was also said that the court was not justified by anything in *Burlington* v. *Beasley*, 94 U. S., 310 [XXIV., 161], or in the decisions of the courts
[2] of Nebraska, "In holding that a steam or other kind of grist mill is of the class of internal improvements which municipal townships in that State are empowered, by the statute in question, to aid by an issue of bonds."

A petition for rehearing was filed near the close of the last Term, calling our attention to the fact that the Supreme Court of Nebraska had then recently decided that a grist mill operated by water power was a work of internal improvement within the meaning of the before mentioned statute. The judgment was suspended, in order that appellee might have an opportunity of presenting the full text of the opinion of the state court. That has been done at the present Term. The case to which reference is made is *Traver* v. *Merrick Co.* [14 Nev., 327], the opinion in which was not filed in the state court until after the close of our last Term.

It is quite true, as claimed by counsel for appellee, that the state court does, in that case, rule that a water grist mill is a work of internal improvement within the meaning of the statute in question. But the court takes care to say: "In our view there is a clear distinction between aiding the development of the water power of the State; a power that is continuing in its nature and may be used without cost or expense and must be used at certain points on a stream where a dam can be erected and power obtained, and a mill propelled by steam that must be attended with a continuous cost for fuel, and may at any time be moved to another locality." So far from the decision of the state court furnishing any ground for a rehearing, it is an authority in support of that construction of the Act of 1867 which excludes steam grist mills from the class of internal improvements in aid of which counties, cities and precincts of organized counties are, by that statute, authorized to issue their bonds.

The rehearing is denied.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—113 U. S., 7.

CIVIL RIGHTS CASES.

UNITED STATES, *Plff.*,
v.
MURRAY STANLEY.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of Kansas.

UNITED STATES, *Plff. in Err.*,
v.
MICHAEL RYAN.

IN ERROR to the Circuit Court of the United States for the District of California.

NOTE.—*Civil rights; state decisions; removal of cases; where denied.*

An Act of the Legislature providing that no Chinese shall be permitted to give evidence in favor of or against any white man is not in conflict with the Fourteenth Amendment. The People v. Brady, 40 Cal., 198; S. C., 6 Am. Rep., 604.

A law forbidding the intermarriage of whites and negroes is not abrogated by the Civil Rights bill nor by the Fourteenth Amendment. State v. Gibson, 36 Ind., 389; S. C., 10 Am. Rep., 42.

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UNITED STATES, *Plff.*,
v.
SAMUEL NICHOLS.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Western District of Missouri.

UNITED STATES, *Plff.*,
v.
SAMUEL D. SINGLETON.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of New York.

RICHARD A. ROBINSON AND SALLIE J. ROBINSON, his wife, *Plffs. in Err.*,
v.
MEMPHIS AND CHARLESTON RAILROAD COMPANY.

IN ERROR to the Circuit Court of the United States for the Western District of Tennessee.

(See S. C., Reporter's ed., 3-62.)

Civil Rights Act—constitutionality of—13th and 14th Constitutional Amendments—Territories—District of Columbia—commercial power of Congress.

*1. The 1st and 2d sections of the Civil Rights Act, passed March 1, 1875, are unconstitutional enactments as applied to the several States, not being authorised either by the 13th or 14th Amendments of the Constitution.

2. The 14th Amendment is prohibitory upon the States only, and the legislation authorized to be adopted by Congress for enforcing it is not *direct* legislation on the matters respecting which the States are prohibited from making or enforcing certain laws, or doing certain acts, but is *corrective* legislation, such as may be necessary or proper for counteracting and redressing the effect of such laws or acts.

3. The 13th Amendment relates only to slavery and involuntary servitude, which it abolishes; and although, by its reflex action, it establishes universal freedom in the United States, and Congress may probably pass laws directly enforcing its provisions, yet such legislative power extends only to the subject of slavery and its incidents; and the denial of equal accommodations in inns, public conveyances and places of public amusement, which is forbidden by the sections in question, imposes no badge of slavery or involuntary servitude upon the party, but at most, infringes rights which are protected from state aggression by the 14th Amendment.

4. Whether the accommodations and privileges sought to be protected by the 1st and 2d sections of the Civil Rights Act, are or are not rights constitutionally demandable; and if they are, in what form they are to be protected, is not now decided.

5. Nor is it decided whether the law, as it stands, is operative in the Territories and District of Columbia; the decision only relating to its validity as applied to the States.

6. Nor is it decided whether Congress, under the commercial power, may or may not pass a law securing to all persons equal accommodations on lines of public conveyance between two or more States.

[Nos. 1, 2, 3, 26, 28.]

Nos. 1, 2, 3, 26, Submitted Nov. 7, 1882. } *Decided Oct. 15, 1883.*
No. 28, Submitted Mar. 29, 1883.

The history and facts of these cases sufficiently appear in the opinion of the court.

Mr. **S. F. Phillips,** *Solicitor-Gen.*, for the United States:

Is the Act of 1875 constitutional?

This is understood to depend upon its conformity to the provisions of one or another of the constitutional Amendments.

Several weighty judgments upon each of the Amendments have been delivered by this court, and to these, as greatly facilitating the present investigation it will be proper to advert.

(Counsel here discussed at length the following cases:

Slaughter House Cases, 16 Wall., 36 (83 U.S., XXI., 394); *Bradwell* v. *State*, 16 Wall., 130 (83 U. S., XXI., 442); *Bartemeyer* v. *Iowa*, 18 Wall., 129 (85 U. S., XXI., 929); *Minor* v. *Happersett*, 21 Wall., 162 (88 U. S., XXII., 627); *Walker* v. *Sauvinet*, 92 U. S., 90 (XXIII., 678); *U. S.* v. *Reese*, 92 U. S., 214 (XXIII., 563); *Kennard* v. *La.*, 92 U. S., 480 (XXIII., 478); *U. S.* v. *Cruikshank*, 92 U. S., 542 (XXIII., 588); *Munn* v. *Ill.*, 94 U. S., 113 (XXIV., 77); *R. R. Co.* v. *Iowa*, 94 U. S., 155 (XXIV., 94); *Peik* v. *R. R. Co.*, 94 U. S., 164 (XXIV., 97); *R. R. Co.* v. *Arkley*, 94 U.S., 179 (XXIV., 99); *R. R. Co.* v. *Blake*,

*Head notes by *Mr. Justice* BRADLEY.

The Statute of Mississippi providing that people of color should have equal privileges in certain public places is constitutional. Donnell v. State, 48 Miss., 661; S. C., 12 Am. Rep., 375.

A statute establishing separate schools for white and colored children is not in violation of the Fourteenth Amendment. Where appropriate schools are maintained for colored children they may be excluded from schools established for white children. Ward v. Flood, 48 Cal., 36; S. C., 17 Am. Rep., 405; People v. Gallagher, 93 N. Y., 438; S. C., 44 Am. Rep., 232.

The same principle has been held under state constitutions with reference to schools. Cory v. Carter, 48 Ind., 337; S. C., 17 Am. Rep., 738; Garnes v. McCann, 21 Ohio, 198; Roberts v. City of Boston, 5 Cush., 198; State v. Duffy, 7 Nev., 342; S. C., 8 Am. Rep., 713.

A colored man may maintain an action for damages under the article in the Louisiana Constitution forbidding the exclusion of any person from any public place on account of race or color. Joseph v. Bidwell, 28 La. Ann., 382; S. C., 26 Am. Rep., 102.

A statute limiting the right of admission as attorney at law to white male citizens is not in conflict with the U. S. Constitution. Matter of Taylor, 48 Md., 28; S. C., 30 Am. Rep., 451.

A statute punishing for living in adultery or fornication, imposing a different punishment when committed by a negro and a white person from that where the persons are of the same race, is constitutional. Pace v. State, 69 Ala., 231; S. C., 44 Am. Rep., 513; affd. 106 U. S., *supra*; Ford v. State, 53 Ala., 150; Ellis v. State, 42 Ala., 525; Hoover v. State, 59 Ala., 57; Green v. State, 58 Ala., 190; S. C., 29 Am. Rep., 739.

A statute making it felony for a white person to marry a negro is not in conflict with the Constitution of the U. S. Frasher v. State, 3 Tex. Ct. of App., 263; S. C., 30 Am. Rep., 131; State v. Bell, 7 Baxt., 12; S. C., 32 Am. Rep., 549; *contra*: Burns v. State, 48 Ala., 195; S. C., 17 Am. Rep., 34.

If a colored man is indicted for crime and colored persons are excluded from serving on juries because of their color the case may be removed into U. S. Circuit Court. *Ex parte* Virginia, 100 U. S., XXV., 667, 676.

Where the laws are impartial and involving in themselves no denial of rights, mere private infringement of such rights does not under the statute give a right to removal. *Ex parte* Wells, 3 Woods, 128; State v. Gaines, 2 Woods, 342; *Ex parte* Virginia, 100 U. S., XXV., 667, 676; Thomas v. State, 58 Ala., 365; State v. Gleason, 12 Fla., 190; Fitzgerald v. Allman, 82 N. C., 492; Le Grand v. U. S., 12 Fed. Rep., 577; State v. Dubuclet, 10 Ch. L. N., 132; State v. Small, 12 Rich. (S. C.), 262.

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94 U. S., 180 (XXIV., 99); *R. R. Co.* v. *Coleman*, 94 U. S., 181, *note* (XXIV., 102); *Blyew* v. *U. S.*, 13 Wall., 581 (80 U. S., XX., 638); *R. R. Co.* v. *Brown*, 17 Wall., 445 (84 U. S., XXI., 675); *Hall* v. *DeCuir*, 95 U. S., 485 (XXIV., 547); *Strauder* v. *West Va.*, 100 U. S., 303 (XXV., 664); *Ex parte Va.*, 100 U. S., 339 (XXV., 676); *Mo.* v. *Lewis*, 101 U. S., 22 (XXV., 989); *Neal* v. *Del.*, 103 U. S., 370 (XXVI., 567).)

Upon the whole, these cases decide, that:

1. The 13th Amendment forbids all sorts of involuntary personal servitude, except penal, as to all sorts of men, the word servitude taking some color from the historical fact that the United States was then engaged in dealing with African slavery, as well as from the signification of the 14th and 15th Amendments, which must be construed as advancing constitutional rights previously existing;

2. The 14th Amendment expresses prohibitions and, consequently, implies corresponding positive immunities, limiting state action only, including in such action, however, action by all state agencies, executive, legislative and judicial, of whatsoever degree;

3. The 14th Amendment warrants legislation by Congress punishing violations of the immunities thereby secured, when committed by agents of States in the discharge of ministerial functions.

Referring to the indictment against Nichols, it appears:

1. That the right violated by him, being indeed of the same class as that violated by Stanley and by Hamilton, is the right of locomotion;

2. That, in violating this, Nichols did not act in a capacity exclusively private, but in one devoted to a public use, and so affected with a public (state) interest.

Upon behalf of the United States it is, therefore, submitted, also, that:

3. Restraint upon the right of locomotion was a well known feature of the slavery abolished by the 13th Amendment.

4. Granting, that by involuntary servitude as prohibited by the 13th Amendment, is intended some institution, *viz.:* custom, etc., of that sort, and primarily, mere scattered trespasses against liberty, committed by private persons; yet, considering what must be the social tendency in at least large parts of the country, it is "appropriate legislation" against such an institution to forbid any action by private persons which, in the light of our history, may reasonably be apprehended to tend, on account of its being incidental to *quasi* public occupations, to create an institution.

5. Therefore, the above Act of 1875, in prohibiting persons from violating the rights of other persons to the full and equal enjoyment of the accommodations of inns and public conveyances, for any reason turning merely upon the race or color of the latter, partakes of the specific character of certain contemporaneous, solemn and effective action by the United States to which it was a sequel, and is constitutional.

The following is an abstract of portions of the brief prepared and filed herein in 1879 by Charles Devens, then *Atty-Gen.*, and Edwin B. Smith, then *Asst. Atty-Gen.:*

Inns are provided for the accommodation of travelers; for those passing from place to place. They are essential instrumentalities of commerce, which it was the province of the United States to regulate even prior to the recent Amendments to the Constitution.

The relation of innkeepers to the State differs from that of a man engaged in the more common avocations of life. The former is required to furnish the accommodations of his inn to all well behaved comers who are prepared to pay the customary regular price.

This business and that of conducting a theater are carried on under license from the State, through the intermediate agency of municipal authority, which is part of the machinery of the State, being delegated to this extent with the power of the State. This is because the business to be carried on is *quasi* public in its nature, and for the general accommodation of the people.

For this reason Congress has the right to prohibit any discriminations against persons applying for admission to an inn or theater, based upon race, color or previous condition of servitude.

Equality before the law is the privilege of American citizenship, conferred by the National Constitution; therefore, to be protected by national legislation. *Slaughter House Cases*, 16 Wall., 79 (83 U. S., XXI., 409); *U. S.* v. *Reese*, 92 U. S., 214, 217 (XXIII., 563, 564)—where the court says that appropriate legislation "May be varied to meet the necessities of the particular right to be protected."

The exclusion complained of in the causes at bar were because of the race and recent servile condition of the persons excluded. The law forbidding such exclusion, for such motive, is "appropriate to efface the existence of any consequence or residuum of slavery." Hon. F. T. Frelinghuysen, in debate on this Bill, Vol. 2, Cong. Rec., pt. 4, first session, Forty-Third Congress, p. 3453. At the bottom of the same page he cites the *Slaughter House Cases*, as holding that "Freedom from discrimination is one of the rights of United States citizenship."

What the United States had the right to give, it necessarily has the right and duty to preserve and protect.

We cannot proceed against or deal with the States to procure needed legislation; nor compel action by the grand juries of the State. We must necessarily prosecute directly those offenders who deny, on account of race or color, the equality which the Constitution guaranties.

It would be strange if language avowedly chosen to effect a desired object, and deemed apt for that purpose by a large majority, if not everybody, in each House of Congress, should now be held by the court not such as to accomplish the end contemplated. The intent of the legislator would not then be the law.

Messrs. **Wm. M. Randolph** and *Fillmore Beall*, for plaintiffs in error in No. 28.

Our case involves the rights of a citizen of one State traveling "by a public conveyance by land" through another State, for the purpose of reaching a place in a third State. We maintain that so far as the Act of Congress applies to such a case, the power to pass it is beyond question. Independently of the "power to enforce by appropriate legislation" the 14th Amendment, there are, as we conceive, at least two other clauses of the Constitution on either of which the Act may rest. The first is the power in Congress

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to regulate commerce with foreign Nations, and among the several States; article 1, section 8, clause 3; and the other is the provision that "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." Article IV., sec. 2. These provisions, taken in connection with the grant of "all legislative powers" to Congress (article 1, sec. 1), and the power "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof" (article 1, sec. 8, clause 18), we submit, leave very little room for argument.

In *Prigg* v. *Pa.*, 16 Pet., 539, it was decided that where the Constitution guaranties a right, Congress is empowered to pass the legislation appropriate to give effect to that right.

And see, *Ableman* v. *Booth*, 21 How., 506 (62 U. S., XVI., 169); *U. S.* v. *Reese*, 92 U. S., 214 (XXIII., 563); *Strauder* v. *W. Va.*, 100 U. S., 303 (XXV., 664).

But, whether Mrs. Robinson's rights in this case were created by the Constitution or only guarantied by it, we submit, in either event, that the Act of Congress, so far as it protects them, is within the Constitution. *Hall* v. *DeCuir*, 95 U. S., 485 (XXIV., 547); *Pensacola Tel. Co.* v. *W. U. Tel. Co.*, 96 U. S., 1 (XXIV., 708).

Messrs. **W. Y. C. Humes** and *D. H. Poston*, for defendants in error in No. 28, did not argue the constitutional question, claiming that their case was not within the Act of 1875.

The other defendants were not represented in this court by counsel.

Mr. Justice **Bradley** delivered the opinion of the court:

These cases are all founded on the 1st and 2d sections of the Act of Congress, known as the Civil Rights Act, passed March 1, 1875, entitled "An Act to Protect all Citizens in their Civil and Legal Rights." 18 Stat. at L., 335. Two of the cases, those against Stanley and Nichols, are indictments for denying to persons of color the accommodations and privileges of an inn or hotel; two of them, those against Ryan and Singleton, are, one an information, the other an indictment, for denying to individuals the privileges and accommodations of a theater, the information against Ryan being for refusing a colored person a seat in the dress circle of Maguire's theater in San Francisco; and the indictment against Singleton being for denying to another person, whose color is not stated, the full enjoyment of the accommodations of the theater known as the Grand Opera House in New York, "Said denial not being made for any reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude." The case of Robinson and wife against the Memphis and Charleston R. R. Company was an action brought in the Circuit Court of the United States for the Western District of Tennessee, to recov-
[5] er the penalty of $500 given by the 2d section of the Act; and the *gravamen* was the refusal by the conductor of the Railroad Company to allow the wife to ride in the ladies' car, for the reason, as stated in one of the counts, that she was a person of African descent. The jury rendered a verdict for the defendants in this case upon the merits under a charge of the court to which a bill of exceptions was taken by the plaintiffs. The case was tried on the assumption by both parties of the validity of the Act of Congress; and the principal point made by the exceptions was, that the Judge allowed evidence to go to the jury tending to show that the conductor had reason to suspect that the plaintiff, the wife, was an improper person, because she was in company with a young man whom he supposed to be a white man, and on that account inferred that there was some improper connection between them; and the Judge charged the jury, in substance, that if this was the conductor's *bona fide* reason for excluding the woman from the car, they might take it into consideration on the question of the liability of the Company. The case is brought here by writ of error at the suit of the plaintiffs. The cases of Stanley, Nichols and Singleton, come up on certificates of division of opinion between the Judges below as to the constitutionality of the 1st and 2d sections of the Act referred to; and the case of Ryan, on a writ of error to the judgment of the Circuit Court for the District of California, sustaining a demurrer to the information.

It is obvious that the primary and important question in all the cases, is the constitutionality [9] of the law; for if the law is unconstitutional, none of the prosecutions can stand.

The sections of the law referred to provide as follows:

"Sec. 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theaters and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Sec. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offense forfeit and pay the sum of $500 to the person aggrieved thereby, to be recovered in an action of debt with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $500 nor more than $1,000, or shall be imprisoned not less than thirty days nor more than one year; *Provided*, That all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by state statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings, either under this Act or the criminal law of any State; *And provided, further*, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment,

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shall be a bar to either prosecution respectively." Are these sections constitutional? The 1st section, which is the principal one, cannot be fairly understood without attending to the last clause, which qualifies the preceding part. The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, [10] facilities and privileges of inns, public conveyances and theaters; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. In other words: it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theaters and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have and those who have not been slaves. Its effect is, to declare that, in all inns, public conveyances and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white citizens; and *vice versa*. The 2d section makes it a penal offense in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the 1st section.

Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three Amendments. The power is sought, first, in the 14th Amendment, and the views and arguments of distinguished Senators, advanced whilst the law was under consideration, claiming authority to pass it by virtue of that Amendment, are the principal arguments adduced in favor of the power. We have carefully considered those arguments, as was due to the eminent ability of those who put them forward, and have felt, in all its force, the weight of authority which always invests a law that Congress deems itself competent to pass. But the responsibility of an independent judgment is now thrown upon this court; and we are bound to exercise it according to the best lights we have.

The 1st section of the 14th Amendment, which is the one relied on, after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that [11] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the Amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state Acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the Amendment. Positive rights and privileges are undoubtedly secured by the 14th Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must, necessarily, be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect. [12] A quite full discussion of this aspect of the Amendment may be found in *U. S.* v. *Cruikshank*, 92 U. S., 542 [XXIII., 588]; *Va.* v. *Rives*, 100 U. S., 313 [XXV., 667], and *Ex parte Va.*, 100 U. S., 339 [XXV., 676].

An apt illustration of this distinction may be found in some of the provisions of the original Constitution. Take the subject of contracts, for example; the Constitution prohibited the States from passing any law impairing the obligation of contracts. This did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by state legislation might be counteracted and corrected; and this power was exercised. The remedy which Congress actually provided was that contained in the 25th section of the Judiciary Act of 1789 [1 Stat. at L., 85], giving to the Supreme Court of the United States jurisdiction by writ of error to review the final decisions of state courts whenever they should sustain the validity of a state statute or authority alleged to be repugnant to the Constitution or laws of the United States. By this means, if a state law was passed impairing the obligation of a contract, and the state tribunals sustained the validity of the law, the mischief could be corrected in this court. The legislation of Congress, and the proceedings provided for under it, were corrective in their character. No attempt was made to draw into the United States courts the litigation of contracts generally; and no such attempt would have been sustained. We do not say that the remedy provided was the only one that might have been provided in that case. Probably Con-

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gress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by a state law; and under the broad provisions of the Act of March 3, 1875, giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States, it is possible that such jurisdiction now exists. But under that or any other law it must appear, as [13] well by allegation as proof at the trial, that the Constitution had been violated by the action of the State Legislature. Some obnoxious state law, passed or that might be passed, is necessary to be assumed, in order to lay the foundation of any federal remedy in the case; and for the very sufficient reason, that the constitutional prohibition is against *state laws* impairing the obligation of contracts.

And so in the present case, until some state law has been passed or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the 14th Amendment, no legislation of the United States under said Amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the Amendment are against state laws and acts done under state authority. Of course, legislation may and should be provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the Amendment was intended to provide against; and that is, state laws, or state action of some kind, adverse to the rights of the citizen secured by the Amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State Legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property, which include all civil rights that men have, are, by the Amendment, sought to be protected against invasion on the part of the State without due process of law, Congress may, therefore, provide due process of law for their vindication in every case; and that, because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the Amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and [14] which, by the Amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the Amendment, they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character.

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the 14th Amendment on the part of the States. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the Amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities.

If this legislation is appropriate for enforcing the prohibitions of the Amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty and property? If it is supposable that the States may deprive persons of life, liberty and property without due process of law, and the Amendment itself does suppose this, why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances and theaters? The truth is, that the implication of a power to legislate in this manner is based upon the assumption that if the States are forbidden [15] to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such state legislation or action. The assumption is certainly unsound. It it is repugnant to the 10th Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

We have not overlooked the fact that the 4th section of the Act now under consideration has been held by this court to be constitutional. That section declares "That no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined, not more than $5,000." In *Ex parte Va.*, 100 U. S., 339 [XXV., 676], it was held that an indictment against a State officer under this section for excluding persons of color from the jury list is sustainable. But a moment's attention to its terms will show that the section is entirely corrective in its character. Disqualifications for service on juries are only created by the law, and the first part of the section is aimed at certain disqualifying laws,

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namely: those which make mere race or color a disqualification; and the 2d clause is directed against those who, assuming to use the authority of the State Government, carry into effect such a rule of disqualification. In the *Virginia Case*, the State, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. Whether the statute-book of the State actually laid down any such rule of disqualification, or not, the State, through its officer, enforced such a rule; and it is against such state action, through its officers and agents, that the last clause of the [16] section is directed. This aspect of the law was deemed sufficient to devest it of any unconstitutional character, and makes it differ widely from the 1st and 2d sections of the same Act which we are now considering.

These sections, in the objectionable features before referred to, are different also from the law ordinarily called the "Civil Rights Bill," originally passed April 9, 1866 [14 Stat. at L., 27], and re-enacted with some modifications in sections 16, 17, 18, of the Enforcement Act, passed May 31, 1870 [16 Stat. at L., 140]. That law, as re-enacted, after declaring that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding, proceeds to enact that any person who, under color of any law, statute, ordinance, regulation or custom, shall subject or cause to be subjected any inhabitant of any State or Territory to the deprivation of any rights secured or protected by the preceding section, above quoted, or to different punishment, pains or penalties, on account of such person being an alien or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and subject to fine and imprisonment as specified in the Act. This law is clearly corrective in its character, intended to counteract and furnish redress against state laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified. In the Revised Statutes, it is true a very important clause, to wit: the words "any law, statute, ordinance, regulation or custom to the contrary notwithstanding," which gave the declaratory section its point and effect, are omitted; but the penal part, by which the declaration is enforced, and which is really the effective part of the law, retains the reference to state laws, by making the penalty apply only to those who [17] should subject parties to a deprivation of their rights under color of any statute, ordinance, custom, etc., of any State or Territory, thus preserving the corrective character of the legislation. R. S., secs. 1977, 1978, 1979, 5510. The Civil Rights Bill here referred to is analogous in its character to what a law would have been under the original Constitution, declaring that the validity of contracts should not be impaired, and that if any person bound by a contract should refuse to comply with it, under color or pretense that it had been rendered void or invalid by a state law, he should be liable to an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defense.

In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property or his reputation; but if not sanctioned in some way by the State, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and to sell, to sue in the courts or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of state law or state authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for [18] which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some state law or state authority for its excuse and perpetration.

Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States, as in the regulation of commerce with foreign Nations, among the several States, and with the Indian Tribes, the coining of money, the establishment of postoffices and post-roads, the declaring of war, etc. In these cases, Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof. But where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular state legislation or state action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be correct-

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ive in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers.

If the principles of interpretation which we have laid down are correct, as we deem them to be, and they are in accord with the principles laid down in the cases before referred to, as well as in the recent case of *U. S.* v. *Harris* [*ante*, 290], decided at the last Term of this court, it is clear that the law in question cannot be sustained by any grant of legislative power made to Congress by the 14th Amendment. That Amendment prohibits the States from denying to any person the equal protection of the laws, and declares that Congress shall have power to enforce, by appropriate legislation, the provisions of the Amendment. The law in question, without any reference to adverse state legislation on the subject, declares [19] that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances and places of amusement. It supersedes and displaces state legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation. Whether it would not have been a more effective protection of the rights of citizens to have clothed Congress with plenary power over the whole subject, is not now the question. What we have to decide is, whether such plenary power has been conferred upon Congress by the 14th Amendment; and, in our judgment, it has not.

We have discussed the question presented by the law, on the assumption that a right to enjoy equal accommodations and privileges in all inns, public conveyances and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with. Whether it is such a right or not, is a different question, which, in the view we have taken of the validity of the law on the ground already stated, it is not necessary to examine.

We have also discussed the validity of the law in reference to cases arising in the States only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. Whether the law would be a valid one as applied to the Territories and the District, is not a question for consideration in the cases before us; they all being cases arising within the limits of States. And whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another, is also a question which is not now before us, as the sections in question are not conceived in any such view.

[20] But the power of Congress to adopt direct and primary, as distinguished from corrective, legislation on the subject in hand, is sought, in the second place, from the 13th Amendment, which abolishes slavery. This Amendment declares "That neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction;" and it gives Congress power to enforce the Amendment by appropriate legislation.

This Amendment, as well as the 14th, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect, it abolished slavery and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the Amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

It is true, that slavery cannot exist without law, any more than property in lands and goods can exist without law; and, therefore, the 13th Amendment may be regarded as nullifying all state laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States; and upon this assumption it is claimed that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances and places of public amusement; the argument being, that the denial of such equal accommodations and privileges is, in itself, a subjection to a species of servitude within the meaning of the Amendment. Conceding the major proposition [21] to be true, that Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance or a theater, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the 13th Amendment.

In a very able and learned presentation of the cognate question as to the extent of the rights, privileges and immunities of citizens which cannot rightfully be abridged by state laws under the 14th Amendment, made in a former case, a long list of burdens and disabilities of a servile character, incident to feudal vassalage in France, and which were abolished by the decrees of the national assembly, was presented for the purpose of showing that all inequalities and observances exacted by one man from another, were servitudes, or badges of slavery, which a great Nation, in its effort to establish universal liberty, made haste to wipe out and destroy. But these were servitudes imposed by the old law, or by long custom which had the force of

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law, and exacted by one man from another without the latter's consent. Should any such servitudes be imposed by a state law, there can be no doubt that the law would be repugnant to the 14th, no less than to the 13th Amendment; nor any greater doubt that Congress has adequate power to forbid any such servitude from being exacted.

But is there any similarity between such servitudes and a denial by the owner of an inn, a public conveyance, or a theater, of its accommodations and privileges to an individual, even though the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from such an act of denial? Whether it might not be a denial of a right which, if sanctioned by the state law, would be obnoxious to the prohibitions of the 14th Amendment, is another question. But what has it to do with the question of slavery?

It may be that, by the Black Code, as it was called, in the times when slavery prevailed, the [22] proprietors of inns and public conveyances were forbidden to receive persons of the African race, because it might assist slaves to escape from the control of their masters. This was merely a means of preventing such escapes, and was no part of the servitude itself. A law of that kind could not have any such object now, however justly it might be deemed an invasion of the party's legal right as a citizen, and amenable to the prohibitions of the 14th Amendment.

The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the 13th Amendment, before the 14th was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely: the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoined by white citizens. Whether this legislation was fully authorized by the 13th Amendment alone, without the support which it afterwards received from the 14th Amendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that time, in 1866, Congress did not assume, under the authority given by the 13th Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

We must not forget that the province and [23] scope of the 13th and 14th Amendments are different; the former simply abolished slavery; the latter prohibited the States from abridging the privileges or immunities of citizens of the United States, by depriving them of life, liberty or property without due process of law, and from denying to any the equal protection of the laws. The Amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the 13th Amendment, it has only to do with slavery and its incidents. Under the 14th Amendment, it has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. Under the 13th Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not; under the 14th, as we have already shown, it must necessarily be and can only be corrective in its character, addressed to counteract and afford relief against state regulations or proceedings.

The only question under the present head, therefore, is, whether the refusal to any persons of the accommodations of an inn or a public conveyance or a place of public amusement, by an individual and without any sanction or support from any state law or regulation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country? Many wrongs may be obnoxious to the prohibitions of the 14th Amendment which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law; or allowing persons who have committed certain crimes, horse-stealing, for example, to be seized and hung by the *posse comitatus* without regular trial; or denying to any person or class of persons the right to pursue any peaceful avocations allowed to oth- [24] ers. What is called "class legislation" would belong to this category, and would be obnoxious to the prohibitions of the 14th Amendment, but would not necessarily be so to the 13th, when not involving the idea of any subjection of one man to another. The 13th Amendment has respect, not to distinctions of race or class or color, but to slavery. The 14th Amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class or to any individual, the equal protection of the laws.

Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the States by the 14th Amendment are forbidden to deny to any person? And is the Constitution vio-

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lated until the denial of the right has some state sanction or authority? Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears?

After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State; or if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of state laws, or state action, prohibited by the 14th Amendment. It would be running the slavery argument into the ground, to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal [25] with in other matters of intercourse or business. Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the 14th Amendment, Congress has full power to afford a remedy, under that Amendment and in accordance with it.

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights, as a citizen or a man, are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of their personal *status* as freemen because they were not admitted to all the privileges enjoyed by white citizens, or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the 13th Amendment, which merely abolishes slavery, but by force of the 14th and 15th Amendments.

On the whole we are of opinion, that no countenance of authority for the passage of the law in question can be found in either the 13th or 14th Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several States is concerned.

This conclusion disposes of the cases now under consideration. In the cases of the *United States* v. *Michael Ryan*, and of *Richard A. Robinson and wife* against *The Memphis and Charleston Railroad Company*, the judgments [26] must be affirmed. In the other cases, the answer to be given will be that the 1st and 2d sections of the Act of Congress of March 1, 1875 [18 Stat. at L., 335], entitled "An Act to Protect all Citizens in their Civil and Legal Rights," are unconstitutional and void, and that judgment should be rendered upon the several indictments in those cases accordingly. *And it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Harlan** dissenting:

The opinion in these cases proceeds, it seems to me, upon grounds entirely too narrow and artificial. I cannot resist the conclusion that the substance and spirit of the recent Amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. "It is not the words of the law but the internal sense of it that makes the law; the letter of the law is the body; the sense and reason of the law is the soul." Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law. By this I do not mean that the determination of these cases should have been materially controlled by considerations of mere expediency or policy. I mean only, in this form, to express an earnest conviction that the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted.

The purpose of the 1st section of the Act of Congress of March 1, 1875, was to prevent *race* discrimination in respect of the accommodations and facilities of inns, public conveyances and places of public amusement. It does not assume to define the general conditions and limitations under which inns, public conveyances and places of public amusement may be conducted, but only declares that such conditions and limitations, whatever they may be, shall not be applied so as to work a discrimination solely be- [27] cause of race, color or previous condition of servitude. The 2d section provides a penalty against any one denying, or aiding or inciting the denial, to any citizen, of that equality of right given by the 1st section, except for reasons by law applicable to citizens of every race or color and regardless of any previous condition of servitude.

There seems to be no substantial difference between my brethren and myself as to the purpose of Congress; for, they say that the essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public convey-

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ances and theaters; but that such enjoyment shall not be subject to conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. The effect of the statute, the court says, is, that colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances and places of amusement as are enjoyed by white persons; and *vice versa*.

The court adjudges, I think erroneously, that Congress is without power, under either the 13th or 14th Amendment, to establish such regulations, and that the 1st and 2d sections of the statute are, in all their parts, unconstitutional and void.

Whether the legislative department of the government has transcended the limits of its constitutional powers, "Is at all times," said this court in *Fletcher* v. *Peck*, 6 Cranch, 128, "a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. * * * The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." More recently in *Sinking Fund Cases*, 99 U. S., 718, we said: "It is our duty, when required in the regular course of judicial proceedings, to declare an Act of Congress void if not within the legislative power of the United States, but this declaration should never be made except in a clear case. Every possible presumption is in [28] favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Before considering the language and scope of these Amendments it will be proper to recall the relations subsisting, prior to their adoption, between the National Government and the institution of slavery, as indicated by the provisions of the Constitution, the legislation of Congress, and the decisions of this court. In this mode we may obtain keys with which to open the mind of the people, and discover the thought intended to be expressed.

In section 2 of article IV. of the Constitution it was provided that "No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." Under the authority of this clause, Congress passed the Fugitive Slave Law of 1793, establishing a mode for the recovery of fugitive slaves, and prescribing a penalty against any person who should knowingly and willingly obstruct or hinder the master, his agent, or attorney, in seizing, arresting and recovering the fugitive, or who should rescue the fugitive from him, or who should harbor or conceal the slave after notice that he was a fugitive.

In *Prigg* v. *Commonwealth of Pennsylvania*, 16 Pet., 539, this court had occasion to define the powers and duties of Congress in reference to fugitives from labor. Speaking by *Mr. Justice* Story it laid down these propositions:

That a clause of the Constitution conferring a right should not be so construed as to make it shadowy, or unsubstantial, or leave the citizen without a remedial power adequate for its protection, when another construction equally accordant with the words and the sense in which they were used, would enforce and protect the right granted;

That Congress is not restricted to legislation for the execution of its expressly granted powers; but, for the protection of rights guarantied [29] by the Constitution, may employ such means, not prohibited, as are necessary and proper, or such as are appropriate, to attain the ends proposed;

That the Constitution recognized the master's right of property in his fugitive slave and, as incidental thereto, the right of seizing and recovering him, regardless of any state law, or regulation, or local custom whatsoever; and,

That the right of the master to have his slave, thus escaping, delivered up on claim, being guarantied by the Constitution, the fair implication was that the National Government was clothed with appropriate authority and functions to enforce it.

The court said: "The fundamental principle, applicable to all cases of this sort, would seem to be that when the end is required the means are given, and when the duty is enjoined the ability to perform it is contemplated to exist on the part of the functionary to whom it is intrusted." Again: "It would be a strange anomaly and forced construction to suppose that the National Government meant to rely for the due fulfillment of its own proper duties, and the rights which it intended to secure, upon state legislation, and not upon that of the Union. *A fortiori*, it would be more objectionable to suppose that a power which was to be the same throughout the Union, should be confided to state sovereignty which could not rightfully act beyond its own territorial limits."

The Act of 1793 was, upon these grounds, adjudged to be a constitutional exercise of the powers of Congress.

It is to be observed from the report of *Prigg's Case* that Pennsylvania, by her Attorney-General, pressed the argument that the obligation to surrender fugitive slaves was on the States and for the States, subject to the restriction that they should not pass laws or establish regulations liberating such fugitives; that the Constitution did not take from the States the right to determine the *status* of all persons within their respective jurisdictions; that it was for the State in which the alleged fugitive was found to determine, through her courts or in such modes as she prescribed, whether the person arrested was, in fact, a freeman or a fugitive slave; that the sole power of the General Gov- [30] ernment in the premises was, by judicial instrumentality, to restrain and correct, not to forbid and prevent in the absence of hostile state action; and that for the General Government to assume primary authority to legislate on the subject of fugitive slaves, to the exclusion of the States, would be a dangerous encroachment on state sovereignty. But to such suggestions this court turned a deaf ear, and adjudged that primary legislation by Congress to enforce the master's right was authorized by the Constitution.

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We next come to the Fugitive Slave Act of 1850, the constitutionality of which rested, as did that of 1793, solely upon the implied power of Congress to enforce the master's rights. The provisions of that Act were far in advance of previous legislation. They placed at the disposal of the master seeking to recover his fugitive slave, substantially the whole power of the Nation. It invested commissioners, appointed under the Act, with power to summon the *posse comitatus* for the enforcement of its provisions, and commanded all good citizens to assist in its prompt and efficient execution whenever their services were required as part of the *posse comitatus*. Without going into the details of that Act, it is sufficient to say that Congress omitted from it nothing which the utmost ingenuity could suggest as essential to the successful enforcement of the master's claim to recover his fugitive slave. And this court, in *Ableman* v. *Booth*, 21 How., 506 [62 U. S., XVI., 169], adjudged it to be "in all of its provisions fully authorized by the Constitution of the United States."

The only other case, prior to the adoption of the recent amendments, to which reference will be made, is that of *Dred Scott* v. *Sandford*, 19 How., 399 [60 U. S., XV., 663]. That case was instituted in a Circuit Court of the United States by Dred Scott, claiming to be a citizen of Missouri, the defendant being a citizen of another State. Its object was to assert the title of himself and family to freedom. The defendant pleaded in abatement that Scott—being of African descent, whose ancestors, of pure African blood, were brought into this country and sold as slaves—was not a *citizen*. The only matter in issue, said the court, was whether the descendants of slaves [31] thus imported and sold, when they should be emancipated, or who were born of parents who had become free before their birth, are citizens of a State in the sense in which the word "citizen" is used in the Constitution of the United States.

In determining that question, the court instituted an inquiry as to who were citizens of the several States at the adoption of the Constitution, and who, at that time, were recognized as the people whose rights and liberties had been violated by the British Government. The result was a declaration by this court, speaking by *Chief Justice* Taney, that the legislation and histories of the times and the language used in the Declaration of Independence, showed "That neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that instrument;" that "they had for more than a century before been regarded as beings of an inferior race, and altogether unfit to associate with the white race, either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit;" that he was "bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it;" and that "this opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without for a moment doubting the correctness of this opinion."

The judgment of the court was that the words "people of the United States" and "citizens" meant the same thing, both describing "the political body who, according to our republican institutions, form the sovereignty and hold the power and conduct the government through their representatives;" that "they are what we familiarly call the 'sovereign people,' and every citizen is one of this people and a [32] constituent member of this sovereignty;" but, that the class of persons described in the plea in abatement did not compose a portion of this people, were not "included, and were not intended to be included, under the word 'citizens' in the Constitution;" that, therefore, they could "claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States;" that, "on the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority and had no rights or privileges but such as those who held the power, and the government might choose to grant them."

Such were the relations which formerly existed between the government, whether national or state, and the descendants, whether free or in bondage, of those of African blood, who had been imported into this country and sold as slaves.

The 1st section of the 13th Amendment provides that "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Its 2d section declares that "Congress shall have power to enforce this article by appropriate legislation." This Amendment was followed by the Civil Rights Act of April 9, 1866, which, among other things, provided that "All persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." 14 Stat. at L., 27. The power of Congress, in this mode, to elevate the enfranchised race to national citizenship, was maintained by the supporters of the Act of 1866 to be as full and complete as its power, by general statute, to make the children, being of full age, of persons naturalized in this country, citizens of the United States without going through the process of naturalization. The Act of 1866, in this respect, was also likened to that of 1843, in which Congress declared "That the Stockbridge Tribe of Indians, and each and every one of them, shall be deemed to be and are hereby declared to be citizens of the United States to all intents and purposes, and shall be entitled to all the rights, privileges and immunities of such citizens, and shall in all respects be subject to the laws of the United States." If the Act of 1866 was valid in conferring national citizenship upon all embraced by its terms, then the colored race, enfranchised by the 13th Amendment, became citizens of the United

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[33] States prior to the adoption of the 14th Amendment. But, in the view which I take of the present case, it is not necessary to examine this question.

The terms of the Thirteenth Amendment are absolute and universal. They embrace every race which then was, or might thereafter be, within the United States. No race, as such, can be excluded from the benefits or rights thereby conferred. Yet, it is historically true that that Amendment was suggested by the condition, in this country, of that race which had been declared, by this court, to have had—according to the opinion entertained by the most civilized portion of the white race, at the time of the adoption of the Constitution—"no rights which the white man was bound to respect," none of the privileges or immunities secured by that instrument to citizens of the United States. It had reference, in a peculiar sense, to a people which (although the larger part of them were in slavery) had been invited by an Act of Congress to aid in saving from overthrow a government which, theretofore, by all of its departments, had treated them as an inferior race, with no legal rights or privileges except such as the white race might choose to grant them.

These are the circumstances under which the Thirteenth Amendment was proposed for adoption. They are now recalled only that we may better understand what was in the minds of the people when that Amendment was considered, and what were the mischiefs to be remedied and the grievances to be redressed by its adoption.

We have seen that the power of Congress, by legislation, to enforce the master's right to have his slave delivered up on claim was *implied* from the recognition of that right in the National Constitution. But the power conferred by the Thirteenth Amendment does not rest upon implica-
[34] tion or inference. Those who framed it were not ignorant of the discussion, covering many years of our country's history, as to the constitutional power of Congress to enact the Fugitive Slave Laws of 1793 and 1850. When, therefore, it was determined, by a change in the fundamental law, to uproot the institution of slavery wherever it existed in the land, and to establish universal freedom, there was a fixed purpose to place the authority of Congress in the premises beyond the possibility of a doubt. Therefore, *ex industria*, power to enforce the Thirteenth Amendment, by appropriate legislation, was expressly granted. Legislation for that purpose, my brethren concede, may be direct and primary. But to what specific ends may it be directed? This court has uniformly held that the National Government has the power, whether expressly given or not, to secure and protect rights conferred or guaranteed by the Constitution. *U. S.* v. *Reese*, 92 U. S., 214 [XXIII., 568]; *Strauder* v. *W. Va.*, 100 U. S., 303 [XXV. 664]. That doctrine ought not now to be abandoned when the inquiry is not as to an implied power to protect the master's rights, but what may Congress, under powers expressly granted, do for the protection of freedom and the rights necessarily inhering in a state of freedom.

The 13th Amendment, it is conceded, did something more than to prohibit slavery as an *institution*, resting upon distinctions of race, and upheld by positive law. My brethren admit that it established and decreed universal *civil freedom* throughout the United States. But did the freedom thus established involve nothing more than exemption from actual slavery? Was nothing more intended than to forbid one man from owning another as property? Was it the purpose of the Nation simply to destroy the institution, and then remit the race, theretofore held in bondage, to the several States for such protection, in their civil rights, necessarily growing out of freedom, as those States, in their discretion, might choose to provide? Were the States against whose protest the institution was destroyed, to be left free, so far as national interference was concerned, to make or allow discriminations against that race, as such, in the enjoyment of those fundamental rights which by universal concession, inhere in a state of freedom? Had the 13th Amendment stopped [35]
with the sweeping declaration, in its 1st section, against the existence of slavery and involuntary servitude, except for crime, Congress would have had the power, by implication, according to the doctrines of *Prigg* v. *Commonwealth of Pennsylvania*, repeated in *Strauder* v. *West Virginia*, to protect the freedom established and, consequently, to secure the enjoyment of such civil rights as were fundamental in freedom. That it can exert its authority to that extent is made clear, and was intended to be made clear, by the express grant of power contained in the 2d section of the Amendment.

That there are burdens and disabilities which constitute badges of slavery and servitude, and that the power to enforce by appropriate legislation the 13th Amendment may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable. They lie at the foundation of the Civil Rights Act of 1866. Whether that Act was authorized by the 13th Amendment alone, without the support which it subsequently received from the 14th Amendment, after the adoption of which it was re-enacted with some additions, my brethren do not consider it necessary to inquire. But I submit, with all respect to them, that its constitutionality is conclusively shown by their opinion. They admit, as I have said, that the 13th Amendment established freedom; that there are burdens and disabilities, the necessary incidents of slavery, which constitute its substance and visible form; that Congress, by the Act of 1866, passed in view of the 13th Amendment, before the 14th was adopted, undertook to remove certain burdens and disabilities, the necessary incidents of slavery, and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property as is enjoyed by white citizens; that under the 13th Amendment, Congress has to do with slavery and its incidents; and that legislation, [36]
so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not. These propositions being conceded, it is impossible, as it seems to

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me, to question the constitutional validity of the Civil Rights Act of 1866. I do not contend that the 13th Amendment invests Congress with authority, by legislation, to define and regulate the entire body of the civil rights which citizens enjoy, or may enjoy, in the several States. But I hold that since slavery, as the court has repeatedly declared, *Slaughter-House Cases*, 16 Wall., 36 [73 U. S., XVIII., 394]; *Strauder* v. *W. Va.*, 100 U. S., 303 [XXV., 664], was the moving or principal cause of the adoption of that Amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races. Congress, therefore, under its express power to enforce that Amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, *because of their race*, of any civil rights granted to other freemen in the same State; and such legislation may be of a direct and primary character, operating upon States, their officers and agents and, also, upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the State.

To test the correctness of this position, let us suppose that, prior to the adoption of the Fourteenth Amendment, a State had passed a statute denying to freemen of African descent, resident within its limits, the same right which was accorded to white persons, of making and enforcing contracts, and of inheriting, purchasing, leasing, selling and conveying property; or a statute subjecting colored people to severer punishment for particular offenses than was prescribed for white persons, or excluding that race from the benefit of the laws exempting homesteads from execution. Recall the legislation of 1865-6 in some of the States, of which this court, in the *Slaughter-House* [37] *Cases*, said, that it imposed upon the colored race onerous disabilities and burdens; curtailed their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value; forbade them to appear in the towns in any other character than menial servants; required them to reside on and cultivate the soil, without the right to purchase or own it; excluded them from many occupations of gain; and denied them the privilege of giving testimony in the courts where a white man was a party. 16 Wall., 57 [402]. Can there be any doubt that all such enactments might have been reached by direct legislation upon the part of Congress under its express power to enforce the Thirteenth Amendment? Would any court have hesitated to declare that such legislation imposed badges of servitude in conflict with the civil freedom ordained by that Amendment? That it would have been also in conflict with the 14th Amendment, because inconsistent with the fundamental rights of American citizenship, does not prove that it would have been consistent with the 13th Amendment.

What has been said is sufficient to show that the power of Congress under the 13th Amendment is not necessarily restricted to legislation against slavery as an institution upheld by positive law, but may be exerted to the extent, at least, of protecting the liberated race against discrimination, in respect of legal rights belonging to freemen, where such discrimination is based upon race.

It remains now to inquire: what are the legal rights of colored persons in respect of the accommodations, privileges and facilities of public conveyances, inns and places of public amusement?

First, as to public conveyances on land and water. In *Nav. Co.* v. *Merchants' Bank*, 6 How., 344, this court, speaking by *Mr. Justice* Nelson, said that a common carrier is "In the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned." To the same effect is *Munn* v. *Ill.*, 94 U. S., 113 [XXIV., 77]. In *Olcott* v. *Supervisors*, 16 Wall., 678 [73 U. S., XVIII., 332], it was ruled that railroads are public highways, established by authority of [38] the State for the public use; that they are none the less public highways, because controlled and owned by private corporations; that it is a part of the function of government to make and maintain highways for the convenience of the public; that no matter who is the agent, or what is the agency, the function performed is *that of the State;* that although the owners may be private companies, they may be compelled to permit the public to use these works in the manner in which they can be used; that, upon these grounds alone, have the courts sustained the investiture of railroad corporations with the State's right of eminent domain, or the right of municipal corporations, under legislative authority, to assess, levy and collect taxes to aid in the construction of railroads. So in *Queensbury* v. *Culver*, 19 Wall., 83 [86 U. S., XXII., 100], it was said that a municipal subscription of railroad stock was in aid of the construction and maintenance of a public highway, and for the promotion of a public use. Again, in *Pine Grove* v. *Talcott*, 19 Wall., 666 [86 U. S., XXII., 227]: "Though the corporation (railroad) was private, its work was public, as much so as if it were to be constructed by the State." To the like effect are numerous adjudications in this and the State courts with which the profession is familiar. The Supreme Judicial Court of Massachusetts in *Inhab. of Worcester* v. *Western R. R. Corporation*, 4 Met., 564, said in reference to a railroad:

"The establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes, therefore, like a canal, turnpike or highway, a public easement. * * * It is true that the real and personal property, necessary to the establishment and management of the railroad, is vested in the corporation; but it is in trust for the public." In *Erie, etc., R. R. Co.* v. *Casey*, 26 Pa. St., 287, the court, referring to an Act repealing the charter of a railroad, and under which the State took possession of the road, said: "It is a public highway, solemnly devoted to public use. When the lands were taken, it was for such use or they could not have been taken at all. * * * Railroads established upon land taken by the right [39] of eminent domain by authority of the Commonwealth, created by her laws as thoroughfares

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for commerce, are her highways. No corporation has property in them, though it may have franchises annexed to and exercisable within them."

In many courts it has been held that, because of the public interest in such a corporation, the land of a railroad company cannot be levied on and sold under execution by a creditor. The sum of the adjudged cases is that a railroad corporation is a governmental agency, created primarily for public purposes, and subject to be controlled for the public benefit. Upon this ground the State, when unfettered by contract, may regulate, in its discretion, the rates of fares of passengers and freight. And upon this ground, too, the State may regulate the entire management of railroads in all matters affecting the convenience and safety of the public; as, for example, by regulating speed, compelling stops of prescribed length at stations, and prohibiting discriminations and favoritism. If the corporation neglect or refuse to discharge its duties to the public, it may be coerced to do so by appropriate proceedings in the name or in behalf of the State.

Such being the relations these corporations hold to the public, it would seem that the right of a colored person to use an improved public highway, upon the terms accorded to freemen of other races, is as fundamental, in the state of freedom established in this country, as are any of the rights which my brethren concede to be so far fundamental as to be deemed the essence of civil freedom. "Personal liberty consists," says Blackstone, "in the power of locomotion, of changing situation or removing one's person to whatever places one's own inclination may direct, without restraint, unless by due course of law." But of what value is this right of locomotion, if it may be clogged by such burdens as Congress intended by the Act of 1875 to remove? They are burdens which lie at the very foundation of the institution of slavery as it once existed. They are not to be sustained, except upon the assumption that there is, in this land of universal liberty, a class which may still be discriminated against, even in respect of [40] rights of a character so necessary and supreme, that, deprived of their enjoyment in common with others, a freeman is not only branded as one inferior and infected, but, in the competitions of life, is robbed of some of the most essential means of existence; and all this solely because they belong to a particular race which the nation has liberated. The 13th Amendment alone obliterated the race line, so far as all rights fundamental in a state of freedom are concerned.

Second, as to inns. The same general observations which have been made as to railroads are applicable to inns. The word "inn" has a technical legal signification. It means, in the Act of 1875, just what it meant at common law. A mere private boarding-house is not an inn, nor is its keeper subject to the responsibilities, or entitled to the privileges of a common innkeeper. "To constitute one an innkeeper, within the legal force of that term, he must keep a house of entertainment or lodging for all travelers or wayfarers who might choose to accept the same, being of good character or conduct." Redfield, Carriers, etc., section 575. Says *Judge* Story:

"An innkeeper may be defined to be the keeper of a common inn for the lodging and entertainment of travelers and passengers, their horses and attendants. An innkeeper is bound to take in all travelers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation; and he must guard their goods with proper diligence. * * * If an innkeeper improperly refuses to receive or provide for a guest, he is liable to be indicted therefor. * * * They (carriers of passengers) are no more at liberty to refuse a passenger, if they have sufficient room and accommodations, than an innkeeper is to refuse suitable room and accommodations to a guest." Story, Bailments, sections 475-6.

In *Rex* v. *Ivens*, 7 Carrington & Payne, 213, 32 E. C. L., 495, the court speaking by *Mr. Justice* Coleridge, said:

"An indictment lies against an innkeeper who refuses to receive a guest, he having at the time room in his house; and either the price of the guest's entertainment being tendered to him, or such circumstances occurring as will dispense with that tender. This law is founded in good [41] sense. The innkeeper is not to select his guests. He has no right to say to one, you shall come to my inn; and to another, you shall not; as everyone coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants, they having in return a kind of privilege of entertaining travelers and supplying them with what they want."

These authorities are sufficient to show that a keeper of an inn is in the exercise of a *quasi* public employment. The law gives him special privileges and he is charged with certain duties and responsibilities to the public. The public nature of his employment forbids him from discriminating against any person asking admission as a guest on account of the race or color of that person.

Third. As to places of public amusement. It may be argued that the managers of such places have no duties to perform with which the public are, in any legal sense, concerned, or with which the public have any right to interfere; and that the exclusion of a black man from a place of public amusement, on account of his race; or the denial to him, on that ground, of equal accommodations at such places, violates no legal right for the vindication of which he may invoke the aid of the courts. My answer is, that places of public amusement, within the meaning of the Act of 1875, are such as are established and maintained under direct license of the law. The authority to establish and maintain them comes from the public. The colored race is a part of that public. The local government granting the license represents them as well as all other races within its jurisdiction. A license from the public, to establish a place of public amusement, imports, in law, equality of right, at such places, among all the members of that public. This must be so, unless it be—which I deny—that the common municipal government of all the people may, in the exertion of its powers, conferred for the benefit of all, discriminate or authorize discrimination against a particular race, solely because of its former condition of servitude.

I also submit, whether it can be said—in view of the doctrines of this court as announced in

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Munn v. *Illinois*, 94 U. S., 113 [XXIII., 77], and [42] re-affirmed in *Peik* v. *C. & N. W. R. Co.*, 94 U. S., 164 [XXIII., 97]—that the management of places of public amusement is a purely private matter, with which government has no rightful concern? In the *Munn Case* the question was whether the State of Illinois could fix, by law, the maximum of charges for the storage of grain in certain warehouses in that State, *the private property of individual citizens*. After quoting a remark attributed to *Lord Chief Justice* Hale, to the effect that when private property is "affected with a public interest it ceases to be *juris privati* only," the court says:

"Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control."

The doctrines of *Munn* v. *Illinois* have never been modified by this court, and I am justified, upon the authority of that case, in saying that places of public amusement, conducted under the authority of the law, are clothed with a public interest, because used in a manner to make them of public consequence and to affect the community at large. The law may, therefore, regulate, to some extent, the mode in which they shall be conducted and, consequently, the public have rights in respect of such places, which may be vindicated by the law. It is, consequently, not a matter purely of private concern.

Congress has not, in these matters, entered the domain of state control and supervision. It does not, as I have said, assume to prescribe the general conditions and limitations under which inns, public conveyances and places of public amusement, shall be conducted or managed. It simply declares, in effect, that since the Nation has established universal freedom in this country, for all time, there shall be no discrimination, based merely upon race or color, in respect of the accommodations and advantages of pub- [43] lic conveyances, inns and places of public amusement.

I am of the opinion that such discrimination practiced by corporations and individuals in the exercise of their public or *quasi* public functions is a badge of servitude, the imposition of which Congress may prevent under its power, by appropriate legislation, to enforce the 13th Amendment; and, consequently, without reference to its enlarged power under the 14th Amendment, the Act of March 1, 1875, is not, in my judgment, repugnant to the Constitution.

It remains now to consider these cases with reference to the power Congress has possessed since the adoption of the 14th Amendment. Much that has been said as to the power of Congress under the 13th Amendment is applicable to this branch of the discussion, and will not be repeated.

Before the adoption of the recent Amendments, it had become, as we have seen, the established doctrine of this court that negroes, whose ancestors had been imported and sold as slaves, could not become citizens of a State, or even of the United States, with the rights and privileges guarantied to citizens by the National Constitution; further, that one might have all the rights and privileges of a citizen of a State without being a citizen in the sense in which that word was used in the National Constitution, and without being entitled to the privileges and immunities of citizens of the several States. Still further, between the adoption of the 13th Amendment and the proposal by Congress of the 14th Amendment, on June 16, 1866, the statute-books of several of the States, as we have seen, had become loaded down with enactments which, under the guise of Apprentice, Vagrant and Contract Regulations, sought to keep the colored race in a condition, practically, of servitude. It was openly announced that whatever might be the rights which persons of that race had, as freemen, under the guaranties of the National Constitution, they could not become citizens of a State, with the privileges belonging to citizens, except by the consent of such State; consequently, that their civil rights, as citizens of the State, depended entirely upon state legislation. To meet this new peril to the black race, that the purposes of the Nation might not [44] be doubted or defeated, and by way of further enlargement of the power of Congress, the 14th Amendment was proposed for adoption.

Remembering that this court, in the *Slaughter-House Cases*, declared that the one pervading purpose found in all the recent Amendments, lying at the foundation of each, and without which none of them would have been suggested, was "The freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him"—that each Amendment was addressed primarily to the grievances of that race—let us proceed to consider the language of the 14th Amendment.

Its 1st and 5th sections are in these words:

"Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * * *

Sec. 5. That Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

It was adjudged in *Strauder* v. *West Virginia*, 100 U. S., 303 [XXV., 664] and *Ex parte Virginia*, 100 U. S., 339 [676], and my brethren concede, that positive rights and privileges were intended to be secured, and are in fact secured, by the 14th Amendment.

But when, under what circumstances and to what extent, may Congress, by means of legislation, exert its power to enforce the provisions of this Amendment? The theory of the opinion of the majority of the court—the foundation upon which their reasoning seems to rest—is, that the General Government cannot, in advance

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of hostile state laws or hostile state proceedings, [45] actively interfere for the protection of any of the rights, privileges and immunities secured by the 14th Amendment. It is said that such rights, privileges and immunities are secured by way of *prohibition* against state laws and state proceedings affecting such rights and privileges, and by power given to Congress to legislate for the purpose of carrying *such prohibition* into effect; also, that congressional legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect.

In illustration of its position, the court refers to the clause of the Constitution forbidding the passage by a State of any law impairing the obligation of contracts. That clause does not, I submit, furnish a proper illustration of the scope and effect of the 5th section of the 14th Amendment. No express power is given Congress to enforce, by primary direct legislation, the prohibition upon state laws impairing the obligation of contracts. Authority is, indeed, conferred to enact all necessary and proper laws for carrying into execution the enumerated powers of Congress and all other powers vested by the Constitution in the Government of the United States or in any department or officer thereof. And, as heretofore shown, there is also, by necessary implication, power in Congress, by legislation, to protect a right derived from the National Constitution. But a prohibition upon a State is not a *power* in *Congress* or *in the National Government*. It is simply a *denial* of *power* to the *State*. And the only mode in which the inhibition upon state laws impairing the obligation of contracts can be enforced, is, indirectly, through the courts, in suits where the parties raise some question as to the constitutional validity of such laws. The judicial power of the United States extends to such suits for the reason that they are suits arising under the Constitution. The 14th Amendment presents the first instance in our history of the investiture of Congress with affirmative power, by *legislation*, to *enforce* an express prohibition upon the States. It is not said that the *judicial* power of the Nation may be exerted for the enforcement of that Amendment. No enlargement of the judicial power was required, for it [46] is clear that had the 5th section of the 14th Amendment been entirely omitted the judiciary could have stricken down all state laws and nullified all state proceedings in hostility to rights and privileges secured or recognized by that Amendment. The power given, is in terms, by congressional *legislation*, to enforce the provisions of the Amendment.

The assumption that this Amendment consists wholly of prohibitions upon state laws and state proceedings in hostility to its provisions, is unauthorized by its language. The first clause of the 1st section—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside"—is of a distinctly affirmative character. In its application to the colored race, previously liberated, it created and granted, as well citizenship of the United States, as citizenship of the State in which they respectively resided. It introduced all of that race, whose ancestors had been imported and sold as slaves, at once, into the political community known as the "People of the United States." They became, instantly, citizens of the United States, *and* of their respective States. Further, they were brought, by this supreme act of the Nation, within the direct operation of that provision of the Constitution which declares that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Art. 4, sec. 2.

The citizenship thus acquired, by that race, in virtue of an affirmative grant from the Nation, may be protected, not alone by the judicial branch of the government, but by congressional legislation of a primary direct character; this, because the power of Congress is not restricted to the enforcement of prohibitions upon state laws or state action. It is, in terms distinct and positive, to enforce "the *provisions* of *this article*" of Amendment; not simply those of a prohibitive character, but the provisions—*all* of the provisions—affirmative and prohibitive, of the Amendment. It is, therefore, a grave misconception to suppose that the 5th section of the Amendment has reference exclusively to express prohibitions upon state laws or state action. If any right was created by that Amendment, the grant of power, through appropriate legisla- [47] tion, to enforce its provisions, authorizes Congress, by means of legislation, operating throughout the entire Union, to guard, secure and protect that right.

It is, therefore, an essential inquiry what, if any, right, privilege or immunity was given, by the Nation, to colored persons, when they were made citizens of the State in which they reside? Did the constitutional grant of state citizenship to that race, of its own force, invest them with any rights, privileges and immunities whatever? That they became entitled, upon the adoption of the 14th Amendment, "to all privileges and immunities of citizens in the several States," within the meaning of section 2 of article 4 of the Constitution, no one, I suppose, will for a moment question. What are the privileges and immunities to which, by that clause of the Constitution they became entitled? To this it may be answered, generally, upon the authority of the adjudged cases, that they are those which are fundamental in citizenship in a free republican government, such as are "common to the citizens in the latter States under their constitutions and laws by virtue of their being citizens." Of that provison it has been said, with the approval of this court, that no other one in the Constitution has tended so strongly to constitute the citizens of the United States one people. *Ward v. Maryland*, 12 Wall., 418; *Corfield* v. *Coryell*, 4 Wash. C. C., 371; *Paul* v. *Va.*, 8 Wall., 168; *Slaughter-House Cases*, 16 Id., 36.

Although this court has wisely forborne any attempt, by a comprehensive definition, to indicate all of the privileges and immunities to which the citizen of a State is entitled, of right, when within the jurisdiction of other States, I hazard nothing, in view of former adjudications, in saying that no State can sustain her denial to colored citizens of other States, while within her limits, of privileges or immunities, fundamental in republican citizenship, upon the ground that she accords such privileges and immunities only to her white citizens and withholds them from her colored citizens. The col-

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ored citizens of other States, within the jurisdiction of that State, could claim, in virtue of section 2 of article 4 of the Constitution, every [48] privilege and immunity which that State secures to her white citizens. Otherwise, it would be in the power of any State, by discriminating class legislation against its own citizens of a particular race or color, to withhold from citizens of other States, belonging to that proscribed race when within her limits, privileges and immunities of the character regarded by all courts as fundamental in citizenship; and that, too, when the constitutional guaranty is that the citizens of each State shall be entitled to "all privileges and immunities of citizens of the several States." No State may, by discrimination against a portion of its own citizens of a particular race, in respect of privileges and immunities fundamental in citizenship, impair the constitutional right of citizens of other States, of whatever race, to enjoy in that State all such privileges and immunities as are there accorded to her most favored citizens. A colored citizen of Ohio or Indiana, while in the jurisdiction of Tennessee, is entitled to enjoy any privilege or immunity, fundamental in citizenship, which is given to citizens of the white race in the latter State. It is not to be supposed that anyone will controvert this proposition.

But what was secured to colored citizens of the United States—as between them and their respective States—by the national grant to them of state citizenship? With what rights, privileges or immunities did this grant invest them? There is one, if there be no other: exemption from race discrimination in respect of any civil right belonging to citizens of the white race in the same State. That, surely, is their constitutional privilege when within the jurisdiction of other States. And such must be their constitutional right, in their own State, unless the recent Amendments be splendid baubles, thrown out to delude those who deserved fair and generous treatment at the hands of the Nation. Citizenship in this country necessarily imports at least equality of civil rights among citizens of every race in the same State. It is fundamental in American citizenship that, in respect of such rights, there shall be no discrimination by the State or its officers, or by individuals or corporations exercising public functions or authority, against any citizen because of his raceor previous condition of servitude. In *U. S.* v. *Cruikshank*, 92 U. S., 542 [XXIII., 588], it was said [49] at page 555, that the rights of life and personal liberty are natural rights of man, and that "The equality of the rights of citizens is a principle of republicanism." And in *Ex parte Virginia*, 100 U. S., 339 [XXV., 676], the emphatic language of this court is that "One great purpose of these Amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States." So, in *Strauder* v. *West Virginia*, 100 U. S., 306 [*supra*], the court, alluding to the 14th Amendment, said: "This is one of a series of constitutional provisions having a common purpose, namely: securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy." Again, in *Neal* v. *Delaware*, 103 U. S., 386, it was ruled that this Amendment was designed, primarily, "To secure to the colored race, thereby invested with the rights, privileges and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white persons."

The language of this court with reference to the 15th Amendment, adds to the force of this view. In *United States* v. *Cruikshank*, it was said: "In *United States* v. *Reese*, 92 U. S., 214, we held that the 15th Amendment has invested the citizens of the United States with a new constitutional right, which is exemption from discrimination in the exercise of the elective franchise, on account of race, color or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship, but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been."

Here, in language at once clear and forcible, is stated the principle for which I contend. It can scarcely be claimed that exemption from race discrimination, in respect of civil rights, against those to whom state citizenship was granted by the Nation, is any less, for the colored race, a new [50] constitutional right, derived from and secured by the National Constitution, than is exemption from such discrimination in the exercise of the elective franchise. It cannot be that the latter is an attribute of national citizenship, while the other is not essential in national citizenship, or fundamental in state citizenship.

If, then, exemption from discrimination, in respect of civil rights, is a new constitutional right, secured by the grant of state citizenship to colored citizens of the United States—and I do not see how this can now be questioned—why may not the Nation, by means of its own legislation of a primary direct character, guard, protect and enforce that right? It is a right and privilege which the nation conferred. It did not come from the States in which those colored citizens reside. It has been the established doctrine of this court during all its history, accepted as essential to the national supremacy, that Congress, in the absence of a positive delegation of power to the State Legislatures, may, by its own legislation, enforce and protect any right derived from or created by the National Constitution. It was so declared in *Prigg* v. *Commonwealth of Pennsylvania*. It was reiterated in *United States* v. *Reese*, 92 U. S., 214, where the court said that "Rights and immunities created by and dependent upon the Constitution of the United States can be protected by Congress. The form and manner of the protection may be such as Congress, in the legitimate exercise of its discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected." It was distinctly re-affirmed in *Strauder* v. *West Virginia*, 100 U. S., 310 [*supra*], where we said that "A right or immunity created by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress." How then can it be claimed in view of the declarations of this court in former cases, that exemp-

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tion of colored citizens, within their States, from race discrimination, in respect of the civil rights of citizens, is not an immunity created or derived from the National Constitution?

This court has always given a broad and liberal construction to the Constitution, so as to enable Congress, by legislation, to enforce rights [51] secured by that instrument. The legislation which Congress may enact, in execution of its power to enforce the provisions of this Amendment, is such as may be appropriate to protect the right granted. The word "appropriate" was undoubtedly used with reference to its meaning, as established by repeated decisions of this court. Under given circumstances, that which the court characterizes as corrective legislation might be deemed by Congress appropriate and entirely sufficient. Under other circumstances primary direct legislation may be required. But it is for Congress, not the judiciary, to say that legislation is appropriate; that is, best adapted to the end to be attained. The judiciary may not, with safety to our institutions, enter the domain of legislative discretion, and dictate the means which Congress shall employ in the exercise of its granted powers. That would be sheer usurpation of the functions of a co-ordinate department, which, if often repeated, and permanently acquiesced in, would work a radical change in our system of government. In *United States* v. *Fisher*, 2 Cranch, 358, the court said that "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution." "The sound construction of the Constitution," said *Chief Justice* Marshall, "must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *McCulloch* v. *Maryland*, 4 Wh., 421.

Must these rules of construction be now abandoned? Are the powers of the National Legislature to be restrained in proportion as the rights and privileges, derived from the Nation, are valuable? Are constitutional provisions, enacted to secure the dearest rights of freemen and citizens, to be subjected to that rule of construction, applicable to private instruments, which [52] requires that the words to be interpreted must be taken most strongly against those who employ them? Or, shall it be remembered that "A constitution of government, founded by the people for themselves and their posterity, and for objects of the most momentous nature—for perpetual union, for the establishment of justice, for the general welfare, and for a perpetuation of the blessings of liberty—necessarily requires that every interpretation of its powers should have a constant reference to these objects? No interpretation of the words in which those powers are granted can be a sound one, which narrows down their ordinary import so as to defeat those objects." 1 Story, Const., sec. 422.

The opinion of the court, as I have said, proceeds upon the ground that the power of Congress to legislate for the protection of the rights and privileges secured by the 14th Amendment cannot be brought into activity except with the view, and as it may become necessary, to correct and annul state laws and state proceedings in hostility to such rights and privileges. In the absence of state laws or state action adverse to such rights and privileges, the Nation may not actively interfere for their protection and security, even against corporations and individuals exercising public or *quasi* public functions. Such I understand to be the position of my brethren. If the grant to colored citizens of the United States of citizenship in their respective States, imports exemption from race discrimination, in their States, in respect of such civil rights as belong to citizenship, then, to hold that the Amendment remits that right to the States for their protection, primarily, and stays the hands of the Nation, until it is assailed by state laws or state proceedings, is to adjudge that the Amendment, so far from enlarging the powers of Congress—as we have heretofore said it did—not only curtails them, but reverses the policy which the General Government has pursued from its very organization. Such an interpretation of the Amendment is a denial to Congress of the power, by appropriate legislation, to enforce one of its provisions. In view of the circumstances under which the recent Amendments were incorporated into the Constitution, and especially in view of the peculiar character of the new rights they created and secured, it [53] ought not to be presumed that the General Government has abdicated its authority, by national legislation, direct and primary in its character to guard and protect privileges and immunities secured by that instrument. Such an interpretation of the Constitution ought not to be accepted if it be possible to avoid it. Its acceptance would lead to this anomalous result: that whereas, prior to the Amendments, Congress, with the sanction of this court, passed the most stringent laws—operating directly and primarily upon States and their officers and agents, as well as upon individuals—in vindication of slavery and the right of the master, it may not now, by legislation of a like primary and direct character, guard, protect and secure the freedom established, and the most essential right of the citizenship granted, by the constitutional amendments. With all respect for the opinion of others, I insist that the National Legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the masters of fugitive slaves. If fugitive slave laws, providing modes and prescribing penalties, whereby the master could seize and recover his fugitive slave, were legitimate exercises of an implied power to protect and enforce a right recognized by the Constitution, why shall the hands of Congress be tied, so that—under an express power, by appropriate legislation, to enforce a constitutional provision granting citizenship—it may not, by means of direct legislation, bring the whole power of this Nation to bear upon States and their officers, and upon such individuals and corporations exercising public

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functions as assume to abridge, impair, or deny rights confessedly secured by the supreme law of the land?

It does not seem to me that the fact that, by the 2d clause of the 1st section of the 14th Amendment, the States are expressly prohibited from making or enforcing laws abridging the privileges and immunities of citizens of the United States, furnishes any sufficient reason for holding or maintaining that the Amendment was intended to deny Congress the power, by general, primary and direct legislation, of protecting citizens of the several States, being also [54] citizens of the United States, against all discrimination, in respect of their rights as citizens, which is founded on race, color or previous condition of servitude.

Such an interpretation of the Amendment is plainly repugnant to its 5th section, conferring upon Congress power, by appropriate legislation, to enforce not merely the provisions containing prohibitions upon the States, but all of the provisions of the Amendment, including the provisions, express and implied, in the 1st clause of the 1st section of the article granting citizenship. This alone is sufficient for holding that Congress is not restricted to the enactment of laws adapted to counteract and redress the operation of state legislation, or the action of state officers, of the character prohibited by the Amendment. It was perfectly well known that the great danger to the equal enjoyment by citizens of their rights, as citizens, was to be apprehended not altogether from unfriendly state legislation, but from the hostile action of corporations and individuals in the States. And it is to be presumed that it was intended, by that section, to clothe Congress with power and authority to meet that danger. If the rights intended to be secured by the Act of 1875 are such as belong to the citizen, in common or equally with other citizens in the same State, then it is not to be denied that such legislation is peculiarly appropriate to the end which Congress is authorized to accomplish, *viz.:* to protect the citizen, in respect of such rights, against discrimination on account of his race. Recurring to the specific prohibition in the 14th Amendment upon the making or enforcing of state laws abridging the privileges of citizens of the United States, I remark that if, as held in the *Slaughter-House Cases*, the privileges here referred to were those which belonged to citizenship of the United States, as distinguished from those belonging to state citizenship, it was impossible for any State, prior to the adoption of that Amendment, to have enforced laws of that character. The judiciary could have annulled all such legislation under the provision that the Constitution shall be the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding. The States were already un- [55] der an implied prohibition not to abridge any privilege or immunity belonging to citizens of the United States as such. Consequently, the prohibition upon state laws in hostility to rights belonging to citizens of the United States, was intended—in view of the introduction into the body of citizens of a race formerly denied the essential rights of citizenship—only as an express limitation on the powers of the States, and was not intended to diminish, in the slightest degree, the authority which the Nation has always exercised, of protecting, by means of its own direct legislation, rights created or secured by the Constitution. Any purpose to diminish the national authority in respect of privileges derived from the Nation is distinctly negatived by the express grant of power, by legislation, to enforce every provision of the Amendment, including that which, by the grant of citizenship in the State, secures exemption from race discrimination in respect of the civil rights of citizens.

It is said that any interpretation of the 14th Amendment different from that adopted by the majority of the court, would imply that Congress had authority to enact a municipal code for all the States, covering every matter affectiong the life, liberty and property of the citizens of the several States. Not so. Prior to the adoption of that Amendment the Constitutions of the several States, without perhaps an exception, secured all *persons* against deprivation of life, liberty or property, otherwise than by due process of law and, in some form, recognized the right of all *persons* to the equal protection of the laws. Those rights, therefore, existed before that Amendment was proposed or adopted, and were not created by it. If, by reason of that fact, it be assumed that protection in these rights of persons still rests primarily with the States, and that Congress may not interfere except to enforce, by means of corrective legislation, the prohibitions upon state laws or state proceedings inconsistent with those rights, it does not at all follow, that privileges which have been *granted by the Nation*, may not be protected by primary legislation upon the part of Congress. The personal rights and immunities recognized in the prohibitive clauses of the Amendment, were, prior to its adoption, under the protection, primarily, [56] of the States; while rights, created by or derived, from the United States, have always been and, in the nature of things, should always be, primarily, under the protection of the General Government. Exemption from race discrimination in respect of the civil rights which are fundamental in *citizenship* in a republican government, is, as we have seen, a new right, created by the Nation, with express power in Congress, by legislation, to enforce the constitutional provision from which it is derived. If, in some sense, such race discrimination is, within the letter of the last clause of the 1st section, a denial of that equal protection of the laws which is secured against state denial to all persons, whether citizens or not, it cannot be possible that a mere prohibition upon such state denial, or a prohibition upon state laws abridging the privileges and immunities of citizens of the United States, takes from the Nation the power which it has uniformly exercised of protecting, by direct primary legislation, those privileges and immunities which existed under the Constitution before the adoption of the 14th Amendment, or have been created by that Amendment in behalf of those thereby made *citizens* of their respective States.

This construction does not in any degree intrench upon the just rights of the States in the control of their domestic affairs. It simply recognizes the enlarged powers conferred by the recent Amendments upon the General Government. In the view which I take of those Amendments,

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the States possess the same authority which they have always had to define and regulate the civil rights which their own people, in virtue of state citizenship, may enjoy within their respective limits; except that its exercise is now subject to the expressly granted power of Congress, by legislation, to enforce the provisions of such Amendments—a power which necessarily carries with it authority, by national legislation, to protect and secure the privileges and immunities which are created by or are derived from those Amendments. That exemption of citizens from discrimination based on race or color, in respect of civil rights, is one of those privileges or immunities, can no longer be deemed an open question in this court.

[57] It was said of the case of *Dred Scott* v. *Sandford*, that this court, there overruled the action of two generations; virtually inserted a new clause in the Constitution; changed its character, and made a new departure in the workings of the Federal Government. I may be permitted to say that if the recent Amendments are so construed that Congress may not, in its own discretion, and independently of the action or non-action of the States, provide by legislation of a direct character, for the security of rights created by the National Constitution; if it be adjudged that the obligation to protect the fundamental privileges and immunities granted by the 14th Amendment to citizens residing in the several States, rests primarily, not on the Nation, but on the States; if it be further adjudged that individuals and corporations, exercising public functions, or wielding power under public authority, may, without liability to direct primary legislation on the part of Congress, make the race of citizens the ground for denying them that equality of civil rights which the Constitution ordains as a principle of republican citizenship; then, not only the foundations upon which the national supremacy has always securely rested will be materially disturbed, but we shall enter upon an era of constitutional law, when the rights of freedom and American citizenship cannot receive from the Nation that efficient protection which heretofore was unhesitatingly accorded to slavery and the rights of the master.

But if it were conceded that the power of Congress could not be brought into activity until the rights specified in the Act of 1875 had been abridged or denied by some state law or state action, I maintain that the decision of the court is erroneous. There has been adverse state action within the 14th Amendment as heretofore interpreted by this court. I allude to *Ex parte Virginia, supra*. It appears, in that case, that one Cole, Judge of a county court, was charged with the duty, by the laws of Virginia, of selecting grand and petit jurors. The law of the State did not authorize or permit him, in making such selections, to discriminate against colored citizens because of their race. But he was indicted in the Federal Court, under the Act of 1875, for making such dis-
[58] criminations. The Attorney-General of Virginia contended before us, that the State had done its duty, and had not authorized or directed that county Judge to do what he was charged with having done; that the State had not denied to the colored race the equal protection of the laws; and that, consequently, the act of Cole must be deemed his individual act, in contravention of the will of the State. Plausible as this argument was, it failed to convince this court, and after saying that the 14th Amendment had reference to the political body denominated a State, "by whatever instruments or in whatever modes that action may be taken," and that a State acts by its legislative, executive and judicial authorities, and can act in no other way, we proceeded:

"The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State Government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and, as he acts under the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or evade it. But the constitutional Amendment was ordained for a purpose. It was to secure equal rights to all persons, and to insure to all persons the enjoyment of such rights, power was given to Congress to enforce its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State, in the denial of the rights which were intended to be secured." *Ex parte Virginia*, 100 U. S., 346-7 [*supra*].

In every material sense applicable to the practical enforcement of the 14th Amendment, railroad corporations, keepers of inns and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and func- [59]
tions, to governmental regulation. It seems to me that, within the principle settled in *Ex parte Virginia*, a denial, by these instrumentalities of the State, to the citizen, because of his race, of that equality of civil rights secured to him by law, is a denial by the State, within the meaning of the 14th Amendment. If it be not, then that race is left, in respect of the civil rights in question, practically at the mercy of corporations and individuals wielding power under the States.

But the court says that Congress did not, in the Act of 1866, assume, under the authority given by the 13th Amendment, to adjust what may be called the social rights of men and races in the community. I agree that government has nothing to do with social, as distinguished from technically legal, rights of individuals. No government ever has brought or ever can bring its people into social intercourse against their wishes. Whether one person will permit or maintain social relations with another is a matter with which government has no concern. I agree that if one citizen chooses not to hold social intercourse with another, he is not and cannot be made amenable to the law for his conduct in that regard; for even upon grounds of race, no legal right of a citizen is violated by the refusal of others to maintain merely social

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relations with him. What I affirm is that no State, nor the officers of any State, nor any corporation or individual wielding power under state authority for the public benefit or the public convenience, can, consistently either with the freedom established by the fundamental law, or with that equality of civil rights which now belongs to every citizen, discriminate against freemen or citizens, in those rights, because of their race, or because they once labored under the disabilities of slavery imposed upon them as a race. The rights which Congress, by the Act of 1875, endeavored to secure and protect, are legal, not social rights. The right, for instance, of a colored citizen to use the accommodations of a public highway, upon the same terms as are permitted to white citizens, is no more a social right than his right, under the law, to use the public streets of a city or a town, or a turnpike road, or a public market, or a postoffice, [60] or his right to sit in a public building with others, of whatever race, for the purpose of hearing the political questions of the day discussed. Scarcely a day passes without our seeing in this court room citizens of the white and black races sitting side by side, watching the progress of our business. It would never occur to anyone that the presence of a colored citizen in a courthouse, or court room, was an invasion of the social rights of white persons who may frequent such places. And yet, such a suggestion would be quite as sound in law—I say it with all respect—as is the suggestion that the claim of a colored citizen to use, upon the same terms as is permitted to white citizens, the accommodations of public highways, or public inns, or places of public amusement, established under the license of the law, is an invasion of the social rights of the white race.

The court, in its opinion, reserves the question whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another. I beg to suggest that that precise question was substantially presented here in the only one of these cases relating to railroads—*Robinson and Wife* v. *Memphis & Charleston Railroad Company*. In that case it appears that Mrs. Robinson, a citizen of Mississippi, purchased a railroad ticket entitling her to be carried from Grand Junction, Tennessee, to Lynchburg, Virginia. Might not the Act of 1875 be maintained in that case, as applicable at least to commerce between the States, notwithstanding it does not, upon its face, profess to have been passed in pursuance of the power of Congress to regulate commerce? Has it ever been held that the judiciary should overturn a statute, because the legislative department did not accurately recite therein the particular provision of the Constitution authorizing its enactment? We have often enforced municipal bonds in aid of railroad subscriptions, where they failed to recite the statute authorizing their issue, but recited one which did not sustain their validity. The inquiry in such cases has been: was there, in any statute, authority for the execution of the bonds? Upon this branch of the case, it may be remarked that the State of Louisiana, in 1869, passed a statute giving to pas- [61] sengers, without regard to race or color, equality of right in the accommodations of railroad and street cars, steamboats or other water crafts, stage-coaches, omnibuses or other vehicles. But in *Hall* v. *De Cuir*, 95 U. S., 487, that Act was pronounced unconstitutional so far as it related to commerce between the States, this court saying that "If the public good requires such legislation it must come from Congress, and not from the States." I suggest, that it may become a pertinent inquiry whether Congress may, in the exertion of its power to regulate commerce among the States, enforce among passengers on public conveyances, equality of right, without regard to race, color or previous condition of servitude, if it be true—which I do not admit—that such legislation would be an interference by government with the social rights of the people.

My brethren say, that when a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. The Statute of 1875, now adjudged to be unconstitutional, is for the benefit of citizens of every race and color. What the Nation, through Congress, has sought to accomplish in reference to that race, is—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more. It was not deemed enough "to help the feeble up, but to support him after." The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of the legal right of the black race to take the rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained. At every step, [62] in this direction, the Nation has been confronted with class tyranny, which a contemporary English historian says is, of all tyrannies, the most intolerable, "For it is ubiquitous in its operation, and weighs, perhaps, most heavily on those whose obscurity or distance would withdraw them from the notice of a single despot." To-day, it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time, it may be that some other race will fall under the ban of race discrimination. If the constitutional Amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be in this Republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect of civil rights, against freemen and citizens because of their race, color or previous condition of servitude. To that decree—for the due enforcement of which, by appropriate leg-

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islation, Congress has been invested with express power—every one must bow, whatever may have been, or whatever now are, his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to give them effect.

For the reasons stated I feel constrained to withhold my assent to the opinion of the court.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—114 U. S., 322.

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[63] UNITED STATES, *Plff.*,
v.
JAMES HAMILTON.

(See S. C., Reporter's ed., 63.)

Motion to quash indictment.

A motion to quash an indictment is always addressed to the discretion of the court; a decision upon it is not error and cannot be reviewed on a writ of error, nor on a division of opinion between the Judges of a Circuit Court.

[No. 204.]

Submitted Nov. 7, 1882. Decided Oct. 15, 1883.

ON certificate of division in opinion between the Judges of the Circuit Court of the United States for the Middle District of Tennessee.

Mr. **S. F. Phillips,** *Solicitor-General,* for plaintiff.

Mr. **Edward H. East,** for defendant.

Mr. Justice **Bradley** delivered the opinion of the court:

The certificate of division in this case was made on a division in opinion between the Judges on a motion to quash the indictment. As a motion to quash is always addressed to the discretion of the court, a decision upon it is not error and cannot be reviewed on a writ of error. In the case of *U. S.* v. *Rosenburgh*, 7 Wall., 580 [74 U. S., XIX., 263], we decided the precise point that this court cannot take cognizance of a division of opinion between the Judges of a Circuit Court upon a motion to quash an indictment. This decision was reaffirmed in *U. S.* v. *Avery*, 18 Wall., 251 [80 U. S., XX., 610] and in *U. S.* v. *Canda* [XXVI., 1069] decided at the last Term.

The case not being properly before us, is dismissed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Plff.*,
v.
EDWARD T. GALE, ET AL.

(See S. C., Reporter's ed., 65-74).

Revised Statutes—objection waived—disqualification of jurors.

1. Sections 5512 and 5515 of the Revised Statutes of the United States are not repugnant to nor in violation of the Constitution of the United States.

2. By pleading not guilty to an indictment, and going to trial without making any objection to the mode of selecting the grand jury, the objection is waived.

3. All ordinary objections, based upon the disqualification of particular jurors, or upon informalities in summoning or impaneling the jury, where no statute makes proceedings utterly void, should be taken *in limine*, either by challenge, by motion to quash, or by plea in abatement.

[No. 205.]

Argued Nov. 9, 1882. Decided Oct. 15, 1883.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Northern District of Florida.

The history and facts of the case appear in the opinion of the court.

Mr. **S. F. Phillips,** *Solicit r-Gen.*, for plaintiff.

No counsel appeared for defendant.

Mr. Justice **Bradley** delivered the opinion of the court: [66]

The indictment agninst the defendants in this case was for misconduct as election officers at an election held in Florida for a representative to Congress, in stuffing the ballot box with fraudulent tickets, and abstracting tickets which had been voted. In impaneling the grand jury which found the indictment, four persons, otherwise competent, were excluded from the panel for the causes mentioned in section 820 of the Revised Statutes, which grounds are, in substance, voluntarily taking part in the rebellion, and giving aid and comfort thereto. The exclusion of these persons for this cause appears by an amendment of the record, made *nunc pro tunc*, showing what took place; but no objection was taken to the indictment or proceedings on that account until after a plea of not guilty, and a conviction, when the objection was first taken on motion in arrest of judgment. The indictment was founded upon sections 5512 and 5515 of the Revised Statutes, and the constitutionality of those sections was called in question, as well as that of section 820. The Judges having disagreed upon the motion in arrest of judgment, certified up the following questions for the determination of this court, namely:

1. Whether sections 5512 and 5515 of the Revised Statutes of the United States, on which such indictment was founded, are repugnant to and in violation of the Constitution of the United States. 2. Whether section 820 of the Revised Statutes of the United States is repugnant to and in violation of the Constitution of the United States. 3. Whether judgment of this court could be rendered against the defendants on an indictment found by a grand jury impaneled and sworn under the section aforesaid; and 4. Whether the indictment aforesaid charges any offense for which judgment could be rendered against the defendants in this court under the Constitution and laws of the United States.

The question of the validity of sections 5512 and 5515 has already been decided by this court

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NOTE.—*Objections to grand jurors, when and how taken.*

It is no ground for quashing an indictment for burglary in breaking into a bank, that two of the grand jurors by whom it was found were stockholders of the bank. Rolland v. Com., 82 Pa. St., 306; S. C., 22 Am. Rep., 758.

It is not a good plea to an indictment for murder

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in the cases of *Ex parte Siebold* and *Ex parte Clarke*, 100 U. S., 371, 399 [XXV., 715, 717], and was determined in favor of their validity. As to those sections, therefore, the answer must be [67] in the negative, namely: that they are not repugnant to nor in violation of the Constitution of the United States.

The second question, as to the constitutionality of the 820th section of the Revised Statutes, which disqualifies a person as a juror if he voluntarily took any part in the rebellion, is not an essential one in the case; inasmuch as, by pleading not guilty to the indictment and going to trial without making any objection to the mode of selecting the grand jury, such objection was waived. The defendants should either have moved to quash the indictment or have pleaded in abatement, if they had no opportunity, or did not see fit, to challenge the array. This, we think, is the true doctrine in cases where the objection does not go to the subversion of all the proceedings taken in impaneling and swearing the grand jury; but relates only to the qualification or disqualification of certain persons sworn upon the jury or excluded therefrom; or to mere irregularities in constituting the panel. We have no inexorable statute making the whole proceedings void for any such irregularities.

Chitty, in his work on Criminal Law, Vol. 1, p. 307, says: "It is perfectly clear that all persons serving upon the grand jury, must be good and lawful men; by which it is intended, that they must be liege subjects of the King, and neither aliens nor persons outlawed even in a civil action; attainted of any treason or felony; or convicted of any species of *crimen falsi*, as conspiracy or perjury, which may render them infamous. And if a man who lies under any of these disqualifications be returned, he may be challenged by the prisoner before the bill is presented; or, if it be discovered after the finding, the defendant may plead it in avoidance, and answer over to the felony; for which purpose he may be allowed the assistance of counsel on producing in court the record of the outlawry, attainder, or conviction, on which the incompetence of the juryman rests."

This, is, undoubtedly, the general rule as to the manner in which objection may be taken to the *personnel* of the grand jury, though in this country a motion to quash the indictment may be made instead of pleading specially in abatement. The requirement of answering over to [68] the felony in connection with the plea in abatement is for the benefit of the accused, in order that he may not be concluded on the merits if he should fail in sustaining his special plea; a precaution which probably would not be necessary in our practice.

By an English statute passed in the 11th year of Henry IV., it was declared that indictments made by persons not returned by the sheriff, or by persons nominated to him, or who were outlawed or had fled to sanctuary for treason or felony, should be void, revoked and annulled. On this statute it was held that if any such persons were on a grand jury which found an indictment, it made the whole void, and if the matter appeared on the record, or in the proceedings of the same court, advantage might be taken of it on motion in arrest of judgment, or even on the suggestion of an *amicus curiæ;* but if it did not appear on the record of the cause, or in the records of the same court, the better opinion was that it could only be pleaded in abatement, or raised by motion to quash. Hawkins says: "If a person who is tried upon such an indictment take no exception before his trial, it may be doubtful whether he may be allowed to take exception afterward, because he hath slipped the most proper time for it; except it be verified by the records of the same court wherein the indictment is depending, as by an outlawry in the same court of one of the indictors, etc." Hawk., b. 2, ch. 25, sec. 27. In Bacon's Abridgement (Juries, A) it is said that the court need not admit the plea of outlawry of an indictor, unless he who pleads it have the record ready, or it be an outlawry of the same court; and it is added, as the better opinion, that no exception against an indictor is allowable, unless the party takes it before trial. Chitty lays down the same rule. 1 Crim. L., 307-8. *Lord Chief Justice* Hale, speaking of what the caption ought to contain, among other things, says: "It must name the jurors that presented the offense and, therefore, a return of an indictment or presentment *per sacramentum*, A. B. C. D., *et aliorum*, is not good, for it may be the presentment was by a [69] less number than twelve, in which case it is not good. H. 41 Eliz. B. R. Croke, *n.* 16, *Clyncard's Case*, p. 654; and it seems to me that all the names of the jurors ought to be returned; for the party indicted may have an exception to some or one of them, as that he is outlawed, in which case the indictment may be quashed by plea, though there be twelve besides without exception; for possibly that one, who is not *le-*

that a member of the grand jury which found it, was a nephew of the murdered man. State v. Easter, 30 Ohio St., 542; S. C., 27 Am. Rep., 478.

Objection, that a grand juror has expressed an opinion as to guilt of a party whose case will be presented, must be made before the juror is impaneled and sworn. Such objection is ground of challenge and not for plea in abatement. Whart. Cr. L., sec. 469; People v. Jewett, 3 Wend., 314; U. S. v. White, 9 U. S. (5 Cranch), 457; State v. Rickey, 5 Halst., 83; Musick v. People, 40 Ill., 268; State v. Hamlin, 47 Conn., 95; S. C., 36 Am. Rep., 54.

That a grand juror is a neighbor of the accused and originated the complaint against him is not a valid objection. Tucker's Case, 8 Mass., 286.

A cause for exemption from jury duty is ground for excuse, and does not disqualify a grand juror. State v. Foeshner, 43 N. H., 89; State v. Quimby, 51 Me., 395.

It is a good plea in abatement that one of the grand jury who found the indictment was not qualified to act. State v. Rockafellow, 1 Halst., 332; State v. Davis, 12 R. I., 492; S. C., 34 Am. Rep., 704; 2 Hale P. C., 155; Reich v. State, 53 Ga., 73; S. C., 21 Am. Rep., 265.

It is good plea in bar that one of the grand jury was not an elector as required by statute. Doyle v. State, 17 Ohio, 222.

In Indiana a person under prosecution for crime and in custody or on bail may challenge for good cause any person returned or placed on the grand jury. Hudson v. State, 1 Blackf., 317; Jones v. State, 2 Blackf., 475; State v. Herndon, 5 Blackf., 75; Hardin v. State, 22 Ind., 347; Mershom v. State, 51 Ind., 14.

Objections to members of a grand jury, or to the array, cannot be raised by plea in abatement, but must be raised by challenge before indictment or motion to quash. Gibbs v. State, 16 Vroom, 379; S. C., 46 Am. Rep., 782.

The right to challenge grand jurors and the causes of challenge are regulated by statute in New York. Code of Criminal Procedure, secs. 237-243.

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galis homo, may influence all the rest, and so vitiate the whole indictment."

All these authorites tend to the same point, namely: that the proper mode of taking objection to the *personnel* of the grand jury, even under the statute referred to, when the matter does not appear of record, is by plea in abatement.

If under the operation of so stringent a statute as that of 11 Hen. IV., the general rule was, that the objection to the constitution of the grand jury must be taken before trial, and could only be taken afterwards when it appeared on the record, much more would it seem to be requisite that all ordinary objections based upon the disqualification of particular jurors, or upon informalities in summoning or impaneling the jury, where no statute makes the proceedings utterly void, should be taken *in limine*, either by challenge, by motion to quash, or by plea in abatement. Neglecting to do this, the defendant should be deemed to have waived the irregularity. It would be trifling with justice, and would render criminal proceedings a farce, if such objections could be taken after verdict, even though the irregularity should appear in the record of the proceedings. In most cases it could not appear in a record properly made up; but, if appearing at all, it would require, as in the present case, a special certificate of the court, analogous to a bill of exceptions, or a case stated, not constituting a part of the true record. But even if it should appear upon the record as a proper part thereof, the fact of pleading to the merits and going to trial without taking the objection would also appear, and would amount in law to a waiver of the irregularity. If it could be taken advantage of on a motion in arrest of judgment, it would be a good ground of reversal on error, [70] and all the proceedings of a long term might be rendered nugatory by admitting a person to the grand jury, or excluding a person from it, without the matter being called to the attention of the court; whereas, if the objection were taken *in limine*, the irregularity might be corrected by reforming the panel or summoning a new jury.

These remarks apply with additional force where the objection is not to the disqualification of jurors who are actually sworn upon the panel, but to the exclusion or excuse of persons from serving on the panel. A disqualified juror placed upon the panel may be supposed injuriously to affect the whole panel; but if the individuals forming it are unobjectionable, and have all the necessary qualifications, it is of less moment to the accused what persons may have been set aside or excused. The present case is of the latter kind. No complaint is made that any of the grand jurors who found the indictment were disqualified to serve, or were in any respect improper persons. It is only complained that the court excluded some persons for an improper cause, that is, because they labored under the disqualification created by the 820th section of the Revised Statutes, which is alleged to be unconstitutional. It is not complained that the jury actually impaneled was not a good one; but that other persons equally good had a right to be placed on it. These persons do not complain. If their right to serve on the grand jury was improperly infringed, perhaps they might complain of being excluded. That is another matter. Or, perhaps, the defendants, if correct in their assumption that the law is unconstitutional, and that the court was governed by an improper rule in excluding persons under it, might have had the benefit of the error by moving to quash the indictment, or by pleading in abatement. But passing by these proper modes of taking the objection, they waited until they had been tried and convicted on a plea of not guilty, and then moved in arrest of judgment. We think they were too late in raising the objection.

Some importance is attached to the fact that the court followed an unconstitutional law, or one assumed to be such. We do not see that this is in anywise different from the case in which the court misconstrues the law. The result is the same; certain persons, under a mis- [71] conception of the court, are excluded from the grand jury who are qualified to serve on it; but the jury as actually constituted, is unexceptionable in every other respect. In either case, whether the court is mistaken as to the validity of a law, or as to its interpretation, the objection relates so little to the merits of the case that it ought to be taken in the regular order and due course of proceeding.

There are cases, undoubtedly, which admit of a different consideration, and in which the objection to the grand jury may be taken at any time. These are where the whole proceeding of forming the panel is void; as where the jury is not a jury of the court or term in which the indictment is found; or has been selected by persons having no authority whatever to select them; or where they have not been sworn; or where some other fundamental requisite has not been complied with. But there is no complaint of this kind in the present case; the complaint simply relates to the action of the court in excluding particular persons who might properly have served on the jury. We do not think that this vitiated all the proceedings so as to render them absolutely null and void. It might have sufficed to quash the indictment if the objection had been timely and properly made. Nothing more.

We think that this conclusion is the result not only of the English, but of the better American authorities.

Mr. Wharton, in his section on the "Disqualification of Grand Jurors, and how it may be excepted to," begins by stating the general rule, that irregularities in selecting or impaneling the grand jury, which do not relate to the competency of individual jurors, may usually be objected to, by challenge to the array, or motion to quash; and this must be before the general issue. Crim. Pl. & Pr., 8th ed., sec. 344. He then shows that in some States it has been held, that objections to disqualification of individual jurors can only be taken by challenge, and not by motion to quash or by plea; but that in others the motion to quash as well as the plea, is allowed; the latter rule being more generally followed, and being more in accordance with the English law. He then adds: "Ordinarily, after the general issue has been pleaded, objections are too late; and when the objection goes [72] to the manner of drawing, it should be taken by challenge to the array. * * * But on principle, in those cases in which the defendant is surprised, and had no opportunity to take excep-

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tion until after the finding of the bill, he should be allowed to take advantage of any irregularity by plea." Sec. 350. We apprehend that the rule last stated is the correct one. But in section 353, it is added, that at common law, if the objection appears of record, and there be no statutory impediment, a motion in arrest of judgment may be entertained. This last position we do not think is well sustained. As we have seen, it was by force of the Statute of 11 Hen. IV. that objections might be taken after the trial in England; and the American cases referred to by Mr. Wharton do not sustain his observation. In *Hardin's Case*, 2 Rich., 533, the motion in arrest of judgment was based on the ground that the grand jury was not such for the term at which the bill was found and, of course, the proceedings were *coram non judice*. In the other cases cited in support of the position, the motions were overruled. We think that the doctrine of waiver applies as well to cases where the objection appears of record as where it appears by averments; and that it applies to all cases of objection to the qualifications of jurors, and to the mode of impaneling the jury; but does not apply to cases where the proceeding is wholly void by reason of some fundamental defect or vice therein. Brooke, Abr. Indict., 2; *Seaborn's Case*, 4 Dev., 305; *Robinson's Case*, 2 Parker, Cr. Cas., 308. In the case in Brooke, persons not *legales homines* were on the grand jury, and it was held that the objection ought to be pleaded before pleading to the felony. In *Seaborn's Case* it was held that, after conviction of murder, it was too late to take advantage of an error in constituting the grand jury, though it appeared in the record. In *Robinson's Case*, 2 Parker, Cr. Rep., 235, 308, 311, which was argued by able counsel in the Supreme Court of New York before *Justices* Parker, Wright and Harris, no precept for summoning the grand jury had been issued by the district attorney to the sheriff as the law re-
[73] quired, though the sheriff summoned them in the usual way. The court held that this omission did not affect the substantial rights of the prisoner, and that the objection could not be raised after trial and conviction. Many authorities were referred to in the opinion of the court delivered by *Mr. Justice* Parker, and this general statement was then made: "It seems to be well settled in most of the States that an objection to the qualification of grand jurors, or to the mode of summoning or impaneling them, must be made by a motion to quash or by a plea in abatement, before pleading in bar." The subject is also discussed in Bish. Cr. Proc., ch. LX., where the same general rule is laid down; though with a reservation of some doubt as to cases where the objection appears of record. Secs. 887, 888. As before stated, we think that it is the nature of the objection, rather than the fact of its appearing or not appearing on the record, which should decide whether it ought to be taken by a plea in abatement, or whether it may also be taken by motion in arrest of judgment; though, of course, it cannot be taken by such a motion unless it does appear of record.

Being satisfied that the defendants could not raise the question of the constitutionality of section 820 by motion in arrest of judgment, it is not necessary, as before observed, to express any opinion on that point. It may be proper, however, to call attention to the singular position of that section. It was originally enacted as section 1 of the Act passed June 17, 1862, entitled "An Act Defining Different Causes of Challenge, and Prescribing an Additional Oath for Grand and Petit Jurors in the United States Courts." 12 Stat. at L., 430. At that time, 1862, it was no doubt a very proper and necessary law; but after the rehabilitation of the insurgent States, the Proclamation of general amnesty, and the adoption of the 14th Amendment, guarantying equal rights to all citizens of the United States, there would seem to have been no just reason for the continuance of the law; especially as by far the largest portion of white citizens in the States lately in rebellion would be disqualified under it. Accordingly, by the 5th section of the Act commonly called the Enforce- [74]
ment Act, passed April 20, 1871, 17 Stat. at L., 15, Congress, after providing that in prosecutions under that Act, no person should be a grand or petit juror who should, in the judgment of the court, be in complicity with any combination or conspiracy punishable by the provisions thereof, repealed the said 1st section of the Act of 1862; and the law remained in this State until the adoption of the Revised Statutes. For some unexplained reason, the revisors imported the section back again into the Revised Statutes, as section 820, although it had not been in force for over two years. It is probable that the fact of its repeal was overlooked by Congress when the revision was adopted; and it is to be hoped that their attention will be called to it.

In conclusion, to the third and fourth questions certified by the court below, the answer will be in the affirmative; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

THOMAS POINDEXTER, *Plff. in Err.*
v.
SAMUEL C. GREENHOW, TREASURER OF THE CITY OF RICHMOND, VA.

IN ERROR to the Hustings Court of the City of Richmond, Va.

WILLIAM L. WHITE, *Plff. in Err.*,
v.
SAMUEL C. GREENHOW.

SAMUEL S. CARTER, *Plff. in Err.*,
v.
SAMUEL C. GREENHOW.

IN ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

(See S. C., Reporter's ed., 63-65.)

Preference on the docket—suit against collector—public questions.

1. Rule 32, as to advancement of causes, applies only to writs of error and appeals brought to this

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court under the provisions of section 5, of the Act of March 3, 1875.

2. A suit against a tax collector for alleged wrongs done while he was engaged in the collection of taxes due the State, in which he is not restrained from discharging any of his official duties, is not entitled to a preference in being heard.

3. Although the questions involved are of public importance, that does not necessarily entitle the parties to a hearing in preference to others.

[Nos. 969, 971, 972.]

Submitted Oct. 9, 1883. Decided Oct. 15, 1883.

ON motion to advance.

The cases appear in the opinion.

Mr. **William Royal**, for plaintiffs in error, in support of motion.

Messrs. F. S. Blair, Atty-Gen., of Virginia, *J. Ambler Smith* and *Samuel B. Witt*, for defendant in error, *contra*.

Mr. Chief Justice **Waite** delivered the opinion of the court:

These motions are denied. Rule 32 applies only to writs of error and appeals brought to this court under the provisions of section 5 of the Act of March 3, 1875 [18 Stat. at L., 472]; that is to say, to writs of error and appeals from orders of the circuit courts remanding causes which have been removed from a state court, and from orders dismissing suits because they do not really and substantially involve disputes or controversies properly within the jurisdiction of the circuit courts, or because the parties to the suits have been improperly made or joined for the purpose of creating a case cognizable under that Act. These are not such cases. That of *Poindexter* is a writ of error to a state court. In those of *White* and *Carter*, begun in the circuit court, the declarations were demurred to because not sufficient in law, and the judgments were in favor of the defendants on the demurrers. The cases as made by the declarations were disposed of on the merits, and the writs of error are for the review of such judgments.

Neither are the parties entitled to a hearing in preference to others under the provisions of section 949 of the Revised Statutes. The State of Virginia is not a party to either of the suits, and the execution of the revenue laws has not been enjoined or stayed. A tax collector has been sued for alleged wrongs done the several plaintiffs while he was engaged in the collection of taxes due the State, but he is not restrained from discharging any of his official duties.

Paragraph 4 of Rule 26 relates only to revenue cases and cases in which the United States are concerned, which also involve or affect some matter of general public interest. Even these cannot be advanced, except in the discretion of the court and on the motion of the Attorney-General.

The questions involved may be of public importance, but that does not necessarily entitle the parties to a hearing in preference to others. Practically, every case advanced postpones another that has been on the docket three years awaiting its turn in the regular call. Under these circumstances we deem it our duty not to take up a case out of its order except for imperative reasons.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MARY R. STEEVER, *Appt.*,

v.

JAMES N. RICKMAN.

(See S. C., Reporter's ed., 74, 75.)

Clerk's fees—dismissal of cause for want of prosecution.

1. The fees of the clerk should be paid in advance, if demanded.

2. If, through the fault of a plaintiff in error or appellant, printed copies of the record are not furnished to the Justices or the parties, when required in the due prosecution of the cause, the writ on appeal will be dismissed for want of prosecution, unless sufficient cause be shown to the contrary.

[No. 67.]

Submitted Oct. 22, 1883. Decided Oct. 23, 1883.

APPEAL from the Circuit Court of the United States for the District of Kentucky.

The case appears in the opinion.

Messrs. **William Stone Abert, West Steever** and *Sterling B. Toney*, for appellant.

Mr. **W. O. Dodd**, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

By the Act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1884, ch. 143, Statutes of 1882–3, p. 631, the clerk of this court is required to pay into the Treasury the fees and emoluments of his office over and above his own compensation as fixed by law, and his necessary clerk hire and incidental expenses. It is proper, therefore, that for his protection his fees should be paid in advance, if demanded.

Under Rule 10, it is the duty of the clerk to have the record printed, and a fee has been fixed for preparing the record for the printer, indexing the same, and supervising the printing. Ordinarily this fee is to be paid in the first instance by the party who prosecutes the cause. If he fails to make the payment when demanded in time to enable the clerk to cause the printing to be done in due course, he fails in the orderly prosecution of his suit, and may be dealt with accordingly. Consequently if, through the fault of a plaintiff in error or appellant, printed copies of the record are not furnished to the justices or the parties when required in the due prosecution of the cause, the writ or appeal will be dismissed for want of prosecution, unless sufficient cause be shown to the contrary. [75]

In the present case the record has been printed, but the clerk has not furnished the necessary copies to the justices because his fee for preparing the record for the printer, etc., has not been paid by the appellant, although demanded. As this is the first time the question has arisen, and the practice has not heretofore been authoritatively announced, *it is ordered that, unless the appellant pay to the clerk, within twenty days from the entry hereof, what is due him for this fee, the appeal be dismissed for want of prosecution.* If the payment is made, the clerk shall at once notify the opposite party, and the cause may thereafter be brought on for hearing under paragraph 7 of Rule 26, as a case that has been passed under circumstances which do not place it at the foot of the docket.

True copy. Test:
James H. McKenney, Clerk. Sup. Court, U. S.

Cited—110 U. S., 402.

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OLIVER, FINNIE & CO., *Plffs. in Err.*,

v.

THE RUMFORD CHEMICAL WORKS, For the Use of J. N. PAYNE and His Wife, KATE G. PAYNE, As Admrx. of ALLEN F. MORGAN, Deceased.

(See S. C., Reporter's ed., 75-84.)

Patented product, licensed to sell—when does not pass to administrator.

*The re-issued letters patent No. 2979, granted to the Rumford Chemical Works, June 9, 1868, for an "improvement in pulverulent acid for use in the preparation of soda powders, farinaceous food and for other purposes," claimed, in claim 1, "As a new manufacture, the above described pulverulent phosphoric acid;" and, in claim 2, the manufacture of such acid; and, in claim 3, the mixing with flour of such acid and an alkaline carbonate, so as to make the compound self raising, on the application of moisture or heat or both. There was transferred to M., by the Rumford Chemical Works, the exclusive right to make, sell and use, in a specified territory, for five years, self raising flour by the use of the acid, he agreeing to make the flour, and to use his skill to introduce it, and to purchase all the acid from the grantor. M. died in less than three months from the date of the grant; held, under the provisions of sections 11 and 14 of the Act of July 4, 1836, 5 Stat. at L., 121, 123, that the right acquired by M. was only that of a licensee; that the instrument of license did not carry such right to anyone but him personally; and that such right did not, on his death, pass to his administrator, so as to authorize a suit at law, founded on the license, to be brought in the name of the grantor, for the use of the administrator, to recover damages for an infringement of the patent committed after the death of M., by the manufacture and sale of self raising flour, by the use of such acid, in said territory.

[No. 27.]

Argued Oct. 10, 11, 1883. Decided Oct. 29, 1883.

IN ERROR to the Circuit Court of the United States for the Western District of Tennessee.

This action was brought in the court below, by the defendant in error, to recover damages alleged to have resulted from the infringement of certain letters patent.

The trial resulted in a verdict and judgment in favor of the plaintiffs for $3,538.97, with costs. Whereupon, the defendant sued out this writ of error.

The case is fully stated by the court.

Messrs. **B. M. Estes** and **H. T. Ellett**, for plaintiffs in error.

The decision of the court on the demurrer was correct; these instruments are a mere license.

An assignment or grant, as distinguished from a license, must be, 1, an assignment of the whole patent; or, 2, of an undivided part of the whole patent; or 3, a grant of an exclusive right to the whole patent, within a specified part or portion of the United States, and which must embrace the entire monopoly for the whole time and must entirely exclude the patentee.

A transfer of any less interest than this is a mere license. Curt. Pat., 4th ed., secs. 178-182, 193, 211, 212, 346, 347; *Gayler* v. *Wilder*, 10 How., 494; *Blanchard* v. *Eldridge*, 1 Wall. Jr., 337; *Littlefield* v. *Perry*, 21 Wall., 219 (88 U. S., XXII., 578); *Brooks* v. *Byam*, 2 Story (C. C.), 525; *Sanford* v. *Messer*, 1 Holmes, 149; *Hill* v. *Whitcomb*, 1 Holmes, 317; *Potter* v. *Holland*, 4 Blatchf., 206; *Baldwin* v. *Sibley*, 1 Cliff., 155; *Suydam* v. *Day*, 2 Blatchf., 20; *Kempton* v. *Bray*, 99 Mass., 353; *Howe* v. *Woolredge*, 12 Allen, 21; *Furrington* v. *Gregory*, 4 Fisher, 223.

A grant of the sole and exclusive right to sell certain patented articles in a specified territory does not pass an interest in the patent; but is only a license, and the licensee cannot sue in his own name for an infringement. *Ingalls* v. *Tice*, 13 Rep., 676.

That the patentee, assignee or grantee, must sue in his own name for an infringement, is declared by the 14th section of the Act of 1836, and substantially the same language is used in section 59 of the Act of 1870, and in section 5919 of the Revised Statutes. *Agawam Co.* v. *Jordan*, 7 Wall., 593 (74 U. S., XIX., 179); *Gordon* v. *Anthony*, 16 Off. Gaz., 1135; *Blanchard* v. *Eldridge*, 1 Wall. Jr., 337; Curt. Pat., secs. 347, 211.

Suits for infringement cannot be brought in the name of the licensee, but must be brought in the name of the patentee or other person holding the legal title, because a license is not an interest in the patent, within the meaning of the patent law.

Curt. Pat., sec. 211; *Nelson* v. *McMann*, 16 Off. Gaz., 761; *Littlefield* v. *Perry*, 21 Wall., 223 (88 U. S., XXII., 579).

Messrs. **Thomas B. Turley**, *Geo. Gantt* and *Isham G. Harris* for defendant in error:

This is an assignment or grant of an exclusive right in and under the patent throughout a specified part or portion of the United States. A patent may embrace more than one invention. Curt. Pat., sec. 110.

This patent embraces four claims or objects. *Rum. Ch. Works* v. *Laeur*, 10 Blatchf., 122.

Either one of these claims or parts could be assigned separately.

Adams v. *Burke*, 17 Wall., 456 (84 U. S., XXI., 703); *Dorsey Rake Co.* v. *Harvester Co.*, 12 Blatchf., 202.

So, too, there can be a grant as to a limited number of machines.

Wilson v. *Rousseau*, 4 How., 686; *Washburn* v. *Gould*, 3 Story, 122.

Morgan had the exclusive right to the third and fourth claims. The contract between Morgan and the Rumford Chemical Works is in two parts. They are to be construed together.

Littlefield v. *Perry*, 21 Wall., 205 (88 U. S., XXII., 577).

The reservation back to the Rumford Chemical Works was a mere right reserved, a license back, and makes no difference.

Littlefield v. *Perry* (*supra*); *Washburn* v. *Gould*, 3 Story, 122; *Dorsey Co.* v. *Harvester Co.*, 12 Blatchf. 202; Curt. Pat., 212.

In such cases the patentee holds the legal title in trust for protection of the equitable interest of the patentee.

Littlefield v. *Perry* (*supra*); *Hartshorn* v. *Day*, 19 How., 220 (60 U. S., XV., 610).

Such exclusive licensee can sue for infringement in the name of the patentee or assignee against strangers.

Goodyear v. *McBurney*, 3 Blatchf., 32; *Goodyear* v. *Bishop*, 4 Blatchf., 438; *Littlefield* v. *Perry* (*supra*); *Dorsey Co.* v. *Harvester Co.*, 12 Blatchf., 203.

Mr. Justice **Blatchford** delivered the opinion of the court:

*Head note by *Mr. Justice* BLATCHFORD.

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On the 9th of June, 1868, re-issued letters patent No. 2979 were granted to the Rumford Chemical Works, a Corporation of Rhode Island, for an "Improvement in pulverulent acid, for use in the preparation of soda powders, farinaceous food, and for other purposes." The original patent, No. 14722, was granted to Eben Norton Horsford, April 22, 1865, for fourteen years, for an "Improvement in preparing phosphoric acid as a substitute for other solid acids," and was re-issued to the Rumford Chemical Works, as No. 2597, May 7, 1867, for an "Improvement in the manufacture of phosphoric acid and phosphates for use in the preparation of food and for other purposes."

The specification of re-issue No. 2979 sets forth the mode of preparing the acid, which is a dry pulverulent acid, described as having the capacity of being intimately mixed with dry alkaline carbonates, or other sensitive chemical compounds, without decomposing them or entering into combination with them, except upon the addition of moisture or the application of artificial heat. It says: "This requires that the phosphoric acid or acid phosphates, be mixed [77] with some neutral agent, as flour or starch, gypsum, etc., so that action of the acid shall be prevented while dry, and shall, when moisture or heat is applied, be prompt, thorough and equally diffused. * * * It may, among other uses, be mixed with dry alkaline carbonates, carbonate of potassa, or carbonate of soda, and remain in this state without evolution of carbonic acid until moistened or heated, thus making it a substitute for cream tartar and tartaric acid in the preparation of yeast powder or baking powder. * * * It * * * is suited to be employed as the acid ingredient in the preparation of self raising farinaceous food. In order to make an article possessing these qualities, and suited to this office, it is necessary that a powder should be made which can be not only evenly comminuted and diluted, but one which shall have so little affinity for the moisture of the atmosphere that it may be mixed with flour and bicarbonate of soda in the practical preparation of self raising flour." The claims of re-issue No. 2979 are four in number, as follows: "1. I claim, as a new manufacture, the above described pulverulent phosphoric acid. 2. I claim the manufacture of the above described pulverulent phosphoric acid, so that it may be applied in the manner and for the purposes above described. 3. I claim the mixing, in the preparation of farinaceous food, with flour, of a powder or powders, such as described, consisting of ingredients of which phosphoric acid or acid phosphates and alkaline carbonates, are the active agents for the purpose of liberating carbonic acid, as described, when subjected to moisture or heat, or both. 4. The use of phosphoric acid or acid phosphates, when employed with alkaline carbonates, as a substitute for ferment or leaven in the preparation of farinaceous food."

On the first of February, 1869, the following instrument in writing was executed and delivered by the Rumford Chemical Works to one Allen F. Morgan: "*To all people to whom these presents shall come*, the Rumford Chemical Works, a Corporation transacting business in East Providence, in the State of Rhode Island, sends greeting: Know ye, that the said Corporation, in consideration of the agreement, of even date herewith, entered into between it and [78] Allen F. Morgan, of Memphis, in the County of Shelby and State of Tennessee, does hereby sell, assign and transfer unto the said Allen F. Morgan the right to use, within the territory described in said agreement, Horsford's patent cream of tartar substitute, for the purpose of manufacturing within said territory self raising cereal flours, with the right to use and sell the flours so manufactured; to have and hold and exercise such rights within the limits aforesaid, for and during the time and under and subject to the conditions and limitations named and specified in the agreement aforesaid, of even date herewith, to which reference is hereby made as a part hereof."

On the same day Morgan executed and delivered to the Rumford Chemical Works the following instrument in writing: "*To all men to whom these presents shall come*: Know ye, that, because the Rumford Chemical Works, a Corporation located at and doing business in the Town of East Providence, in the State of Rhode Island, has licensed and granted unto Allen F. Morgan, of the City of Memphis, County of Shelby and State of Tennessee, the exclusive right to manufacture, sell and use, during the time of five years from the date hereof, the article known as self raising flour, from cereals, by the use of Horsford's patent pulverulent phosphoric acid, in the following described territory, to wit: Beginning at the point where the northern boundary of the State of Tennessee touches the Mississippi River; thence southerly along the said river to and including Vicksburgh; thence easterly along the line of the Mississippi Southern R. R. to Jackson; thence northerly along the line of the Mississippi Central R. R. to Granada; thence northeasterly to the junction of the eastern boundary line of Alabama with the southern boundary line of Tennessee; thence along the eastern boundary line of Middle Tennessee (so-called) to the northern boundary line of Tennessee, and westerly along said boundary line to the point of beginning, by an instrument in writing bearing even date herewith, which is made a part of this agreement; and because of other good and sufficient reasons moving him thereto, that he has agreed, and by these presents does covenant and agree, to and with the aforesaid Rumford Chemical Works, that he will immediately commence the manufacture of self raising flour in accordance with the written instructions furnished by the said Rumford Chemical Works, as to pro- [79] portions and quality of flour, and that he will use all his business tact and skill, and all other means necessary to introduce and sell the same, and to make the sale thereof as large as in any way possible in the territory aforesaid, during the continuance of the license aforesaid, and no longer, and to sell the said self raising flour nowhere but in the territory specified, except upon the written consent of the said Rumford Chemical Works. And I further agree to except, in the aforesaid license, such rights as are covered by the patents granted to Eben N. Horsford, and by him assigned to the said Rumford Chemical Works, and to maintain them at my own cost and expense in suits at law, whenever it shall be in my judgment necessary so to do, and to avail myself of such ad-

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vice, counsel and assistance as the said Rumford Chemical Works may elect to give in said suits; and to purchase all of the acid used in making our said self raising flour of the Rumford Chemical Works or of their agents, as directed; and that in case of my failure to perform the covenants and agreements hereby entered into, it shall be lawful for the said Rumford Chemical Works to annul and revoke their said license to me, and to terminate this agreement. The use of said phosphoric acid by families for domestic purposes shall not be construed as a violation of this agreement."

On the 12th of April, 1870, the patent was duly extended for seven years from April 22, 1870. On the 21st of May, 1870, the extended term was assigned by Horsford to the Rumford Chemical Works. Morgan died on the 19th of April, 1869. In July, 1869, his widow, Kate G. Morgan, was appointed administratrix of his estate. She afterwards intermarried with J. N. Payne. A suit at law was brought, in 1875, in the name of the Rumford Chemical Works, for the use of J. N. Payne and his wife, Kate G. Payne, in the Circuit Court of the United States for the Western District of Tennessee, against J. N. Oliver and others, partners constituting the firm of Oliver, Finnie & Co., to recover damages for the infringement by the defendants, for the period from April 1, 1870, to February 1, 1874, of the rights of the said Kate G. Payne and her husband, under said patent, by [80] making and selling self raising flour by the use of Horsford's patent pulverulent phosphoric acid in the territory before named. The theory of the suit was that the right of Morgan became vested in his administratrix, as a personal asset, and continued under the extension, and that the suit brought would lie for infringements of such right committed prior to the expiration of the five years from February 1, 1869. The suit was tried by a jury and resulted in a verdict for the plaintiffs for $3,538.97 damages, and a judgment in their favor for that amount, with costs. To review that judgment, this writ of error is brought.

Various questions are presented by the record and have been discussed in argument, but there is one which goes to the foundation of the suit, and upon which our views are such as to make it unnecessary to consider any other. The court charged the jury that the interest of Morgan in the patent did not terminate at his death, but passed to his administratrix. The defendants excepted to this charge. The evidence was that Morgan died on the 19th of April, 1869, and the defendants asked the court to instruct the jury that the privilege conferred on Morgan by the instrument of February 1, 1869, from the Rumford Chemical Works to him, terminated at his death, and did not pass to his administratrix, and that they should find for the defendants, if they believed that Morgan died on the 19th of April, 1869. The court refused to give such instruction, and the defendants excepted.

It is apparent that what was granted to Morgan was only the exclusive right to use, within the territory specified, the patented acid in making self raising flour, and to use and sell in said territory the flour so made. The acid used in making the self raising flour was all of it to be purchased from the Rumford Chemical Works, or its agents. No right was granted to make the acid, or to use it or to sell it otherwise than as an ingredient in the self raising flour. The effect of the grant made by the two instruments of February 1, 1869, is subject to the provisions of section 11 of the Act of July 4, 1836, 5 Stat. at L., 121, which was the statute in force at the time, and provided as follows: "Every patent shall be assignable at law, either as to the whole interest or any undivided part thereof, by any [82] instrument in writing; which assignment, and also every grant and conveyance of the exclusive right under any patent, to make and use, and to grant to others to make and use, the thing patented within and throughout any specified part or portion of the United States, shall be recorded in the Patent Office within three months from the execution thereof." By section 14 of the same Act it was provided that damages for making, using or selling the thing whereof the exclusive right is secured by a patent, "May be recovered by action on the case, in any court of competent jurisdiction, to be brought in the name or names of the person or persons interested, whether as patentees, assignees or as grantees of the exclusive right within and throughout a specified part of the United States." Morgan was not an assignee of the entire right secured by the patent, nor of any undivided part of such entire right, nor of the exclusive interest in such entire right for the territory specified. He did not acquire the whole of the exclusive right or legal estate vested in the Rumford Chemical Works by the patent for the said territory, leaving no interest in his grantor for that territory, as to anything granted by the patent. It is well settled that a transfer of a right such as Morgan acquired is not an assignment, nor such a grant of exclusive right as the statute speaks of, but is a mere license. Curt. Pat., 3d ed., section 179; *Gayler* v. *Wilder*, 10 How., 477, 494. This being so, the instrument of license is not one which will carry the right conferred to any one but the licensee personally, unless there are express words to show an intent to extend the right to an executor, administrator or assignee, voluntary or involuntary. In *Iron and Nail Factory* v. *Corning*, 14 How., 193, 216, this court said: "A mere license to a party, without having his assigns or equivalent words to them, showing that it was meant to be assignable, is only the grant of a personal power to the licensee, and is not transferable by him to another." In the present case, there [83] are no words of assignability in either instrument. The right is granted to Morgan alone, to him personally, with an agreement by him that *he* will enter on the manufacture of the self raising flour, and that he will use all *his* business tact and skill to introduce and sell the flour. It is apparent that licenses of this character must have been granted to such individuals as the grantor chose to select because of their personal ability or qualifications to make or furnish a market for the self raising flour and thus for the acid, all of which was to be purchased from the grantor. The license was made revocable by the grantor on the failure of Morgan to perform his covenants and agreements.

We have not overlooked the fact that the privilege granted to Morgan was to continue for five years. This means no more than that he was to have it for five years, if he should

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live so long, and if the patent should not have expired. But it cannot have the effect to impart assignability to the privilege, or to prolong its duration beyond that of his life.

Respect for the Supreme Court of Tennessee induces us to say that we have carefully examined the opinion of that court in *Oliver* v. *Morgan*, 10 Heisk., 322. That was a suit brought by the widow and administratrix of Morgan against Oliver, Finnie & Co., in a court of the State, to recover compensation under an agreement made between him and them February 15, 1869, and which was to continue till April 1, 1870, whereby he was to prepare self raising flour for them, under the license to him from the Rumford Chemical Works, and they were to pay him so much a barrel. In that suit it was held that Mrs. Morgan could recover not only for the time prior to Morgan's death, but for the subsequent time, and that the license to Morgan vested in him an interest which passed, at his death, to his personal representative. The proceedings in that suit are made a part of the record on this writ of error. But the suit in the circuit court was tried wholly on the view that the question as to the construction of the instruments of February 1, 1869, was an open one, and was a question of general law, and not one as to a rule of property, and that there was nothing in the former suit which, as *res judicata*, [84] could be binding between the parties in this suit, as an estoppel. There is nothing in the pleadings which raises the question of such an estoppel. The lower state court having, in the prior suit, rendered a judgment for the plaintiff, the Supreme Court of the State, while giving the interpretation before mentioned of the rights of Morgan, reversed the judgment for errors in other respects, and awarded a new trial. Afterwards there was, in the lower court, a verdict by consent, followed by a judgment for the plaintiff, for a less sum than the amount of the first verdict and judgment. Moreover, the present suit is one in a court of the United States, brought under the provisions of an Act of Congress, for the infringement of letters patent. The former suit arose out of a contract between Morgan and Oliver, Finnie & Co., and was brought to recover damages for the breach of that contract. Under these circumstances, the question as to the rights of Morgan under the patent must be regarded as one to be passed upon in this suit as an original question, as if there had been no former suit. Giving to the opinion of the Supreme Court of Tennessee that consideration which is due to the force of reasoning in the views which it announces, we are unable to concur in the construction it gave to the license to Morgan. *Accordingly, the judgment of the Circuit Court is reversed, with direction to award a new trial.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

W. D. PORTER, Assignee, *Plf. in Err.*,
v.
CHARLOTTE C. LAZEAR.

(See S. C., Reporter's ed., 84-90.)

Dower not barred by sale by assignee in bankruptcy.

*In Pennsylvania, as in other States, dower is not barred by an assignment of the husband's estate under the Bankrupt Act of the United States, and a sale by the assignee in bankruptcy under order of the court.

[No. 85.]

Submitted Oct. 11, 1883. Decided Oct. 29, 1883.

IN ERROR to the Supreme Court of the State of Pennsylvania.

The history and facts of the case appear in the opinion of the court.

Mr. **D. T. Watson,** for plaintiff in error.

Mr. **Thos. C. Lazear,** for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

This is an action by the assignee in bankruptcy of S. B. W. Gill, to recover the purchase money of land of the bankrupt, sold by the plaintiff to the defendant.

In the case stated by the parties the following facts were agreed: on the 28th of November, 1877, Gill, upon petition of his creditors, was adjudged a bankrupt by the District Court of the United States for the Western District of Pennsylvania, and the plaintiff was afterwards appointed assignee of his estate, which included two lots of land in Pittsburgh. On the 27th of May, 1878, the assignee, pursuant to an order of the district court, and for the purpose of raising money to pay the bankrupt's debts, sold these lots by public auction to the defendant for the sum of $465, subject to the lien of a certain mortgage for $2,550; but the order of the court directed and the advertisement thereof stated that all other liens and incumbrances should be discharged by the sale. At the time of the commencement of the proceedings in bankruptcy, the bankrupt had a wife, who is still living, and who claims a right of dower in the land. The sale having been confirmed absolutely by the district court, the assignee thereupon executed and tendered a deed of the land to the defendant, and demanded payment of the purchase money, which was refused, by reason of the incumbrance of the right of dower. It was agreed that if the court should be of opinion that the right of dower of the bankrupt's wife was devested by the bankruptcy proceedings and sale, judgment should be entered for the plaintiff for the sum of $465, with interest and costs; otherwise, judgment for the defendant.

Upon the case stated, the Supreme Court of Pennsylvania gave judgment for the defendant, [86] and the plaintiff sued out this writ of error.

The single question is, whether a wife's right of dower is barred by an assignment in bankruptcy and a sale by the assignee in bankruptcy under order of the court. By the law of England, which is our law in this respect, except so far as it has been changed by statute, the wife's right of dower is no part of the estate of the husband, and is not affected by proceedings in bankruptcy against him. *Squire* v. *Compton*, 9 Vin. Abr. Dower, G. *pl.*, 60; *Smith* v. *Smith*, 5 Ves., 189. If it is barred in this case, it must be either by force of the provisions of the recent Bankrupt Act, or by reason of the nature of the right of dower under the local law of Pennsylvania.

*Head note by *Mr. Justice* GRAY.

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But, under the provisions of the Bankrupt Act, all that passes to the assignee by the assignment in bankruptcy, or that can be sold by direction of the court, is property or rights of the bankrupt, or property conveyed by the bankrupt in fraud of creditors, unless indeed a person holding a mortgage or pledge of, or lien upon, property of the bankrupt, elects to release the same. R. S., secs. 5044–5046, 5061–5066, 5075; Stat. 22d June, 1874, ch. 390, sec. 4 [18 Stat. at L., 179]; *Donaldson* v. *Farwell*, 93 U. S., 631 [XXIII., 993].

The law of Pennsylvania, as to the liability of the right of dower to be taken for the debts of the husband, is certainly in some respects peculiar.

An Act passed in 1705, "For taking lands in execution for payment of debts," provided that all lands of a debtor, having no sufficient personal estate, should be liable to be seized and sold upon judgment and execution obtained against him; and that in case of default in payment of any debt secured by mortgage of real estate, the mortgagee might, by writ of *scire facias*, obtain execution to be levied by sale of the mortgaged premises. 1 Dall. Laws of Pa., 67–71. Another Act passed in the same year, "For the better settling of intestates' estates," while recognizing a right of dower in the widow, "which dower she shall hold as tenants in dower do in England," authorized the administrator, in case of insufficiency of the personal estate, to sell and convey the lands of the deceased, in- [87] cluding the rights of the widow therein, for the payment of his debts. *Ib.*, Appendix 43–45.

It was established by judicial decisions in Pennsylvania, upon the construction and effect of these statutes, before the beginning of the publication of reports, that the wife's right of dower could be taken and sold on execution upon a judgment recovered against the husband, or upon *scire facias* on a mortgage executed for valuable consideration by him alone, or under a devise by him for the payment of his debts. *Howell* v. *Laycock*, cited in 2 Dall., 128, and 4 Dall., 301, *n.*; *Graff* v. *Smith*, 1 Dall., 481, 484; *Scott* v. *Crosdale*, 2 Dall., 127 [*Scott* v. *Crosdale*], 1 Yeates, 75; *Mitchell* v. *Mitchell*, 8 Pa. St., 126; *Blair Co. Directors* v. *Royer*, 48 Pa. St., 146.

The grounds of those decisions have been explained by two of the most eminent Judges of Pennsylvania.

In *Kirk* v. *Dean*, 2 Binn., 341, 347, *Chief Justice* Tilghman said: "It may be proper to take notice of deeds of mortgage of the husband's property. It is understood that by such deeds the wife may be barred of dower, though she was no party to the conveyance. But this depends on another principle, in which the law of Pennsylvania differs from the common law. The right of creditors prevails against the right of dower. A purchaser under an execution against the husband takes the land discharged of dower; and the only mode of proceeding on a mortgage, with us, is to sell the land by an execution. We have no court in which the equity of redemption can be foreclosed."

In *Helfrich* v. *Obermyer*, 15 Pa. St., 113, 115, *Chief Justice* Gibson said: "Land is a chattel for payment of debts, only when the law has made it a fund for that purpose. It then has undergone a species of conversion, so far as may be necessary to the purpose of satisfaction, which extinguishes every derivative interest in it which cannot consist with the qualities it has been made to assume. Thus, a judgment or a mortgage binds it and converts it; and it is seized as personal property on a *fieri facias*, which commands the sheriff to levy the debt off [88] the defendant's goods and chattels. We readily comprehend how a sale on a judgment, a mortgage, or an order of the Orphans' Court, passes the land freed from dower; but the reason is not so obvious why a sale under a testamentary power, created in good faith, for the benefit of creditors, should do so. It is because the law makes a decedent's land a fund for payment of his debts, by giving the creditors a lien on it, which might be enforced by judicial process, and would extinguish the widow's dower in it. It would come to the same thing in the end, and she is, consequently, not injured by a process substituted by the husband to produce exactly the same result."

It thus appears that the right of dower in Pennsylvania does not differ, in nature or extent, from the right of dower at common law, except so far as the local law has made it a chattel for the payment of debts of the husband, either by converting it into personalty, in his lifetime, by virtue of the effect attributed by that law to a judgment recovered against him or a mortgage executed by him, either of which could only be enforced in that State by a levy of execution in common form; or by giving his creditors, after his death, a lien upon the whole title in the land.

The state court has, accordingly, constantly held that with these exceptions the right of dower is as much favored in Pennsylvania as elsewhere; that the old decisions are not to be extended, and that neither an absolute conveyance by the husband nor an assignment by him for the benefit of creditors, whether executed voluntarily or under a requirement of the insolvent law of the State, impairs the wife's right of dower. *Kennedy* v. *Nedrow*, 1 Dall., 415, 417; *Graff* v. *Smith* and *Kirk* v. *Dean*, above cited; *Killinger* v. *Reidenhauer*, 6 S. & R., 531; *Riddlesberger* v. *Mentzer*, 7 Watts, 141; *Keller* v. *Michael*, 2 Yeates, 300; *Eberle* v. *Fisher*, 13 Pa. St., 526; *Helfrich* v. *Obermyer*, above cited; *Worcester* v. *Clark*, 2 Grant, 84.

In *Worcester* v. *Clark*, just cited, it was held that the sale of a bankrupt's real estate by his assignee under the Bankrupt Act of 19th August, 1841, ch. 9 [5 Stat. at L., 440] did not devest the widow's right of dower. It is true [89] that the decision was put upon the ground that the right of dower was saved by the proviso, inserted in the 2d section of that Act, that "Nothing in this Act contained shall be construed to annul, destroy or impair any lawful rights of married women, which may be vested by the laws of the States respectively, and which are not inconsistent with the provisions of the 2d and 5th sections of this Act;" and that the Judge delivering the opinion said that, were it not for that proviso, he should have no difficulty in hold that a sale in pursuance of a decree in bankruptcy would, like a sheriff's sale, by virtue of either a judgment or a mortgage, bar dower. But the decision is significant, as evidence that by the law of Pennsylvania a right of dower is "a lawful right, valid by the law of the State," and as treating the question

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whether it was devested by proceedings in bankruptcy as depending upon the true construction of the Bankrupt Act. Upon this question of construction, we are not bound by the opinion of the state court, and have no hesitation in disapproving the *dictum*, and in holding that the proviso relied on was not in the nature of an exception to or restriction upon the operative words of the Act, but was a mere declaration, inserted for greater caution, of the construction which the Act must have received without any such proviso, and that the omission of the proviso in the recent Bankrupt Act does not enlarge the effect of the assignment nor of the sale in bankruptcy, so as to include lawful rights which belong not to the bankrupt but to his wife.

The result is, that, so far as this case depends upon the construction of the Bankrupt Act of the United States, this court is of opinion that *there is nothing in that Act, nor in the proceedings under it, to bar the wife's right of dower in lands of which her husband was seised during the coverture; and that*, so far as it depends upon the law of Pennsylvania, *the decision* of the Supreme Court of that State in this case, reported in 87 Penn. State, 513, *is in accord with all the previous adjudications of that court, and is strong if not conclusive evidence against the plaintiff in error.*

It may be added that this decision is in conformity with one made twelve years ago by *Judge* Cadwalader in the District Court of the [90] United States for the Eastern District of Pennsylvania. *In re Angier*, 10 Am. L., Reg. (N. S.), 190; *S. C.*, 4 Bk. Reg., 619.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

AUGUSTUS LAVER, *Appt.*,

v.

ROBERT DENNETT, COLTON MAW AND FREDERICK INGLE, Copartners, under the Name and Style of ROBERT DENNETT & COMPANY.

(See S. C., Reporter's ed., 90-93.)

Rescinding contract for mistake.

A party cannot rescind a contract in equity, on account of a mutual mistake in the language of the instrument containing it, when the other party offered to make the correction as soon as he had notice of the mistake.

[No. 10.]

Submitted Oct. 9, 1883. Decided Oct. 29, 1883.

APPEAL from the Circuit Court of the United States for the District of California.

The history and facts of the case appear in the opinion of the court.

Mr. **John F. Swift**, for appellant:

The instrument should be canceled because, it failed to express the intention of the parties.

Erwin v. *Bank*, 5 La. Ann., 4; *Hiriart*, v. *Roger*, 13 Serg. & R., 129; 1 Story, Cont., sec. 538; 2 Chit. Cont., Am. ed., 1089, 1090.

"Where there is a mutual mistake as to the fact forming the basis of the contract, the contract will be void, although no fraud be practiced."

1 Story, Cont., sec. 539 and cases cited; 1 Pars. Cont., 475; 1 Story, Eq. Jur., secs. 152, 153, 164, *f.*

Where the instrument fails to state the full terms of the agreement or understanding of the parties, the mistake is one of fact, which equity will relieve against.

Hunt v. *Rousmaniere*, 1 Pet., 1; *Hartford & S. Ore Co.* v. *Miller*, 41 Conn., 133; *Briosa* v. *Ins. Co.*, 4 Daly, 246; 1 Ad. Eq., Am. *Notes*, 169.

Where the mistake is one of law, equity would afford relief.

Hunt v. *Rousmanier*, 8 Wheat., 211; *Wheeler* v. *Smith*, 9 How., 55; *Wheelon's Appeal*, 70 Pa. St., 410; *Hearst* v. *Pujol*, 44 Cal., 235; 1 Story, Eq. Jur., secs. 119, *et seq.*, 180, 188.

The promise of appellant contained in the contract is *nudum pactum*, being without consideration to support it.

1 Ad. Eq., Am. *Notes*, 188; 1 Story, Cont., 605, 606, *notes*; 1 Pars. Cont., 462 *et seq.*; *Bliss* v. *Negus*, 8 Mass., 46.

Messrs. **R. E. Houghton** and **Frank W. Hackett**, for appellees:

As a general rule, equity will not grant relief against a mistake of law.

Hunt v. *Rousmaniere*, 1 Pet., 1; *Bank* v. *Daniel*, 12 Pet., 55; *Roger* v. *Ingham*, 8 Ch. D., 351.

If a contract be canceled for such reasons as Laver gives, there would be no security in business. The Supreme Court so ruled in *Upton* v. *Tribilcock*, 91 U. S., 45 (XXIII., 203).

See, also, to the same effect: *Kearney* v. *Saccer*, 37 Md., 276; *Nelson* v. *Davis*, 40 Ind., 369; *Beaufort* v. *Neeld*, 12 Cl. & F., 248; *Barker* v. *Comins*, 110 Mass., 477; *Oiler* v. *Gard*, 23 Ind., 219; *Voorhis* v. *Murphy*, 26 N. J. Eq., 434; *Custard* v. *Custard*, 25 Tex., supp., 49; *Arthur* v. *Arthur*, 10 Barb., 15; *Dupre* v. *Thompson*, 4 Barb., 282; *Lewis* v. *Jones*, 4 Barn. & C., 506.

Mr. Justice **Matthews** delivered the opinion of the court:

This appeal is from a decree dismissing the complainant's bill, and the record discloses the following as the facts material to the determination of the controversy:

The appellees, in 1870, being British subjects, were owners of letters patent of the United States bearing date January 4, 1870, granted to one Dennett, for the term of seventeen years from August 13, 1863, for an improvement in the construction of concrete arches for building. On November 2, 1870, they entered into a written contract with the appellant, an architect, then residing in Albany, N. Y., but at the time of filing this bill a citizen of California. By this contract, the appellees granted to the appellant, his executors, administrators and assigns, during the residue of the unexpired term of the letters patent, full and free liberty, license and authority to make, use and sell, or vend to oth- [92] ers to be sold, the said invention within the divisions of the United States, as thereinafter specified or one or more of them, in the manner and according to the provisions and agreements thereinafter contained and upon the payment of the sums of money as therein provided, and not otherwise. For the purposes of the license, the territory of the United States was *divided* into four *districts*, named A, B, C and D respectively, and a royalty of ten shillings sterling, per square of one hundred square feet was to be paid for all work actually done under the patent, and

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which, from certain specified dates, it was agreed should amount to an annual minimum sum of £500, and not to be payable in excess of an annual maximum sum of £1,000 in each of such divisions.

It was also stipulated that the appellant might surrender the license at any time upon giving six months' notice, and that the appellees might revoke it upon any default of the appellant after thirty days' notice.

It appears that this contract was entered into after many conversations between the parties, and after a draft agreement had been prepared and submitted to the appellant for examination. Upon his suggestion, it was amended and finally executed.

Various unsuccessful efforts appear to have been made by the appellant while at Albany and after his removal to San Francisco, and also by one Fuller, who acted as his agent at Albany, to introduce the patent; and some correspondence took place between the parties in regard to its progress and prospects.

This correspondence, as well as the negotiations which led to the execution of the contract, was conducted on the part of the appellees by Frederick Ingle; and it was to him that the following letter was addressed by the appellant:

"San Francisco, *26th April*, 1873.

Frederick Ingle, Esq.,

5 *Whitehall, London, England.*

Dear Sir: It now turns out, just as Mr. Fuller [93] and myself are about to close negotiations for the sale of your patent right, that I have no power to sell. Will you, therefore, send me the proper papers from your firm, stating that you will not grant licenses to any one else in the United States? I enclose you an eminent legal opinion thereon. Mr. Fuller had arranged for the sale of Massachusetts, which includes Boston; but we wait for your proper authority, which must be exclusive, or no value can be attached to the license I hold. Of course I am aware of the understanding which I have stated your firm would not go back on, but then the parties purchasing hold that it is not exclusive. In like manner I am unable to close with parties here for section D. I have had so much trouble with this matter, and now that it appeared to be in a good way to be productive of profit this annoyance arose. You can, however, remedy it in the way prescribed.

Yours very truly, Augustus Laver.

P. S. Send the papers to Mr. Fuller, at Albany, and then he will send me duplicates.

A. L."

This letter seems to have been received by Ingle, and in reply he sent by cable the following:

"*May* 6, 1873.

Fuller, *Architect, Albany, New York:*

Dennett will alter agreement, giving Laver exclusive right. Robert Dennett & Co."

Fuller had evidently written a letter to Ingle to the same effect, about the same time, for, although it is not contained in the record, Ingle's reply to it, written the day he sent the cable message, was produced and read in evidence. In this letter, dated May 5, 1873, he says, referring to the objection to the terms of the license, that "There is no objection on our part to alter it in any way to suit the requirements of the case." He adds:

"You will bear in mind that this lease was granted to Mr. Laver to pay as an annual royalty. If it had been proposed then to purchase out and out, I dare say the terms to the exclusive right would have been more precise; at any rate, our intention was for Mr. Laver to have the exclusive right (in all our negotiations), and when the document was signed we looked upon [94] it as so settled, unless he elected to throw it up before certain dates for the respective sections as specified in the agreement. He had the document to examine before signing it, and could have made the objection then. At any rate you will, I think, give us credit for having faithfully carried out both the letter and spirit of the agreement. We have had many applications from parties for permission to work the patent in the United States since October, 1870, the date of our agreement, but have had to reply in each case that our arrangements as to licensing were made. * * *

I shall write to our solicitor, Mr. Van Santvoord & Hauff, of Times Building, Park Row, New York, and instruct him to get whatever you require with regard to the specification. I don't know in what respect it is incomplete. The agreement can be altered to give any parties who propose to purchase the most absolute rights, on payment of the purchase money of section B."

He then proceeds, in answer he says to a request to that effect, to give the prices for each division, upon an out and out purchase of a gross sum; and referring to Laver's statement, that Fuller was on the point of completing the negotiations for division B, he says: "To facilitate completion of the matter, had you not better write to or see Mr. Van Santvoord, whom we will instruct to give you as much assistance as he can. We could not, of course, undertake any litigation in respect of infringements, after we had disposed of our rights for a fixed sum." He says, further:

"Our wishes have always been to give him exclusive rights, and I thought that the agreement expressed as much before you raised the question. At any rate we are willing to alter it to facilitate your negotiations. The question is: how is it to be done?

One plan is for us to send power of attorney out to Mr. Van Santvoord, and tell him to alter the agreement and sign for us. Another, and I think a preferable plan, is to write to him to prepare two fresh copies of agreement, distinctly giving Laver exclusive rights, and referring to the old agreement, which will be thereby canceled. He will then let you see the alterations. One copy must be sent to Laver for sig- [95] nature, and another to us, and on the return you and Van Santvoord can exchange them. You must clearly understand, however, that we shall not consent to any other alterations, or to introduce any fresh clauses."

On May 9, 1873, Ingle wrote to the appellant as follows:

"Dear Sir: Yours of 29th March came duly to hand, with enclosures, and I delayed answering it for a week or two, as I was expecting to hear from Mr. Fuller. I have now heard from him, and you no doubt know to what effect.

He complains of the agreement not giving you exclusive rights. I think it expressed enough for the purpose contemplated at the time, and you were satisfied with it. At any

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rate, we intended to give you exclusive rights, and have in all good faith acted up to that intention, inasmuch as we have refused many offers of agency since Oct., 1870, the date of our agreement with you. I suppose Mr. Fuller will send you the letter I wrote him in reply; at any rate, I will write him by this post a line requesting him to do so; then you will see exactly what I propose to do. I may say that I have also by this post instructed Mr. Van Santvoord, our solicitor in New York, to prepare full agreements, giving you exclusive rights, and send them to each of us to be re-signed and exchanged; when this is done they will supersede the others, and I hope will be sufficient for Mr. Fuller's purpose.

Speaking generally, our view with regard to this matter is this, I mean Dennett's and my own: that we gave you a liberal margin of time to make preliminary arrangements, and asked for only a moderate royalty on each section. You had the option of holding or abandoning up to certain dates. If you had decided to surrender, we should have been losers of two years of valuable time, and should have had all our work to begin over again. As you elected to keep the patent-right, you could hardly expect us to forego the just claims for which we stipulated, after such very liberal reservations in your favor. We do not suppose for a moment that you expect this. We do not wish to press you hardly in the matter, but it is really time now that some tangible return was made to us; of course if the section B is sold at once and the money paid over, as we hope it will be, we forego any claim for royalties already due on that section."

[96] It is also shown that the appellees, on May 10, 1873, wrote to their solicitors in New York, giving instructions in reference to drawing up a fresh agreement, giving the appellant the exclusive rights which he required; but that neither the appellant nor Fuller, his agent, communicated with the solicitors on the subject. It was not until November 3, 1873, that appellant wrote to Ingle refusing to sign any new agreement, and claiming that the defect in the original agreement had resulted in the loss of the sale of the patent for Massachusetts for the price of $30,000, and intimating that in consequence thereof, the appellant was entitled to treat the whole matter as at an end. On October 12, 1874, the appellees, having in the meantime, by further correspondence, insisted upon their rights under the contract and demanded payment of the royalties which had accrued, brought an action in the Circuit Court of the United States for the District of California against the appellant, to recover the amount due on account thereof. And on September 3, 1875, the appellant filed this bill in equity in the same court, in which it was claimed that by reason of the mistake in omitting from the contract a grant of the exclusive right to the appellant to use and sell the said invention under the said patent, the said indenture was not the agreement of the appellant, and that in November, 1873, because of said defect, he had surrendered said invention and indenture and all his rights thereto and thereunder to the appellees. The bill prayed that the indenture be ordered to be canceled, as executed by mistake, and that the appellees be perpetually restrained and enjoined from the prosecution of the action at law upon it.

The chief, if not the only instance, in which, it is alleged, the defect in the license actually operated to the injury of the appellant, is the loss of the sale of the patent for the New England States; and as to that, the proof wholly fails. The only witness examined on the subject is the appellant himself, who knew nothing of it, except as he learned it from Fuller, his agent; and his evidence, being hearsay, cannot be regarded. The parties with whom the negotiations took place, and who, it is said, refused to proceed after discovering the defect in the license, are not examined nor even named. Fuller, the agent of the appellant, who personally [97] conducted the negotiation, is not examined as a witness at all; and in his letter to Ingle of June 23, 1873, gives an entirely different account of the reasons for the loss of the sale. He there says: "*Your decision not to protect* the patent renders it valueless, even if it could not be infringed. *The duration of the patent is so short* no parties would dream of paying large sums for it. Acting as Mr. Laver's attorney, I did the best I could to dispose of it for New England States. *That is now abandoned unless the patent can be extended.*"

There is no proof of fraud or misrepresentation on the part of the appellees, and all charges to that effect in the bill are substantially withdrawn by the appellant in his testimony.

It is claimed, however, on the part of the appellant, that he has a strict right in equity to the relief prayed for in his bill, on the ground that no contract was ever in fact entered into, the minds of the parties never having met upon the same terms.

But there is no foundation for such a contention. The minds of the parties did meet. There was, in fact, an actual agreement, the terms of which were perfectly well understood by both parties. They acted upon that understanding from the time the instrument was executed; and when the appellant first discovered that it did not have the legal effect intended, and gave notice to the appellees accordingly, there was no controversy between them on the subject. The common intention was at once admitted and the necessary correction promptly offered. There was, no doubt, a mistake, but it was in the instrument which undertook to express the agreement, and not in the agreement itself. It did not relate to any matter of fact which was the basis of the contract, an error in regard to which would be fundamental and, therefore, fatal, but affected only the document which professed to express, but did so incorrectly, the actual intention of both parties.

It is equally wide of the mark to say, as it was argued, that the contract has failed by reason of the failure of the consideration. The appellant cannot say that he did not acquire something by reason of the license, although his right was not, as it was intended to be, exclusive. But so far as appears in the case, he [98] had the same benefits and advantages he would have enjoyed if the instrument had contained the exclusive grant it was supposed to secure. For the parties on both sides acted upon that construction, and, as we have already shown, no actual loss is proven to have arisen to the appellant by virtue of the defective assurance.

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That the instrument imperfectly expressed the agreement of the parties was not the exclusive fault of the appellees. It was the duty of the appellant to have discovered the error before executing the contract. He did not, in fact, find it out until after two years from its date; and then, applying for its correction, failed to avail himself of the offer of the appellees, promptly made, in response to his demand to execute a corrected agreement.

The only equity which the appellant could claim was to have the mutual mistake in the language of the instrument corrected, until some default had occurred on the part of the appellees. But they were in no default. They offered to make the correction as soon as they had notice of the mistake; but the appellant declined to accept it. After the further lapse of more than six months, he insisted on his right to put an end to the agreement itself. This he was in no position to do. His delay to assert such a claim, if his right had been otherwise better founded, constituted such laches as would, at least, greatly weaken his title to relief, if it did not amount to a bar; and coupled with the loss to the appellees of the value of their own rights under the patent, which cannot be restored, would make it inequitable, as against them, to absolve the appellant from the legal obligation of his contract.

We see no ground in the facts of the case for the application of the principles and authorities invoked by the appellant as a warrant to grant him the relief for which his bill prays. The decree is, accordingly, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[99]

WENDELL R. KING, *Appt.*,
v.
AUGUST GALLUN AND ALBERT TROSTEL.

(See S. C., Reporter's ed., 99-108.)

Patentable invention—judicial notice—product of old process.

1. A claim for an article of manufacture, to wit: a bale of plasterers' hair, consisting of several bundles inclosed in bags, and compressed and secured to form a package, does not describe a patentable invention.
2. In deciding whether a patent covers an article, the making of which requires invention, this court may take notice of matters of common knowledge or things in common use.
3. The product of an old process applied to old materials is not patentable.

[No. 20.]

Submitted Oct. 10, 1883. Decided Oct. 29, 1883.

APPEAL from the Circuit Court of the United States for the Eastern District of Wisconsin.

The history and facts appear in the

Statement of the case by *Mr. Justice* **Woods:**

This was a bill in equity brought by Wendell R. King, the appellant, against August Gallun and Albert Trostel to restrain them from infringing letters patent No. 152,500, dated June 30, 1874, granted to the appellant for certain improvements in baled plastering hair.

The invention and its advantages are thus set forth in the specification:

"It is found that the wants of the trade in plastering hair require it to be compressed for transportation in packages of from three to five bushels; this amount of hair forms a package of a good size to conveniently handle, weighing from twenty to forty pounds. The trade unit for the article of plastering hair is always the bushel; it is sold by the bushel or by the multiple thereof.

Heretofore this hair has been packed in a mass of a certain number of bushels baled together, varying in amount as the order required, so that when received the retail dealer was compelled to parcel out the same and weigh it to suit his customers. This is a disagreeable and difficult thing to do, as the hair is dirty and matted together and, after it is once removed from the case into which it has been compressed by a baling press, is bulky and not easy to reduce again to a convenient package. For this convenience of the trade I propose to form the hair in small bundles of one bushel each, and unite several bundles into a bale of a convenient size for transportation.

I first place a bushel of hair into a paper sack [100] locsely, or only so far packed as may be readily done by hand; several of these one bushel packages are then placed side by side in a baling press. I use for this purpose the baling press heretofore patented to me; they are thus compressed forcibly together, so that the bale produced will be a compact, firm bale, occupying only about one fifth of the original bulk; the paper bags which still envelop the individual bushels of the bale keep said bushels separate, and serve at the same time to protect the hair.

The bale, after being compressed, is tied in the usual way, and is then in shape for transportation without further covering, although it may be desirable, if the bale is to be sent a long distance, to envelop it in a stout sacking cover. Hair baled thus may be separated by the retail dealer into bushel packages, each of which remains compressed into a small size, and is in convenient condition to handle."

The claim was as follows:

"Having thus described my invention, I claim, as an article of manufacture, the bale B of plasterers' hair, consisting of several bundles, A, containing a bushel each by weight, inclosed or incased in paper bags or similar material, and united, compressed and secured to form a package, substantially as specified."

The defense was want of novelty in the alleged invention, and that the same was not patentable.

The circuit court dismissed the bill, and from its decree the complainant has appealed.

Mr. **L. L. Coburn,** for appellant.
Mr. **Joshua Stark,** for appellees.

Mr. Justice **Woods** delivered the opinion of the court:

We are of opinion that the patent of complainant does not describe a patentable invention. The claim is for an article of manufacture, to wit: a bale of plasterers' hair consisting of several bundles inclosed in bags, and compressed and secured to form a package.

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It is evident that the patent does not cover any improvement in the quality of the hair. Its qualities are unchanged. It does not cover [101] the packing of the hair into parcels nor the size, shape nor weight of the parcels, nor the compression of the parcels separately. Nor does it cover the material of the bags which constitute the outer covering of the parcels. Complainant claims none of these things as secured by his patent. The packing of hair and other articles in parcels of the same shape, size and weight, and the compression of the several parcels, has from time immemorial been in common use. Neither does complainant contend that his patent covers a single parcel or package of hair. All, therefore, that the patent can cover is simply an article of manufacture resulting from the compression and tying together in one bale of several similar parcels or packages of plasterers' hair. The object of this invention is thus set out in the specification: "For the convenience of the trade," that is to say, to enable the retail dealer more easily to parcel out the hair in quantities to suit his customers, "I propose to form the hair in small bundles of one bushel each and with several bundles into a bale of convenient size for transportation." The invention and the object to be accomplished by it are thus seen to be contained within narrow limits.

In deciding whether the patent covers an article, the making of which requires invention, we are not required to shut our eyes to matters of common knowledge or things in common use. *Brown* v. *Piper*, 91 U.S., 48 [XXIII., 202]; *Terhune* v. *Phillips*, 99 U. S., 592 [XXV., 293]; *Ah Kow* v. *Nunan*, 5 Sawy., 552.

The subdivision and packing of articles of commerce into small parcels for convenience of handling and retail sale, and the packing of these small parcels into boxes or sacks, or tying them together in bundles for convenience of storage and transportation, is as common and well known as any fact connected with trade. This well known practice is applied, for instance, to fine cut chewing and fine cut smoking tobacco, to ground coffee and spices, oatmeal, starch, farina, desiccated vegetables and a great number of other articles. This practice having been common and long known, it follows that there is nothing left for the patent of complainant to cover but the compression of the bale formed of several smaller parcels. Can this be dignified by the name of invention? When the [102] contents of the smaller parcels are such as to admit of compression into a smaller compass, the idea of compressing the bale of the smaller parcels for transportation and storage would occur to any mind. There is as little invention in compressing a bale of several parcels of hair tied up together, as in compressing one large parcel of the same commodity.

But it is perfectly well known that the compression of several packages of the same thing into larger packages or bundles is not new, and that it has long been commonly practiced. Packages of wool, feathers and plug tobacco have been so treated. The case of plug tobacco is a familiar instance. The plugs are formed so as to retain their identity and shape, the outer leaves of the plug forming at the same time a part of the plug as well as its covering. The plugs, after being so put up as to preserve their identity under pressure, are, as is well known, placed in a frame and subjected to pressure, and reduced to a smaller and compact mass, which is then boxed up and is ready for market. This is done in part for convenience in handling, transportation and storage. When the box is opened by the retail dealer, the plugs can be taken out separately and sold. This method of treating plug tobacco would suggest to every one the compression into a bale, of distinct packages of plasterers' hair, and leaves no field for invention in respect to the matter to which the patent of complainant relates.

In view of the facts to which we have referred, which are of common observation and knowledge, we are of opinion that the article of manufacture described in the specification and claim of the complainant's patent does not embody invention, and that the patent is for that reason void.

In support and illustration of our views, we refer to the following cases decided by this court: *Hotchkiss* v. *Greenwood*, 11 How., 248; *Phillips* v. *Page*, 24 How., 167 [65 U. S., XVI., 640]; *Brown* v. *Piper* [*supra*]; *Terhune* v. *Phillips* [*supra*]; *Atlantic Works* v. *Brady* [*ante*, 488]; *Slawson* v. *R. R. Co.* [*ante*, 576].

The patent of complainant cannot be sustained by the authority of the case of *Smith* v. *Goodyear Dental Vulcanite Co.*, 93 U. S., 486 [XXIII., 952], where the court said: "The invention is a product or manufacture made in a [103] defined manner. It is not a product alone, separate from the process by which it is created." In that case, the invention was the product of a new process applied to old materials. In this case it is the product of an old process applied to old materials.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 606, 608; 112 U. S., 359; 114 U. S., 12, 156.

ROBERT C. HEWITT, *Appt.*,

v.

PETER CAMPBELL.

(See S. C., Reporter's ed., 103.)

Dismissal of cause.

Where the record discloses a serious conflict of testimony, and the court below might well have dismissed the bill solely for failure to establish the facts upon which the claim for relief is based, a decree of dismissal will be affirmed.

[No. 43.]

Submitted Oct. 12, 1883. Decided Oct 29, 1883.

APPEAL from the Supreme Court of the District of Columbia.

The case is sufficiently stated by the court.

Mr. **S. S. Henkle**, for appellant.

Mr. **W. E. Edmonston**, for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

Counsel for appellant states the theory of the bill to be that Campbell was not the *bona fide* purchaser of the lots described, or of either of them, although he holds them by conveyances absolute upon their face; that he was only the

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broker of Burgess; and that the conveyances were made to him in that capacity, for the purpose of enabling him to raise money upon them for the use of Burgess, less reasonable charges for any services in that behalf rendered. The bill was dismissed by the court below in Special Term, and that order was affirmed in General Term.

The record discloses a serious conflict in the testimony of witnesses, and the court below might well have dismissed the bill upon the sole ground that the complainant had failed to establish the facts upon which he based his claim for relief, and which must have been established before any relief could be granted. *The decree must, therefore, be affirmed. It is so ordered.*

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[104] COUNTY OF GREEN, *Plff. in Err.*,

v.

JOHN CONNESS.

(See S. C. Reporter's ed., 104-108.)

Validity of municipal bonds—consolidation of railroads—transfer of franchises.

1. The rights of innocent holders of bonds, when the law of the State is materially altered by its courts, are to be determined by the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper.
2. When two railroad companies are authorized to consolidate their roads, it is to be presumed that the franchises and privileges of each continue in respect to the several roads so consolidated.
3. Authority given to consolidate, upon such terms as may be deemed just and proper, includes the power to transfer to the consolidated company the franchises and privileges connected with the road.

[No. 925.]

Submitted Oct. 9, 1883. Decided Oct. 29, 1883.

IN ERROR to the Circuit Court of the United States for the Eastern Division of the Western District of Missouri.

This action was brought in the court below, by the defendant in error, to recover the amount of six hundred eighty-six interest coupons, which had been detached from forty-nine bonds issued by the defendant.

Trial by jury having been waived, the court made a special finding of the facts and rendered judgment thereon for the plaintiff, for $33,-298.44, with costs. Whereupon, the defendant sued out this writ of error.

The special facts of the case are sufficiently stated by the court.

Messrs. **Henry C. Young**, *P. T. Simmonds* and *Charles W. Thrasher*, for plaintiff in error.

Messrs. **James S. Botsford, Robert G. Ingersoll** and *Marcus T. C. Williams*, for defendant in error.

Mr. Justice **Bradley** delivered the opinion of the court:

Nearly every point in this case has already been decided by this court in the cases of *Callaway Co.* v. *Foster*, 93 U. S., 567 [XXIII., 911]; *Scotland Co.* v. *Thomas*, 94 U. S., 682 [XXIV., 219]; *Henry Co.* v. *Nicolay*, 95 U. S., 619 [XXIV., 394]; *Schuyler Co.* v. *Thomas*, 98 U. S., 169 [XXV., 88]; *Cass Co.* v. *Gillett*, 100 U. S., 585 [XXV., 585]; *Louisiana City* v. *Taylor*, 105 U. S., 454 [XXVI., 1133], and *Ralls Co.* v. *Douglass*, 105 U. S., 728 [XXVI., 957]. In the case last cited, we referred to the previous cases, and [105] to the cases in Missouri which they followed, and said: "Such being the condition of the law on this subject, down to April, 1878, we do not feel inclined to reconsider our former rulings, and follow the later decisions of the Supreme Court of the State in *State* v. *Garroute*, 67 Mo., 445, and *State* v. *Dallas Co.*, 72 Id., 329, where this whole line of cases was substantially overruled. The bonds involved in this suit were all in the hands of innocent holders when the law of the State was so materially altered by its courts. In our opinion the rights of the parties to this suit are to be determined by the "law as it was judicially construed to be when the bonds in question were put on the market as commercial paper. *Douglass* v. *Pike Co.*, 101 U. S., 687 [XXV., 971]." From the views thus expressed we are not disposed to swerve.

One point taken in the present case may not have been presented in any of the cases cited, to wit: that the rights, privileges and franchises of the Kansas City and Cameron Railroad Company were not expressly declared to pass over to the company with which it might become consolidated, by the law authorizing such consolidation. This law was passed March 11, 1867, and declared as follows: "It shall be lawful and competent for said company to make such arrangement with any other railroad company to furnish equipments and to run and manage its railroad as it may deem expedient and find necessary, or to lease the same, or to consolidate it with any other company upon such terms as may be deemed just and proper." In the finding of facts made by the court it is, amongst other things, found as follows: "That under the provisions of an Act of the General Assembly of the State of Missouri, approved May 11, 1867, entitled, etc., the said corporation, then known as the Kansas City and Cameron Railroad Company, on the 21st day of February, in the year, 1870, was consolidated with the Hannibal and St. Joseph Railroad Company, [106] and all the rights, privileges, franchises and property of said Kansas City and Cameron Railroad Company were, by said consolidation, transferred to the Hannibal and St. Joseph Railroad Company, which then and thereby became the owner of and possessed of the same." If only a sale of the road to another company had been authorized and made, then it might very plausibly have been contended that the purchasing company took and held it under its own charter only, without the franchises and privileges connected with it in the hands of the vendor company; but consolidation is not sale, and when two companies are authorized to consolidate their roads, it is to be presumed that the franchises and privileges of each continue to exist in respect to the several roads so consolidated. This point was considered in the case of *Tomlinson* v. *Branch*, 15 Wall., 460 [82 U. S., XXI., 189], and *Branch* v. *Charleston*, 92 U. S., 677 [XXIII., 750], and was decided in accordance with this view. This being so, the au-

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NOTE.—*Municipal bonds as affected by change in ruling of highest court of State, or by change in Constitution.* See *note* to Mitchell v. Burlington, 71 U. S., XVIII., 350.

When consolidation dissolves former companies. See *note* to Shields v. Ohio, 95 U. S., XXIV., 357.

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thority given to consolidate, upon such terms as may be deemed just and proper, would include the power to transfer to the consolidated company the franchises and privileges connected with the road if the law itself did not have that effect; and the court has found that this was done. We think, therefore, that the point is not well taken.

The judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—114 U. S., 507.

SARAH B. HASKINS, *Appt.*,
v.
ST. LOUIS & SOUTHEASTERN RAILWAY COMPANY (Consolidated), AND JAMES H. WILSON, Receiver of SAID COMPANY.

(See S. C., Reporter's ed., 106, 107.)

Citation when necessary to appeal—voluntary appearance—security on appeal.

1. If an appeal is allowed in open court, the security may be taken by the court and no citation is necessary; but if the security is not given until after the term is over, a citation must be issued and served.
2. Unless an appellee voluntarily appears, this court cannot proceed against him if the record does not show affirmatively that he has been brought within its jurisdiction by proper notice.
3. Section 1000 of the Revised Statues, requires the justice or judge signing the citation to take the security. This power cannot be delegated to the clerk or to a commissioner.

[No. 15.]

Submitted Oct. 9, 1883. Decided Oct. 29, 1883.

APPEAL from the Circuit Court of the United States for the Middle District of Tennessee.

This case arose upon a petition filed in the court below, by the appellant, for leave to proceed against the Receiver to recover damages for the death of her husband, J. B. Haskins, while in the employ of said Receiver. The petition was granted and suit was accordingly brought in a state court. Subsequently, by order of the court below, the suit was stopped and the claim presented in that court.

The special commissioner to whom the claim was referred, found in her favor and reported in favor of an allowance of $5,000. The court sustained exceptions to this report and entered a decree dismissing the petition. Whereupon, the petitioner appealed to this court.

Messrs. **F. E. Williams,** and *R. McP. Smith,* for appellant.

No counsel appeared for the appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

We have no jurisdiction in this case. The appellee has not appeared, and has never been served with a citation. The decree was entered on the 14th of June, 1879, and at the foot of the entry is the following: "Petitioner prays an appeal, which is granted upon bond and security being given, according to law, within thirty days." A copy of what purports to be an appeal bond, filed on the 3d of July, 1879, is found in the transcript, but there is no evidence that it was ever approved or taken as good and sufficient security by the court or any justice or judge thereof. A commissioner of the circuit court has certified that he knew the obligors to be good and responsible for any cost that might accrue in the cause, but that is not enough. Section 1,000 of the Revised Statutes requires the justice or judge signing the citation to take the security. This power cannot be delegated to the clerk or to a commissioner. *O'Reilly* v. *Edrington*, 96 U. S., 726 [XXIV., 659]. If the appeal is allowed in open court the security may be taken by the court and no citation is necessary, but if the security is not given until after the term is over, a citation must be issued and served. *Sage* v. *R. R. Co.*, 96 U. S., 715 [XXIV., 643]. Unless an appellee voluntarily appears, we cannot proceed against him if the record does not show affirmatively that he has been brought within our jurisdiction by proper notice.

The appeal is dismissed, for want of jurisdiction.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CITY OF OPELIKA, *Plff. in Err.*, [108]
v.
RICHARD C. DANIEL.

(See S. C., Reporter's ed., 108, 109.)

Jurisdiction as to amount—effect of judgment—amendment of pleading.

1. In a suit on coupons for more than $5,000 in amount, if the plaintiff amends his complaint by discontinuing as to part, so as to recover judgment for less than that sum, this court has no jurisdiction to review the judgment.
2. The jurisdiction of this court depends on the matter which is directly in dispute in the particular cause in which the judgment or decree sought to be reviewed has been rendered, and not upon its collateral effect in a subsequent suit between the same or other parties.
3. It is clearly within the discretion of a court to permit an amendment of the complaint before trial.

[No. 21.]

Submitted Oct. 10, 1883. Decided Oct. 29, 1883.

IN ERROR to the Circuit Court of the United States for the Middle District of Alabama.

The history and facts of the case appear in the opinion of the court.

Messrs. **John T. Morgan** and *Bragg & Thorington*, for plaintiff in error.

Messrs. **Samuel F. Rice,** *R. C. Daniel* and *H. A. Herbert*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The action below was brought originally upon one hundred nineteen interest coupons cut from twenty-four bonds of the City of Opelika. The bonds were in the aggregate for $24,000, and the amount claimed to be due on the coupons

NOTE.—*Jurisdiction of U. S. Supreme Court dependent on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

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was more than $5,000. At first a demurrer was filed to the complaint. This being overruled, the validity of the bonds was put in issue by various pleas. Before trial, the plaintiff, Daniel, asked and obtained leave to amend his complaint so as to include only ninety of the coupons originally sued for. After the amendment a jury was impaneled, and on the trial the ninety coupons only were put in evidence. The verdict was for $4,755.64, and a judgment was entered thereon for that amount and no more. To reverse that judgment, this writ of error was brought. At a former Term, Daniel moved to dismiss because the value of the matter in dispute did not exceed $5,000. That motion was continued for hearing with the case on its merits.

We decided at the last Term, in *Elgin* v. *Marshall* [*ante*, 249], that our jurisdiction depends on "The matter which is directly in dispute in the particular cause in which the judgment or decree sought to be reviewed has been rendered," and that we are not permitted, "for the purpose of determining its sum or value, to estimate its collateral effect in a subsequent suit between the same or other parties." That, like this, was a suit on coupons, and the judgment was for less than $5,000, although the bonds from which they were cut amounted to much [109] more, and the validity of the bonds was one of the questions in dispute. The two cases cannot be distinguished in this particular.

It was clearly within the discretion of the court to permit the amendment of the complaint before trial. In *Thompson* v. *Butler*, 95 U. S., 694 [XXIV., 540], we declined to take jurisdiction where the verdict was for more than $5,000, but the plaintiff, before judgment, with leave of the court, remitted the excess, and actually took judgment for $5,000 and no more. In that case it was said, p. 696 [541]: "Undoubtedly, the trial court may refuse to permit a verdict to be reduced by a plaintiff on his own motion; and if the object of the reduction is to deprive the appellate court of jurisdiction in a meritorious case, it is to be presumed the trial court will not allow it to be done. If, however, the reduction is permitted, the errors in the record will be shut out from our re-examination in cases where our jurisdiction depends upon the amount in controversy." That case was stronger in favor of jurisdiction than this. There the reduction was made after verdict. Here before trial. The plaintiff, in effect, discontinued his suit as to part of the coupons. He certainly could have discontinued as to all, and it is difficult to see why he might not as to a part.

The writ is dismissed for want of jurisdiction.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[110] GOOD INTENT TOW-BOAT COMPANY, W. H. McLELLAN Subrogated to the Rights of THE OCEAN TOW-BOAT COMPANY, STEPHEN FLANAGAN ET AL., *Appts.*,

ATLANTIC MUTUAL INSURANCE COMPANY OF NEW YORK, ET AL.

ATLANTIC MUTUAL INSURANCE COMPANY OF NEW YORK, ET AL., *Appts.*,

v.

GOOD INTENT TOW-BOAT COMPANY, W. H. McLELLAN, Subrogated to the Rights of THE OCEAN TOW-BOAT COMPANY, STEPHEN FLANAGAN ET AL.

(See S. C., "*The Tornado*," Reporter's ed., 110-117.)

Contract as to sunken ship, construction of—practice on appeal.

*1. The owners of three steam-tugs which had pumping machinery were employed by the master and agent of a ship sunk at a wharf in New Orleans, with a cargo on board to pump out the ship for a compensation of $50 per hour for each boat, to be continued until the boats were discharged. When the boats were about to begin pumping, the United States Marshal seized the ship and cargo on a warrant on a libel for salvage. After the seizure, the Marshal took possession of the ship and displaced the authority of the master, but permitted the tugs to pump out the ship. After they had pumped for about 18 hours, the ship was raised and placed in a position of safety. The tugs remained by the ship, ready to assist her in case of need, for twelve days, but their attendance was unnecessary and not required by any peril of ship or cargo. In libels of intervention, in the suit for salvage the owners of the tugs claimed each $50 per hour for the whole time including the twelve days, as salvage. The claims were resisted by insurers of the cargo, to whom it was abandoned. The district court allowed $500 to each tug, and $500 to the crew of each tug. On appeal by the owners of the tugs, the circuit court decreed to each of them $1,000. On further appeal by them, this court affirmed that decree.

2. To enforce the contract as one continuing during the time claimed would be highly inequitable; and, as against the insurers of the cargo, the right of the tugs to compensation must be regarded as having terminated when the ship and cargo were raised, and the tugs must be regarded as having been then discharged.

3. The decree of the circuit court was entered May 24, 1880. June 26 a cross appeal to this court, returnable at its October Term following, was allowed. The bond thereon was filed in the circuit court July 5. But the appellants in it did not docket it, or enter their appearance on it, in this court, until September 27, 1883; *held*, that it must be dismissed.

[Nos. 64, 987.]

Argued Oct. 22, 1883. *Decided Nov. 5, 1883.*

CROSS appeals from the Circuit Court of the United States for the District of Louisiana.

The history and facts of the case appear in the opinion of the court.

Messrs. **Joseph P. Hornor** and **William S. Benedict**, for the Good Intent Tow-Boat Company.

Messrs. **P. Phillips**, *James McConnell* and *W. Hallett Phillips*, for the Insurance Companies.

Mr. Justice **Blatchford** delivered the opinion of the court:

These were three libels of intervention filed [111] in the District Court of the United States for the District of Louisiana, against the ship Tornado, her cargo and freight and the proceeds thereof, in the registry of that court, to recover for salvage services rendered by three steam-tugs, The Rio Grande, The Norman and The Harry Wright.

*Head notes by *Mr. Justice* BLATCHFORD.

NOTE.—*Salvage, what is; who is salvor; rates of salvage.* See *note* to Stratton v. Jarvis, 33 U. S. (8 Pet.), 4.

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The libel in the case of the Rio Grande alleges an employment of her owners on the 27th of February, 1878, by the master and agents of The Tornado, "to pump out and raise said ship and her cargo;" with the pumps and appliances of The Rio Grande, for a compensation of $50 per hour, and claims $14,900, for 298 hours, from 6 o'clock P. M., on February 27, till 4 o'clock A. M. on March 12. It alleges that the Marshal of the United States seized the ship while the work was going on, and directed the libelants to proceed under the contract to finish the work.

The libel in the case of The Norman alleges an employment of her owners on the 27th of February, by the master and agents of The Tornado, "to assist in pumping out and raising said ship and cargo," by the use of The Norman and her appliances, for a compensation of $50 per hour, and claims $13,900, for 278 hours, from 6 o'clock P. M. on February 27, till 8 o'clock A. M. on March 11. The libel alleges that the ship was under seizure by the Marshal when the work was commenced, and that the Marshal continued the services of The Norman till the saving of the ship and cargo was fully assured.

The libel in the case of The Rio Grande alleges an employment of her owners, on February 27, to pump water out of the ship and to remain near her afterwards ready to render service, for a compensation of $50 per hour, and claims $11,200, for 224 hours, from 10 o'clock P. M. on February 27, till 6 o'clock A. M. on March 9. The libel alleges that the ship was raised and saved, with her cargo, late in the afternoon of February 28; and that the Marshal, after he seized the ship and cargo, continued the employment of the tug under said contract.

The resistance to these claims is made by the underwriters on the cargo, to whom the cargo was abandoned. Their answer alleges that the ship and cargo and her freight were seized by [112] the Marshal about midday of February 27; that the three tugs came about sundown on the 27th, but performed no effective service in pumping during that night; that effective pumping began the next morning, and that by noon of the 28th the ship was raised out of the water, and was free from all danger of sinking or again taking in water.

The district court awarded $1,000 to each tug, one half to her owners and the other half to her crew. The owners of the three tugs appealed to the circuit court, and that court awarded to the owners of each tug $1,000, and they have appealed to this court. The circuit court found the facts and the conclusions of law on which it rendered its decree. There is no bill of exceptions, and our review of the decree must be limited to a determination of the questions of law arising on the record. The material findings of fact by the circuit court were as follows: "The ship Tornado was a vessel of 1,720 tons burden, and had come to the Port of New Orleans for a cargo of cotton, which she had shipped and stowed away, to the amount of 5,195 bales. She was almost ready for sea, and was lying alongside the wharf in the third district of the City of New Orleans, at the foot of Marigny Street, when, on Sunday, the 24th of February, 1878, at six o'clock A. M., smoke was found coming out of the main hatch, and a number of the crew were at once sent to the nearest fire alarm box, and the fire department of the City of New Orleans were quickly on the spot. The main hatch having been opened, the fire-engines immediately commenced to throw water down the main hatch, which they continued to do until nine o'clock A. M., when the main hatch was closed, and the steam gas-boat Protector, being provided with apparatus for the manufacture of carbonic acid gas, commenced to attempt to extinguish the fire, which at that time was raging quite violently in the hold, by attempting to fill the vessel with carbonic acid gas. This continued until nine o'clock P. M., when the main hatch was opened, and it was found that there was less smoke than there had been before the experiment with the gas had commenced. The engineer of The Protector went down the main hatch, and having hooked on to some bales of the cotton they were hoisted up and landed on the levee greatly charred. [113] In the meantime, the fire-engines were pumping in water through the hatch hole, and the smoke was increasing. A hole was then cut in the deck abreast the main rigging on the starboard side, and some fourteen bales of cotton were got out of this hole. At six o'clock P. M., smoke was greatly increasing and the hatches were again put on, and the hole in the deck covered, and The Protector again commenced pouring carbonic acid gas into the hold of the vessel, and continued doing so during the night. While these things were going on, the harbor tug-boats, The Continental, The N. M. Jones, The Belle Darlington, The Fern, The Aspinwall, The Charlie Wood, The Ida, The Ella Wood No. 2, The Joseph Cooper, Jr., and The Wasp, had all got there, hearing that the vessel was in peril, and were, with the fire department, engaged in pouring water, with their more or less powerful pumps, upon the fire, at all times when the gas experiments were not going on. Arriving at the scene of the disaster, some earlier than others, they were all there during the whole of the first day. On Monday, the 25th of February, at six o'clock in the morning, the main hatch was opened, and the hole that had been made in the deck was uncovered, and the smoke was found to be greatly increased; some thirty-two bales of cotton were at this time taken out by the stevedores. The fire department was hard at work pumping water, and several holes were cut in the decks, trying to get at the seat of the fire. The main pumps were taken up to allow the hose suction to be put down, and The Protector and the steam-engines were pumping out the water, part of the day, but the smoke kept on increasing. At six o'clock P. M., there were twelve feet six inches of water in the hold, and the draft of water aft was twenty-three feet eight inches, and forward twenty-five feet six inches. At eleven and a half P. M., the smoke was still increasing and appearing, and the crew were employed in landing the sails and new ropes, sizing stuff, and all that could be got at, on the wharf. On Tuesday, the 26th of February, at six o'clock A. M., Canby, the regular stevedore of the vessel, and his men, came on board and landed the boats and water casks on the wharf, tore up the forward deck and carlings and commenced to save cargo. By noon the stevedore Drysdale had one hundred eighty-one bales landed and Mr. Canby

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one hundred. The fire department were pouring in water during the night and all the fore- [114] noon, and still the smoke increased, and by noon the men were forced to come up from the hold, and the fire brigade were set to work to fill the ship with water, it having been determined by the captain that the only chance of saving any part of the ship or cargo was to fill her with water and sink her, it being deemed impossible to stop the fire otherwise; and about 7 o'clock P. M. of Tuesday, February 26, the ship sank, the water being two or three feet above the main deck. On Wednesday, February 27, Ellis, the master, and Shultz, the agent, of The Tornado, made a contract with the Tow-Boat Association to which The Norman, Rio Grande and Harry Wright belonged, to pump out The Tornado for a compensation of $50 per hour for each boat, to be continued until the boats were discharged. After the making of said contract, and while The Tornado still lay upon the bottom of the river, The Protector filed a libel for salvage against The Tornado and cargo and, by virtue of a warrant issued on said libel, the United States Marshal seized The Tornado and cargo when the said tow-boats were about to begin pumping her out. After the seizure, the Marshal took possession of The Tornado and displaced the authority of the master, but permitted the said tow-boats to proceed and pump out The Tornado. The said tow-boats commenced pumping out The Tornado early in the evening of February 27, assisted by other tugs and the fire department of the City of New Orleans, and succeeded, with said assistance, at 12 o'clock M. of Thursday, February 28, in raising The Tornado and placing her in a position of safety. The efficient work of pumping out The Tornado was done between 6 A. M. and 12 M. of February 28. The said pumping service was done without serious danger to the tow-boats by which it was rendered. The total valuation of the property saved was $140,090.75. The value of the tow-boats in the aggregate was $75,000; and their daily expenses were each $100, when actually at work. The usual charge made by tugs in the Port of New Orleans is from $6 to $12 per hour for pumping. The said tow-boats remained alongside The Tornado after she was raised, ready to render her assistance in case it was needed, for the period of about twelve days, but such attendance was unnecessary and not required by any peril of The Tornado and cargo, and the fire department of the city was also at hand ready to extinguish a fire [115] in The Tornado should it again break out. The three tow-boats of the appellants, at the time of making the contract, were out of service, laid up on the other side of the river, without crews or provisions, but were immediately manned and victualed and brought over and laid alongside of The Tornado in the afternoon of Wednesday, the 27th of February. At that time there were no other tow-boats alongside of The Tornado. The said tow-boats were provided with machinery and pumps for extinguishing fires and pumping out sunken ships."

The circuit court found the following conclusions of law from these facts: 1. The contract made by the master and agent of The Tornado for pumping her out was inequitable and ought not, under the facts of the case, to be enforced. 2. The service rendered by the three tow-boats was a salvage service, but one of low grade. 3. Each of them should be allowed $1,000. 4. The cost of the appeal should be paid out of the fund in the registry. The decree was that the owners of each tug recover $1,000 from the fund in the registry and that the costs of the appeal be paid out of that fund.

The sole question to be considered on the appeal of the appellants is, whether the amounts which the circuit court awarded to them severally, as owners of the three steam-tugs, should be increased. The errors assigned by the appellants are; (1) that the circuit court held that the contract for pumping out the ship was inequitable, and ought not, under the facts of the case, to be enforced; (2) that it held that the salvage service was of a low grade; (3) that it allowed to each boat only $1,000. These are all assigned as errors in conclusions of law. There is no complaint made by the libelants of the conclusion of law that the service was a salvage service.

In the case of *The Connemara* [*ante*, 751], at the last Term, this court said: "The services [116] performed being salvage services, the amount of salvage to be awarded, although stated by the circuit court in the form of a conclusion of law, is largely a matter of fact and discretion, which cannot be reduced to precise rules, but depends upon a consideration of all the circumstances of each case."

We are of opinion that no ground is shown, on the facts found, for awarding a larger sum to the appellants than the circuit court allowed them. The contract, as found, was a contract made by the master and the agent of the ship with the association to which the three tugs belonged, "to pump out" the ship, for a compensation of $50 per hour for each boat, "to be continued until the boats were discharged." This does not give a very clear idea as to what the contract was. If the pumping out should be completed, there could be no continuance of the service of pumping out the ship, nor of the contract, as a contract to pump out the ship. If the contract was, that the compensation named should continue, in any event, and whether the ship was pumped out or not, until the boats should be discharged, the attendance of the boats alongside of the ship, after she was pumped out and raised and placed in a position of safety, the boats being ready to render assistance, in case it was needed, for a period of about twelve days, is found to have been unnecessary and not required by any peril of The Tornado and cargo. It is not found, as a fact, that the boats were formally discharged by the master or agent of the ship. But it is found that, after the contract was made and while the ship still lay at the bottom of the river, and when the boats were about to begin to pump her out, the Marshal seized the ship and cargo under a warrant on a libel for salvage filed against the ship and cargo, and took possession of the ship, and displaced the authority of the master, but permitted the boats to proceed and pump out the ship, and that they, with other assistance, pumped out the ship and raised her and placed her in a position of safety by a pumping service of about eighteen hours. It is not found that the Marshal requested or sanctioned in any way the continued presence of the tugs after the ship was raised and made safe. The authority of

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the master was displaced by the Marshal. On these facts, we are of opinion that to enforce [117] the contract as one continuing during the time claimed by the libelants would be highly inequitable; and that, as against the insurers of the cargo, the right of the boats to compensation must be regarded as having terminated when the ship and cargo were raised, and the boats must be regarded as having been then discharged, within any fair interpretation which can be given to the contract. A compensation of $50 per hour for the eighteen hours of actual pumping would amount to $900. Every agreement for salvage compensation is subject, as to amount, to the judgment of the court as to its being equitable and conformable to the merits of the case. Pars. Ship., 306; *The Helen and George*, Swabey, 368, Jones, Salvage, 94 *et seq.*

The final decree of the circuit court was entered on the 24th of May, 1880. On the 26th of June following, the underwriters on the cargo filed a petition in the circuit court praying a cross appeal to this court from the decree, and it was allowed, returnable at the October Term, 1880. On the 5th of July following, the bond on the cross appeal was filed in the circuit court. But the appellants in the cross appeal did not docket it nor enter their appearance on it, in this court, until September 27, 1883; and the appellees in it are entitled to have it dismissed. *Grigsby* v. *Purcell*, 99 U. S., 505 [XXV., 354]; *The S. S. Osborne*, 105 U.S., 447 [XXVI., 1065]. *The cross appeal is dismissed and, on the appeal of the libelants, the decree of the Circuit Court is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

DOUBLE POINTED TACK COMPANY,
Appt.,
v.
TWO RIVERS MANUFACTURING COMPANY ET AL.

(See S. C., Reporter's ed., 117-121.)

Letters patent, validity of—patentable invention.

*1. The first claim of letters patent No. 147343, granted February 10, 1874, to the Double Pointed Tack Company, as assignees of Purches Miles, the inventor, for an "improvement in bail ears," namely. "1. The compound staple fastening *d*, for bails, made with the diagonally cut penetrating points 2 and 3, loop four and body 5, said diagonally cut points being positioned as set forth, so as to bend upwardly in driving into the wood, as set forth," does not, in view of what existed before in the art, set forth any patentable invention.

2. It was commonly known that the effect of a diagonal cut on a penetrating point was to force the point, in being driven, in a direction away from the cut. Double pointed staples, with a diagonal cut on each point, but the diagonal cut on one point on the upper and outer side, and on the other point on the lower and outer side, as the staple was driven, were old, the effect in driving being to bring the points together; and there was nothing more than mechanical skill in putting the diagonal cuts on the same side of each leg, so as to incline both points, in driving, in the same direction.

3. The second claim of the patent, namely, "2 The convex metallic washer *e*, in combination with the compound bail-fastening staple *d*, having upwardly penetrating points 2, 3, and loop 4, as and for the purposes specified," does not set forth a patentable combination, but only an aggregation of parts. Neither the staple nor the washer affects or modifies the action of the other.

*Head notes by *Mr. Justice* BLATCHFORD.

[No. 78.]

Argued Oct. 25, 1883. Decided Nov. 5, 1883.

APPEAL from the Circuit Court of the United States for the Eastern District of Wisconsin.

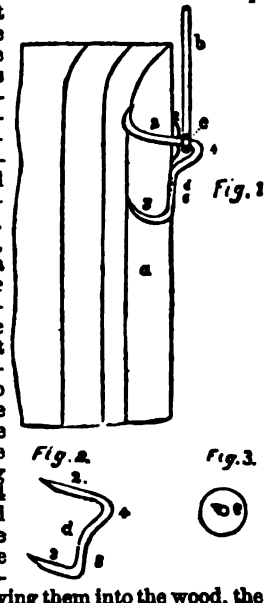
The history and facts of the case appear in the opinion of the court.

Mr. **A. V. Briesen**, for appellant.
Mr. **Wm. P. Lynde**, for appellees.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity brought in the Circuit Court of the United States for the Eastern District of Wisconsin, for the infringement of letters patent No. 147343, granted February 10, 1874, to the plaintiff, the Double Pointed Tack Company, as assignees of Purches Miles, the inventor, for an "improvement in bail ears." The circuit court dismissed the bill, and the plaintiff has appealed to this court.

The specification of the patent says: "Wire staples have been employed to form the fastening eyes for bails, and these have been driven into the wood with the penetrating points nearly at right angles to the surface, and in use they are liable to pull out by the weight. My invention consists in a bail fastening staple made of wire, with the penetrating ends cut at such an angle that, in driving them into the wood, they will assume an upward inclination so that the weight will tend to force such points inwardly rather than to draw them out, and the bending of the ends in clinching will always be upwardly, thus making a better and more reliable article than heretofore; and I combine with such fastening a convex metallic washer to keep the bail from contact with the wood or the paint thereon. In the drawing, Figure 1 is a section of the fastening complete; Figure 2 shows the compound staple fastening separately; and Figure 3 is an elevation of the washer. The wood work, *a*, represents part of a pail or tub, and the bail, *b*, is of wire, having eyes, *c*, at the ends, which are bent so as to stand parallel, or nearly so, to each other. The compound staple fastening, *d*, is made with the penetrating points 2, 3, loop 4 for the eye, *c*, and the body, 5. The ends, 2, 3, of the wire are cut diagonally, so that, in driving them into the wood, the tendency is to bend upwardly and clinch, and they will usually be long enough to pass through the wood and be clinched. The body of the [119]



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fastening stands vertically or nearly so, and will usually be partially imbedded in the wood. The sheet metal washer *e* prevents the eye *c* coming against the wood. The points of the staple penetrate the wood upwardly so as effectually to prevent the staple pulling out under the ordinary strain to which it is subjected." The claims of the patent are these: "1. The compound staple fastening *d*, for bails, made with the diagonally cut penetrating points 2 and 3, loop 4 and body 5, said diagonally cut points being positioned as set forth, so as to bend upwardly in driving into the wood, as set forth. 2. The convex metallic washer *e*, in combination with the compound bail-fastening staple *d*, having upwardly penetrating points 2, 3, and loop 4, as and for the purposes specified."

The gist of the invention set forth in the de-
[120] scriptive part of the specification, so far as the first claim is concerned, is to cut the two penetrating ends of the wire diagonally, and in such a way that, while the staple is being driven, the cut faces will both of them be on the lower side, and the two penetrating ends will both of them incline upwardly. It is shown to have been commonly known that the effect of a bevel, or a diagonal cut on a penetrating point was to force the point, in being driven, in a direction away from the bevel or cut. Double pointed staples, with a diagonal cut on each point, but the diagonal cut on one point on the upper and outer side and on the other point on the lower and outer side, as the staple was driven, were old. They were used to secure wire screens as guards for windows. The effect in driving them was to bring the two points together, by throwing them towards each other, through their movements in opposite directions. The mechanical action embodied was the forcing each point, in being driven, in a direction away from its bevel or cut. The result was that the legs of the staple were bent and came together, and were thus clinched in the driving, and it was more difficult to pull out the staple than if the legs had gone in without bending. In view of this state of the art, there was no patentable invention, and nothing more than mechanical skill, in putting the diagonal cuts or bevels on the same side of each leg of the staple, so as to give both points, in driving, an inclination in the same direction, that direction being one away from both bevels, and in using the device to fasten a bail. This was the view taken by the circuit court. There is no suggestion in the specification or claims as to any invention or novelty in the form of the loop, or of the body, or in the relative lengths of the two penetrating points, or as to the angles formed by such points with the loop or the body, before driving. The so cutting the penetrating ends that they will both of them incline upwardly in driving is the only feature of invention set forth, and to this the patent must be limited, so far as the first claim is concerned.

The second claim is for the washer in combination with the staple of the first claim. This is not a patentable combination. There is only an aggregation of parts when the staple is used
[121] with the washer. The use of the washer is stated in the specification to be to keep the eye at the end of the bail from contact with the wood or the paint thereon. The upper point or leg of the staple goes through the eye and through the center of the washer. But the presence of the washer does not modify or affect the action of the staple, nor does the staple modify or affect the action of the washer. The washer keeps the eye of the bail from rubbing the wood of the pail. It would have the same effect if it were fastened in some other way than by having the leg of the staple pass through it, and the staple would in such case have the same operation which it now has.

The decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—114 U. S., 12.

MANHATTAN LIFE INSURANCE COMPANY, *Plff. in Err.*, *v.* JOHN G. BROUGHTON, Trustee.

(See S. C., Reporter's ed., 121-132.)

Former adjudication—trustee in another State—jurisdiction—self-killing by insane person, not suicide.

*1. A judgment of nonsuit is no bar to a new action, and of no weight as evidence at the trial of that action.

2. Pending an action in a court of the State of New York against a Corporation established in that State, by a widow, a citizen of New Jersey, upon a policy of insurance on the life of her husband, the plaintiff assigned the policy to a citizen of New York in trust for her benefit, and was afterwards nonsuited by order of the court. Upon a subsequent petition by the trustee to another court of the State to be relieved of his trust, a citizen of New Jersey was at her request appointed trustee in his stead. One object of this appointment was to enable a suit on the policy to be brought in the Circuit Court of the United States, which was afterwards brought accordingly. Held, that the suit should not be dismissed under the Act of 3d March, 1875, ch. 137, sections 1, 5.

3. A self-killing by an insane person, understanding the physical nature and consequences of his act, but not its moral aspect, is not a death by suicide, within the meaning of a condition in a policy of insurance upon his life, that the policy shall be void in case he shall die by suicide, or by the hands of justice, or in consequence of a duel, or of the violation of any law.

[No. 63.]

Argued Oct. 22, 1883. Decided Nov. 5, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

This action was brought in the court below, by the defendant in error, to enforce the payment of an insurance policy on the life of Israel Ferguson, deceased.

The trial resulted in a verdict and judgment for the plaintiff for $11,348.78, with costs, whereupon, the defendant sued out this writ of error.

The history and facts of the case more fully appear in the opinion of the court.

Mr. **James Otis Hoyt,** for plaintiff in error:

*Head notes by *Mr. Justice* GRAY.

NOTE.—*Consequences of a nonsuit or dismissal of the complaint; distinction in actions for equitable relief; a nonsuit is no bar to another action for same cause.* See *note* to Homer v. Brown, 57 U. S. (16 How.), 354.

Effect of provision in policy of life insurance avoiding it in case of suicide. See *note* to Life Ins. Co. v. Terry, 82 U. S., XXI., 236.

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The expression "in case he shall die by suicide" includes all cases of self-destruction. If a man take his life, knowing and intending the consequences of his act, it is his act within the meaning of the policy, and it is immaterial whether he did not know the difference between right and wrong; but if he was so insane that he did not know that his act would kill him and did not intend it should it was not his act within the meaning of the policy.

The question is, whether the self-killing is his own act, and not whether it was his responsible act.

This is the law of New York, the *locus* of the contract;

Van Zandt v. *Ins. Co.*, 55 N. Y., 169; *McClure* v. *Ins. Co.*, 55 N. Y., 651; *De Gogorza* v. *Ins. Co.*, 65 N. Y., 232; *Weed* v. *Ins. Co.*, 70 N. Y., 561; and of Massachusetts: *Dean* v. *Ins. Co.*, 4 Allen, 96; *Cooper* v. *Ins. Co.*, 102 Mass., 227; and of Pennsylvania and other States: *Ins. Co.* v. *Isett*, 74 Pa., 176; *St. L. Mut. L. Ins. Co.* v. *Graves*, 6 Bush, 268; and of England: *Borradaile* v. *Hunter*, 5 M. & G., 639; *Defaur* v. *Assur. Co.*, 25 Beav., 602.

The cases of *Ins. Co.* v. *Terry*, 15 Wall., 590 (82 U. S., XXI., 241); *Ins. Co.* v. *Rodel*, 95 U. S., 232 (XXIV., 433), although seeming to adopt a somewhat different doctrine from the above cases, do not go as far as the learned Judge below in his charge.

There is no evidence of any insane impulse in the case. On the contrary, the evidence shows a deliberately planned and intelligently executed act of suicide.

The court below had no jurisdiction; or if the plaintiff was a citizen of New Jersey, it should not have exercised its jurisdiction, the appointment having been made merely to bring the action where it was supposed a more favorable rule existed than in New York.

The same issues involved in this action were tried in the case in the Court of Common Pleas for the City of New York, and the judgment in that case was a bar to the present one and an estoppel.

Krekeler v. *Ritter*, 62 N. Y., 372.

In the event of a recovery by plaintiff, the amount of the judgment in the Court of Common Pleas should be deducted.

Mr. **Erastus F. Brown**, for defendant in error:

Under no circumstances in a common law action, where the trial is before a jury, will a judgment of nonsuit be deemed final, whether entered before or at the trial.

Coit v. *Beard*, 33 Barb., 357; *Wilds* v. *R. R. Co.*, 24 N. Y., 437; *Pratt* v. *Hull*, 13 Johns., 334; *Audubon* v. *Ins. Co.*, 27 N. Y., 218; *People* v. *Valas*, 36 N. Y., 459; *Wheeler* v. *Ruckman*, 51 N. Y., 391; *Dexter* v. *Clark*, 35 Barb., 271; *Wright* v. *Marshall*, 3 Daly, 331; *People* v. *Smith*, 51 Barb., 360; Freem. Judg., 2d ed., sec. 261, Title, Nonsuit; *Derby* v. *Jacques*, 1 Cliff., 425; *Homer* v. *Brown*, 16 How., 354.

When the *cestui que trust* resides abroad, it may be proper to appoint trustees in the same jurisdiction with the beneficiary. The New York Supreme Court exercised this discretion, and the court will not review it.

Perry, Trusts, sec. 297; *Amory* v. *Amory*, 95 U. S., 186 (XXIV., 428); *Grignon* v. *Astor*, 2 How., 319.

If there was any evidence that the deceased was insane, the Judge was not bound to and could not properly take the case from the jury. This is the rule which has been laid down in this court.

Ins. Co. v. *Doster* (*ante*, 65); *Ins. Co.* v. *Terry*, 15 Wall., 580 (82 U. S., XXI., 236).

For if the death is caused by the act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning powers are so far impaired that he is not able to understand the moral character, general nature, consequences and effect of the act he is about to commit, such death is not within the contemplation of the parties to the contract, and the insurer is liable.

Ins. Co. v. *Terry* (*supra*); *Ins. Co.* v. *Rodel*, 95 U. S., 232 (XXIV., 433).

Mr. Justice **Gray** delivered the opinion of the court:

This is an action brought on the 9th of June, 1879, in the Circuit Court of the United States for the Southern District of New York by John G. Broughton, a citizen of Bloomfield in the State of New Jersey, against a Corporation established in the City and State of New York, upon a policy of insurance in the sum of $10,000 on the life of Israel Ferguson, of New York, dated the 15th of June, 1864, made and payable to his wife, and containing a condition that it should be null and void "In case he shall die by suicide, or by the hands of justice, or in consequence of a duel, or of the violation of any law of these States, or of the United States," or of any other country which he might be permitted by this policy to visit or reside in.

At the trial, the plaintiff offered evidence that Ferguson died in the City of New York on the [124] 14th of August, 1876, and that presently afterwards his widow and family removed to Redbank in the State of New Jersey, and had since had their home there. He also introduced a deed, dated the 10th of February, 1877, by which Mrs. Ferguson assigned the policy to John G. Nestell, of New York, in trust to pay a claim for $2,000 and the necessary expenses of collecting the amount of the policy, and to invest the surplus for her benefit; and a record of the Supreme Court of New York, showing that in May, 1879, in a suit brought by Nestell against Mrs. Ferguson to be relieved of his trust, Broughton, the plaintiff, was, upon her request, substituted as Trustee in Nestell's stead. There was evidence tending to show that one object in having Broughton appointed was that a suit could be brought in his name in the United States Court.

The defendant, having pleaded in bar a former judgment in an action brought against it upon the policy by Mrs. Ferguson in October, 1876, in the Court of Common Pleas for the City and County of New York, offered evidence by which it appeared that in such an action the death of Ferguson by hanging himself was proved, and the only question in controversy was whether, and how far, he was insane at the time of his death; and that, upon the defendant's motion, the court, in December, 1879, granted a nonsuit, because he was not shown to have been so insane as not to know the physical consequences of his act, and the decision was entered of record in this form: "Motion

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for nonsuit granted, and complaint dismissed; allowance $150 to defendant, if further litigation be carried on by plaintiff."

The defendant requested the circuit court to direct a verdict for the defendant, because the former judgment was a bar, and afterwards objected to the introduction by the plaintiff of evidence of the condition of Ferguson's mind at the time of his death, because that question had been tried and determined in the former action. The court rightly denied the request, and overruled the objection. A judgment of nonsuit does not determine the rights of the parties, [125] and is no bar to a new action. *Homer* v. *Brown*, 16 How., 354. A trial upon which nothing was determined cannot support a plea of *res judicata*, or have any weight as evidence at another trial.

The defendant, at the close of the plaintiff's evidence in chief, and again at the close of all the evidence in the case, moved to dismiss the action for want of jurisdiction, because Broughton had only a nominal interest, and the real controversy was between citizens of New York; and at the argument in this court contended that the action should be dismissed because the evidence showed that the plaintiff was made Trustee for the purpose of bringing an action in the United States Court, after Mrs. Ferguson had failed to recover in the state court, under the rule established by the recent decisions of the Court of Appeals in *Van Zandt* v. *Ins. Co.*, 55 N. Y., 169, and *Weed* v. *Same*, 70 N. Y., 561.

But the case does not fall within the prohibition of the 1st section of the Act of 3d March, 1875, ch. 137, that no circuit court shall have cognizance of any suit founded on contract, in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made; nor within the provision of the 5th section of the same Act, authorizing the circuit court to dismiss a suit, upon being satisfied that it does not really and substantially involve a dispute or controversy properly within its jurisdiction, or that parties have been improperly or collusively made or joined for the purpose of creating a case cognizable by that court. 18 Stat. at L., 470, 472; *Williams* v. *Nottawa*, 104 U.S., 209 [XXVI., 719]. Mrs. Ferguson, the assured and payee named in the policy, was herself a citizen of New Jersey, and as such, if no assignment had been made, might have sued the Company in the Circuit Court of the United States; and Bromfield, a citizen of the same State, was appointed in the stead of the former trustee, a citizen of New York, not by Mrs. Ferguson's deed *in pais*, but by a court of competent jurisdiction. Under these circumstances, the mere fact that one object in having him appointed was to enable a suit to be brought in the circuit court is not sufficient to require or justify the construction that he was improperly and it cannot be pretended that he was collusively made a plaintiff for the [126] purpose of creating a case cognizable by that court. The question involved was not a question of local law, but of general jurisprudence, upon which Mrs. Ferguson, and Broughton as her Trustee, had a right to seek the independent judgment of a Federal Court. *R. R. Co.* v. *Lockwood*, 17 Wall., 357, 368 [84 U. S., XXI., 627, 636]; *Myrick* v. *R. R. Co.* [*ante*, 325]; *Buryess* v. *Seligman* [*ante*, 359].

Several minor points suggested at the argument hardly present any question of law.

The interrogatories put by the counsel for the plaintiff to the expert called by the defendants were clearly admissible on cross-examination, for the purpose of testing the knowledge and accuracy of the witness, and require no special consideration.

The instruction requested, that "The only legal test of insanity is delusion," was in direct contradiction of the testimony of the experts called on each side, and could not properly be given as a rule of law.

The court rightly refused to direct a verdict for the defendant on the ground that there was no sufficient evidence to show that Ferguson was insane, or to render the defendant liable upon its contract. Without undertaking to recapitulate the evidence, it is sufficient to say that members of his family, and persons well acquainted with him in his business, testified that he was naturally of a lively, cheerful, sanguine disposition; that in 1874 he met with heavy losses in business, and his son died suddenly by falling from a window; that from that time forward there was a marked change in his demeanor; "he was always walking with his head bowed down, and a gloomy expression, and the entire vitality and cheerfulness which the man had before was gone;" "he was gloomy, dull, mopish;" "he sat down in the office and moaned and would be gloomy there;" "he always complained of his head; he would say, 'The trouble is here; it is all in my head, my head;'" that shortly before his death he had "a vacant expression in his face;" "he had a queer expression about his eyes; it was a sort of wild, unnatural expression;" "that kind of expression which the human face takes on when one is frightened; a far off, glassy look, as though the mind was dwelling on nothing;" that "he was very much changed, and was very excitable; [127] he looked different, and had a wild expression; he staid a great deal by himself when he came home from business; he would go to his room and lie on his bed with his hat and overcoat on, and not come out to his meals." The experts called for the plaintiff testified that Ferguson was suffering from that kind of unsoundness of mind which they termed melancholia. There was clearly some evidence of insanity for the jury, and the question of its weight was for them, and not for the court. *Ins. Co.* v. *Rodel*, 95 U. S., 232 [XXIV., 433].

The remaining and the most important question in the case is whether a self-killing by an insane person, having sufficient mental capacity to understand the deadly nature and consequences of his act, but not its moral aspect and character, is a death by suicide, within the meaning of the policy. This is the very question that was presented to this court in 1872 in the case of *Ins. Co.* v. *Terry*, 15 Wall., 580 [82 U. S., XXI., 236]. At that time, there was a remarkable conflict of opinion in the courts of England, in the courts of the several States, and in the Circuit Courts of the United States, as to the true interpretation of such a condition. All the authorities agreed that the words "die by suicide" or "die by his own hand" did not cover every possible case in which a man took his own life, and could not be held to include the case of self-destruction in a blind frenzy or un-

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der an overwhelming insane impulse. Some courts and judges held that they included every case in which a man, sane or insane, voluntarily took his own life. Others were of opinion that any insane self-destruction was not within the condition.*

[128] In *Terry's Case* (the trial of which in the Circuit Court before *Mr. Justice* Miller and *Judge* Dillon is reported in 1 Dill., 403), it was admitted that the person whose life was insured died by poison, self-administered; and the insurance company requested the court to instruct the jury: first, that if he destroyed his own life, and at the time of self-destruction had sufficient capacity to understand the nature of the act which he was about to commit, and the consequences which would result from it, the plaintiff could not recover on the policy; and second, that if the self-destruction was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit and the consequences which would result from it, it was wholly immaterial that he was impelled thereto by insanity, which impaired his sense of moral responsibility, and rendered him to a certain extent irresponsible for his action. 15 Wall., 581 [82 U. S., XXI., 236]. The circuit court declined to give either of the instructions requested, and instructed the jury in substantial accordance with the first of them only, saying: "It devolves on the plaintiff to prove such insanity on the part of the decedent, existing at the time he took the poison, as will relieve the act of taking his own life from the effect which, by the general terms used in the policy, self-destruction was to have, namely: to avoid the policy. It is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring liable. To do this, the act of self-destruction must have been the consequence of the insanity, and the mind of the decedent must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing. If he was impelled to the act by an insane impulse, which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable. On the other hand, there is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity, and if you believe from the evidence that the decedent, although excited or angry or distressed in mind, formed the determination to [129] take his own life, because, in the exercise of his usual reasoning faculties, he preferred death to life, then the company is not liable, because he died by his own hand within the meaning of the policy." 15 Wall., 582 [236].

*Borradaile v. Hunter, 5 Man. & Gr., 639; S. C., 5 Scott (N. R.), 418; Dormay v. Borrodaile, 10 Beav., 335; Schwabe v. Clift, 2 Car. & K., 134, and 3 C. B., 437; Stormont v. Waterloo Ins. Co., 1 F. & F., 22; Dufaur v. Professional Ins. Co., 25 Beav., 599, 602; Solicitors' Assurance Society v. Lamb, 1 Hem. & M., 716, and 2 De G. J. & S., 251; Breasted v. Farmers L. & T. Co., 4 Hill, 73, and 8 N. Y., 299; Dean v. Ins. Co., 4 Allen, 96; Cooper v. Ins. Co., 102 Mass., 227; Eastabrook v. Ins. Co., 54 Me., 224; Gove v. Ins. Co., 48 N. H., 41; Ins. Co. v. Graves, 6 Bush, 268; Nimick v. Ins. Co., 10 Am. L. Reg. (N. S.), 101; Gay v. Ins. Co., 9 Blatchf. (C. C.), 142; Terry v. Ins. Co., 1 Dill., 403.

The necessary effect of giving these instructions, after refusing to give the second instruction requested, was to rule that if the deceased intentionally took his own life, having sufficient mental capacity to understand the physical nature and consequences of his act, yet if he was impelled to the act by insanity, which impaired his sense of moral responsibility, the company was liable. That the ruling was so understood by this court is apparent by the opening sentences of its opinion, on page 583 [239], as well as by its conclusion, which, after a review of the conflicting authorities on the subject, was announced in these words: "We hold the rule on the question before us to be this: if the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy or a desire to escape from the ills of life, intentionally takes his own life; the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable." Pp. 590, 591 [242].

In *Ins. Co.* v. *Rodel* [*supra*], the same rule was expressly re-affirmed. In that case, the circuit court declined to instruct the jury that the plaintiff could not recover if the assured knew that the act which he committed would result in death, and deliberately did it for that purpose; and, instead thereof, repeated to the jury the instructions of the circuit court in *Terry's Case*, and the conclusion of the opinion of this court in that case, as above quoted. This court, in affirming the judgment, said: "This charge [130] is in the very words of the charge sanctioned and approved by this court in the case of *Ins. Co.* v. *Terry* [*supra*], including an explanatory clause of the opinion of the court in that case. We see no reason to modify the views expressed by us on that occasion." 95 U. S., 241 [*supra*].

The policies in the cases of *Terry* and of *Rodel* used the words "die by his own hand," instead of which the policy before us has the words "die by suicide." But, for the purposes of this contract, as was observed in *Terry's Case*, the two expressions are equivalent.

In the present case, the defendant requested the court to instruct the jury "That if Israel Ferguson died by suicide, the plaintiff cannot recover, unless he has proved to your satisfaction that such act of self-destruction was not Ferguson's voluntary and willful act; that he had not at the time sufficient power of mind and reason to understand the physical nature and consequences of such act, and did not have, at the time, a purpose and intention to cause his own death by the act;" "that unless the evidence established that Israel Ferguson did not commit suicide consciously and voluntarily, the plaintiff cannot recover;" and "that if he thus committed it, it is immaterial whether he was capable of understanding its moral aspects, or of distinguishing between right and wrong."

The court declined to give these instructions, and read to the jury the second instruction re-

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fused in *Terry's Case*, and the instructions given therein, as above quoted, and stated that the refusal of the former and the giving of the latter had been approved by this court, and that its decision contained a full exposition of the law, so far as it was necessary to be understood for the purposes of this case, and laid down the rule which would determine them in the application of the evidence, which had been introduced; and further instructed them as follows: "Upon the part of the defendant, an argument based upon the peculiar circumstances surrounding the suicide has been addressed to you, which is deserving of consideration; the various circumstances, showing premeditation, plan, thought, which, it is very fairly urged, afford [131] quite strong evidence that at the time of his death he was in the full possession of his mental faculties. A serious question, gentlemen, which you will ask yourselves in this case, it seems to me, is this: had he, in view of his misfortunes, and of the probable future that awaited him, deliberately come to the conclusion that it was better to die than to live, and did he in that view commit suicide; or was he so far mentally unsound that he could not exercise a rational judgment upon the question of life and death? Did he become oblivious to the duties which he owed to his family, to his friends and to himself? Was he impelled by a morbid impulse which he had not sufficient strength of will to resist, and acting under the influence of this insane impulse did he determine to take his own life? Because, if his reasoning faculties were so far impaired that he could not fairly estimate the moral consequences, the moral complexion of the act, even though he could reason sufficiently well to prepare with great deliberation, and to execute his design with success, nevertheless, within the authority which I have read, he was so far insane that the plaintiff is entitled to recover on this policy."

These instructions are in exact accordance with the adjudications in the cases of *Terry* and *Rodel;* and upon consideration we are unanimously of opinion that the rule so established is sounder in principle, as well as simpler in application, than that which makes the effect of the act of self-destruction, upon the interests of those for whose benefit the policy was made, to depend upon the very subtile and difficult question how far any exercise of the will can be attributed to a man who is so unsound of mind that, while he foresees the physical consequences which will directly result from his act, he cannot understand its moral nature and character, nor in any just sense be said to know what it is that he is doing.

If a man's reason is so clouded or disturbed by insanity as to prevent his understanding the real nature of his act, as regards either its physical consequences or its moral aspect, the case appears to us to come within the forcible words uttered by the late *Mr. Justice* Nelson, when *Chief Justice* of New York, in the earliest American case upon the subject; "Speaking legally also (and the policy should be subjected to this [132] test), self-destruction by a fellow being bereft of reason can with no more propriety be ascribed to his own hand than to the deadly instrument that may have been used for the purpose;" and, whether it was by drowning or poisoning or hanging or in any other manner, "was no more his act, in the sense of the law, than if he had been impelled by irresistible physical power." *Breasted* v. *Farmers' L. & T. Co.*, 4 Hill, 73, 75.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

CHESTER A. ARTHUR, Collector of the PORT OF NEW YORK, *Plff. in Err.*, [139]

v.

HENRY PASTOR ET AL.

(See S. C., Reporter's ed., 139-142.)

Tariff Act, construction of.

Under a Tariff Act which declares that the duty upon washed wool shall be twice the amount of duty to which it would be subjected if imported unwashed, the duty, so far as determined by weight, is calculated upon the same number of pounds at double the rate, and the *ad valorem* duty is to be assessed upon double the value of the unwashed wool.

[No. 47].

Argued Oct. 15, 1883. *Decided Nov. 5, 1883.*

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the opinion of the court.

Mr. **William A. Maury**, *Asst. Atty-Gen.*, for plaintiff in error.

Messrs. **Edward Hartley** and *Walter H. Coleman*, for defendants in error.

Mr. Justice **Matthews** delivered the opinion of the court:

This action was brought by the defendants in error, to recover from the defendant below, now plaintiff in error, money alleged to have been illegally exacted and paid under protest, as customs duties upon an importation of wool. Upon the facts set out in a bill of exceptions and in respect to which there is no dispute, there was a verdict and judgment for the plaintiff below, upon a charge of the court to that effect, to review which this writ of error is prosecuted, the error alleged being that, upon the law of the case, the verdict and judgment should have been rendered for the plaintiff in error.

The importation, which took place January 3, 1876, consisted of 3,294 pounds of washed wool of class 1, tariff schedule L, the dutiable appraised value of which in its washed condition was $1,627, or 49.49 cents per pound. Had it been imported in an unwashed condition, the dutiable appraised value thereof would have been $813.50, or 24.69 cents per pound.

There were three grades or descriptions of wool known to the trade, rated as to value according to the degree to which they had been freed from impurities, by processes of cleaning, known as unwashed, washed and scoured wool: and their cost and value were determined in a corresponding proportion, washed wool being worth twice and scoured wool three times that of unwashed wool. [140]

The same distinction, for the purposes of the law, was made in the provisions of the Tariff Act then in force. By the terms of that Act, R. S., title XXXIII., schedule L, foreign wools

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were divided into three classes, the first, clothing wools; the second, combing wools; the third, carpet wools and other similar wools. It was provided that "The duty upon wool of the first class, which shall be imported *washed*, shall be twice the amount of the duty to which it would be subjected if imported *unwashed*; and the duty upon wool of all classes, which shall be imported *scoured*, shall be three times the duty to which it would be subject if imported *unwashed*."

It was then provided that the duty to be levied should be as follows: "Wools of the first class, the value whereof at the last port or place whence exported to the United States, excluding charges in such port, shall be thirty-two cents or less per pound; ten cents per pound, and in addition thereto eleven per centum *ad valorem*. Wools of the same class, the value whereof at the last port or place whence exported to the United States, excluding charges in such port, shall exceed thirty-two cents per pound; twelve cents per pound, and in addition thereto ten *per centum ad valorem*."

The Collector, in making his assessment upon the importation in question, exacted duty as follows:

On 3,294 pounds @ 20 cts. per pound,	$658 80
" $1,627 (its value *washed*) @ 22 per cent	357 94
Total	$1,016 74

The importers protested that they should be charged, as an *ad valorem* duty, only $178.97, or one half the amount charged and collected, being twenty-two per cent on the reduced value of the wool, as if unwashed, making a difference of $178.97, which is the amount in controversy. It was proven on the trial that the value of that number of pounds of such wool, *unwashed*, would have been $813.50.

The construction of the statute and the rule of computation, adopted by the Collector, proceeds upon the supposition that the rate of duty to be charged and collected upon washed wool, is to be double that charged and collected upon the same weight and value of unwashed wool. Hence, because 3,294 pounds of unwashed wool would be chargeable with a duty of ten cents per pound, and eleven per cent of its appraised value as unwashed wool, it is found that the same weight of washed wool would be chargeable with twenty cents per pound, and twenty-two per cent of its appraised value as washed wool.

The error in this calculation clearly is in assuming that the same number of pounds of unwashed wool would be worth as much as washed wool, a supposition which is inconsistent with the fact, as admitted, and with the evident meaning of the law. The language of the Act of Congress is too plain to admit of doubt. It declares that the duty upon a given quantity of [142] washed wool shall be twice the amount of duty "to which it would be subjected if imported unwashed." By the terms of the comparison, the weight is supposed to be the same in both cases—in the case, as actually presented, a quantity of wool weighing 3,294 pounds. Hence, the duty, so far as determined by weight, is calculated upon the same number of pounds, being eleven cents per pound for the unwashed wool, and twenty-two cents per pound for the washed wool. But when the *ad valorem* duty is to be determined, the relative values necessarily determine its amount; and, as 3,294 pounds of unwashed wool is to be appraised at $813.50, while the same weight of washed wool would be twice that sum, or $1,627, it follows that the duty on the latter is to be double that which the law imposes upon the former, namely: twenty-two per cent of $813.50, which is equal to $178.97, and not twenty-two per cent on $1,627, equal to $357.94, as charged by the Collector. If the rule adopted by him should prevail, the amount of the *ad valorem* duty collected upon equal weights of unwashed and of washed wool, would be four times as great upon the latter as upon the former, for not only is the rate of duty doubled, but it is assessed upon double the value of the unwashed wool. But the statute expressly limits the duty in the case of washed wool to double the amount to which it would be subjected if imported unwashed.

It is admitted in argument, that the letter of the law justifies, if it does not require this conclusion; but it is urged that the meaning of the statute requires the construction which would impose rates of duty upon washed wool double those imposed upon unwashed, calculated upon the weight and value of each separately considered. And this contention is maintained upon the argument that the contrary reading of the statute implies that Congress has made the appraised value of wool in its unwashed state the standard for determining the amount of *ad valorem* duty to be collected from washed wool, which, it is insisted upon the argument, *ab inconvenienti*, is not admissible. But this is, not by implication merely, but expressly what the Act declares; and any fancied or real objections to such a standard cannot affect the obvious meaning of the law. It is obvious, however, [143] that the natural division of wools into the grades of unwashed, washed and scoured, carried into the Act as the ground of difference in the amount of duties to be assessed accordingly, fully explains the intention of Congress to tax the wool itself uniformly by varying the amount of duty according to the degree to which a given quantity has been freed, by processes of cleansing from the dirt and foreign matter with which, in its unwashed state, it is usually found.

There is no error in the record, and the judgment is affirmed.

Mr. Justice **Field** did not sit in this case and took no part in its decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

HARRY NEWMAN, *Plff. in Err.*,
v.
CHESTER A. ARTHUR, Collector of the PORT OF NEW YORK.

(See S. C., Reporter's ed., 132-138.)

Tariff Act, construction of.

1. A clause in a Tariff Act, fixing a duty on manufactures of cotton exceeding two hundred threads to the square inch, does not apply only to goods so classed by mercantile usage where the threads can be counted by the aid of a glass; but the language being unequivocal, it applies to all such goods in

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which the threads can be counted even by unraveling.

2. The fact that, at the date of the passage of a Tariff Act, goods of a particular kind had not been manufactured, cannot withdraw them from the class to which they belong, as described in the statute, where its language fairly and clearly includes them.

[No. 79.]

Argued Oct. 24, 1883. Decided Nov. 5, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **Edwin B. Smith,** for plaintiff in error.

Mr. **S. F. Phillips,** *Solicitor-Gen.*, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

This action was brought to recover money alleged to have been illegally exacted by the Collector of Customs at the Port of New York, and paid under protest. There was a verdict and judgment in favor of the defendant below, to reverse which this writ of error is prosecuted.

The importations were made in 1875 and consisted of cotton goods, upon which the Collector assessed a duty of five and a half cents a square yard and twenty per centum *ad valorem*. The plaintiff, at the time of the liquidation, claimed that the goods were liable to a duty of only thirty-five per cent *ad valorem*, as manufactures of cotton not otherwise provided for.

It was proven on the trial that goods like those in question were first manufactured in [133] Manchester, England, in 1868 or 1869, they being then a new article of manufacture, and were first introduced into this country in 1869 or 1870. They have been known since their first introduction into this country, in trade and commerce, by the name of cotton Italians, and used exclusively for coat linings. The importations in question were wholly of cotton and dyed black in the piece, after being woven, and were made in imitation of a well known article called Italian cloth, made of wool, and used for lining woolen coats. The surface of the cotton Italians was, by some process of weaving and calendering made smooth and glossy like that of the real Italians.

Plain woolen goods are those in which the warp and woof threads cross each other at right angles. Cotton Italians are not plain woven, but are twilled goods, and had upon them figures of different designs made in weaving. The cotton Italians in question had more than one hundred threads and less than two hundred threads to the square inch, counting the warp and filling, and were less in weight than five ounces to the square yard, and did not exceed in value twenty-five cents to a square yard. Plaintiff's counsel gave evidence tending to show that the number of threads to the square inch in plaintiff's importations could not be counted without unraveling the goods.

The plaintiff's counsel asked the plaintiff, who was duly sworn as a witness in the cause, the following question: "Are the goods bought and sold by the count of the number of threads?"

The defendant's counsel objected to the question as immaterial. The court sustained the objection, and plaintiff's counsel duly excepted.

The plaintiff's counsel then offered to prove by the witness that goods like those in question were never known in trade and commerce in this country as countable goods, or so bought and sold.

The defendant's counsel objected to the evidence as immaterial. The court sustained the objection, and plaintiff's counsel duly excepted. Plaintiff's counsel then offered to show that, prior to 1861 and ever since, there have been in [134] trade and commerce in this country a great variety of cotton cloths known as countable goods, and which were bought and sold by the number of threads in the warp and filling, which number of threads were ascertainable by a glass and without taking the fabric to pieces.

The defendant's counsel objected to the question as immaterial. The court sustained the objection, and plaintiff's counsel duly excepted. The plaintiff's counsel then asked the witness the following question: "Was the value of cotton Italians partially or wholly determined between the manufacturer and the purchaser according to the number of threads to the square inch?"

To this question, defendant's counsel objected as immaterial. The court sustained the objection, and plaintiff's counsel duly excepted.

It was conceded that plaintiff's goods were neither cotton jeans, denims, drillings, bed-tickings, ginghams, plaids, cottonades nor pantaloon stuff, nor goods of like description to them or either of them, nor for similar use.

Among others, not necessary here to refer to, the following instructions were requested by the counsel for the plaintiff in error, which the court refused to give, and to which exception was duly taken, *viz.*:

"3. That if the number of threads to the square inch in plaintiff's goods, counting the warp and filling, cannot be counted without taking the goods to pieces, then the plaintiff is entitled to recover.

5. That cotton Italians, being a new manufacture, and unknown here and abroad when the Act of 1864 was passed, they were not specifically enumerated, and the presumption, until rebutted, is, that they come under the general provision of manufactures not otherwise provided for."

The provisions of the law which govern the case are contained in section 2504 Revised Statutes, being schedule A, cotton and cotton goods, and are as follows:

"1. Sec. 2504. On all manufactures of cotton, except jeans, denims, drillings, bed-tickings, ginghams, plaids, cottonades, pantaloon stuff and goods of like description, not bleached, colored, stained, painted or printed, and not exceeding one hundred threads to the square inch, counting the warp and filling, and exceeding in weight five ounces per square yard, five cents per square yard; if bleached, five cents and a half per square yard; if colored, stained, painted or printed, five cents and a half per square yard, and, in addition thereto, ten per centum *ad valorem*.

2. On finer and lighter goods of like description not exceeding two hundred threads to the square inch, counting the warp and filling, unbleached, five cents per square yard; if bleached, five and a half cents per square yard; if colored, stained, painted or printed, five and a half cents per square yard and, in addition thereto, twenty per centum *ad valorem*.

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[136] 3. On goods of like description, exceeding two hundred threads to the square inch, counting the warp and filling, unbleached, five cents per square yard; if bleached, five and a half cents per square yard; if colored, stained, painted or printed, five and a half cents per square yard and, in addition thereto, twenty per centum *ad valorem*.

4. On cotton jeans, denims, drillings, bed-tickings, ginghams, plaids, cottonades, pantaloon stuffs and goods of like description, or for similar use, if unbleached and not exceeding one hundred threads to the square inch, counting the warp and filling, and exceeding five ounces to the square yard, six cents per square yard; if bleached, six cents and a half per square yard; if colored, stained, painted or printed, six cents and a half per square yard and, in addition thereto, ten per centum *ad valorem*.

5. On finer or lighter goods of like description, not exceeding two hundred threads to the square inch, counting the warp and filling, if unbleached, six cents per square yard; if bleached, six and a half cents per square yard; if colored, stained, painted or printed, six and a half cents per square yard and in addition thereto, fifteen per centum *ad valorem*.

6. On goods of lighter description, exceeding two hundred threads to the square inch, counting the warp and filling, if unbleached, seven cents per square yard; if bleached, seven and a half cents per square yard; if colored, stained, painted or printed, seven and a half cents per square yard and, in addition thereto, fifteen per centum *ad valorem; Provided*, That, upon all plain woven cotton goods, not included in the foregoing schedule, unbleached, valued at over sixteen cents per square yard; bleached, valued at over twenty cents per square yard; colored, valued at over twenty-five cents per square yard, and cotton jeans, denims and drillings, unbleached, valued at over twenty cents per square yard, and all other cotton goods of every description, the value of which shall exceed twenty-five cents per square yard, there shall be levied, collected and paid a duty of thirty-five per centum *ad valorem; And provided, further*, That no cotton goods having more than two hundred threads to the square inch, counting the warp, and filling, shall be admitted to a less rate of duty than is provided for goods which are of that number of threads.

[137] 12. * * * and all other manufactures of cotton not otherwise provided for, thirty-five per centum *ad valorem*."

The contention of the plaintiff in error now relied on is, in substance, that the goods in question are not embraced in the provisions of the statute, applicable to manufactures of cotton, described and classed by the number of threads to the square inch, because that description had reference only to goods so described and classed by mercantile usage in dealings between buyers and sellers, where the threads could be counted by the aid of a glass; whereas, the goods in question, as it must be assumed from the offers of proof which were rejected, were not dealt in by manufacturers and merchants according to any such usage, and could not be, because the threads in a square inch could not be counted, except by unraveling the fabric for that purpose; and it is therefore argued that, as the goods in question were of a new manufacture, not known at the date of the passage of the Act, they cannot be considered as within the specified enumeration of the statute, and the appropriate duty must be determined by the final clause, embracing "all other manufactures of cotton not otherwise provided for." The claim is, in the language of counsel making it, that "Congress did not mean to subject to this 'countable' clause every article of cotton manufacture of which, by cutting out a square inch, the number of threads constituting the warp and woof of that area *could be counted;* but only those articles in which the threads *were counted* in ordinary mercantile transactions therein, and which could be counted by methods practiced by the trade."

It is sought to support this argument by invoking the rule of construing the statute, applied in *Arthur* v. *Morrison*, 96 U. S., 108 [XXIV., 764], and the numerous cases there cited, that where words are used in an Act imposing duties upon imports which have acquired, by commercial use, a meaning different from their ordinary meaning, the latter may be controlled by the former if such be the apparent intent of the statute; but the application fails in the present instance because the language used is unequivocal. There is no reference in the statute, either expressly [138] or by implication, to any commercial usage, and there is no language in it which requires for its interpretation the aid of any extrinsic circumstances. The rejected proof of the custom of merchants to rate certain descriptions of goods, as to values, by the number of threads to the square inch, as ascertained by inspection by means of a glass, throws no light whatever on the meaning of the law, because the law fixes the rate of duty by a classification based on the number of the threads in a square inch, without reference to the mode in which the count is to be made. It might be quite convenient for dealers not to count the threads, except when they could do so without unraveling, but it is pure conjecture that Congress intended to stop the count by Collectors at the same limit. There appears to be no difficulty in counting the threads, no matter how fine the fabric, as long as the goods are plain woven; and the necessity of unraveling for the purpose of counting seems to exist only in case of twilled goods; and yet, this very Act requires a count of threads in the case of jeans, denims, drillings, bed-tickings, etc., which are twilled, and bases a difference of duty upon them according to the number of threads to the square inch so ascertained.

The fact that, at the date of the passage of the Act, goods of the kind in question had not been manufactured, cannot withdraw them from the class to which they belong, as described in the statute, where, as in the present case the language fairly and clearly includes them.

There is no error in the record, and the judgment is accordingly affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Appt.*,
v.
JOSEPH W. FISHER.

(See S. C., Reporter's ed., 143-146.)

Salary of Judges—appropriation Act.

1. The Act of June 17, 1880, fixing the annual

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salary of the *Chief Justice* of a Territory at $3,000, was not a contract that the salary should not be reduced during his term of office.

2. A subsequent Act which appropriates $2,600 for the salary of such officer for one year, and declares that the sum so appropriated shall be in full compensation for his services as *Chief Justice* for the year specified, prevents his recovering the greater sum fixed by such former Act; the earlier Act must, for the time covered by the appropriation Act, be considered as suspended.

[No. 53.]

Submitted Mar. 30, 1883. Decided Apr. 16, 1883. Judgment vacated Apr. 23, 1883. Decided Nov. 5, 1883.

APPEAL from the Court of Claims.

The history and facts appear in the

Statement of the case by *Mr. Justice* **Woods:**

It appears from the findings of the Court of Claims that the appellee held the office of *Chief Justice* of the Territory of Wyoming, from February 14, 1876, to November 26, 1879. Up to and including June 30, 1877, he was paid his salary at the rate of $3,000 per annum. From June 30, 1877, up to and including November 26, 1879, he was paid and received, without protest, compensation as such *Chief Justice*, at the rate of $2,600 per annum.

The appellee contending that he was entitled to a salary at the rate of $3,000 per annum for his whole term of service, brought this suit in the Court of Claims to recover the difference between what his salary at that rate would have been from June 30, 1877, up to and including November 26, 1879, and the amount actually paid him for that period.

The majority of the Court of Claims was of opinion that the contention of the appellee could not be sustained, but in order that the question might be brought to this court and finally settled, rendered a judgment *pro forma* in his favor for $862.22, from which the United States have appealed.

Mr. **William A. Maury,** *Asst. Atty-Gen.*, for appellant.

Messrs. **Theodore H. N. McPherson** and *J. Thomas Turner*, for appellee.

Mr. Justice **Woods** delivered the opinion of the court:

The Act of June 17, 1870, entitled "An Act to Regulate the Salaries of Chief Justices and Associate Justices in the Territories," 16 Stat. at L., 152; Rev. Stat. sec. 1879, provided as follows: "The salaries of the Chief Justices and Associate Justices of the Territories of New Mexico, Washington, Wyoming, etc., shall be $3,000 each per annum."

This statute remaining in force, Congress, on March 3, 1877, passed an Act entitled "An Act Making Appropriations for the Legislative, Executive and Judicial Expenses of the Government for the Year Ending June 30, 1878, and for Other Purposes." 19 Stat. at L., 294. This Act declared as follows: "That the following sums be, and the same are hereby appropriated out of any money in the Treasury not otherwise appropriated, in full compensation for the service of the fiscal year ending June 30, 1878, for the objects hereinafter expressed.

* * * * * *

Government in the Territories.

* * * * * *

Territory of Wyoming. For salaries of Governor, *Chief Justice* and two Associate Judges, at $2,600 each."

The Act of June 19, 1878, making appropriations for the fiscal year ending June 30, 1879, contained similar provisions in the same language. 20 Stat. at L., 178, 194. The Act of June 21, 1879, 21 Stat. at L., 23, making appropriations for the fiscal year ending June 30, 1880, appropriated "The same sums of money and for like purpose, and continuing the same provisions relating thereto, as were appropriated for the fiscal year ending June 30, 1879," by the Act above referred to making appropriations for that year. With the exception of the words "in full compensation," the opening clause of these Acts is substantially the same as that used in all other appropriation Acts of every description since the foundation of the Government. [145]

Upon this state of the statute law, the question is presented whether, from June 30, 1877, up to and including November 26, 1879, the appellee was entitled to a salary at the rate of $3,000 per annum, or at the rate of $2,600 per annum. The contention of appellee is that under the Act of June 17, 1870, he was entitled to the salary of $3,000, notwithstanding the subsequent legislation above referred to.

We cannot concur in this view. The Act of June 17, 1880, fixing the annual salary of appellee at $3,000 was not a contract that the salary should not be reduced during his term of office. *Butler* v. *Pa.*, 10 How., 402. Nor was there any provision of the Constitution which forbade a reduction. *Clinton* v. *Englebrecht*, 13 Wall., 434 [80 U. S., XX., 659].

Congress therefore could, without the violation of any contract, reduce the salary of appellee, and had the constitutional power to do so.

Certain well settled rules of interpretation are applicable to this case. One is that a legislative Act is to be interpreted according to the intention of the legislation apparent upon its face; *Wilkinson* v. *Leland*, 2 Pet., 627; another that, if possible, effect must be given to every clause, section and word of the statute; Bacon's Abr. Statute I., 2; *Powlter's Case*, 11 Coke, 29*a*, 34*a*; Potter, Dwar., 194; *Opinion of the Justices*, 22 Pick., 571; and a third, that where two Acts are in irreconcilable conflict, the later repeals the earlier Act, even though there be no express repeal. *McCool* v. *Smith*, 1 Black, 459 [66 U. S., XVII., 218]; *U. S.* v. *Tynen*, 11 Wall., 88 [78 U. S., XX., 153]; *Red Rock* v. *Henry* [*ante*, 251]; *U. S.* v. *Irwin*, 5 McLean, 178; *West* v. *Pine*, 4 Wash., 691; *Britton* v. *Commonwealth*, 1 Cush., 302.

Applying these rules, we think that the appropriation Acts above referred to, so far as they concern the question in hand, are susceptible of but one meaning. Placing side by side the two clauses of the statute which relate to this controversy, their plain effect is to appropriate $2,600 for the salary of the appellee for one year, and to declare that the sum so appropriated shall be in full compensation for his services as *Chief Justice* for the year specified. There is no ambiguity and no room for construction. [146]

We cannot adopt the view of appellee unless we eliminate from the statute the words "in full compensation," which Congress, abandon-

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ing the long used form of the appropriation Acts has, *ex industria*, inserted. Our duty is to give them effect. When Congress has said, that the sum appropriated shall be in full compensation of the services of the appellee, we cannot say that it shall not be in full compensation, and allow him a greater sum.

Not only do the words of the statute make the intention of Congress manifest, but that intention is plainly repugnant to the former statute, which fixes the yearly salary of the *Chief Justice* at $8,000. It is impossible that both Acts should stand. No ingenuity can reconcile them. The later Act must therefore prevail, and the earlier Act must, for the time covered by the appropriation Acts above referred to, be considered as suspended. *The result of these views is, that the judgment of the Court of Claims, which gives the appellee a salary at the rate of $3,000 per annum from June 30, 1877, to November 26, 1879, must be reversed, and the case remanded to the Court of Claims, with directions to dismiss the petition.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Appt.*,
v.
CHARLES MITCHELL.

(See S. C., Reporter's ed., 146-150.)

Appropriation Act—effect of, on salaries.

By the Revised Statutes the salaries of interpreters were fixed at $400 per annum. For five years during the appellee's term of service the appropriation for the annual pay of interpreters was $300 each. Held, that it was the intention of Congress to fix, by such appropriation Acts, the annual salaries of interpreters for the time covered by those Acts at $300 each, and no more can be recovered.

[No. 850.]

Submitted Mar. 30, 1883. Decided Nov. 5, 1883.

APPEAL from the Court of Claims.

The history and facts appear in the

Statement of the case by *Mr. Justice* **Woods:**

This was a suit by the appellee, Charles Mitchell, to recover a balance which he claimed to be due him as Indian interpreter at the Santee Agency in the State of Nebraska, under section 2,070, title XXIII., of the Revised Statutes.

That section, and section 2,076, which constitutes part of the same title, and also relates to the compensation of interpreters, are as follows:

Sec. 2070. "The salaries of interpreters lawfully employed in the service of the United States in Oregon, Utah and New Mexico, shall be $500 a year each, and of all so employed elsewhere, $400 a year each."

Sec. 2076. "The several compensations prescribed by this title shall be in full of all emoluments and allowances whatsoever."

It appears from the findings of the Court of Claims that the appellee was an interpreter at the Santee Indian agency in the State of Nebraska, duly appointed under section 2068 of the Revised Statutes, and that he held the office and discharged its duties for several periods between July 1, 1878, and November 22, 1882, his whole term of service amounting to three years and seven months.

During all this time, instead of the salary of $400 per annum, as provided in section 2070, he was paid only at the rate of $300 per annum, for which he gave a receipt in full for his services, Congress having appropriated that sum only for his yearly compensation during his term of service.

The appellee, contending that he was entitled to a salary at the rate of $400 per annum, brought this suit to recover the difference between his salary at that rate and the sum which he was actually paid. The Court of Claims, adopting the views of the appellee, rendered a judgment in his favor for $353.33, from which the United States appealed.

Messrs. **Thomas Simons,** *Asst. Atty-Gen.*, and **John S. Blair,** for appellant.

Mr. **George A. King,** for appellee.

Mr. Justice **Woods** delivered the opinion of the court:

It is contended on behalf of the United States that, by the appropriation Acts which cover the period for which the appellee claims compensation, Congress expressed its purpose to suspend the operation of section 2070 of the Revised Statutes, and to reduce for that period the salaries of the appellee and other interpreters of the same class from $400 to $300 per annum. We think this contention is well founded.

The law fixing the salaries of interpreters, as found in section 2070 of the Revised Statutes, was first passed in the Indian appropriation Act of February 27, 1851. 9 Stat. at L., 587. That Act appropriated a gross sum for the pay of interpreters authorized by the Act of June 30, 1834, 4 Stat. at L., 735, and declared that the salaries of interpreters employed in certain named Territories should be $500, and in all others $400 per annum. From the passage of that Act down to the passage of the Indian appropriation Act of March 3, 1877, 19 Stat. at L., 271, the appropriations for the salaries of interpreters were made at those rates. The Act last mentioned specifically appropriated for the pay of Indian interpreters the uniform sum of $300 each. This course of legislation was continued for five consecutive years, until the passage of the Indian appropriation Act of May 17, 1882, 22 Stat. at L., 68, which appropriated the gross sum of $20,000 for the payment of necessary interpreters, to be distributed in the discretion of the Secretary of the Interior, and repealed section 2070 of the Revised Statutes. A like appropriation was made in the same terms by the Indian appropriation Act of March 1, 1883. 22 Stat. at L., 433.

An examination of this legislation, especially of the Indian appropriation Acts, beginning with that of March 3, 1877, down to and including the Act of March 3, 1881, which are all similar in their provisions, will clearly reveal the purpose of Congress. The Act of March 3, 1877, opens with this provision: "That the following sums be and they are hereby appropriated * * * for the purpose of paying the current and contingent expenses of the Indian Department and fulfilling treaty stipulations with the various Tribes.' * * * [149]

Then follow the specific appropriations, and among them the following:

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"For the pay of seventy-six interpreters, as follows; * * * Seven for the Tribes in Nebraska, to be assigned to such agencies as the Secretary of the Interior may direct at $300 per annum, $2,100."

After the specific appropriation for salaries of interpreters the following clause appears:

"For additional pay of said interpreters to be distributed in the discretion of the Secretary of the Interior, $6,000." All the subsequent Indian appropriation Acts down to and including the Act of March 3, 1881, make in the same language the same appropriation for salaries of interpreters, and contain a similar clause for their additional compensation.

We find, therefore, this state of legislation: by the Revised Statutes, the salaries of interpreters were fixed, some at $400 and some at $500 per annum, with a provision that such compensation should be in full of all emoluments and allowances whatsoever.

By the Acts in force during the appellee's term of service the appropriation for the annual pay of interpreters was $300 each, and a large sum was set apart for their additional compensation, to be distributed by the Secretary of the Interior at his discretion.

This course of legislation, which was persisted in for five years, distinctly reveals a change in the policy of Congress on this subject, namely: that instead of establishing a salary for interpreters at a fixed amount, and cutting off all other emoluments and allowances, Congress intended to reduce the salaries and place a fund at the disposal of the Secretary of the Interior, [150] from which, at his discretion, additional emoluments and allowances might be given to the interpreters. The purpose of Congress to suspend the law fixing the salaries of interpreters in Nebraska at $400 per annum, is just as clear as its purpose to suspend the section forbidding any further emoluments and allowances. Our opinion is, therefore, that the intention of Congress to fix, by the appropriation Acts to which we have called attention, the annual salaries of interpreters for the time covered by those Acts at $300 each, is plain upon the face of the statute.

The whole question depends on the intention of Congress as expressed in the statutes. Whether a simple failure by Congress to appropriate any or a sufficient sum to pay the salary of an officer fixed by previous law is, of itself, an expression of purpose by Congress to reduce the salary, we do not now decide. That is not this case. On the contrary, in this case, Congress has in other ways expressed its purpose to reduce for the time being the salaries of the interpreters.

This purpose is, of course, irreconcilable with the provisions of the Revised Statutes on the same subject, and those provisions must be considered as having been suspended until they were finally repealed by the Act of May 17, 1882. As the appellee has been paid in full his salary as fixed by the later Acts, which were in force before and during and continued in force after his term of service, he has no cause of action against the United States. *It follows that the judgment of the Court of Claims in his favor must be reversed, and it is so ordered.*

True copy. Test:
James H. McKenney Clerk, Sup. Court, U. S.

CHARLES E. HOVEY AND WILLIAM P. DOLE, *Appts.*,

v.

AUGUSTINE R. McDONALD AND WILLIAM WHITE.

(See S. C., Reporter's ed., 150-162.)

Parties to appeal—correction of decree—decree dissolving injunction—effect of writ of error.

1. A receiver appointed in a suit, though not a party in the principal suit, who is a principal party to an independent issue incidentally arising, is a proper party to a final decree on such issue and to an appeal therefrom.

2. A correction of the form of a decree of the Special Term of the Supreme Court of the District of Columbia by adding the direction to the receiver to pay over the money in his hands to the defendants, which was a thing of course, merely expressing the legal effect and consequence of the decree, may be made by the special term notwithstanding an appeal.

3. A decree dismissing a suit brought to obtain an injunction and dissolving the injunction, is not governed by the ordinary rules that relate to a *supersedeas* of execution, but by those principles and rules which relate to chancery proceedings exclusively.

4. Neither a decree for an injunction, nor a decree dissolving an injunction, is suspended in its effect by a writ of error, although all the requisites for a *supersedeas* are complied with.

[No. 23.]

Argued Oct. 10, 1883. Decided Nov. 5, 1883.

APPEAL from the Supreme Court of the District of Columbia.

The history and facts of the case very fully appear in the opinion of the court.

Messrs. **Geo. F. Edmunds,** *Chas. W. Hornor* and *T. J. Durant*, for appellants.

Messrs. **Conway Robinson** and *S. Wilmer*, for appellees.

Mr. Justice **Bradley** delivered the opinion of the court: [152]

An award against the United States of nearly $200,000 having been made to one A. R. McDonald, a British subject, by the Mixed Commission appointed under the Treaty of 1871, his bankrupt assignee, Thomas J. Phelps, filed a bill in the Supreme Court of the District of Columbia to restrain him from collecting the money, and to have it made subject to his debts, making one White also a defendant, who claimed to have purchased the claim. A restraining order, and subsequently a preliminary injunction, was granted according to the prayer of the bill, and George W. Riggs was appointed a receiver to collect and hold the money until the further order of the court. In the meantime, a bill was filed by Charles E. Hovey and William Dole (the present appellants) against McDonald and White, setting up a lien upon one fourth of the fund under an alleged agreement by which they were to receive that proportion as compensation for their services in aiding the prosecution of the claim, and praying that the lien might be established, and that the defendants might be enjoined from collecting or receiving more than three fourths of the award. A preliminary injunction was also granted in accordance with the prayer of this bill. On the 16th of February, 1875, the following consent decree, or order, was made, to wit:

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"In the Supreme Court of the District of Columbia.

Thomas J. Phelps, Assignee, v. Augustine R. McDonald and William White. } In Equity. No. 3910.

This cause came on to be further heard on this 16th day of February, A. D. 1875; and thereupon, and upon consideration thereof, and with the consent of the parties to this suit, and of Charles E. Hovey and William P. Dole, parties complainant in a certain cause in equity in this court, numbered 3937, against the same defendants, and claiming one fourth of the award in the proceedings mentioned.

It is, this 16th day of February, A. D. 1875, [153] ordered, adjudged and decreed:

1. That the restraining orders heretofore made in both said causes are hereby vacated.

2. That the decree made in this cause on the 28th day of December, A. D. 1874, appointing George W. Riggs, Esq., receiver, and granting a provisional injunction, is modified as follows, *viz.:* that the defendant, William White may receive from the agents of the British Government the one half of the net amount of the award in the proceedings mentioned, free and discharged of all claims of the plaintiffs in both the causes above mentioned, to enable the said defendant to pay the expenses incurred by the defendant A. R. McDonald in the prosecution of this claim; which sum of one half of said award the court finds to be the reasonable expense incident to the prosecution of the said claim by said defendant A. R. McDonald before said Mixed Commission, exclusive of said claim of Hovey & Dole.

3. That the remaining half of the net amount of said award shall be paid to the said George W. Riggs; and it is ordered, adjudged and decreed that the defendants shall execute all such orders, receipts and acquittances necessary to enable the said George W. Riggs to collect the same. And the said George W. Riggs shall hold the said half of the said award subject to the claims, liens and rights of the said Charles E. Hovey and William P. Dole and of the plaintiff in this cause, to be determined by the further decree of this court in this cause and in the cause of said Hovey & Dole hereinbefore mentioned. It is further ordered that said receiver be directed to invest the money so placed in his hands in bonds of the United States or in 3-65/100 bonds of the District of Columbia guarantied by the United States, as he may deem best for the interest of the parties concerned, and that a copy of this decree be filed in the last mentioned cause."

This decree was carried out; the money was collected from the agent of the British Government, one half of it being received by Mr. Riggs, as receiver, and the suits progressed in due course. Both bills were demurred to and both demurrers were sustained, and the bills dismissed by the court in Special Term.

In the case of *Hovey* and *Dole* a decree was entered on Thursday, the 24th of June, 1875, [154] simply decreeing that the demurrer to the bill be sustained, and that the bill be dismissed with costs. An appeal to the General Term was entered the same day on the minutes of the court.

On Monday, the 28th of June, 1875, the decree was amended by adding thereto the clause, "That the receiver appointed in this cause, and in *Phelps* v. *McDonald* [2 McArth., 375], No. 3,910, be directed to pay the funds belonging to said cause to the said defendants, McDonald and White, or order, and thereon said receiver shall be discharged;" and at the same time a decree was entered in the suit of Phelps, assignee, that the demurrer be sustained, and the bill dismissed with costs, and the same direction was given to the receiver to deliver the funds to McDonald and White. An appeal was entered in this case also, on the day the decree was rendered; but no appeal bond or undertaking was filed in either case until the 12th of July.

Soon after the entry of the last decree, and on the same day, a copy of it was served on the receiver by the attorney of McDonald and White, and the fund in his hands, then consisting of district bonds, was demanded of him: but before he delivered the bonds, the attorney of Hovey and Dole appeared and gave him verbal notice that an appeal had been taken, and insisted that it was a *supersedeas* of the decree. Thereupon, the receiver and the attorneys repaired to the court, and the receiver asked the Judge what he should do, and was simply told to obey the decree; the complainants' attorney, at the same time, offering to furnish the security named by the court on the appeal. The receiver then delivered the bonds to the defendants.

In the case of *Phelps*, the bankrupt assignee, the decree of the Special Term was afterwards affirmed; but in that of Hovey and Dole the decree of the Special Term was reversed, and the counsel for the complainants obtained an order on the defendants to pay back into court the money, or funds, which they had obtained from the receiver. Failing to do this, they were adjudged in contempt, and a decree *pro confesso* was entered against them. Thereupon, the complainants obtained an order on the receiver to file his account; and this being done, and it appearing thereby that, in obedience to the de- [155] cree of the Special Term, he had delivered the fund to the defendants, the account was referred to an auditor, and the complainants filed exceptions thereto on the ground that he had delivered up the funds without due authority. The auditor took testimony as to the circumstances of the appeal, the notice given to the receiver, and his conduct in the matter, and reported that in his opinion the receiver had only done his duty. This report was confirmed by a decree of the General Term, and from that decree the present appeal was taken.

The first matter to be determined is the motion on the part of the receiver to dismiss the appeal for the reason that he was not a party to the suit. This motion cannot prevail. The proceedings instituted by the order requiring the receiver to file his account, and the subsequent reference of that account to an auditor, and the exceptions thereto, were all directed against the receiver for the purpose of rendering him personally responsible for the fund which had been placed in his hands, and which he had delivered over in obedience to the original decree. It was a side issue in the cause, in which the complainants on the one side and the receiver on the other were real and interested parties. The decree confirming the auditor's report was, as to this matter, a final decree against the complainants and in favor of the receiver. We have

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so often considered cases of this sort, arising incidentally in a cause, but presenting independent issues to be determined between the parties to them, that it is unnecessary to enter into a detailed discussion of the subject at this time. The receiver, though not a party in the principal suit, was an officer of the court appointed in the suit, and was a principal party to the particular question raised by the proceedings referred to. It is only necessary to refer to some of the cases that apply to the subject. It will be found fully discussed in *Blossom* v. *R. R. Co.*, 1 Wall., 655 [68 U. S., XVII., 673]; *Butterfield* v. *Usher*, 91 U. S., 248 [XXIII., 319]; *Trustees* v. *Greenough*, 105 U. S., 531 [XXVI., 1159]; and *Hinckley* v. *R. R. Co.*, 94 U. S., 467 [XXIV., 166]. In the case last cited, a decree was rendered against a receiver, directing him to pay into court a certain sum of money, being the balance found [156] due from him on the settlement of his accounts. He appealed from this decree, and his right to appeal was sustained by this court. This case is a direct authority to show that the receiver in the present case, had the decree been against him, could have taken an appeal; and, if he would have had a right to appeal, surely the opposite parties have the same right.

We are brought, then, to consider the effect of the appeal taken from the decree of the Special Term upon the efficacy of said decree as a justification of the receiver in handing over to the defendants the fund in his possession. To arrive at a satisfactory conclusion, it will be necessary, in the first place, to take notice of the question as to the power of the court in Special Term to amend its decree after the appeal was entered.

By the laws relating to the District of Columbia, the Supreme Court of the District has General Terms and Special Terms, the latter being held by a single judge, and proceeding in the conduct of causes as if it were a separate court. R. S. D. C., sec. 753. The Special Term renders final judgments and decrees; and any party aggrieved by an order, judgment or decree of the Special Term, if the merits are involved, may appeal to the General Term. Sec. 772. The court in General Term is authorized to adopt rules to regulate the time and manner of making appeals, and to prescribe the terms and conditions upon which they may be made. Sec. 770. Such rules have been adopted. One is, that executions may issue after judgment in Special Term, unless the party condemned move to vacate it or set it aside for fraud, deceit, surprise or irregularity, or resort to a review of it before the General Term. Rule 89. Another is, that appeals must be brought within thirty days after the judgment or decree is made or pronounced; and that they shall not stay execution (as between private parties) where the judgment is for a specific sum, unless, within twenty days after judgment or decree, an undertaking be given, with security, to abide by, perform, and pay the judgment or decree. Rule 91.

We do not perceive that there is anything peculiar in these appeals from the Special to the General Term to take them out of the operation of the general principles and rules which gov- [157] ern appeals from one court to another. One general rule in all cases (subject, however, to some qualifications) is that an appeal suspends the power of the court below to proceed further in the cause. This includes a suspension of the power to execute the judgment or decree. But, of course, besides merely taking an appeal, those additional things must be done which the law requires to be done in order to give to the appeal a suspensive effect, whether it be security for the payment of the claim or other condition imposed by law.

One of the qualifications of the general rule as to the suspensive effect of an appeal is, that the inferior court may perfect its judgment or decree, usually at any time during the Term at which it is rendered. If, when an appeal is taken or a writ of error is sued out, the record has not been made up, it may be made up in due form. If any obvious mistake has occurred, it may be corrected; as where the jury by mistake has given damages in a penal action, or has given damages for a larger sum than the declaration demanded, the plaintiff may enter a *remittitur* of the damages on the record, after a writ of error is brought. Tidd, Pr., 942. And it is laid down as a general rule, at law, the principle of which is equally applicable to chancery proceedings, that those things which are amendable before error brought, are amendable afterwards, so long as diminution may be alleged and *certiorari* awarded; provided, of course, that the time for amendment has not passed by. Tidd, 714. In chancery proceedings it is a rule that when a clerical error has crept into the decree, or some ordinary direction has been omitted, the court will entertain an application to rectify it, even though it has been passed and entered. Where a decree has omitted a direction that is of course at the time it is made, it may be corrected by the insertion of that direction; as where, in a creditor's suit, the decree has omitted the usual direction to take an account of the personal estate, it was ordered to be inserted. Daniell, Ch. Pr., ch. XXV., sec. V. This rule is formulated in the 8th Equity Rule established by this court for the government of the circuit courts, which declares that "Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by [158] order of the court or judge thereof, upon petition, without the form or expense of a rehearing." Such corrections, by analogy to the practice in cases at law, may undoubtedly be made after an appeal is taken.

In the present case, the correction of the form of the decree by adding the direction to the receiver to pay over the money in his hands to the defendants was a thing of course; it was merely expressing the legal effect and consequence of the decree. It was an amendment which the court below, the Special Term, was competent to make notwithstanding the appeal. The terms of the injunction were that the defendants should be restrained from receiving the money until the final hearing of the cause. Of course, when the cause was finally heard, and the bill dismissed, the injunction ceased to have effect by its own terms. The appointment of Mr. Riggs as receiver was for the purpose of holding the money as agent of the court, and withholding it from the defendants until the decision. The words of his commission were, "To collect and hold the money until, and subject to, the further order of the court." It was there-

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fore a necessary consequence of the decree of dismissal, that the injunction should be dissolved, and that the receiver should be discharged and directed no longer to withhold the money from the possession of the defendants. The dissolution of the injunction, and the discharge of the receiver were directions of course to be inserted in the decree of dismissal, unless the court should affirmatively order otherwise. The court below, it is true, in view of the appeal, might have made an order to continue the injunction and to retain the property in the receiver's hands; but that was a matter of discretion, to be exercised according to the justice of the case. If the Judge did not see fit to exercise it, it was of course to add to the decree of dismissal its legal effect and consequence. The making of the correction without notice to the complainants, if such notice was requisite, was an irregularity of which the receiver was not bound to know. We are of opinion, therefore, that the completion of the decree on the 28th of June by adding the usual direction, was within the power of the Special Term; and the rights [159] of the parties to this appeal must be determined as if the decree had originally contained that direction.

This brings us to the question of the effect of the appeal as a *supersedeas*, or as a suspension of the decree thus corrected. The appeal was taken in time, and verbal notice that it had been taken and would be followed up by the proper undertaking was given to the receiver at once, before he had parted with the funds in his hands. At the same time he was served with a copy of the decree ordering him to deliver those funds to the defendants. The question is, whether, under these circumstances, he paid the money in his own wrong, notwithstanding the order of the court.

A *supersedeas*, properly so called, is a suspension of the power of the court below to issue an execution on the judgment or decree appealed from; or, if a writ of execution has issued, it is a prohibition emanating from the court of appeal against the execution of the writ. It operates from the time of the completion of those acts which are requisite to call it into existence. If, before those acts are performed, an execution has been lawfully issued, a writ of *supersedeas* directed to the officer holding it will be necessary; but if the writ of execution has been not only lawfully issued, but actually executed, there is no remedy until the appellate proceedings are ended, when, if the judgment or decree be reversed, a writ of restitution will be awarded. To remedy the inconveniences that arose from an immediate issue of execution before the appellate proceedings could be perfected, the original Judiciary Act of 1789 [1 Stat. at L., 73], provided, and the present Revised Statutes now provide, that no execution shall issue upon judgments in the courts of the United States, where a writ of error may be a *supersedeas*, until the expiration of ten days after the judgment. R. S., 1007. This regulation applies to proceedings in equity as well as to cases at law. But it does not extend to the present case. The regulation of appeals from the special to the General Term of the Supreme Court of the District is specially provided for in the laws and rules before referred to, which cover the whole subject. By these rules it is declared that, after judgment is entered in the [160] circuit court, or at a Special Term, execution may be issued, unless the party condemned move to vacate or set it aside, or resort to a review of it before the General Term; but no appeal shall operate as a stay of execution where the judgment is for a specific sum of money, unless the appellant, with surety, within twenty days after the judgment or decree, execute and file an undertaking in the form prescribed. The appellants insist that this rule makes it unlawful to issue an execution within the twenty days. We doubt very much whether that is the true meaning of the rule. It would be more in accordance with the general mode of construing such regulations to hold that the *supersedeas* does not take effect until the condition is complied with, and will not take effect at all unless complied with during the time limited.

But this case is not within the terms of the rule. There was no decree for a specific sum of money; there was no decree at all in favor of the complainants; and no execution was applicable to, or could be issued in the case, except an execution for the costs of the defendants. The truth is, that the case is not governed by the ordinary rules that relate to a *supersedeas* of execution, but by those principles and rules which relate to chancery proceedings exclusively. It depends upon the effect which, according to the principles and usages of a court of equity, an appeal has upon the proceedings and decree of the court appealed from, and the doctrines which apply to a *supersedeas* can only be brought in by way of analogy.

In England, until the year 1772, an appeal from a decree or order in chancery suspended all proceedings; but since that time a contrary rule has prevailed there. The subject was reviewed by the House of Lords in 1807, and an order was made establishing the right of the Chancellor to determine whether and how far an appeal should be suspensive of proceedings, subject to the order of the House on the same subject. See, Palmer's Pr. H. L., 9, 10; [*Huguenin* v. *Baseley*] 15 Ves., 184; [*Hart* v. *Mayor of Alb.*] 3 Paige, 383-385.

In this country the matter is usually regulated by statute or rules of court, and generally speaking an appeal, upon giving the security required by law, when security is required, suspends further proceedings and operates as a [161] *supersedeas* of execution. This, as we have seen, is the case in the Circuit Courts of the United States. But the decree itself, without further proceedings, may have an intrinsic effect which can only be suspended by an affirmative order either of the court which makes the decree, or of the appellate tribunal. This court, in the *Slaughter-House Cases*, 10 Wall., 273 [77 U. S., XIX., 915], decided that an appeal from a decree granting, refusing or dissolving an injunction, does not disturb its operative effect. *Mr. Justice* Clifford, delivering the opinion of the court, said: "It is quite certain that neither an injunction nor a decree dissolving an injunction passed in a circuit court is reversed or nullified by an appeal or writ of error before the cause is heard in this court;" and held that the same rule applies to writs of error from state courts in equity proceedings; and the decision of the court was based upon that view of the law. It was decided that neither a decree for an injunc-

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tion nor a decree dissolving an injunction was suspended in its effect by the writ of error, though all the requisites for a *supersedeas* were complied with. It was not decided that the court below had no power, if the purposes of justice required it, to order a continuance of the *status quo* until a decision should be made by the appellate court, or until that court should order the contrary. This power undoubtedly exists, and should always be exercised when any irremediable injury may result from the effect of the decree as rendered; but it is a discretionary power, and its exercise or non-exercise is not an appealable matter. In recognition of this power, and for the purpose of facilitating its proper exercise in certain cases, on appeals from the circuit courts, this court by an additional rule of practice in equity, adopted in October Term, 1878 [see, XX., 919], declared that "When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party." (Rule 93.) Of course, where the power [162] is not exercised by the court, nor by the judge who allows the appeal, the decree retains its intrinsic force and effect.

Applying these principles to the present case, it is clear that the force of the decree was not affected by the appeal, although it was in the power of the Special Term to have continued the injunction and to have retained the fund in its control in the hands of the receiver had it seen fit to do so. Judging only from what appears in the record, we cannot refrain from saying that, in this case, the latter course would have been eminently proper. It would have protected all parties and produced injury to none. But if the court failed to do what it might properly have done, such failure ought not to be visited upon the receiver, who was the mere instrument and hand of the court, and subject to its order. It was his duty to obey the decree as made.

This disposes of the case, and requires that the decree appealed from should be affirmed, and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 699.

ANNIE LOUIS,
v.
TRUSTEES OF BROWN TOWNSHIP, DELAWARE COUNTY, OHIO.

(See S. C., Reporter's ed., 162-168.)

Purchaser of bonds after maturity—effect of judgment—adjudicating defendant's rights.

1. One who purchases bonds after maturity, and after a suit in which they were decided and adjudged to be void in the hands of the holder from whom the purchase is made, is bound by that judgment.

2. A judgment in a *mandamus* case, as to the invalidity of certain bonds, is conclusive in a subsequent action as to the questions decided, on the parties and their privies, in a subsequent litigation.

3. In chancery suits, adverse interests as between co-defendants may be passed upon and decided; and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree.

[No. 36.]

Submitted Oct. 11, 1883. Decided Nov. 5, 1883.

IN ERROR to the Circuit Court of the United States for the Northern District of Ohio.

The history and facts of the case appear in the opinion of the court. See, also, *Hopple* v. *Trustees of Brown Township*, 13 Ohio St., 311; *Hopple* v. *Hipple*, 33 Ohio St., 116.

Messrs. **Geo. Hoadly, E. M. Johnson** and **Edward Colston,** for plaintiff in error.

Messrs. **C. H. Scribner** and **J. S. Jones,** for defendants in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is an action on bonds and interest coupons thereto attached, signed by the Trustees of Brown Township, payable to the Springfield, Mt. Vernon and Pittsburgh Railroad Company, or its assigns, on the first day of October, 1871, and dated April 20, 1853.

The plaintiff says she is the owner and holder of the bonds and coupons, and in explanation of her title alleges that "After execution and delivery of said note to said railway company as aforesaid, and in the year 1854, the said railroad company did indorse and deliver said note and the coupons thereto attached to Brown, Collins and Brown, and that said Brown, Collins and Brown afterwards indorsed and delivered said note and coupons to Richard B. Hopple, and Richard B. Hopple afterwards indorsed and delivered said note and coupons to the plaintiff, who now holds and owns the same."

The defendants for answer, among other [164] matters, filed two pleas of a former adjudication, in which the bonds were declared to be void, and rely upon these in bar of the action.

The first of these pleas, called defense No. 3, sets out a suit by one Hiram Hipple, plaintiff, against the Trustees of Brown Township, Robert B. Hopple and others, in which he alleges himself to be the owner of real estate incumbered by a mortgage to secure the payment of the bonds on which the present suit is brought, and that said defendants, among whom was the Richard B. Hopple from whom plaintiff in this suit purchased the bonds aforesaid, asserted a claim to his land on account of said mortgage. The plea further alleges that the holders of the bonds, among whom was Richard B. Hopple, filed their answer and cross-bill alleging the bonds and mortgage to be valid, and pray that the bonds and mortgage might be declared to be valid, and for a decree of foreclosure of the mortgage, and that in said cross-bill said Richard B. Hopple set up as the foundation of his prayer for relief, his ownership of the identical bonds now set forth in this action. In the suit, on the mortgage, which was finally appealed to the Supreme Court of the State, Hopple and the other bondholders failed and were adjudged to pay costs, on the ground of the want of au-

NOTE.—Mandamus *to compel city, town or county to levy tax to pay bonds or interest on bonds.* See *note* to The Mayor v. U. S., 76 U. S., XIX., 704.

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thority in the Trustees of Brown Township to issue the bonds. To this suit, the Trustees of Brown Township and Richard B. Hopple and other bondholders were parties.

The second plea sets forth an application by Richard B. Hopple, in his right as owner of these bonds, for a writ of *mandamus* from the Supreme Court of Ohio, to compel the Trustees of Brown Township to levy a tax to pay the interest on said coupons. To the alternative writ, the Trustees answered, denying the validity of the bonds, and the court decided that the supposed bonds and coupons were issued without any legal authority, and without any authority to take stock in the railroad company to which they were delivered, and gave judgment for costs against said Hopple.

The plea also avers that said bonds were not transferred to Annie Louis, plaintiff, until long after said bonds and coupons were due.

[165] To these pleas, demurrers were filed and the demurrers overruled, and plaintiff not desiring to reply or plead further, judgment was rendered for defendant.

The error assigned by plaintiff is the overruling of these demurrers.

We think the court was right, upon the plainest principles of jurisprudence.

The case is unembarrassed by the doctrine of *bona fide* purchaser of negotiable securities, because the bonds were overdue in the hands of Richard B. Hopple when the suit of Hipple against him and others to have them declared void was commenced, the bonds falling due October 1, 1871, and the suit commenced October 18 of that year, and the cross-bill, in which Hopple sought to enforce the bonds, was commenced April 2, 1872. The bonds were, therefore, past due during the whole period of that litigation in which they were adjudged to be void in his hands.

As regards the action of *mandamus* while the bonds were not overdue, at the time of the judgment against Mr. Hopple, the plea expressly avers that they were overdue when plaintiff Louis became their owner, and as she alleges in her declaration that she bought them of Hopple, it follows that they remained in his hands from the date of the judgment on *mandamus* against him until they became past due. This follows also from the fact that he asserted ownership of them after they were due in the cross-bill to Hipple's suit.

The plaintiff, therefore, holding under Hopple by a purchase made after the bonds were due, and after the judgment in which they were decided to be void in his hands, is bound by that judgment, unless something can be shown which takes the case out of the general rule.

In the *mandamus* case the plaintiff was the owner of the bonds, and the present plaintiff is bound by the privity of a subsequent holder of them. The defendants in that case are the defendants in this, so that the action is now between parties on whom that judgment is binding.

The only objection made to this is, that while the statute of Ohio makes a judgment on *mandamus* a bar to another civil action where the [166] writ is granted, it does not so declare where it is refused. The words of the statute are not presented to us, nor any decision of the courts of that State cited to sustain the proposition.

It is easy to see why the statute should declare that where a party has had a recovery of what he claims by a writ of *mandamus*, the other party should not also be harassed by another action for the same demand. But it would not follow that where a *mandamus* was refused on grounds which were conclusive against the right of plaintiff to recover in any action whatever, that the judgment would not be a protection when such other action was brought. Such was the case before us. The ground of the court's judgment in denying the *mandamus* was not left to inference, however strong that inference might be from the pleadings, as in the case of *Block* v. *Comrs.*, 99 U. S., 686 [XXV., 491], but the court declared, in the case we are now considering, in positive terms, that: "The said supposed bonds or undertaking and coupons in the writ mentioned, were issued by the defendants without any legal power or authority * * * and without any legal power or authority to make said supposed subscription to the capital stock of the railroad company, and that said supposed subscriptions, and said supposed bonds and coupons, are for said reason absolutely void," and that defendants are not estopped to set up the invalidity of said instruments.

Here is not only a denial of the writ of *mandamus*, but an adjudication that in the hands of Hopple the bonds now in suit were absolutely void.

This court has repeatedly held since *Postmaster-General Kendall's Case*, 12 Pet., 614, that the proceeding in *mandamus* is, when appropriate, an action at law to recover money, and is subject to the principles which govern said actions, and in the case of *Block* v. *Comrs.* [*supra*], the denial of the writ is held to be conclusive in a subsequent action as to the invalidity of the bonds, though the fact that the decision in *mandamus* was based on that ground is inferred from the pleadings, and not from the express language of the judgment, as in the present case.

We are of opinion that the judgment of the [167] Supreme Court of Ohio established the fact that the bonds and coupons were void in the hands of Hopple, and the judgment is conclusive of that fact against his vendee and privy in this action.

The same result must follow in the case of *Hipple* v. *The Board of Trustees and Richard B. Hopple and others*. It is argued, in avoidance of this conclusion, that the board of Trustees and Hopple being both defendants to Hipple's bill, no adversary contention on the question of the validity of the bonds could have taken place between them.

But this view of the case ignores entirely the facts that Hopple, in filing his cross-bill seeking to establish the bonds as valid, became plaintiff, and made the Trustees defendants, and in this manner raised the issue of their validity between himself and the Trustees directly, and it was in express terms decided against him. His assigee of those bonds in the present action against the same Trustees, is clearly bound by that decision.

But if there had been no cross-bill, the fact that both Hopple and the trustees were placed as defendants in the suit of Hipple, does not impair the conclusive character of the decree in that case as between those parties. The present

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case is precisely analogous to that of *Corcoran v. Canal Co.*, 94 U. S., 741 [XXIV., 190], and we cannot better express our views of this case than by a quotation from the opinion in that:

"It is said that Corcoran and his co-trustees, the canal company and the State of Maryland, *were all defendants to that suit, and that as between them no issue was raised by the pleadings on this question, and no adversary proceedings were had.* The answer is, that in chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided, *and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree.* It is to be observed, also, that the very object of that suit was to determine the order of the distribution of the net revenues of the canal company, and that the [168] Corcoran trustees were made defendants for no other purpose than that they might be bound by that decree. And, lastly, as the decree did undoubtedly dispose of that question, its conclusiveness cannot now be assailed collaterally, on a question of pleading, when it is clear that the issue was fairly made and was argued by Corcoran's counsel, as is shown by the third head of their brief, made a part of this record by stipulation." And in conclusion the court say: "It seems to us very clear that the question we are now called on to decide has been already decided by a court of competent jurisdiction which had before it the parties to the present suit; that it was decided on an issue properly raised, to which issue both complainant and defendant here were parties, and in which the appellant here was actually heard by his own counsel; and that it, therefore, falls within the salutary rule of law which makes such a decision final and conclusive between the parties, and that none of the exceptions to that rule exist in this case."

We are of opinion that both demurrers were properly overruled, and affirm the judgment of the Circuit Court.

Mr. Justice **Matthews** did not sit in this case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[174] *Ex Parte:*

In the Matter of the STATE OF PENNSYLVANIA, *Petitioner.*

(See S. C., Reporter's ed., 174-176.)

Writ of prohibition—correction of error.

1. Where an admiralty court has jurisdiction of a vessel sued, and of the subject-matter of the suit, it cannot be restrained by a writ of prohibition from deciding all questions properly arising in that suit, as a claim for pilotage fees under a statute of another State.

2. A supposed error in a judgment of an admiralty court on the merits of an action cannot be corrected by prohibition. The remedy, if any, is by appeal.

[No. 7, Orig.]

Argued Oct. 15, 1883. *Decided Nov. 5, 1883.*

APPLICATION for a writ of prohibition.

This case arises upon the application of Lewis C. Cassidy, Attorney-General of Pennsylvania, for a writ of prohibition to the District Court of the United States, sitting as a Court of Admiralty.

The petition alleges that said Commonwealth has established a pilotage system for the Port of Philadelphia, and the pilots licensed by the said Commonwealth are subject to the control of the Board of Wardens of the Port of Philadelphia; that, by the Act of February 4, 1846, it is made unlawful, for any person to undertake to pilot a vessel on the Bay or River Delaware, without a license duly granted by said board; that by the Act of June 8, 1881, sec. 3, it is provided, "That a deduction of ten per centum from the rates mentioned in section 1 shall be made when a vessel is spoken first by the pilot inside of a straight line drawn from Cape May Light to Cape Henlopen Light; but the vessel shall in every such case be exempt from the duty of taking a pilot on her voyage inward to the Port of Philadelphia, and the vessel as well as her master, owner, agent or consignee shall be exempt from the duty of paying pilotage or half pilotage or any penalty whatsoever, in case, of her neglect or refusal to do so; that, on Apr. 5, 1881, an Act of the State of Delaware (P. L., 494) was duly passed, appointing a Board of Pilot Commissioners for the State of Delaware, with authority to grant licenses to persons to act as pilots in the Bay and River Delaware, and to make rules for their government; that March 3, 1883, came John P. Virden, a pilot duly licensed under the laws of Delaware, but not licensed by the Board of Wardens of the Port of Philadelphia, to act as a pilot for the Port of Philadelphia, and presented his libel to the District Court of the United States for the Eastern District of Pennsylvania in admiralty, setting forth that he, the said John P. Virden, had tendered his services as a pilot to the American brig, Charles A. Sparks, a vessel bound from Cardenas to Philadelphia Feb. 23, 1883, at a point which is inside of a straight line drawn between Cape May Light and Cape Henlopen Light, and that the services of the said John P. Virden had been refused; and claiming that he was entitled to recover from the said vessel the sum of $70.32, being the amount recoverable under the laws of Delaware by reason of the tender and refusal of his services; and thereupon the court allowed the said libel, and caused the said brig, Charles A. Sparks, to be arrested in said cause.

The said cause coming on to be heard, the said court proceeded to decree in favor of the said libelant for the full amount of said claim, with costs. And the Commonwealth of Pennsylvania suggests that such proceedings are without warrant of law, and in contravention of the laws of the said Commonwealth of Pennsylvania; and that the Admiralty Court of this District had no jurisdiction to impose on vessels bound to the Port of Philadelphia, a lien or privilege, by virtue of the laws of the State of Delaware.

NOTE.—*Pilots, their authority, duties, responsibility; responsibility of owner for their acts; right to salvage.* See *note* to Thompson v. The Great Republic 90 U. S., XXIII., 55.

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Therefore, the Commonwealth of Pennsylvania prays a remedy, by a writ of prohibition, to be issued out of this honorable court, to the Judge of the District Court of the United States for the Eastern District of Pennsylvania, to be directed, to prohibit him from further proceeding in said cause, and from proceeding to make or enforce any decree by execution or otherwise in said cause.

Messrs. **H. G. Ward, M. P. Henry** and *Lewis C. Cassidy, Atty-Gen.* of Pennsylvania, for petitioner:

If the district court has erred in pronouncing the Delaware Statute valid, it has exceeded its jurisdiction in enforcing the provisions of the statute against the vessel, and the writ of prohibition is the proper remedy.

High, Extr. Legal Rem., secs. 780, 781; *Quimbo Appo.* v. *People*, 20 N. Y., 531; *State* v. *Ridgell*, 2 Bailey, 560; *U. S.* v. *Peters*, 3 Dall., 121.

The second question is, whether the State of Delaware has power to impose a compulsory pilotage law upon the Ports of Pennsylvania.

The American law treats pilotage as a port regulation, so that a vessel bound to a port becomes subject to the pilotage laws of that port wherever she may be. *Smith* v. *Condry*, 1 How., 28; *The China*, 7 Wall., 53 (74 U. S., XIX., 67); *The Annapolis*, Lush., 295; *Cooley* v. *Wardens*, 12 How., 299; *Gibbons* v. *Ogden*, 9 Wheat., 1.

Messrs. **Thomas F. Bayard, Henry Flanders** and *Curtis Tilton, contra:*

The pilotage laws of the several States have been adopted by Congress, and incorporated into its legislation. *Wilson* v. *McNamee*, 102 U. S., 574 (XXVI., 234).

By the Act of March 2, 1837, it is also provided: "The master of any vessel coming into or going out of any port, situate upon waters which are the boundary between two States, may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters, to pilot the vessel to or from such port." R. S., sec. 4236.

The Clymene, 9 Fed. Rep., 165; *S. C.*, 12 Fed. Rep., 346; *The Alzena*, 14 Fed. Rep., 174.

Finally, the district court had jurisdiction of the vessel and the subject-matter of the action, to wit: a claim for pilotage. This claim it was competent to hear and determine.

Ex parte Hagar, 104 U. S., 520 (XXVI., 816); *Ex parte Gordon*, 104 U. S. 515 (XXVI., 814); *Ex parte Ferry Co.*, 104 U. S. 519 (XXVI., 815.

Mr. Chief Justice **Waite** delivered the opinion of the court:

We are unable to distinguish this case in principle from *Ex parte Hagar*, 104 U. S., 520 [XXVI., 816], where it was held on the authority of *Ex parte Gordon*, Id., 515 [814], that as the admiralty court had jurisdiction of the vessel sued, and of the subject-matter of the suit, it could not be restrained by a writ of prohibition from deciding all questions properly arising in that suit. This, like that, is a suit for pilotage fees; and the question is, whether a statute of [176] Delaware, under which the fees are claimed, is valid. If valid in Delaware it is in Pennsylvania, and the court sitting in Pennsylvania is as competent to decide that question in a suit of which it has jurisdiction, as a court in Delaware. The jurisdiction of the court in Pennsylvania is no more dependent on the validity of the law than was that of the court in Delaware. The subject-matter of the suit is a claim of a Delaware pilot for his pilotage fees under a Delaware Statute, and the sole question in the case is, whether the fees are recoverable. The vessel when seized was confessedly within the jurisdiction of the court in Pennsylvania, and she was properly brought into court to answer the claim which was made upon her. About that there is no dispute, as there was at the last Term in *Devoe Mfg. Co.* [*ante*, 764] where the question was as to the right of the court in New Jersey to send its process to the place where the seizure was made. There the question was as to the jurisdiction of the court over a particular place; here as to the liability of a vessel confessedly seized within the territorial jurisdiction of the court upon a claim subject to judicial determination in an admiralty proceeding. The evident purpose of this application is to correct a supposed error in a judgment of an admiralty court on the merits of an action. That cannot be done by prohibition. The remedy, if any, is by appeal. If an appeal will not lie, then the parties are concluded by what has been done. Congress alone has the power to determine whether the judgment of a court of the United States, of competent jurisdiction, shall be reviewed or not. If it fails to provide for such a review, the judgment stands as the judgment of the court of last resort, and settles finally the rights of the parties which are involved.

The petition is dismissed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

INDIANA SOUTHERN RAILROAD COMPANY, *Appt.*,

v.

LIVERPOOL, LONDON AND GLOBE INSURANCE COMPANY.

WILLIAM H. GUION, *Appt.*,

v.

LIVERPOOL, LONDON AND GLOBE INSURANCE COMPANY.

(See S. C., Reporter's ed., 168-173.)

Leave to file cross-bill—review on the evidence—appeal, effect of—who may not.

1. Leave to file a cross-bill is a matter in the discretion of the court.
2. Where the evidence has not been sent up, and no objections were made to any of the proof, this court cannot review the decree on the ground that it is against evidence.
3. Where the bondholders and trustees under a mortgage take no appeal from the decree as it has been entered and are satisfied with it, this court will not, on an appeal by the mortgagor, inquire whether they might not have had more.

NOTE.—*No one but parties to record can be heard on appeal or writ of error.* See *note* to Harrison v. Nixon, 34 U. S. (9 Pet.), 483.

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4. An appeal cannot be taken from a decree in a suit by one who is not a party to it.

[Nos. 45, 46.]

Submitted Oct. 15, 1883. Decided Nov. 5, 1883.

APPEALS from the Circuit Court of the United States for the District of Indiana.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **A. L. Roache** and **S. A. Huff** for appellants.

Messrs. **George Hoadly** and **B. Harrison**, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

These are appeals from the final decree in a suit brought by the Liverpool, London and Globe Insurance Company to foreclose a mortgage given by the Indiana Southern Railroad Company to William H. Swift and Samuel J. Tilden, trustees, to secure an issue of bonds, fifteen hundred of which, amounting in the aggregate to $1,500,000, are held by the Insurance Company.

The suit was begun in a state court on the 13th of June, 1868, but on the 24th of November, 1871, it was removed to the Circuit Court of the United States for the District of Indiana. Among the defendants, when the removal was made, were the Ohio & Mississippi Railway Company and the Fort Wayne, Muncie & Cincinnati Railroad Company.

The Indiana Southern Company acquired its title to the mortgaged property in January, 1866, by purchase at a foreclosure sale of the property of the Fort Wayne & Southern Railroad Company. When this purchase was made, the railroad was in an unfinished condition, and the Indiana Southern Company itself abandoned all work upon it early in 1867. A part only of the line was graded by these Companies, and no ties or rails were ever laid by either of them. The Indiana Southern Company is confessedly insolvent.

After the proceedings for the foreclosure of the mortgage of the Fort Wayne & Southern Company had been finished, after the mortgage by the Indiana Southern Company to Swift and Tilden had been executed, and after the commencement of this suit for its foreclosure, the Ohio and Mississippi Company and the Fort Wayne, Muncie & Cincinnati Company each [170] purchased from the Fort Wayne & Southern Company a part of the line of that company, the purchasing companies intending to use the property purchased in the construction of their respective roads. They claimed that the proceedings for the foreclosure of the mortgage of the Fort Wayne & Southern Company were invalid, and that their title by purchase from that company was superior to the title of the Indiana Southern Company and its mortgagees. Upon their purchase they each entered into the possession of their respective portions of the old line, and proceeded to construct and finish their several roads thereon.

On the 12th of September, 1872, Swift and Tilden, the trustees of the Indiana Southern mortgage, filed a cross-bill in the cause, the object and purpose of which was to foreclose the mortgage for the benefit of all bondholders, and to quiet their title as against the adverse claims of the Ohio & Mississippi and Fort Wayne, Muncie & Cincinnati Companies. The Indiana Southern Company has never answered either the bill or the cross-bill, and on the 24th of September, 1872, an order was entered in due form that the bill and cross-bill be taken as confessed by that Company. On the 14th of November, 1873, a reference to a master was ordered, to ascertain and report the amounts due to bondholders on the Indiana Southern mortgage. On the 18th of December, 1873, the Ohio & Mississippi and Fort Wayne, Muncie & Cincinnati Companies each filed answers to the bill and cross-bill, setting up their respective titles and what they had done pending the suit in the construction of their roads upon and over a part of the original right of way and grading of the Fort Wayne and Southern Company. Before this time, an agreement of compromise had been entered into between the Insurance Company and the two purchasing railroad companies, to take effect if all the other parties in interest should give their assent. This assent does not appear to have been obtained.

On the 21st of April, 1877, the master made a report, stating the amounts due the several bondholders who had proven their claims before him, and on the 17th of May the Indiana Southern Company filed exceptions to all his allowances. On the 2d of January, 1878, the [171] same company appeared and moved to set aside the order referring the case to the master, and also for leave to file a cross-bill, the prayer of which was, 1, that the Insurance Company be required to take issue on the answers of the two railroad companies; 2, that the Indiana Southern Company might have leave to do the same thing; and 3, that a receiver be appointed to take the possession of the property from the two companies and hold it pending the suit. Leave to file this cross-bill was refused, but no action was taken directly on the motion to set aside the order of reference.

On the 2d of July, 1879, William H. Guion, claiming to have an interest in the bonds held by the Insurance Company, filed a petition to be admitted as a party to the suit for his own protection. This petition was denied.

On the 28th of January, 1880, both the trustees and the Insurance Company filed replications to the answers of the two railroad companies, and the cause was thereupon submitted to the court, by all the parties who had appeared and pleaded, on the original and cross-bills, the answers thereto, the replications and proofs, and on consideration a decree was entered, finding due to the Insurance Company the full amount of the bonds held by it, principal and interest, being more than $2,000,000, and to the other parties who had presented their claims the sums reported in their favor respectively by the master. It then ordered a sale of the mortgaged property, subject "To the right of the Ohio & Mississippi Railway Company and the Fort Wayne, Muncie & Cincinnati Railroad Company, to remove from said right of way or real estate any ties, rails and other structures by them respectively placed thereon, or, by proceedings under their power of eminent domain, to appropriate such portions of said right of way used and possessed by them respectively, on making compensation therefor in accordance with law."

From this decree, the Indiana Southern Com-

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pany took an appeal, giving security for costs only. Guion was also allowed an appeal on giving bond and security for costs, but the transcript does not show that he ever gave the bond.

[172] The objections made to the decree by the Indiana Southern Company are:

1. Because leave was refused the Company to file its cross-bill.

2. Because the amounts found due the respective bondholders were not supported by sufficient evidence; and,

3. Because of the reservations in favor of the Ohio & Mississippi and Fort Wayne, Muncie & Cincinnati Companies.

The objection of Guion is that he was refused leave to become a party to the suit.

As to the first objection of the Railroad Company: it is sufficient to say that it was, under the circumstances, clearly within the discretion of the court to refuse leave to file the cross-bill. The object of the Railroad Company was to get replications to the answers of the two intervening, or, as they are called in the argument, intruding railroad companies, and the appointment of a receiver. The replications were afterwards filed by the Insurance Company and the trustees, and the case was clearly not one in which the appointment of a receiver would have been proper. If it had been, no cross-bill was necessary to get the appointment. The Indiana Southern Company was a party to the suit, and could move in that particular as well without as with a cross-bill.

As to the second objection: while this point is made in the assignment of errors, it was not mentioned in the argument. The evidence presented to the master in support of the claims of the several appearing bondholders has not been set up. The master says they each presented sworn statements of their title, and also presented and filed with him their bonds and coupons. As no objections were made to any of the proof, the claims were allowed as presented. Under these circumstances, we cannot review the decree in this particular.

As to the third objection: the Railroad Company has alone appealed. The bondholders and trustees under the mortgage are satisfied with the decree as it has been entered. The Railroad Company has no other property which can be subjected to the payment of the balance of the mortgage debt remaining due after the mortgage is exhausted, and if the mortgagees are satisfied with the security as it has been ad-
[173] judged to them, we see no reason for inquiring, on the suggestion of the Railroad Company only, at this late day, whether they might not have had more.

The petition of Guion was for leave to appeal from a decree in a suit to which he was not a party. We decided in *Ex parte Cutting*, 94 U. S., 14 [XXIV., 49], that such an appeal could could not be taken. He had applied for leave to become a party, but this leave was not given. So he is not a party to the decree from which he appeals. But if he is, he has never perfected an appeal by giving the necessary security.

Under the appeal of the Railroad Company, the decree is affirmed, and the appeal of Guion is dismissed for want of jurisdiction.

Mr. Justice **Field** did not sit in this case and took no part in its decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

GARRETT B. HUNT ET AL., *Appts.*, [177]
v.
DAVID D. OLIVER.

(See S. C., Reporter's ed., 177-179.)

Writ of supersedeas.

Where a decree appealed from finds, as a fact, that land conveyed to another was for the joint benefit of himself and the appellants, a writ of *supersedeas* may issue to stay a writ of assistance issued by the court below to put the appellee into possession, although the holder of the legal title has not appealed.

[No. 856.]

Argued Oct. 22, 1883. Decided Nov. 5, 1883.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

On motion for the allowance of a writ of *supersedeas*.

The history and facts of the case appear in the opinion of the court.

Mr. **Henry M. Duffield**, for appellants.

Messrs. **C. F. Burton, N. Wilson** and *Alfred Russell*, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a motion for a writ of *supersedeas* to stay the execution of a writ of assistance issued by the circuit court, after an appeal to this court, to put the appellee in possession of a part of the property involved in the litigation below. The material facts affecting the motion, as found and determined by the circuit court, or otherwise shown by the motion papers, are these:

On the 17th of November, 1866, Oliver, the appellee, executed to Henry S. Cunningham, Garrett B. Hunt and Jacob Eschelman a mortgage on certain lands in Michigan to secure a debt of $35,000. Included in this mortgage was the S. fr. ¼ sec. 12, T. 29, N. R. 8 E., containing $227\frac{8}{100}$ acres, more or less, with the saw-mill and other improvements thereon. In the summer of [178]
1868, Oliver owned and possessed other lands incumbered by other mortgages, one to Calvin Haines and Philip N. Ranney, and others to other parties, and he also owed other debts to other persons, which were unsecured, amounting in the aggregate to a large sum. On the 2d of September, 1868, Cunningham assigned his interest in the $35,000 mortgage to his co-mortgagees, Hunt and Eschelman, and then took a conveyance from Oliver of all his property, real and personal, for the purpose of assisting him in disposing of it, and realizing any surplus that should remain after his debts were paid. Among other lands conveyed by Oliver at this time and for this purpose was frac. sec. 12, T. 29, N. R. 8 E. The decree finds that Cunningham took this conveyance for the joint benefit of himself and his co-mortgagees. After this conveyance was made Cunningham, Hunt, Eschelman,

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Haines, Ranney, George Robinson and Henry Robinson, formed a partnership to carry on lumbering business and to cut the timber upon the property, and manufacture it. Hunt then proceeded to foreclose the $35,000 mortgage, and purchased the mortgaged property at the foreclosure sale. After this, on the 18th of March, 1873, Oliver filed a bill in equity in the Circuit Court of the United States for the Eastern District of Michigan against Cunningham, Hunt, Eschelman, Haines, Ranney and the two Robinsons, the object of which was to redeem the lands which had been conveyed to Cunningham and to charge the defendants, as mortgagees in possession, with the rents and profits of the property. Upon this bill, a final decree was rendered on the 21st of September, 1882, finding due from the defendants to Oliver the sum of $41,488.87, for which execution was ordered, and directing the defendants to "Surrender and yield up to the complainant possession of all lands transferred by said complainant to said defendant Cunningham by deeds dated September 3, 1868," and to make, execute and deliver to complainant good and sufficient conveyances to transfer all their title and interest in and to the land described in said deeds, and which should describe and specify the lands as follows: "The entirety of the following lands: * * * Entire fractional sec. 12, Town. 29, North Range 8 East. * * *" From this decree, Hunt and Eschelman alone appealed, giving security [179] for a *supersedeas*. Upon section 12 is a valuable saw-mill, but the complainant claims it is located on the north half of the section and not on the south half. After the appeal and *supersedeas* were perfected, Oliver applied to the circuit court for a writ of assistance to put him in possession of the north half of this section, and the writ was granted, on the ground that as Hunt had title only to the south half of the section, his appeal did not operate to stay the execution of the decree as to the north half. It is to stay the execution of this writ that the present application is made.

We think this motion should be granted. The decree appealed from finds as a fact, that although the conveyance of Oliver was in form to Cunningham alone, it was taken by him for the joint benefit of himself and his co-mortgagees, that is to say: Hunt and Eschelman, the appellants. Such being the case, it is a matter of no importance that the legal title to the north half of section 12 may not have been in either of the appellants. As Cunningham took title to the whole property for them as well as himself, whatever in the decree affects that title affects them as well as him. They have been charged with the entire amount realized from the whole property, and it is impossible to reach any other conclusion from the papers submitted on this motion, than that, in the whole proceeding below, the appellants were deemed to have been, in equity, grantees under the deed to Cunningham jointly with him, and that their rights under the appeal are to be governed accordingly. Certainly, an appeal with *supersedeas* by him would, on the face of the papers, stay the execution of the writ of assistance now complained of; and if such an appeal would have that effect as to him, the present appeal must as to these appellants.

A writ of supersedeas, *such as is asked for, may issue, on application to the clerk, by the appellants or either of them.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

J. N. EVANS, *Plff. in Err.*, [180]
v.
SAMUEL BROWN.

(See S. C., Reporter's ed., 180.)

Amendment of writ of error.

Where a writ of error is not made returnable on any particular day on motion for a dismissal, leave to amend the writ by inserting the proper return day will be granted; but where the case was manifestly brought here for delay only, and the questions presented are frivolous, a motion to affirm will be granted.

[No. 949.]

Submitted Oct. 15, 1883. Decided Nov. 5, 1883.

IN ERROR to the Circuit Court of the United States for the District of Nevada.

On motion to dismiss, with which is united under Rule 6, a motion to affirm.

Messrs. **W. E. P. Seal** and **C. J. Hill**, for defendant in error, in support of motions.

Messrs. **Wm. Woodburn** and *Clarke & King*, for plaintiff in error, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

The writ of error in this case was not made returnable on any particular day. This, if the defect is not cured by amendment, entitles the defendant in error to a dismissal, but the plaintiff in error asks leave, under the authority of section 1005, R. S., to amend the writ by inserting the proper return day. That leave we grant, and therefore overrule the motion to dismiss; but on looking into the record we find the case was manifestly brought here for delay only. All the questions presented are so frivolous as not to need further argument. The motion to affirm is granted.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WINTHROP IRON COMPANY ET AL.,
Appts.,
v.
ARTHUR B. MEEKER ET AL.

(See S. C., Reporter's ed., 180-185.)

Final decree what is—subsequent accounting.

1. A decree is final by which the whole purpose of the suit has been accomplished.
2. An accounting, ordered only in aid of the execution of the decree and which is no part of the relief prayed for in the bill, does not prevent the decree being final where the litigation as to the merits is terminated, and nothing remains to be done but to carry the decree into execution.

[No. 1118.]

Submitted Oct. 15, 1883. Decided Nov. 5, 1883.

NOTE.—*What is final decree or judgment of state or other court from which appeal lies.* See *note* to Gibbons v. Ogden, 19 U. S. (6 Wheat.), 448.

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APPEAL from the Circuit Court of the United States for the Western District of Michigan.

On motion to dismiss.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **Frederic Ullman** and **L. D. Norris**, for appellees, in support of motion.

Mr. **R. D. Mussey**, for appellants, *contra*.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a motion to dismiss an appeal because the decree appealed from is not a final decree. The motion papers show that the appellees, Meeker, Brown and Brooks, a minority of the stockholders of the Winthrop Iron Company, on or about the 12th of November, 1881, filed a bill in equity in the Circuit Court of the United States for the Western District of Michigan, against the Winthrop Iron Company, the Winthrop Hematite Company, and certain directors of the Iron Company who were the stockholders of the Hematite Company, the object and purpose of which was to set aside as fraudulent and void the proceedings of the stockholders of the Iron Company at a meeting held in Chicago on the first of October, 1881, and to have a receiver appointed to take possession of the property of the company and manage its affairs. The effect of the proceedings of the meeting complained of was, as alleged, to authorize a lease of the property of the Iron Company to the Hematite Company from and after the first of December, 1882, for the personal advantage of the majority stockholders of the Iron Company regardless of the rights of the minority. The stockholders of the Hematite Company were also elected directors of the Iron Company and constituted a majority of the board. On the 2d day of October, 1882, the cause was submitted to the court upon the pleadings, proofs and arguments of counsel. From the proofs it appeared that, notwithstanding the pendency of the suit, the Iron Company had on the 30th of [182] November, 1881, executed a lease to the Hematite Company, according to the vote of the stockholders. On the 6th of April, 1883, a decree was rendered which, in effect, adjudged that the proceedings of the meeting were in fraud of the rights of the minority stockholders, and that the lease which had been executed in accordance with the authority then given was null and void, for the fraud of the defendants, the Winthrop Hematite Company and the St. Clair Brothers, the majority stockholders and directors of the Iron Company, in procuring the same. By the same decree, a receiver was appointed to take charge of and manage the business of the Iron Company, evidently because a majority of the board of directors, after the election at the October meeting, were considered unfit to control its affairs, as their personal interests were in conflict with the interests of the Company. Both the Iron Company and the Hematite Company, as well as the defendant directors of the Iron Company, were ordered to forthwith surrender and deliver to the receiver all the property of the Iron Company, and all corporate records and papers. The receiver was fully authorized to "Continue the management of the business of the * * * Company, with power to lease or operate its mines and plants until the further order of the court." The decree further ordered an accounting before a master by the Hematite Company and the defendant directors of the Iron Company, for all profits realized from the use of the leased property after the first of December, 1882, the date of the beginning of the term under the lease which had been set aside. There was also an order for an accounting by the defendant directors "Concerning the ores mined by them, and the royalty upon such ores due and owing by them to the * * * Company, and concerning the rights and obligations of the lessor and lessee, under and according to a lease mentioned in the bill, * * * expiring on December 1 1882." At the foot of the decree is the following: "And the court reserves to itself such further directions as may be necessary to carry this decree into effect, concerning costs, or as may be equitable and just." From this decree the appeal was taken.

In our opinion the decree as entered is a final [183] decree, within the meaning of section 692 of the Revised Statutes, regulating appeals to this court. The whole purpose of the suit has been accomplished. The lease made under the authority of the meeting of October, 1881, has been canceled, and the management of the affairs of the Company has been taken from the board of directors, a majority of whom were elected at that meeting, and committed to a receiver appointed by the court, plainly because, in the opinion of the court, the rights of the minority stockholders would not be safe in the hands of directors elected by the majority. In order that the receiver may perform his duties, the defendants are required to turn over to him the entire property and records of the Company. The accounting ordered is only in aid of the execution of the decree, and is no part of the relief prayed for in the bill, which contemplated nothing more than a rescission of the authority to execute the fraudulent lease, or a cancellation of the lease if executed, and a transfer of the management of the affairs of the Company from a board of directors, whose personal interests were in conflict with the duty they owed the Corporation, to some person to be designated by the court. The litigation of the parties as to the merits of the case is terminated, and nothing now remains to be done but to carry what has been decreed into execution. Such a decree has always been held to be final for the purposes of an appeal. *Bostwick* v. *Brinkerhoff* [*ante*, 73], and the cases there cited. In *Forgay* v. *Conrad*, 6 How., 204, it was said by *Chief Justice* Taney, for the court: "And when the decree decides the right to the property in contest, and directs it to be delivered by the defendant to the complainant * * * and the complainant is entitled to have such a decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the circuit court as is necessary for the purpose of adjusting, by a further decree, the accounts between the parties pursuant to the decree passed. This rule, of course, does not apply to cases where money is directed to be paid into court, or property to be delivered to a receiver, or [184] property held in trust to be delivered to a new trustee appointed by the court, or to cases of a like description. Orders of that kind are frequently and necessarily made in the progress

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of a cause. But they are interlocutory only, and intended to preserve the subject-matter in dispute from waste or dilapidation, and to keep it within the control of the court until the rights of the parties concerned can be adjudicated by a final decree."

Here the rights of the Hematite Company and the defendant directors of the Iron Company have been adjudicated and definitely settled. Their lease, which was in reality the subject-matter of the action, has been canceled, and a delivery of the leased property to the Iron Company has been ordered. The complainants are entitled to the immediate execution of such a decree. The receiver to whom the delivery is to be made was not appointed to hold the property until the rights of the parties could be adjudicated, but to stand, subject to the direction of the court, in the place of and as and for the Corporation, because, under the circumstances, the Corporation is incapacitated from acting for itself. His position is like that of the guardian of the estate of an incompetent person. He represents the Iron Company, and a delivery of the leased property to him is a delivery in fact and in law to the Company itself; that is to say, to the party for whose use the suit was prosecuted. The complainant stockholders sue for the Company, and the delivery to the receiver is a delivery to the Company that has been adjudged to be entitled to immediate possession, notwithstanding the lease to the Hematite Company. The defendant directors have not in form been removed from their office, but their power as directors has been taken from them and they are no longer able to carry into effect the orders of the stockholders made in fraud of the rights of the minority at the meeting in October. A new officer has been appointed to stand in the place of the directors as manager of the affairs of the Company. In the words of *Mr. Justice* McLean in *Craighead* v. *Wilson*, 18 How., 201 [59 U. S., XV., 333], the decree is final on all matters within the pleadings, and nothing remains to be done but to adjust the accounts between the [185] parties growing out of the operations of the defendants during the pendency of the suit. The case is altogether different from suits by patentees to establish their patents and recover for the infringement. There the money recovery is part of the subject-matter of the suit. Here it is only an incident to what is sued for.

The motion to dismiss is denied.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

MICHAEL RETZER, *Plff. in Err.*,

v.

ALFRED M. WOOD, COLLECTOR OF INTERNAL REVENUE.

(See S. C., Reporter's ed., 185-188.)

Express business—defense of Statute of Limitations—action to recover back taxes.

*1. The idea of regularity, as to route or time or both, is involved in the words "express business," under section 104 of the Act of June 30, 1864, ch. 173, 13 Stat. at L., 276, and those words do not cover what is done by a person who carries goods solely on call and at special request, and does not run regular trips or over regular routes.

2. In the absence of a statutory rule to the contrary, the defense of a statute of limitations, which is not raised either in pleading or on the trial, or before judgment, cannot be availed of.

3. In a suit to recover back internal revenue taxes, tried by the circuit court, without a jury, the court having found the facts, and held that the taxes were illegally exacted, but that the suit was barred by a Statute of Limitation, rendered a judgment for the defendant. On a writ of error by the plaintiff, the record not showing that the question as to the Statute of Limitations was raised by the pleadings, or on the trial, or before judgment, and the conclusion of law as to the illegality of the taxes being upheld, this court reversed the judgment and directed a judgment for the plaintiff to be entered below.

*Head notes by *Mr. Justice* BLATCHFORD.

[No. 75.]

Argued Oct 24, 1883. Decided Nov. 12, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the opinion of the court.

Messrs. **Edwin B. Smith** and *William Stanley*, for plaintiff in error.

Mr. **S. F. Phillips**, *Solicitor-Gen.*, for defendant in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

This suit was commenced in a court of the State of New York and was removed by the defendant into the Circuit Court of the United States for the Southern District of New York by a writ of *certiorari*. The defendant was a Collector of Internal Revenue, and exacted and collected from the plaintiff at various times in the years 1866, 1867 and 1868, sums of money amounting in all to $61.30, as a tax of 3 per [186] centum on the gross amounts of the plaintiff's receipts from his business, under the provisions of section 104 of the Act of June 30, 1864, ch. 173, 13 Stat. at L., 276, which enacted "That any person, firm, company or corporation carrying on or doing an express business, shall be subject to and pay a duty of three per centum on the gross amount of all the receipts of such express business." The suit was commenced June 2, 1874. The plea was the general issue. The Statute of Limitations was not pleaded. A jury having been waived by a written stipulation of the parties, the action was tried before the court without a jury. The court found the fact of the dates and amounts of the exactions, and these further facts: the plaintiff's business was the carrying of goods between New York and Brooklyn, and from one place in the City of Brooklyn to another place in the same city. He did not run regular trips nor over regular routes or ferries, but where ordered. He had a place in Brooklyn where he received orders on a slate from persons who wished articles sent from there to New York, and from one place in Brooklyn to another place in Brooklyn. The goods were carried in wagons. They were of a miscellaneous character, such as boxes of dry goods, barrels of sugar, rolls of sole leather, trunks and general merchandise. His business was done solely upon call, and at special request, and, as requested, he sent to any place in either of said cities and took baggage or freight to any place in either of said cities. On the 28th of May, 1873, he presented to the Commissioner of Internal Revenue a claim,

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supported by his own oath, for the refunding to him of the moneys so exacted as taxes. No decision was ever made on the claim. The court found, as conclusions of law: 1, that the tax was illegally exacted; 2, that the action was barred by section 44 of the Act of June 6, 1872, ch. 315, 17 Stat. at L., 257. A judgment was rendered for the defendant. To reverse that judgment the plaintiff brought this writ of error.

There is in the record a bill of exceptions, which shows that, after the plaintiff had given evidence to establish the facts so found, the defendant offering no testimony, the plaintiff requested the court to render judgment for the [187] plaintiff; but the court refused, and the plaintiff excepted, and the court directed a judgment for the defendant, and the plaintiff excepted.

We are of opinion that the plaintiff was not liable to this tax, because he did not carry on or do an express business, within the meaning of the statute. Although he carried goods between New York and Brooklyn, and from one place to another in either city, he did so solely on call and at special request. He did not run regular trips or over regular routes or ferries. He was no more than a drayman or truckman, doing a job when ordered. The fact that he had a place in Brooklyn where orders could be left on a slate made no difference. The words "express business," in the statute, must have the meaning given them in the common acceptation. An "express business" involves the idea of regularity, as to route or time or both. Such is the definition in the lexicons. Whether, if the plaintiff had held out to the world, at any place of business, that he was carrying on an "express" or was doing an "express business," or had so designated himself by inscription on his vehicle or vehicles, that would have made any difference, it is not necessary to inquire, because no such thing was shown.

As to the defense of the Statute of Limitations, it was not pleaded, nor brought to the attention of the court, as a defense, at the trial. It was not within the issue raised by the plea of the general issue, which was the only issue to which the stipulation for a trial by the court extended. It is well settled that, in the absence of a contrary rule established by statute, a defendant who desires to avail himself of a statute of limitation as a defense, must raise the question either in pleading, or on the trial, or before judgment. *Storm* v. *U. S.*, 94 U. S., 76, 81 [XXIV., 42, 44]; *Upton* v. *McLaughlin*, 105 U. S., 640 [XXVI., 1197]. Such was always the law in New York, and no contrary rule was in force in New York, by statute, at any time after [188] this suit was brought. When the testimony at the trial closed, and the plaintiff asked for a judgment in his favor, he was entitled to it. It is proper that the circuit court should be directed to enter such a judgment. The conclusion of law, by the circuit court, that the tax was illegally exacted, being a correct conclusion, and its conclusion that the suit was barred by limitation being an incorrect conclusion, it follows that the plaintiff was entitled to judgment on the facts found. The special findings of fact were equivalent to a special verdict, and the question thereon was whether they required a judgment for the plaintiff or the defendant. This was a matter of law, the ruling on which can be reviewed by this court. *Norris* v. *Jackson*, 9 Wall., 125 [76 U. S., XIX., 608].

The defendant in error asks that, if the judgment be reversed, the case be remanded, so that the Statute of Limitations may be pleaded. Without passing on the question as to whether the statute invoked would furnish a defense in this case, we are of opinion that no ground exists for the course suggested. The record shows that the defendant's attorney had notice, by the declaration, that the plaintiff's claim accrued before a date more than eight years prior to the filing of the plea. Under such circumstances it would not be a fair exercise of discretion not to hold the defendant to his legal *status*.

The judgment is reversed and the case is remanded to the Circuit Court, with directions to enter a judgment for the plaintiff for $61.30, with interest according to the law of the State of New York.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 165.

CHARLES A. SNYDER, *Appt.*, [189]
v.
MORRIS MARKS, Collector of Internal Revenue for the DISTRICT OF LOUISIANA.

(See S. C., Reporter's ed., 189-194.)

Injunction against collecting tax—suit for illegal taxes.

* A bill in equity will not lie to enjoin a Collector of Internal Revenue from collecting a tax assessed by the Commissioner of Internal Revenue against a manufacturer of tobacco, although the tax is alleged in the bill to have been illegally assessed.

[No. 94.]

Submitted Nov. 1, 1883. Decided Nov. 12, 1883.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **Wm. Grant** and *J. D. Rouse*, for appellant.

Mr. **Wm. A. Maury**, *Asst. Atty-Gen.*, for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

This suit was brought in a state court of Louisiana by the appellant, a tobacco manufacturer, against the appellee, a Collector of Internal Revenue, to obtain an injunction restraining the appellee from seizing and selling the property of the appellant to pay two assessments of taxes against him, made by the Commissioner of Internal Revenue, and to have the assessments declared void. An injunction having been granted *ex parte*, the appellee removed the suit, by *certiorari*, into the Circuit Court of the United States for the District of Louisiana, on the allegation that it was brought on account of acts done by the appellee, as such Collector, under authority of the internal revenue laws of the

*Head note by *Mr. Justice* BLATCHFORD.

NOTE.—*When taxes illegally assessed can be recovered back.* See *note to* Erskine v. Van Onsdale, 82 U. S., XXI., 63.

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United States, and to enjoin him, in his official capacity, from enforcing the payment of assessments made against the appellant, under authority of such laws, by executing warrants of distraint, as authorized by such laws.

After the removal of the suit the appellant, under an order to reform his pleading, filed a bill in equity in the circuit court. It set forth the assessments, complained of as being in these words:

"Alphabetical list of persons liable to tax under the internal revenue laws of the United States, in the collection district of the State of Louisiana, reported by the Collector of said district for assessments, and the amount assessed against each by the Commissioner of Internal Revenue, and certified to the Collector of said district, for the month of October, 1879.

Name.	P. O. address.	Article or occupation.	Period.	Tax assessed.	Total tax and penalty assessed.
Snyder, Chas. A.	New Orleans	S. T. Tob, 7,800¼ lbs.	July 6, '78, to Dec. 3, '78.	$1,872 12	$1,872 12
Irwin & Snyder	do	do 6,657 lbs	Jan'y 1, '78, to June 6, '78.	1,567 68	1,567 68

Made Nov. 17, 1879."

[190]

The bill also averred that the assessments did not show upon what they were based nor upon what the taxes were claimed to be due and were void for uncertainty and unauthorized by law, and the Commissioner of Internal Revenue was without jurisdiction to make them; that the Irwin & Snyder assessment was made more than fifteen months after the time which it embraced had elapsed, and that was true, also, as to a part of the Snyder assessment, and the commissioner had no authority to make an assessment except for a period of time not exceeding fifteen months before it was made; that the appellant was never a member of the firm of Irwin & Snyder; that he never owed the amount of either assessment; that, when he commenced the manufacture of tobacco, he gave a bond to the United States in a penalty of $20,000, conditioned that he would stamp all tobacco manufactured by him, as required by law, and comply with all the requirements of law relating to the manufacture of tobacco, and the sureties thereon were solvent, and that, if the United States had any lawful claim against him, an action would lie on the bond, which was ample security, while he was without adequate remedy against the United States for the seizure of his property to pay the claims. The prayer of the bill was for a decree declaring each of the assessments void as against the appellant, and enjoining the appellee from distraining on the property of the appellant for the purpose of collecting the amounts of the assessments, and from attempting to collect the same except by judicial process. [191]

The appellee demurred to the bill for want of equity, and because no suit could be maintained in any court to restrain the collection of any tax of the United States, and the appellant could not be permitted in this suit to attack the validity or regularity of the assessments or restrain the execution of a warrant issued thereunder. The circuit court sustained the demurrer and dismissed the bill. To review its decree, this appeal is brought.

The sole object of the suit is to restrain the collection of a tax which purports to have been assessed under the internal revenue laws. A decree adjudging the tax to be void as against the appellant is sought for only as preliminary to relief by injunction, and would be futile for any purpose of this suit unless followed by an injunction.

The internal revenue Act of July 13, 1866, ch. 184, 14 Stat. at L., 152, provided (sec. 19) as follows: "No suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury, established in pursuance thereof, and a decision of said Commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this Act takes effect; *Provided*, That if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal." By section 10 of the Act of March 2, 1867, ch. 169, 14 Stat. at L., 475, it was enacted that section 19 of the said Act of 1866 be amended "by adding the following thereto:" "And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." In the Revised Statutes this amendment of and addition to section 19 of the Act of 1866 is made a section by itself (section 3224), separated from that of which it is an amendment and to which it is an addition, and reads thus: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." The word "any" was inserted by the revisers. This enactment in section 3224 has a no more restricted meaning than it had when, after the Act of 1867, it formed a part of section 19 of the Act of 1866, by being added thereto. The first part of section 19 related to a suit to recover back money paid for a tax alleged to have been erroneously or illegally assessed or collected, and the section, after thus providing for the circumstances under which such a suit might be brought, proceeded, when amended to say, that "No suit for the purpose of restraining the assessment or collection of [192]

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tax shall be maintained in any court." The addition of 1867 was *in pari materia* with the previous part of the section and related to the same subject-matter. The tax spoken of in the first part of the section was called a tax *sub modo*, but was characterized as a "tax alleged to have been erroneously or illegally assessed or collected." Hence, when, on the addition to the section, a tax was spoken of, it meant that which is in a condition to be collected as a tax, and is claimed by the proper public officers to be a tax, although on the other side it is alleged to have been erroneously or illegally assessed. It has no other meaning in section 3224. There is, therefore, no force in the suggestion that section 3224, in speaking of a tax, means only a legal tax; and that an illegal tax is not a tax, and so does not fall within the inhibition of the statute, and the collection of it may be restrained.

The statute clearly applies to the present suit and forbids the granting of relief by injunction. It is distinctly alleged in the bill that the appellee claims that the appellant owes to the United States the amounts assessed for taxes, both [193] the tax assessed against the appellant and that assessed against Irwin & Snyder. The bill also shows sufficiently that the assessment had relation to the business of the appellant, as a manufacturer of tobacco, and to his liability to tax, under the internal revenue laws in respect to such business. The instructions of the Internal Revenue Department in regard to the preparation of assessment lists provided, that where an assessment was reported against a manufacturer of tobacco for having removed any taxable articles from his manufactory without the use of the proper stamp, or for not having duly paid such tax by stamp at the time and in the manner provided by law, the entry in the column headed "article or occupation" should be "Stamp Tax. Tob.," with liberty to use the initials "S. T." as an abbreviation for "stamp tax." The instructions stated that "Tob." is an abbreviation for "tobacco." Resort may be had to these instructions to show the meaning of the abbreviations in the assessment list. Read by the light of the instructions, the list shows a tax which the appellant might be liable to pay, and one which the commissioner had general jurisdiction to assess against him.

The inhibition of section 3224 applies to all assessments of taxes, made under color of their offices, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. The remedy of a suit to recover back the tax after it is paid, is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. Such has been the current of decisions in the Circuit Courts of the United States, and we are satisfied it is a correct view of the law. *Howland* v. *Soule*, Deady, 413; *Pullan* v. *Kinsinger*, 2 Abb., U. S., 94; *Robbins* v. *Freeland*, 14 Int. Rev. Rec., 28; *R. R. Co.* v. *Prettyman*, 17 Id., 99; *U. S.* v. *Black*, 11 Blatchf., (C. C.), 548; *Kissinger* v. *Bean*, 7 Biss., 60; *U. S.* v. *R. R. Co.*, 4 Dill., 69; *Alkan* v. *Bean*, 23 Int. Rev. Rec., 351; *Kensett* v. *Stivers*, 18 Blatchf. (C. C.), 397. In *Cheatham* v. *U. S.*, 92 U. S., 85, 88 [XXIII., 561, 562], and again in *State Railroad Tax Cases*, Id., 575, 613 [XXIII, 663, 673], it was said by this court, that the system prescribed by the United States in regard to both [194] customs duties and internal revenue taxes, of stringent measures, not judicial, to collect them, with appeals to specified tribunals and suits to recover back moneys illegally exacted, was a system of corrective justice, intended to be complete and enacted under the right belonging to the government, to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares by section 3224, that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject-matter in question, have made the assessment, and claim that it is valid.

The decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

GEORGE D. CRAGIN, *Plff. in Err.*,

v.

WILLIAM S. LOVELL, Exr. of ELIZA A. QUITMAN, Deceased.

SAME, *Appl.*,

v.

SAME.

(See S. C., Reporter's ed., 194-200.)

Bill in equity to avoid judgment—note of agent—liability of principal—judgment on default, when reversed.

*1. A defendant, against whom a judgment has been rendered on default by a Circuit Court of the United States, in an action at law, cannot maintain a bill in equity to avoid it, upon the ground that the plaintiff at law falsely and fraudulently alleged that the parties were citizens of different States, without showing that the false allegation was unknown to him before the judgment.

2. Upon a negotiable promissory note made by an agent, in his own name and not disclosing on its face the name of the principal, no action lies against the principal.

3. In an action at law, the declaration alleged that the plaintiff sold land to a third person, who gave his notes for the purchase money, secured by mortgage of the land; that afterwards the defendant, in a suit by him against that person, claimed the ownership of the land, and alleged that the other person, acting merely as his agent, illegally made the purchase in his own name, and that he was liable and ready to pay for the land; that he was, thereupon, adjudged to be the owner of the land, and took possession thereof; and that, by reason of the premises, the defendant was liable to the plaintiff in the full amount of the notes. Held, that the declaration showed no cause of action, even under article 1890 of the Civil Code, and article 35 of the Code of Practice of Louisiana.

4. A judgment, rendered on default, upon a declaration setting forth no cause of action, may be

*Head notes by *Mr. Justice* GRAY.

NOTE.—*Undisclosed principal is not bound by note or bill of the agent signed or drawn in agent's own name.*

A person not a party to a note or bill of exchange cannot be made liable upon it upon proof that the ostensible party signed or indorsed as his agent. Chitty, Bills, 38; Snelling v. Howard, 51 N. Y., 377; Meeker v. Claghorn, 44 N. Y., 351; Barker v. Mechs.

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reversed on writ of error, and the case remanded with directions that judgment be arrested.

[Nos. 92, 93.]

Argued Nov. 1, 1883. Decided Nov. 12, 1883.

IN ERROR to the Circuit Court of the United States for the District of Louisiana. And, APPEAL from the Circuit Court of the United States for the District of Louisiana.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **Wm. Grant** and *J. D. Rouse*, for plaintiff in error and appellant:

The general rule is that a judgment upon a declaration, which does not aver a promise, will be set aside, even after verdict on issue joined.

Myers v. *Davis*, 6 Blatchf., 77; *Candler* v. *Rossiter*, 10 Wend., 488.

The law will not create a promise in pleading.

Ninan v. *Bland*, 3 Smith, 114; *Morris* v. *Norfolk*, 1 Taunt., 217; *Buckler* v. *Angil*, 1 Lev., 164.

An action will not lie against one person, upon a covenant which purports to have been made by another.

Beckham v. *Drake*, 9 Mees. & W., 79; *Spencer* v. *Field*, 10 Wend., 88; *Townsend* v. *Hubbard*, 4 Hill, 351; see, also, *Fowler* v. *Shearer*, 7 Mass., 14; *Elwell* v. *Shaw*, 16 Mass., 42; *Brinley* v. *Mann*, 2 Cush., 337, *Kimball* v. *Tucker*, 10 Mass., 192; *Stackpole* v. *Arnold*, 11 Mass., 27.

In New York and Massachusetts the rule is so strictly enforced that the maker of a note, who describes himself as agent of a particular person, is held to bind himself and not the principal.

De Witt v. *Walton*, 9 N. Y., 571; *Barker* v. *Ins. Co.*, 3 Wend., 94; *Pentz* v. *Stanton*, 10 Wend., 271; *R. R. Co.* v. *Benedict*, 5 Gray, 566; *Taber* v. *Cannon*, 8 Met., 456; *Brown* v. *Parker*, 7 Allen, 337; *Bradlee* v. *Glass Co.*, 16 Pick., 347; *Bass* v. *O'Brien*, 12 Gray, 477; see, also, *Metcalf* v. *Williams*, 104 U. S., 93 (XXVI., 665); *McTyer* v. *Steele*, 26 Ala., 487; *Merch. Bank* v. *Cent. Bank*, 1 Ga., 418; *McDonald* v. *Bear River Co.*, 13 Cal., 220; *Garrison* v. *Combs*, 7 J. J. Marsh., 84; 1 Dan. Neg. Inst., sec. 303.

Messrs. **Joseph P. Hornor**, *W. S. Benedict* and *Francis W. Baker*, for defendant in error and appellee:

It has been held for many years, that if the defendant dispute the allegation of citizenship in the declaration, he must plead the fact in abatement of the suit.

Jones v. *League*, 18 How., 81 (59 U. S., XV., 264); *Wythe* v. *Myers*, 3 Sawy., 599.

The Term at which the judgment had been rendered, having expired before the filing of the appellant's bill, the court was powerless to re-open the judgment and had lost control of it.

Bank v. *Moss*, 6 How., 37; *Crabtree* v. *Neff*, 1 Bond, 554.

"No fact once tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

U. S. Const., 7th Amend.; *Parsons* v. *Bedford*, 3 Pet., 433; *Crim* v. *Handley*, 94 U. S., 657 (XXIV., 217); *Bank* v. *Moss*, 6 How., 37.

Complainant has been at fault and thus lost all remedy.

Crim v. *Handley* (*supra*); *Truly* v. *Wanzer*, 5 How., 142; 2 Story, Eq., 9th ed., sec. 887; *R. R. Co.* v. *Neal*, 1 Woods, 353; *Searles* v. *R. R. Co.*, 2 Woods, 621; *Brown* v. *Buena Vista*, 95 U. S., 159 (XXIV., 422).

"If anything be settled in our jurisprudence, it is: that one cannot be heard by way of action in nullity, to destroy a judgment for matters known and in existence at the time of the institution of the suit in which the judgment was rendered, even though, by some neglect, they may not have been pleaded."

Succession of Lebrew, 31 La. Ann., 214; *Perry* v. *Rue*, 31 La. Ann., 287.

Mr. Justice **Gray** delivered the opinion of the court:

These two cases have been argued together. Eliza A. Quitman, the defendant in error and appellee, having died since the judgment below, William S. Lovell, her executor, has appeared in her stead.

In the action at law, she filed a petition against George D. Cragin in the Circuit Court of the United States for the District of Louisiana, alleging that she was a citizen of New York and he was a citizen of Louisiana; that, on the 31st of January, 1878, she sold a plantation to Orlando P. Fisk for the price of $22,500, of which the sum of $4,500 was paid in cash, and for the rest of which nine notes of Fisk were given, for $2,000 each, payable in successive years and secured by a mortgage of the estate; that Cragin had paid the first three of the notes, and the petitioner, by foreclosure and sale of the estate under the mortgage, had obtained the sum of $10,447.05, to be credited on the remaining notes under date of May 1, 1874; and further alleging as follows:

"Now your petitioner represents that George D. Cragin is and was the real owner of said property and liable to your petitioner, for the following reasons, *viz.:*

That subsequently to the said purchase of property by said Fisk, by a certain proceeding filed in this honorable court, the said Cragin

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Ins. Co., 3 Wend., 94; S. C., 20 Am. Dec., 664; Pentz v. Stanton, 10 Wend., 271; S. C., 25 Am. Dec., 558; De Witt v. Walton, 9 N. Y., 571; Beckham v. Drake, 9 Mees. & W., 79; Stackpole v. Arnold, 11 Mass., 27; S. C. 6 Am. Dec., 150; Briggs v. Partridge, 64 N. Y., 357; Eastern R. R. Co. v. Benedict, 5 Gray, 566.

There can be no recovery on a note or bill against one whose name does not appear upon it. When an agent acts in his own name, he binds himself and not his principal. Thomas v. Bishop, 2 Str., 955; Allen v. Coit, 6 Hill, 318; Barlow v. Bishop, 1 East, 432; S. C., 3 Esp., 266; Leadbitter v. Farrow, 5 Maule & S., 345.

An agent accepting a bill in his own name binds himself and not his principal. Bk. of Rochester v. Monteath, 1 Denio, 401; S. C., 43 Am. Dec., 681.

An agent is liable on a note given by him in his principal's name without authority. Rossiter v. Rossiter, 8 Wend., 494; S. C., 24 Am. Dec., 62; Bartlett v. Tucker, 104 Mass., 336; Dusenberry v. Ellis, 3 Johns. Cas., 70; S. C., 2 Am. Dec., 144; Dung v. Parker, 52 N. Y., 499; Collen v. Wright, 8 E. & B., 647; Hochster v. Baruch, 5 Daly, 440.

If an agent in the course of his agency sign a bill in his own name, he and not the principal is liable. Joynson v. Richard, 12 J. & Sp., 20; Newhall v. Dunlap, 14 Me., 180; S. C., 31 Am. Dec., 45.

The character in which a person draws a bill may be shown as between himself and his principal, though he may be personally liable to third persons. Newhall v. Dunlap, 14 Me., 180; S. C., 31 Am. Dec., 45.

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did claim the entire ownership of the said property and did claim that the purchase made in the name of the said Fisk was illegally entered in his own name by said Fisk, who was acting merely as the agent of said Cragin, and that the amount of the purchase price of said property paid in cash, as well as the first and second notes aforesaid, were made by said Fisk with the money of said Cragin, and that he, said Cragin, was liable for and ready to pay for said property; that thereafter, in due course of law and [196] after proper proceedings, the said Cragin was adjudged by this honorable court, by final decree, to be the owner of said property, and the matters and things in said petition contained were found to be true and correct.

That, pending said proceedings, the said George D. Cragin was in said case appointed the receiver of the said plantation, so sold by your petitioner as aforesaid; and that, acting as such receiver, and subsequently as such owner of said plantation, he did remove therefrom all the movable property thereon and which existed thereon at the date of the sale, by your petitioner, to said Fisk, of a value exceeding $1,000, and did lay waste and dilapidate the said property, to benefit his adjoining plantation, and to the detriment of your petitioner's rights.

Petitioner further avers, that, by reason of the causes aforesaid, the said George D. Cragin is liable and indebted unto your petitioner in the full amount of said notes, less the credit due as aforesaid, for which amicable demand has been made without avail."

The record shows that Cragin was served with process in Louisiana and, not appearing, was defaulted, and judgment was rendered for the plaintiff in the sum claimed, which was shown by computation and agreement of counsel to be $6,888.40, and the defendant sued out a writ of error, which is the first of the cases before us.

The other case is an appeal from a decree of the same court, dismissing upon demurrer a bill in equity, filed by Quitman against Cragin, to annul and avoid the judgment aforesaid and to restrain the issue of execution thereon. The bill set forth the proceedings in the suit at law; and its only other material allegations were, that the circuit court had no jurisdiction of that suit, because both parties were citizens of New York; and that Quitman, knowing that fact, falsely and fraudulently alleged Cragin to be a citizen of Louisiana, and illegally and unjustly obtained judgment by default against him.

It is quite clear that the bill in equity was rightly dismissed, because it contains no allegation that Cragin did not know, before the judgment against him in the suit at law, that the plaintiff in that suit alleged that he was a citizen of Louisiana. If he did then know it, he should have appeared and pleaded in abatement; and equity will not relieve him from the consequence of his own negligence. *Jones* v. *League*, 18 How., 76 [59 U. S., XV., 263]; *Crim* v. *Handley*, 94 U. S., 652 [XXIV., 216.] *The decree in the suit in equity must, therefore, be affirmed.*

But it is equally clear that the judgment at law is erroneous. The petition shows no privity between the plaintiff and Cragin. It alleges no promise or contract by Cragin to or with the plaintiff. The mere description of the notes, received by the plaintiff, as "notes of Fisk" does not show that they were not negotiable instruments, but, on the contrary, in the connection in which it is used and applied to notes given for the purchase money of land and secured by mortgage thereof, designates, as was assumed by both counsel at the argument, negotiable promissory notes, bearing no name but that of Fisk, as maker; and on such notes no action will lie against any other person. *Nash* v. *Towne*, 5 Wall., 689, 703 [72 U. S., XVIII., 527, 530]; *Williams* v. *Robbins*, 16 Gray 77; *In Re Adansonia Fibre Co.*, L. R. 9 Ch., 635; *Daniels* v. *Burnham*, 2 La., 243, 245. The case does not come within the decisions in *Mechanics' Bank* v. *Bank of Columbia*, 5 Wheat., 326, and in *Metcalf* v. *Williams*, 104 U. S., 93 [XXVI., 665], in each of which the name of the principal appeared upon the face of the note.

If the action is treated, not as an action upon the notes themselves, but as an action to recover [199] the amount of the notes, by reason of a subsequent agreement of Cragin to pay them, the plaintiff fares no better. The only allegations touching the relation of Cragin to these notes are that, in a suit by him against Fisk, he alleged that Fisk in purchasing the land acted merely as his agent, and that he owned the land and was liable and ready to pay for it; and that he was, thereupon, adjudged to be the owner of the land and took possession thereof. If this amounted to a promise to anyone, it was not a promise to the plaintiff, nor even a promise to Fisk to pay to the plaintiff the amount of the notes; but it was, at the utmost, a promise to Fisk to pay that amount to him or to indemnify him in case he should have to pay it. It is, therefore, not within the provisions of the Louisiana Codes, cited in argument;* and the defendant is liable to an action at law by Fisk only, and not by the plaintiff. *Nat. Bk.* v. *Grand Lodge*, 98 U. S., 123 [XXV., 75]; *Bank* v. *Rice*, 107 Mass., 37; *M'Cauley* v. *Hagan*, 6 Rob. (La.), 359. The final allegation that, by reason of the causes aforesaid, the defendant is indebted and liable to the plaintiff, is a mere conclusion of law, which is not admitted by demurrer or default. *Hollis* v. *Richardson*, 13 Gray, 392.

The judgment having been rendered on default, upon a declaration setting forth no cause of action, may be reversed on writ of error. *McAllister* v. *Kuhn*, 96 U. S., 87 [XXIV., 615]; *Hollis* v. *Richardson*, above cited; *La. Bank* v. *Senecal*, 9 La., 225. This court, on reversing a judgment of the circuit court, may order such judgment for either party as the justice of the [200] case may require. R. S., sec. 701; *Ins. Co.* v. *Boykin*, 12 Wall., 433 [79 U. S., XX., 442]. In the case at bar, the order, following the precedent

* "A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract cannot be revoked." La. Civil Code, 1870, art. 189.

"An equitable action is that which does not immediately arise from a contract, but from equity in favor of a third person, not a party to it, and for whose benefit certain stipulations have been made; thus, if one stipulated in a contract, entered into with another person, and as an express condition of that contract, that this person should pay a certain sum on his account or give a certain thing to a third person, not a party to the act, that third person has an equitable action against the one who has contracted the obligation, to enforce the execution of the stipulation." La. Code of Pr., art. 35.

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of *Slacum* v. *Pomery*, 6 Cranch, 221, will be that *the judgment below be reversed and the case remanded, with directions that judgment be arrested.*

Ordered accordingly.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Appt.*,

v.

FRANCIS A. GIBBONS, Jr.

(See S. C., Reporter's ed., 200-205.)

Contract, when explainable—construction of.

1. Where the language of a contract is susceptible of two meanings, the meaning of the parties may be explained by the circumstances attending the transaction.

2. Where, in a contract made to replace a government building which had been destroyed by fire, it was agreed that the foundations and brick walls, so far as uninjured, should remain, it was the duty of the United States to point out the work deemed to be sufficiently uninjured to remain, and this was performed by allowing it to stand, and by not directing it to be taken down.

[No. 57.]

Argued Oct. 23, 1883. Decided Nov. 12, 1883.

APPEAL from the Court of Claims.

The history and facts of the case appear in the opinion of the court.

See, also, 15 Ct. Cl., 174.

Mr. **William A. Maury**, *Asst. Atty-Gen.*, for appellant:

In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence.

Chicago v. *Sheldon*, 9 Wall., 54 [76 U. S., XIX., 596; *Lowber* v. *Bangs*, 2 Wall., 737 [69 U. S., XVII., 769].

The contract, as we have seen, expressly prohibits any recovery for extra charge for modifications, unless agreed upon by the parties. There could be no such agreement except with the concurrence of the bureau of yards and docks, the channel through which the Government became a party to the contract.

Hawkins v. *U. S.*, 96 U. S., 689 [XXV., 607]; *Ford* v. *U. S.*, 17 Ct. Cl., 60; *Dale* v. *U. S.*, 14 Ct. Cl., 514.

Mr. **Enoch Totten**, for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

The principal question in this case relates to the proper construction of a building contract between the parties, entered into May 22, 1866, the United States acting by Joseph Smith, Chief of the Bureau of Yards and Docks, under the authority of the Navy Department, for the repair of the entrance buildings and carpenter shop at the Norfolk Navy Yard, which had been destroyed by fire in 1861 at the outbreak of the civil war.

[201] The contract required the appellee to furnish, at his own risk and expense, all the materials and work necessary for the repairs of the buildings according to the plans and specifications annexed, the entrance buildings to be entirely completed and delivered within one hundred and twenty days, and the carpenter shop within thirty days, from the date of the contract. A gross sum was to be paid for the work on each, partial payments to be made during the progress of the work upon the certificate of the superintendent, and final payment when the work should be entirely completed, according to the plans and specifications, and to the satisfaction of the party of the second part. It was declared in the contract that "No extra charge for modifications will be allowed, unless mutually agreed upon by the parties; and no changes or modifications mutually agreed upon by the parties to this contract shall in any way affect its validity."

The specifications for the entrance buildings contained the following clause, upon which the case turns:

"The foundations and the brick walls now standing, that were injured by the fire, will remain and be carried up to the height designated in the plan by new work."

The contract was made in pursuance of proposals, invited by an advertisement, in which it was stated that "Persons desiring to bid must, necessarily, visit the yard and examine the present condition of the works, and can there see the plans and specifications to enable them to bid understandingly."

The findings of fact by the Court of Claims bearing on this point are as follows:

"III. At the outbreak of the late rebellion, these buildings mentioned in the contract were burnt, but portions of the walls were left standing. Prior to the proposals for work, an inspection of these fragmentary walls, so left standing, had been made by the officers of the Government in charge of the works, and those portions of them deemed unfit to form a part of the permanent structure were taken down, and those parts which were considered uninjured and proper to be built upon were left standing for that purpose. After the agents of the Government had prepared the walls, retaining the portion which the civil engineer of the navy yard in charge of the work supposed might be used in the new structure, the chief of the bureau of yards and docks invited the examination of bidders by the advertisement annexed to the petition, and the claimant, by his agent, visited and saw the walls so standing. At the time the claimant, by his agent, so visited the yard he was shown the walls by a quarterman acting under the civil engineer of the yard. The claimant's agent asked if those walls were to stand. The quarterman replied that they were, so far as he knew, and that Mr. Williams, the master mason of the yard, and Mr. Worrall, the civil engineer of the yard, had said that they were to stand. (But it does not appear that the quarterman was authorized to make such representations to the claimant's agent.) And the civil engineer likewise represented to the claimant's agent that the portion of the walls then standing would remain and be used in the new work. After the claimant's agent had so visited the yard and been shown the walls, the claimant made his bid. [202]

NOTE.—*Oral evidence as applicable to written contracts.* See *note* to Bradley v. Wash., etc., Steam Packet Co., 38 U. S. (13 Pet.), 89.

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IV. After the claimant had begun work under his contract, it was discovered that a portion of the walls still standing had been so injured by the fire as to be unfit for building a superstructure thereon. Commodore Hitchcock, commanding the naval station, thereupon ordered that the walls be further razeed, and pursuant to his orders, about one third of the portion then standing was taken down by the claimant before proceeding to build. The effect of this second razeeing was that the claimant had to substitute new brick work for that so removed; and the additional cost of construction thereby thrown upon him was the sum of $4,050; and for it he has received no remuneration additional to the price named or consideration expressed in the contract. It does not appear that at the time Commodore Hitchcock ordered the walls to be further razeed the defendant's officers made any pretense or claim that the increased expense was to be borne by the claimant as work required by the contract; nor does it appear that the claimant made any objection to the taking down of the walls as ordered by Commodore Hitchcock."

The appellee claimed compensation beyond [203] the contract price for the additional cost of construction rendered necessary by rebuilding that portion of the walls torn down by order of Commodore Hitchcock. The United States contended that it was covered by the terms of his contract.

In our opinion the Court of Claims committed no error in allowing the claim of the contractor.

The language of the specifications is, perhaps, susceptible of two meanings. According to one, it is as if it read that "the foundations and the brick walls now standing," *so far as they* "were uninjured by the fire, will remain"; according to the other that "the foundations and brick walls now standing," *being such as* "were uninjured by the fire, will remain." But, without going into any refinements of merely verbal interpretation, we think the meaning of the parties, explained by the circumstances attending the transaction, is sufficiently plain, and determines satisfactorily their relative rights and obligations.

It must be conceded, we think, that it was intended that the old portion of the work was to remain as part of the new structure only so far as it was in fact fit to do so, having reference to the character and uses of the building, and that the United States had the right to determine the fact of fitness. It was clearly its interest to do so, in advance of bidding, because if it reserved the right to make the determination at any stage in the progress of the work, or even at the time of final acceptance on its completion, the whole risk of the contingency would be thrown upon the contractor, who could only indemnify himself by an increase in [204] the estimate of probable cost; and the Government would thus be compelled to pay for an uncertainty which could as well be resolved in advance. The United States having a right to determine the fact, it would be reasonable, having regard merely to its own interests, to do so before letting the contract. It would be equally reasonable and just to the contractor that the decision should be made at the outset; and as the right to make it belongs to the proprietor, the duty follows to exercise it so that the contractor shall not be misled and injured.

Under the circumstances in the present case, and according to the terms of the specifications, we think it was the duty of the officers acting for the United States, the right performance of which the Government assumed, to point out to the bidders the parts of the foundations and walls which were in fact so far uninjured as to enter into the new structure, and that this was actually done by dismantling and stripping the burnt building, so that upon inspection of what was left standing the proposing contractor would be able by measurement to ascertain precisely what new work he was to do and be paid for. To require him to determine the fact for himself provisionally, subject at any time before completion of the work to have his judgment reversed, and to be required in consequence to perform work which he could not and did not provide for in his estimates, would be unreasonable and unjust. The inspection invited by the advertisement was not for the purpose of assisting the contractor to determine, subject to such a condition, the question of the fitness of the standing walls to remain, but was, as we think, that he might see as part of the plan of the work what the authorized agents of the United States had designated as intended to remain in the permanent structure. It was the duty of the United States to point out the work deemed to be sufficiently uninjured to remain, and this was performed by allowing it to stand, and by not directing it to be taken down. We lay no stress, as the Court of Claims did not, on what was said at the time to that effect by unauthorized subordinates. The foundation and walls themselves, as left standing by authority of the proper officers, constituted under the circumstances a representation on the part of the United States that they had been adjudged to be so far uninjured by fire that they were to remain, upon the faith of which the intending contractor was entitled to rely for the purpose of estimating the probable cost of the work to be done. [205]

Judgment in favor of the appellee was rendered by the Court of Claims upon two other claims for small amounts, in respect to which we do not deem it necessary to say more than that it appears to us the allowance was proper. The defense by reason of the Statute of Limitations, also for the reasons alleged in the opinion of that court, was, in our opinion, properly overruled.

The judgment of the Court of Claims is, accordingly, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

EDWARD R. BOOTH, Jr., ET AL., Heirs at Law of EDWARD R. BOOTH, Deceased, *Plffs. in Err.*,

v.

JOHN M. TIERNAN.

(See S. C., Reporter's ed., 205-211.)

Review of question of fact—copy of record of deed, as evidence—parol evidence of mistake.

1. The finding of the court without a jury that a defendant had not been possessed of the land in con-

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troversy, by actual residence thereon, for a period sufficient to bar the action, is a conclusion of fact which this court cannot review, where the evidence was legally sufficient to justify it.

2. A certified copy from the proper recorder's office, of the record of an original deed, which, by a clerical error described the land conveyed as the southeast quarter instead of the northeast quarter of a section, is admissible with evidence to show the error, under a statute which provides that such copy may be read, with like effect as though the original was produced.

3. Testimony of witnesses who have read the original deed and a copy of its registry in a file book kept by the recorder, is admissible to prove the alleged mistake.

[No. 95.]

Submitted Nov. 1, 1883. Decided Nov. 12, 1883.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The history and facts of the case appear in the opinion of the court.

Messrs. **B. C. Cook** and **Charles W. Needham**, for plaintiffs in error.

Messrs. **Wm. Burry** and *Van H. Higgins*, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

[206] This was an action of ejectment brought by the defendant in error against the plaintiffs in error to recover the title and possession of a tract of land in Grundy County, Illinois, described as the northeast quarter of section twenty-nine (29), in township thirty-two (32) north of the base line, and in range eight (8) east of the third principal meridian.

By stipulation, the intervention of a jury was waived by the parties, and the cause was submitted upon the evidence to the circuit court.

One of the defenses relied on was the Statute of Limitations of Illinois, being section 4, chapter 83, of the Revised Statutes of that State, providing that possession for seven years, by actual residence thereon by any person having a connected title in law or equity, deducible of record from the State or the United States, etc., should be a bar to an action brought for the recovery of lands, etc.

Evidence was introduced on the part of the defendant below, the ancestor of the plaintiffs in error, tending to prove, as was claimed, that he had possessed the premises in controversy, by actual residence, for seven years next preceding the commencement of the action; but the finding of the court was that he had not been possessed by actual residence thereon, of the land in controversy, for that period.

This finding although excepted to and alleged as error, is a conclusion of fact which we cannot review. No exceptions appear on the record to the rulings of the court, upon any questions relating to the evidence upon this point and it cannot be claimed that the evidence, as stated in the bill of exceptions, was not legally sufficient to justify the conclusion reached by the court. No error in law can, therefore, be predicated of this conclusion of fact.

On the trial it was admitted that Ibzan Lacey, the common source of title, derived title to the premises in controversy from the United States in 1839, and a power of attorney from Lacey and wife dated April 20, 1839, to Joel Wicks, authorizing him to sell and convey the premises was proved. It was further admitted that an original deed from Lacey and wife by Wicks, their attorney in fact, to Alva Newman, dated May 6, 1840, had been lost and it was proved [207] that it was not in the power of the plaintiff to produce it, and that it had not been intentionally destroyed or disposed of for the purpose of introducing a copy thereof in place of the original.

The plaintiff below then offered in evidence a certified copy from the proper recorder's office, of the record of said original deed, which, however, described the land conveyed as the *southeast* quarter of section twenty-nine, etc., instead of the *northeast* quarter of that section; but counsel for the plaintiff stated in connection with the offer that there would be offered other evidence tending to show that there was a clerical error in the description of the land as entered upon the record and contained in the copy, and that it should be the *northeast* instead of the *southeast* quarter of the section.

To the introduction of this certified copy, objection was made, because it did not describe the land in controversy and because no evidence was admissible to prove and correct any alleged mistake.

The ground of this objection is stated to be that the Statute of Illinois, Laws, 1861, p. 174, sec. 1, in force at the time authorizing the record of a deed or a certified transcript from the record, to be used as evidence on a trial in place of a lost original, provided that it might be read in evidence "With like effect as though the original of such deed, conveyance or other writing was produced and read in evidence;" and that as, in this case, if the original had been produced, no evidence would be admitted to prove and correct the alleged mistake in the description of the premises conveyed, none can be admitted to prove and correct such a mistake in the record or transcript.

The court overruled the objection and admitted the certified copy of the deed in evidence, reserving the question upon the subsequent evidence to be offered, for the purpose of proving and correcting the alleged mistake. Such evidence was, in the further progress of the trial, admitted, on which, as a conclusion of fact, the court found that the land actually described in the lost deed was that in controversy; and thereon judgment was given for the plaintiff below. Exceptions were taken to the rulings of the court admitting the evidence subsequently offered as to the mistake in the description, [208] upon the ground of its competency, which will be hereafter considered. The general question raised by the exception to the introduction of the certified copy from the record, is whether evidence of any description is admissible for such a purpose.

The ruling of the circuit court on this point was correct. The language of the statute was intended merely to declare that the record of a deed or a transcript from the record, though a copy only and, therefore, in its nature merely secondary evidence, should nevertheless have the same effect, when competent as evidence at all, as the original itself, if it had been produced, upon the determination of the issues to

NOTE.—*Evidence of lost paper and secondary evidence of its contents.* See *note* to Bouldin v. Massie, 20 U. S. (7 Wheat.), 122.

Effect of refusal to produce or destruction of paper. See *note* to Hanson v. Eustace, 43 U. S. (2 How.), 653.

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be tried. It was not intended to declare that the record or a copy from it should, in law, be an original instrument for all purposes. The presumption is that, as public officers generally perform their prescribed duties accurately, the record and all certified transcripts from it will be true copies of the original; but they are none the less copies on that account and are made evidence only in lieu of the original, and on the grounds on which secondary evidence is permitted to be given. And there is nothing in the statute, either expressed or implied, which forbids the party from showing, by extrinsic proof, otherwise legitimate, what the contents of the lost original really were, where it is shown that the record itself, or a copy from it is not a true copy. By the very terms of the statute, the record of a deed is not original evidence, for it can be used only on proof of the loss of the original deed, or that the latter cannot be produced by the party offering the proof; and the object of the statute evidently was to require recording, in the first place, as notice to subsequent purchasers; and in the second, to supply a convenient statutory mode and instrument of secondary evidence. Its whole effect can be accomplished, without in any manner displacing or superseding the common law principles which authorized other modes of proving the contents of lost deeds and other instruments. It is in this light that the statute has been viewed and treated by the Supreme Court of Illinois. *Bowman* v. *Wettig*, 39 Ill., 416. In *Nattinger* v. *Ware*, 41 Ill., 245, it was decided that a deed, properly exe- [209] cuted and acknowledged but recorded with a misdescription of the premises, would protect the grantee against subsequent purchasers and incumbrancers. But how could this be, unless the party were at liberty to prove the mistake in the record, either by the production of the original or, in case of its loss, by other competent secondary evidence? This is what happened in *Nizon* v. *Cobleigh*, 52 Ill., 387. There the plaintiff in ejectment, to prove his title, relied on a deed, signed, as he claimed, "Samuel H. Turrill." The original not being in his power to produce, he offered a certified copy from the record. It purported, however, to be signed by "James H. Turrill." Against the objection of the defendant, he was allowed to prove, by parol evidence, that the original was signed by the name of Samuel H. Turrill. The court said: "This renders it morally certain that the recorder made a mistake in transcribing the original upon his records."

The same construction was given to a statute of Alabama, the meaning of which cannot be distinguished from the Statute of Illinois, by the Supreme Court of that State in *Harvey* v. *Thorpe*, 28 Ala., 250, where the very point was ruled, that parol evidence was admissible to show that a deed was not correctly recorded. And the same principle was adjudged in Wisconsin, in *Sexsmith* v. *Jones*, 13 Wis., 631, and in New Hampshire, in *Wells* v. *Iron Co.*, 48 N. H., 534.

The next question relates to the competency of the evidence admitted by the court to prove the mistake in the record of the deed, and the correct description of the property as contained in the original.

This was in substance as follows: first, the testimony of certain persons tending to prove that they had seen the original deed, and that it described the land conveyed as identical with that in controversy; second, a certified copy from an entry or file book kept by the Recorder of La Salle County, in which the land was situate at the time the conveyance was made by the attorney of Lacey to Newman, of a memorandum made by the recorder, showing the date of the receipt of the deed for record, the names of the grantor and grantee, the hour of its receipt, the nature of the conveyance, the date of its execution, and the location of the land con- [210] veyed, under which head the premises are described as the "N. E. ¼ S. 29, T. 32 N., R. 8 E. 3d P. M.;" third, a transcript from the land-office at Springfield, Illinois, in which office was contained the records of the entry of the land in controversy, showing Jeddiah Wooley entered the N. E. ¼ 29, 32, 8, on August 8th, 1835, and that he did not enter the S. E. ¼ of said section; also a receipt from the land-office at Chicago, Illinois, in which office the land in controversy was sold, dated August 8, 1835, for $200 from Jeddiah Wooley, Jr., in full payment of the N. E. ¼ sec. 29, town. 32 N., R. 8 east of 3d principal meridian, being the land in controversy, upon which receipt was a memorandum indorsed in the handwriting of Joel Wicks, who was dead at the time of the trial, as follows: "Sold this to Alva Newman, May 6, 1840." But it is recited in the bill of exceptions that the court did not decide that the last mentioned memorandum and a memorandum on the copy of the deed of May 6, 1840, from Lacey to Newman, that "this land was entered by Jeddiah Wooley, August 8, 1835," were either of them competent evidence.

The evidence offered and objected to was, we think, competent. The testimony of witnesses who had read the original deed, as to their recollection of its contents, was direct evidence of the fact; and the copy of the registry of the deed, as entered in the file book, was a copy of an official entry, made in a book of public records required to be kept by the recorder, and which constitutes the first step in the process of recording. The statute requires that every recorder shall keep "an entry book, in which he shall, immediately on the receipt of any instrument to be recorded, enter, in the order of its reception, the names of the parties thereto, its date, the day of the month, hour and year of filing the same, and a brief description of the premises, indorsing upon such instrument a number corresponding with the number of such entry." R. S. Ill., 1845, p. 432, sec. 7; L. 1847, p. 69, sec. 1; L. 1869, p. 2, sec. 7.

All these items of evidence tended to prove the alleged mistake and what was the correct description of the premises conveyed in the lost original deed, and were entitled to be considered, in connection with the certified copy [211] of the record of the deed itself, as secondary evidence of its contents. In admitting and considering them, the circuit court committed no error; what effect should be given to them, singly or together, was for that court, to whom the cause had been submitted, alone to determine.

We find no error in the record, and the judgment is affirmed.

True copy. Test:
JAMES H. McKENNEY, Clerk, Sup. Court, U. S.

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NEW ORLEANS NATIONAL BANKING ASSOCIATION, MRS. ANNA GOODWIN GILMOUR ET AL., *Appts.*,

v.

JOHN I. ADAMS, JAY L. ADAMS, WILLIAM H. REGNAUD ET AL.

(See S. C., Reporter's ed., 211-215.)

Mortgage, what is—an agreement is not.

1. Although no precise form of words is necessary to constitute a mortgage, yet there must be a present purpose of the mortgagor to pledge his land for the payment of a sum of money or the performance of some other act, or it cannot be construed as a mortgage.

2. A purchaser of premises at a mortgage foreclosure sale cannot, by agreement, keep alive and in force such mortgage after it has been foreclosed, as security for the purchase money; such agreement is not a mortgage.

[No. 91.]

Argued Oct. 31, 1881. Decided Nov. 12, 1883.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The history and facts appear in the

Statement of the case by *Mr. Justice* **Woods:**

In equity. The facts as they appear from the pleadings and evidence, were as follows: a firm doing business in Louisiana under the name of Tucker Brothers, on February 24, 1860, made and delivered their promissory note of that date, for $5,000, payable February 15, 1860, to the Bank of New Orleans, which afterwards, by virtue of the provisions of the "Act to Provide a National Currency," etc., passed June 3, 1864, became a national bank under the name of the New [212] Orleans National Banking Association. Tucker Brothers, on the same day, executed three other notes, for $5,000, one of them, payable to Godfrey Barnsley, falling due January 21, 1861. To secure these four notes, the makers executed a mortgage on a certain plantation in La Fourche Parish, Louisiana. Two of the notes were paid, but those given to the Bank of New Orleans and Barnsley were not paid at maturity. Thereupon, the Bank, having instituted a suit on the mortgage and the note held by it, on June 11, 1867, obtained a decree of foreclosure against Tucker Brothers, by virtue of which, on September 7, 1867, the mortgaged property was sold by the sheriff to one Albert N. Cummings for the price of $13,025 to satisfy said unpaid notes. Cummings being unable to pay the purchase money, it was agreed between him and the parties entitled to the proceeds of the sale that he should have time; whereupon, Cummings, on September 7, 1867, executed an agreement in writing, before J. K. Gourdain, a notary of the Parish of La Fourche, in which he recited that he had not paid the purchase money of the plantation, and declared as follows: "That he corresponded and compromised with the mortgage creditors hereinafter named, who agreed to give him time, without, however, impairing or novating the original claims, the right to enforce which they expressly reserved."

Cummings then by this same agreement stipulated that out of the price of the plantation he would pay to one Gaubert the sum of $1,851.10, on or before March 1, 1861, he holding the first privilege on a part of the plantation for that amount; to Barnsley the sum of $4,904.40, on or before May 15, 1870, and to the Bank of New Orleans $6,269.50, on or before May 1, 1870, and that all these sums should bear interest at the rate of eight per cent per annum after maturity till paid. The agreement then further declared as follows:

"It is understood, as above stated, that the parties hereto do not by these presents impair, affect or novate their existing claims; and that, in case of non-payment, they will be entitled to enforce the judgments which may be held by them; and furthermore, that the original mort-

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NOTE.—*Mortgage defined; nature of.*

Generally speaking, whenever a transaction resolves itself into a security for a debt it is a mortgage. Lyon v. Lyon, 67 N. Y., 250; Wilcox v. Morris, 1 Murph., 116; S. C., 3 Am. Dec., 678; Reed v. Lansdale, Hardin, 6; Wilmerding v. Mitchell, 42 N. J. L., 476; Peckham v. Haddock, 36 Ill., 38; Dougherty v. McColgan, 6 Gill & J., 275.

At common law a mortgage of lands is an estate upon a condition, defeasible by the performance of the condition according to its legal effect, as the payment of money or the fulfillment of some contract. Montgomery v. Bruere, 4 N. J. L., 268; Gibson v. Martin, 38 Ark., 212; Mitchell v. Burnham, 44 Me., 299; Carter v. Taylor, 3 Head, 30; Erskine v. Townsend, 2 Mass., 495; Lund v. Lund, 1 N. H., 41; Welsh v. Phillips, 54 Ala., 309; Moore v. Eety, 5 N. H., 469; Baker v. Thrasher, 4 Den., 495; Trimm v. Marsh, 54 N. Y., 599; S. C., 13 Am. Rep., 623; Dexter v. Harris, 2 Mason, 531; 4 Kent, Com., 133; Wms. Real Prop., 349; 1 Greenl. Cruise, 548.

It is in substance a security for a debt or an obligation to which it is collateral. Heburn v. Warner, 112 Mass., 273; Brobst v. Brock, 77 U. S., XIX., 1002; Blackwell v. Barnett, 52 Tex., 326.

The condition of defeasance may either be part of the deed conveying the estate, or it may be in another deed executed at the same time and a part of the same transaction. Friedley v. Hamilton, 17 Serg. & R., 70; S. C., 17 Am. Dec., 638; Clement v. Bennett, 70 Me., 207; Corpman v. Baccastow, 84 Pa. St., 363; Erskine v. Townsend, 2 Mass., 495; Archambau v. Green, 21 Minn., 520; Warren v. Lorris, 53 Me., 463; Haines v. Thompson, 70 Pa. St., 424; Norman v. Shepherd, 38 Ohio St., 320; Woodworth v. Guzman, 1 Cal., 213; Bapt. Soc. v. Clapp, 18 Barb., 36.

If the mortgagor fails to perform the condition for the revesting of the estate at the time appointed, at law the estate vests in the mortgagee, subject in equity to the right of redemption by the mortgagor. Shields v. Lozear, 34 N. J. L., 496; Fay v. Cheney, 14 Pick., 399; Carpenter v. Carpenter, 6 R. I., 542; Hemphill v. Ross, 66 N. C., 477; Hagar v. Brainerd, 44 Vt., 294; Johnson v. Watson, 87 Ill., 535; Wood v. Trask, 7 Wis., 566.

A mortgage is regarded in many States as merely a lien on land, both at law and in equity; the mortgage is regarded as only incident to the debt, which is considered the principal thing. Brinkman v. Jones, 44 Wis., 498; Fletcher v. Holmes, 32 Ind., 497; Goodenow v. Ewer, 16 Cal., 461; Dutton v. Warschauer, 21 Cal., 609; Bludworth v. Lake, 33 Cal., 255; Mack v. Wetzlar, 39 Cal., 247; Hurley v. Estes, 6 Neb., 386; Vason v. Ball, 56 Ga., 268; Trimm v. Marsh, 54 N. Y., 599; Elfe v. Cole, 26 Ga., 197; Vason v. Ball, 56 Ga., 268; Woolley v. Holt, 14 Bush, 788; Berthold v. Fox, 13 Minn., 501; Timms v. Shannon, 19 Md., 269; Glass v. Ellison, 9 N. H., 69; Perkins v. Sterne, 23 Tex., 561; Blackwell v. Barnett, 52 Tex., 326.

The word mortgage is said to be a French translation of the Latin *mortuum vadium*, that is, dormant or dead pledge, because if the mortgagor does not perform the condition on the day limited, the land is taken from him and so becomes dead to him upon condition. Litt., sec. 332; 2 Bl. Com., 157; 1 Greenl. Cruise, 545; 1 Washb. Real Prop., 476; Bruce v. Range, 2 E. D. Smith, 486.

If the instrument clearly indicates the creation of a lien, the property upon which it is to take effect, and the debt to be secured, it is enough. Baldwin v. Jenkins, 23 Miss., 206; Burnside v. Terry, 45 Ga., 621; Sargent v. Howe, 21 Ill., 148; De Leon v. Higuera, 15 Cal., 483; Turner v. Watkins, 31 Ark., 429.

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gages and privileges remain in full force and [213] effect, and are not hereby novated and, if need be, for the purpose of avoiding all doubts, the said privileges and mortgages are hereby recognized as operating on the said property in the proportions aforesaid, and to secure the debts stated as aforesaid with the rank above stated."

This agreement was duly recorded in the office of the recorder of mortgages for the Parish of La Fourche on September 12, 1867.

After the making of this agreement Cummings, without having paid the sums the payment of which was promised, thereby sold the property to a Mrs. Tucker, who conveyed an undivided half interest to one Thomas J. Daunis, and Mrs. Tucker and Daunis then executed a mortgage on the same to John I. Adams & Co. to secure certain notes made by Daunis to said firm, after which Mrs. Tucker conveyed her undivided half of the property to Daunis. Subsequently, the Bank of New Orleans, now become the New Orleans National Banking Association, assuming that the agreement entered into by Cummings before Gourdain, the notary, on September 7, 1867, constituted a mortgage by which the balance found thereby to be due it from Cummings was secured, filed the bill in this case to foreclose the same. The bill made the firm of John I. Adams & Co. parties defendant, charging that said firm claimed to have a mortgage on the property covered by the alleged mortgage of the complainant, and that if said firm had any lien upon or interest in said premises it was subsequent to September 12, 1867, the date of the inscription of the complainant's alleged mortgage.

To this bill, John I. Adams & Co. filed a plea and answer, in which they set up that they, being holders of certain notes secured by a mortgage on the property described in the bill of complaint, instituted a certain suit upon the same against Thomas J. Daunis, in the District Court sitting for the Parish of La Fourche, and obtained a writ of seizure and sale against said property, under and by virtue of which the same was seized by the sheriff, and in October, 1875, sold to John I. Adams, who claimed title thereto. They further alleged that the agree- [214] ment dated September 7, 1867, set forth in the complainant's bill, being the agreement of Cummings with the Bank of New Orleans and other holders of liens upon the plantation sold to him, was not a mortgage, and if it were, it was prescribed, because it had not been re-inscribed within ten years from the date of the original inscription, on September 12, 1867, as required by the law of Louisiana.

Upon final hearing upon the pleadings and evidence, the circuit court dismissed the bill, and from its decree the complainant appealed.

Messrs. **Wm. Grant**, *J. D. Rouse* and *Thomas L. Bayne*, for appellants.

Messrs. **Joseph P. Hornor**, *W. S. Benedict* and *Francis W. Baker*, for appellees.

Mr. Justice **Woods** delivered the opinion of the court:

It is conceded by counsel for complainant that the original mortgage made by Tucker Brothers, dated February 24, 1860, and the decree rendered thereon in favor of the Bank of New Orleans by the District Court of the Parish of La Fourche in June, 1867, were both extinguished by the sale of the mortgaged premises to Cummings on September 7, 1867.

But complainant insists that the agreement, made by Cummings on the day last named with the Bank of New Orleans and other parties entitled to the proceeds of the sale, constituted a mortgage, and that the same having, on September 12, 1867, been recorded in the office of the recorder of mortgages for the parish in which the lands were situate, secured them a lien and privilege on the premises from the date of said record.

We are of opinion that this contention is not well founded. While it may be conceded that no precise form of words is necessary to constitute a mortgage, yet there must be a present purpose of the mortgagor to pledge his land, for the payment of a sum of money, or the performance of some other act, or it cannot be construed to be a mortgage. *Wilcox* v. *Morris*, 1 Murphy, 116; *S. C.*, 3 Am. Dec., 678.

The agreement of September 7, 1867, does not, on its face nor by its terms, profess to create a lien in favor of the Bank of New Orleans on the premises in question, but it recites that the parties thereto do not thereby impair, affect or novate their existing claims, that the [215] original mortgages and privileges remain in full force and are recognized as operating on said property "to secure the debts stated as aforesaid with the rank above stated." The agreement is not of doubtful meaning. Its purpose is to recognize the old mortgage made by Tucker Brothers in 1860 and to preserve its lien on the mortgaged premises from the date of its inscription.

The contention of complainant is not that the agreement is a mortgage to secure the notes made by Tucker Brothers, but to secure from Cummings the price which he bid for the premises at the sale made to satisfy the mortgage executed by Tucker Brothers. The bill of complainant is framed upon this theory. But the fault of this theory is, that the agreement does not profess, of its own force, to secure the money due from Cummings, but excludes the idea that such is its purpose by declaring that the original mortgages are recognized as operating on said property to secure the sums due from Cummings.

It is perfectly clear, therefore, that the agreement of September 7, 1867, was not intended by the parties as a new mortgage to take effect at that date, but as a recognition of the old mortgage, and that its purpose was to keep it alive and to preserve its lien as of the date of its inscription.

In other words, Cummings, by this agreement, undertakes to keep alive and in full force a mortgage made by another party after it had been foreclosed, the mortgaged property sold and the mortgage and the decree rendered thereon extinguished. It was not in his power to do this. It follows that the effect of the agreement of Cummings of September 7, 1867, is simply as a contract to pay the parties entitled to it the purchase money of the premises bought by him, and creates no lien or privilege on the premises sold. In other words, it is not a mortgage.

This view is supported by the decision of the Supreme Court of Louisiana in the case of *Adams* v. *Daunis*, 29 La. Ann., 315. This was

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the proceeding by Adams to cause to be erased the mortgages anterior to his purchase of the premises in question. The agreement of Cummings, of September 7, 1867, was put in evidence in that case, and this court held it to be no mortgage.

It results from this view, that the decree of the Circuit Court dismissing the bill of complaint was right and must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[216] SALMON S. MATTHEWS, *Plff. in Err.*,
v.
THADDEUS DENSMORE, ELISHA P. GROW AND DEARTT GROW.

(See S. C., Reporter's ed., 216-221.)

Liability of officer for seizing property on attachment—when officer protected.

1. Although a writ of attachment be a valid writ, the officer is liable for the wrongful seizure of property not subject to the writ.
2. A writ of attachment, valid on its face, is sufficient protection to the officer who executed it, when sued for seizing the property of the defendant therein, although it might have been avoided on a proper proceeding for a defect in the affidavit on which it was issued.

[No. 58.]

Submitted Oct. 18, 1883. Decided Nov. 12, 1883.

IN ERROR to the Supreme Court of the State of Michigan.

The history and facts of the case appear in the opinion of the court. See, also, 43 Mich., 461.

Messrs. **Julian G. Dickinson** and *Don M. Dickinson*, for plaintiff in error:

The writ and affidavit were not questioned nor assailed in the suit and court wherein they were made.

The affidavit was no part of the writ; it was filed in the suit with the clerk of the United States Circuit Court, and did not pass from his custody. Conforming to section 6433, the writ, when offered, was admissible in evidence because:

1. It was a valid writ.

2. It was a good writ upon its face. *a.* It was the writ under which the United States Marshal, to whom it was directed and whom it commanded, acted. *b.* It was the process of a court of competent jurisdiction to issue such writs. *c.* There was nothing upon its face to apprise the officer of any insufficiency in the affidavit filed with the clerk of the court.

3. The United States Marshal was at least entitled to whatever protection such a writ would afford and warrant him in doing. It was evidence, material to the issue.

Barker v. *Miller*, 6 Johns., 195; *Blackley* v. *Sheldon*, 7 Johns., 32; *Spoor* v. *Holland*, 8 Wend., 445; *Wilbraham* v. *Snow*, 2 Saund., 47.

Mr. **O. M. Barnes**, for defendant in error:

The affidavit was fatally defective, as it failed to state that anything whatever was due to the plaintiff.

Cross v. *McMaken*, 17 Mich., 511; *Wells* v. *Parker*, 26 Mich., 102; *Mathews* v. *Densmore* 43 Mich., 463; *Hale* v. *Chandler*, 3 Mich., 531; *Fessenden* v. *Hill*, 6 Mich., 242.

An affidavit which does not conform to the statutory requirements is utterly void. The defect is jurisdictional; is not amendable; and the proceedings may be questioned in any collateral proceedings where a benefit is claimed under them.

Greenvault v. *Bank*, 2 Doug., 498; *Wilson* v. *Arnold*, 5 Mich., 98; *Drew* v. *Dequindre*, 2 Doug., 92; *Hale* v. *Chandler*, 3 Mich., 531.

The writ, although fair on its face, is no protection when the officer is sued by a stranger to the writ.

1 Waterman, Tres., sec. 467; 2 Hill. Torts, 4th ed., 135-137 and *n.*; *Rosenbury* v. *Angell*, 6 Mich., 508; *Cook* v. *Hopper*, 23 Mich., 511; *High* v. *Wilson*, 2 Johns., 45; *Rinchey* v. *Stryker*, 28 N. Y., 45.

Under the Michigan Statutes, the officer issuing the writ only acts ministerially. No officer is required to be satisfied of the existence of the facts.

Drake, Attach., 3d ed., secs. 86, 97-100.

It is the universal rule that, under statutes of this class, when the affidavit does not show the facts required by statute, the writ is absolutely void, and may be attacked collaterally in any proceeding in which they are involved.

Drake, Attach., 3d ed., secs. 82-88.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Michigan.

The plaintiff in error was Marshal of the United States for the eastern district of that State and, under a writ of attachment from the circuit court, levied on a stock of goods which was the subject of controversy. The defendants in error, who were not the parties named in the writ of attachment, sued Matthews, the Marshal, in trespass; on the ground that they were the owners of the goods and that the goods were not liable to the attachment, under which the Marshal acted.

To this action the defendant pleaded the general issue, with notice that he should rely on the writ of attachment, and should prove that the goods were subject to be seized under it.

When the defendant, who was admitted to be the Marshal, as he had alleged, offered in evidence the writ of attachment, the court refused to receive it, on the ground that it did not appear by the affidavit on which it was issued that the debt claimed by the plaintiff in the writ was due. As the plaintiffs in the present action were in possession of the goods when they were seized, under the writ, this ruling of the court was decisive of the case; for however [217] fraudulent might have been that possession, the defendant here, in the absence of any valid writ, was a mere trespasser and could have no right to contest the lawfulness of that possession.

The whole case turned, therefore, on the trial in the local state court, as it did on the writ of error in the Supreme Court, which affirmed the judgment of the lower court, on the question of the validity of the writ of attachment in the hands of the Marshal, and its sufficiency to protect him if the property seized under it was liable to be attached in that suit.

NOTE.—*Ministerial officer protected by regular process.* See *note* to Erskine v. Hohnbach, 81 U. S., XX., 745.

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It is to be observed that this does not present a case where the validity of the writ is assailed by any proceeding in the court which issued it, either by a motion to set it aside as improvidently [218] issued, or to discharge the levy and return the property, or by appeal to a higher court of the same jurisdiction to correct the error of issuing it on an insufficient affidavit, but it is a proceeding in a court of another jurisdiction, to subject an officer of the United States to damages as a trespasser for executing a writ of the court to which he owes obedience.

The Supreme Court of Michigan, whose judgment we are reviewing, says of this writ, in answer to the argument that, being regular on its face, it should protect the officer: "No doubt the writ in this case must be regarded as fair on its face. Under the general law relating to attachments, where the suit is begun by that writ, the affidavit is attached to and in legal effect becomes a part of it; and if then the affidavit is void the writ is void also. But, under an amendatory statute passed in 1867, which permits the issue of the writ in pending suits, the affidavit is filed with the clerk, and the officer to whom the writ is issued is supposed to know nothing of it. Comp. L., section 643. It was under the amendatory statute that the writ in this case was issued, and an inspection of its provisions shows that the writ contains all the recitals that the statute requires."

Here, then, we have a writ which is fair on its face, issued from a court which had jurisdiction both of the parties and of the subject-matter of the suit in which it was issued, and which was issued in the regular course of judicial proceeding by that court, and which the officer of the court in whose hands it was placed is bound to obey, and yet by the decision of the Michigan court it affords him no protection when he is sued there for executing its mandate.

We do not think this is the law. Certainly it is not the law which this court applies to the processes and officers of the courts of the United States and of other courts of general jurisdiction.

It had been supposed by many sound lawyers after the case of *Freeman* v. *Howe*, 24 How., 450 [65 U. S., XVI., 749] that no action could be sustained against a Marshal of the United States in any case in a state court where he acted under a writ of the former court; but in *Buck* v. *Colbath*, 3 Wall., 334 [70 U. S., XVIII., 257] where this class of cases was fully considered, it was held that though the writ be a valid writ, if the officer attempt to seize property under it which does not belong to the debtor against [219] whom the writ issued, the officer is liable for the wrongful seizure of property not subject to the writ.

In the present case, the officer is sued for that very thing, and offered to prove that the property attached was the property of the defendant in the attachment, and was liable to be seized under that writ, and that plaintiff in the present suit had no valid title to it, at least no title paramount to the mandate of the writ, but the state court refused to permit him to make that proof.

The ground of this ruling is that, because there is a defect in the affidavit on which the attachment issued, that writ is absolutely void, and the officer who faithfully executed its commands stands naked before his adversary as a willful trespasser.

It would seem that the mandatory process of a writ of general jurisdiction, with authority to issue such a process and to compel its enforcement at the hands of its own officer, in a case where the cause of action and the parties to it are before the court and are within its jurisdiction, cannot be absolutely void, by reason of errors or mistakes in the preliminary acts which precede its issue.

It may be voidable. It may be avoided by proper proceedings in that court. But when in the hands of the officer who is bound to obey it, with the seal of the court and everything else on its face to give it validity, if he did obey it and is guilty of no error in this act of obedience, it must stand as his sufficient protection for that act in all other courts.

The precise point as to the validity of this writ of attachment was under consideration in this court in the case of *Cooper* v. *Reynolds*, 10 Wall., 308 [77 U. S., XIX., 931], in which the effect of an insufficient affidavit for a writ of attachment was set up to defeat the title to land acquired by a sale under the attachment. The case has been often quoted since, and is conclusive in the Federal Courts in regard to the validity of their own processes when collaterally assailed, as in the present case.

The court, after discussing the nature of the jurisdiction in cases of attachment, their relation to suits *in rem* and *in personam*, in answer to the question: on what does the jurisdiction [220] of the court in that class of cases depend? answers it thus: "It seems to us that the seizure of the property, or that which in this case is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in a proceeding purely *in rem*. Without this, the court can proceed no further; with it, the court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such writ is returned into the court the power of the court over the *res* is established. The affidavit is preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but the writ being issued and levied, the affidavit has served its purpose, and though a revising court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon the defendant's property." See, *Voorhees* v. *Bank*, 10 Pet., 449; *Grignon* v. *Astor*, 2 How., 319.

If, in a case where the title to land is to be devested by a proceeding in which its owner is not within the jurisdiction and is never served with process nor makes any appearance, the writ on which the whole matter depends is held valid, though there be no sufficient affidavit to support it, how much more should the writ be held to protect the officer in a case where the defendant is in court and makes no objection to it, nor seeks to set aside or correct it, and where the

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court before it issues the writ has jurisdiction of the parties to the suit?

We think that when the writ is offered in a collateral suit against the officer who executed it as evidence of the authority of the court to command him to attach the property of defendant in that suit, it is not void, though it might be avoided on a proper proceeding, and in the contest for the value of the goods seized with a stranger who claims them it is sufficient to raise the issue of the liability of those goods [221] to the exigency of the writ.

The judgment of the Supreme Court of Michigan is reversed, with directions for further proceedings in conformity to this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Ex Parte:

In the Matter of HARRIET A. MEAD, *Petitioner*, EXTX., etc., of JAMES C. MEAD, Deceased.

(See S. C., Reporter's ed., 230-232.)

Notice of appeal, when necessary.

The omission to give notice to an assignee in bankruptcy, of an appeal from a decree in his favor, is fatal to the appeal in proceedings under section 5081, R. S. for the re-examination of a claim filed against a bankrupt's estate.

[No. 9, Orig.]

Submitted Oct. 29, 1883. Decided Nov. 12, 1883.

PETITION for *mandamus*.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **Frank Hackett** and *Henry J. Scudder*, for petitioner.

There was no opposing counsel.

Mr. Chief Justice **Waite** delivered the opin- [231] ion of the court:

James C. Mead, in his lifetime, filed with a register in bankruptcy proof of his claim against the estate of Abraham Mead, a bankrupt. Mary E. Travis, a creditor of the bankrupt, applied for a re-examination, and upon consideration the claim was rejected by the district court. Pending the proceedings James C. Mead died, and the petitioner, his executrix, appeared in his stead. After the rejection of the claim, the executrix took an appeal to the circuit court, and did all that was necessary to perfect such an appeal except giving notice to the assignee within ten days after the entry of the decision. This she did not do, but she did give notice to the objecting creditor within the prescribed time. The circuit court, on the application of the assignee, refused to entertain the appeal because of the failure of notice to him. The petitioner now seeks by *mandamus* to require the circuit court to take the case and proceed therewith.

By section 4980 of the Revised Statutes "Appeals may be taken from the district to the circuit courts in all cases in equity" arising under the bankrupt Act; "and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the district court to the circuit court for the same district;" but by section 4981 no such appeal can be allowed, unless, among other things, notice thereof be given "To the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from." If a supposed creditor takes an appeal from an order rejecting his claim he must, under the provisions of section 4984, file in the clerk's office of the circuit court "A statement in writing of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceedings shall be thereupon had in the pleadings, trial, and determination of the [232] cause, as in actions at law commenced and prosecuted in the usual manner in the courts of the United States."

In *Wood* v. *Bailey*, 21 Wall., 640 [88 U. S., XXII., 689], it was decided that the omission to give notice to an assignee of an appeal from a decree in his favor in a suit in equity was fatal to the appeal. The effect of the ruling in that case is that the statute makes the notice within the prescribed time a condition of the right of appeal under section 4980. That seems to us conclusive of the present case. Proceedings, under section 5081, for the re-examination of a claim filed against a bankrupt's estate are in the nature of a suit against the assignee for the establishment of the claim. A creditor may move for the re-examination and, under General Order in Bankruptcy, No. 84, may be required to form the issue which is to be certified to the district court for determination, but the assignee alone can appeal from an order of allowance, and if the supposed creditor appeals the assignee must defend in the circuit court, where the proceedings are against him. Hence, the necessity for notice to him in such cases; and in our opinion the words "to the assignee or creditor, as the case may be," in section 4981, mean to the assignee if the appeal is by the supposed creditor and to the supposed creditor if it is by the assignee.

As, upon the petitioner's own showing, the circuit court properly refused to entertain his appeal, the rule asked for is denied and the petition dismissed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

COUNTY COURT OF KNOX COUNTY, MISSOURI, AND THE JUSTICES THEREOF, *Plffs. in Err.*,

v.

UNITED STATES, *ex rel.* GEORGE W. HARSHMAN.

SAME

v.

UNITED STATES, *ex rel.* SAMUEL C. DAVIS.

SAME

v.

UNITED STATES, *ex rel.* WELLS AND FRENCH COMPANY.

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MACON COUNTY COURT AND THE JUSTICES THEREOF,

v.

ALFRED HUIDEKOPER, Relator.

THOMAS C. BAKER, Treasurer of KNOX COUNTY, MISSOURI, *Plff. in Err.*,

v.

UNITED STATES, *ex rel.* SAMUEL C. DAVIS.

(See S. C., Reporter's ed., 229, 230.)

Payment of county bonds—cases followed.

1. Where bonds are debts of a county, for any balance remaining due thereon after the application of the proceeds of a special tax, the holders are entitled to payment out of the general funds of the county.
2. U. S. v. Macon Co., and Macon Co. v. Huidekoper, XXV., followed.

[Nos. 4, 80, 81, 83, 199.]

Argued Oct. 26, 1883. Decided Nov. 12, 1883.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

These cases arose upon informations filed in the court below, by the defendants in error, for writs of *mandamus* to enforce the payment of certain judgments. They are similar in character to the cases cited in the opinion of the court, and no special statement is deemed necessary.

Messrs. **James Carr**, *Geo. D. Reynolds* and *David P. Dryer*, for plaintiffs in error.

Messrs. **Joseph Shippen, George D. Shields**, *T. K. Skinner* and *John B. Henderson*, for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

In *U. S.* v. *Clark Co.*, 96 U. S., 211 [XXIV., 628], it was decided, at the October Term, 1877, that bonds of the character of those involved in the present suits were debts of the county and that for any balance remaining due on account of principal or interest after the application of the [230] proceeds of the special tax of one twentieth of one per cent, the holders were entitled to payment out of the general funds of the county. This, we all agree, means that the payment of this balance is demandable out of funds raised by taxation for ordinary county uses. The *mandamus* applied for in that case was one "requiring the county court and the justices thereof to direct the clerk of the county to draw a warrant on the county treasurer, for the balance of the judgment remaining unpaid, so that he might be enabled, on its presentation, to have it paid in its order out of the county treasury," and there was no fund out of which the payment could be made, except that raised by taxation, for ordinary county uses. By the judgment of this court such a *mandamus* was awarded.

At the next Term, in 1878, the point thus decided was explicitly stated in *U. S.* v. *Macon Co.*, 99 U. S., 589 [XXV., 332], and in *Macon Co.* v. *Huidekoper*, Id., 592 [XXV., 333], a majority of the court adhered to the decision and ordered judgment accordingly. *It was conceded on the argument that all the judgments now under consideration must be affirmed, unless these cases are overruled. This a majority of the court are unwilling to do, and judgments of affirmance are, consequently, ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ALABAMA GOLD LIFE INSURANCE COMPANY, *Plff. in Err.*,

v.

MARY ALICE NICHOLS, In Her Own Behalf and as Guardian of Her Minor Children, W. ELY NICHOLS, ET AL.

(See S. C., Reporter's ed., 232-234.)

Jurisdiction as to amount—reduction of judgment.

1. Where, after a judgment was entered for over $5,000 in the circuit court, that court permitted a part of it to be remitted and a new judgment to be entered for $5,000 and costs, the latter judgment is the final one and determines the jurisdiction of this court on writ of error.
2. It is within the discretion of a court of the United States sitting in Texas, if a plaintiff appears in open court and remits a part of a verdict in his favor, to make the proper reduction and enter judgment accordingly.

[No. 130.]

Submitted Oct. 29, 1883. Decided Nov. 12, 1883.

IN ERROR to the Circuit Court of the United States for the Eastern District of Texas.

On motion to dismiss.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **William W. Boyce**, for defendant in error, in support of motion.

Messrs. **W. Hallett Phillips** and *P. Phillips*, for plaintiff in error, *contra*.

Mr. Chief Justice **Waite** delivered the opinion of the court:

In this case, a verdict was rendered against the plaintiff in error for $6,610, and a judgment entered thereon December 9, 1879. In the verdict was included, for damages $600; attorney's fees $500; and interest $510; in all $1,610. The next day, December 10, 1879, the defendants in error appeared in open court and "entered a remitter" of these amounts, leaving the amount of said judgment to be for the amount of $5,000 and costs of suit. Upon this being done, a new judgment was entered "That the plaintiffs have and recover from said defendant the sum of $5,000, and also all costs about this suit incurred, as of the date of said judgment, and have execution therefor instead of the sum of $6,610, and also all costs about this suit incurred as in said judgment is recited." This writ of error was brought on the 8th of January, 1880, to reverse the judgment so entered. The defendant in error now moves to dismiss the writ because the value of the matter in dispute does not exceed $5,000.

The judgment as it stands is for $5,000, and no more. The entry of the 10th of December

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NOTE.—*Jurisdiction of U. S. Supreme Court depends on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See *note* to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

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is equivalent to setting aside the judgment of the 9th and entering a new one for the amount remaining due after deducting from the verdict the sum remitted in open court. There was nothing to prevent this being done during the Term and before error brought. The judgment of the 10th is, therefore, the final judgment in the action.

In *Thompson* v. *Butler*, 95 U. S., 696 [XXIV., [234] 541], it was said: "Undoubtedly, the trial court may refuse to permit a verdict to be reduced by a plaintiff upon his own motion; and if the object of the reduction is to deprive an appellate court of its jurisdiction in a meritorious case, it is to be presumed the trial court will not allow it to be done. If, however, the reduction is permitted, the errors in the record will be shut out from our re-examination in cases where our jurisdiction depends on the amount in controversy."

Articles 1351 and 1352 of the Revised Statutes of Texas are as follows:

"Article 1351. Any party in whose favor a verdict has been rendered may in open court remit any part of such verdict, and such remitter shall be noted on the docket and entered in the minutes, and execution shall thereafter issue for the balance only of such judgment, after deducting the amount remitted.

Article 1352. Any person in whose favor a judgment has been rendered may in open court remit any part of such judgment, and such remitter shall be noted on the docket and entered in the minutes, and execution shall thereafter issue for the balance only of such judgment, after deducting the amount remitted." R. S. of Texas, 1879, pp. 211, 212.

Without deciding what effect, these statutes will have on our jurisdiction in cases coming up from that State, if the amount is remitted after judgment without any action thereon by the court other than noting on the docket and entering on the minutes what has been done, we are of opinion that it is within the discretion of a court of the United States, sitting in that State, if a plaintiff appears in open court and remits a part of a verdict in his favor, to make the proper reduction and enter judgment accordingly. That was the effect of what was done in this case, and the rule established in *Thompson* v. *Butler*, *supra*, applies.

The motion to dismiss is, therefore, granted. Dismissed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—110 U. S., 224.

BOARD OF LIQUIDATION OF THE CITY DEBT, *Appt.*,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL.

(S. C., Reporter's ed., 221-229.)

City of New Orleans, power of council.

Under the Louisiana legislation of 1882, the City Council of New Orleans had full authority to bind the city by a compromise of a pending suit with a railroad company, respecting its right to use lands known as the batture property of the city, and such compromise was not subject to the control of the Board of Liquidation of the city.

[No. 997.]

Argued Oct. 18, 19, 1883. Decided Nov. 12, 1883.

APPEAL from the Supreme Court of the United States for the Eastern District of Louisiana.

The history and facts of the case fully appear in the opinion of the court. See, also, *New Orleans* v. *N. O., M. & T. R. Co.*, *ante*, p. 635.

Messrs. **Henry C. Miller** and **R. T. Merrick**, for appellant.

Messrs. **Thos. L. Bayne** and *John L. Cadwalader*, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The appeal presents the following case:

Prior to the year 1820, disputes had arisen between the City of New Orleans and certain proprietors of riparian estates as to the ownership of the batture or alluvion in front of the city on the Mississippi River. In compromise of these [222] disputes, the proprietors surrendered to the city all their claims to property within certain boundaries.

In 1869 the Legislature of Louisiana undertook, by Act No. 26 of 1869, to grant to the New Orleans, Mobile & Chattanooga Railroad Company, now by change of name the New Orleans, Mobile & Texas Railroad Company, "The right to locate, construct, maintain and use a passenger depot with offices and apartments suitable for its legitimate business, upon that part or portion of the levee or streets and grounds in the City of New Orleans bounded by Canal, Delta and Poydras Streets and a line parallel to and one hundred and fifty feet easterly from Delta Street; and for the construction of a freight depot, and for other purposes of its legitimate business, to inclose and occupy the blocks of grounds, parts of streets, and portion of levee in said city bounded by Girod, Water and Calliope Streets and a line parallel to and two hundred and ninety feet easterly from Water Street, provided said company shall not inclose or occupy that part or portion of the blocks of ground within said last limits which is the private property of individuals, until said company has acquired the title thereto; and said company shall thereafter, if requested by said city, extend the wharf in front thereof equal with the present wharf in front of the northerly corner of the outer block within said limits, recently sold by said city and now owned by said company."

The validity of this Act was disputed by the city, and suits were brought by the company in a state court to establish the grant. These suits resulted in judgments, which, as the company claimed, confirmed its title. The city denied that such was the effect of the judgments, and attempted to tear down and destroy the fences and other structures of the company. Thereupon the company, on the 8th of July, 1874, brought another suit to enjoin the city. This suit resulted in a decree by the Circuit Court of

NOTE.—*Compromise of a disputed claim binding; payment of less amount for greater.* See *note* to Oglesby v. Attrill, 105 U. S., XXVI., 1186.

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the United States for the District of Louisiana on the 11th of June, 1878, allowing the injunction prayed for. From that decree the city, on the 30th of July, 1878, appealed to this court, and the appeal was docketed on the 16th of December following.

[223] During the pendency of the suit in this court the Legislature of Louisiana passed Act No. 133 of 1880, creating a Board of Liquidation of the City Debt "For the purpose of liquidating, reducing and consolidating the debt of the City of New Orleans." By this Act it was provided that the board thus created should "have exclusive control and direction of all matters relating to the bonded debt of the City of New Orleans," and authority to issue new bonds of the city, to be exchanged for old at the rate of fifty cents of new for one dollar of old.

Sec. 5 of that Act is as follows:

"Sec. 5. That it shall be the duty of the city authorities, as soon as possible, after the organization of the Board of Liquidation of the City Debt, to turn over and transfer to the said Board all the property of the City of New Orleans, both real and personal, not dedicated to public use; and the Board of Liquidation shall be, and is hereby, empowered and authorized to dispose of said property on such terms and conditions as may be deemed favorable; the proceeds of such sale or sales to be deposited with the fiscal agents of the Board to credit of 'city debt fund.'"

No new bonds were ever issued by the Board of Liquidation under this authority, and the city never actually transferred to the board any of the batture property. Neither did the Board ever assume control of such property. A reason given for this by the president of the Board, and suggested by the counsel for the appellant in his argument is, that fears were entertained that if property not dedicated to public uses should be actually separated and set apart from that which was, judgment creditors of the city might levy their executions and subject such as was thus shown not to be required for public use to the payment of their judgments.

On the 23d of June, 1882, Act No. 20, of 1882, was passed by the Legislature of Louisiana, "To incorporate the City of New Orleans, provide for the government and administration of the affairs thereof, and to repeal all Acts inconsistent and in conflict with its provisions."

Secs. 8, 28 and 78 of this Act are as follows:

[224] "Sec. 8. The council shall also have power * * * to authorize the use of streets for horse and steam railroads and to regulate the same; to require and compel all lines of railway or tramway in any one street to run on and use one and the same track and turntable; to compel them to keep conductors on their cars and compel all such companies to keep in repair the street bridges and crossings through or over which their cars run; to lay off and sell in lots or squares so much of the batture, from time to time, as may not be required for public purposes, but the right of accretion or to future batture shall never be sold.

Sec. 28. That all the rights, titles and interest of the City of New Orleans, as now existing in and to all lands, tenements, hereditaments, bridges, ferries, streets, roads, wharves, markets, stalls, levees and landing-places, buildings and other property, of whatever description and wherever situated, and with all goods, chattels, moneys, effects, debts, dues, demands, bonds, obligations, judgments and judgment liens, actions and rights of actions, books, accounts and vouchers, be and they are hereby vested in the City of New Orleans, as incorporated by this Act.

Sec. 78. All laws in conflict, inconsistent or contrary to the provisions of this Act, be and the same are hereby repealed."

By Act No. 58 of 1882, passed June 30, 1882, entitled "An Act to Authorize the City of New Orleans to Renew and Extend Payment of Her Outstanding Bonds, Other than Premium Bonds, to Provide the Rate of Interest on the Bonds as Reduced or Extended, and Authorize the Levy of a Tax to Pay the Same," the Board of Liquidation was "authorized and empowered to extend the bonded indebtedness of said city, other than premium bonds, outstanding at the passage and promulgation of this Act, for the period of forty years from January 1, 1883, at a rate of interest not exceeding six per cent."

On the 5th of July, 1882, Act No. 81 of 1882 was passed and approved, a copy of which is as follows:

"Act No. 81 of 1882, entitled, An Act to Authorize the City of New Orleans in the Sale or Lease of Franchise, or Right of Way for Street Railroads, or Other Privilege, to Apply the [225] Price Paid for the Same, in the Performance of Works of Public Improvements of a Permanent Character, such as Paving Streets, Embellishing Parks, etc.

Whereas, notice as required by article 48 of the Constitution has been given of the intention to apply for the passage of this Act; therefore,

Sec. 1. *Be it enacted*, by the General Assembly of the State of Louisiana, That hereafter, whenever the City of New Orleans, through the proper authorities, shall contract with private corporations or individuals for the sale or lease of public privileges or franchises, such as the rights of way for street railroads or for other public undertakings within her legal power and control, the price paid for the sale or lease of public privileges or franchises shall be applied by said city in the performance of works of public improvement of a permanent character, such as paving streets, embellishing parks, etc.

Sec. 2. *Be it further enacted*, That all laws or parts of laws, and especially so much of section 10, of Act No. 31, Acts of 1876, known as the Premium Bond Act, and by section 5 of Act No. 133, Acts of 1880, as may be in conflict herewith be, and the same are hereby, repealed."

Such being the legislative authority of the different departments of the city government, a resolution was passed by the city council on the 11th of October, 1882, accepting a proposition of the Railroad Company to compromise and settle all the matters in controversy in the suit pending in this court on appeal, by which the Company was to pay the city $40,000 and the city was to dismiss its appeal and acquiesce in the decree of the circuit court. The negotiations which resulted in this compromise began as early as August 1, 1882, when the council appointed a committee to confer with the Railroad Company on the subject. The money stipulated for in the compromise was paid on the 11th of October, 1882, and on the same day an agreement of compromise, dismissing the ap-

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peal and acquiescing in the decree appealed from, was duly signed and executed by the mayor of the city under the authority of the council. On the next day the Board of Liquidation notified the city authorities that it claimed [226] the fund realized from this settlement. On the 13th of October a resolution of the Board was adopted to the effect "that the $40,000 now in the hands of the administrator of finance be enjoined and the attorney be directed to institute legal proceedings at once." On the 17th of October the resolution of the 13th was so far modified as "to authorize the attorney of the Board to take such steps as, in his judgment, are requisite to set aside the agreement of compromise; * * * to oppose the dismissal of the appeal, and to hold the fund decreed from said compromise so as to restore it if the compromise is annulled, or to claim it for the Board if said compromise becomes a finality."

On the 10th of October, 1882, the suit pending in this court was continued at the request of the parties, but at a later day in the Term the Railroad Company appeared and presenting a stipulation for the dismissal of the appeal, signed by the city attorney of New Orleans pursuant to the terms of the compromise, asked to have the appropriate order entered upon that stipulation. Thereupon the Board of Liquidation came and resisted the entry of any such order on the ground that during the pendency of the appeal, authority over the subject-matter of the controversy had been transferred from the city council to the Board, and that the compromise which had been effected was not binding. The Board also asked leave to prosecute the appeal in the name of the city. It was conceded that the city council made the compromise which was claimed, and that the Railroad Company was entitled to a dismissal of the appeal if the council had authority to do what was done, and the compromise was fair. This court thought the dispute as to the authority of the council presented questions too important to be settled summarily on motions, and ordered the motions to be continued until the present Term, when the appeal would be dismissed in accordance with the stipulation, unless the Board should begin and prosecute without unnecessary delay, in some court of competent jurisdiction, an appropriate suit to set aside the compromise. This suit was brought for that purpose, and the Circuit Court for the Eastern District of Louisiana, on full consideration, entered a decree dismiss- [227] ing the bill. To reverse that decree this appeal was taken, and the single question to be decided is, whether upon these facts, the Board of Liquidation is entitled to the relief it has prayed for.

There is no pretense of fraud, either on the part of the city council or the Railroad Company. So far as appears, the negotiations were carried on by both parties openly and without any attempt at concealment. The Board of Liquidation does not even allege that it was ignorant of what was being done.

The whole case, therefore, turns on the legislative authority of the city council to bind the city by a compromise of the suit, and about this we have no doubt. Under Act No. 133 of 1882 the city authorities were only required to turn over to the Board such property as was not dedicated to public use. It was substantially conceded on the argument that if the railroad was removed, the property between Poydras and Canal Streets would immediately be put to such use, and it is by no means certain that this may not be true of some or all the rest. All except that between Poydras and Canal Streets has been formed into squares, but the control of it was never assumed by the Board. The fact that fears were entertained that if such control should be assumed the property would be levied on and sold under executions against the city, is very persuasive evidence to show that it was apparently property dedicated to public use, though occupied to some extent by the Railroad Company for its tracks and passenger and freight stations.

But however this may be, we are entirely satisfied that under the legislation of 1882 the city council had full authority to bind the city by a compromise of the pending suit. Confessedly no bonds were ever issued, or obligations incurred, by the Board of Liquidation under Act No. 133 of 1880, and on the 23d of June, 1882, the city council was, in express terms, authorized to lay off and sell, in lots or squares, so much of the batture, from time to time, as might not be required for public purposes. Then, on the 5th of July, only a few days later, the city was authorized, through its proper authorities, to contract with private corporations for the sale or lease of public privileges or franchises, such as rights of way for street railroads, or for other public undertakings within her legal pow- [228] er and control, the price paid to be applied by the city "in the performance of works of public improvement of a permanent character." All this is entirely inconsistent with the provisions of section 5 of Act No. 133 of 1880, at least so far as the control and disposition of batture property are concerned. The repealing sections of these Acts, therefore, operated directly on the powers of the Board over the subject-matter of this compromise, and left the city council free to act in the premises.

It must be borne in mind that all the legislation involved relates to the distribution of the powers of the city government among the different departments. As the question is presented to us, no contract rights need protection. Whether the Board of Liquidation is a corporation that can sue in its own name or be sued, is not at all important; for even if it be a corporation, it is in effect nothing more than one of the departments of the city government charged with the duty of controlling and directing matters relating to the bonded debt. Even though the effect of section 5 of the Act of 1880 was to pledge the property of the city not dedicated to public use to secure the payment of the public debt, there was nothing to prevent the Legislature from revoking the pledge until contract rights had in some way intervened. It is agreed that no new bonds were ever issued by the Board under the authority or upon the faith of the Act of 1880 before the new charter was granted, and Act No. 81 of 1882 was passed before anything was done in the way of extending or renewing bonds under Act No. 58 of the same year.

The result of the whole legislation is, therefore, that in 1880 the Board of Liquidation was created and given power to dispose of and sell the property of the city not dedicated to public uses, and out of the proceeds pay the public

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debt, but before any new rights had accrued under this power, the control and disposition of batture property not needed for public purposes, was withdrawn from the Board and given to the city council, and the proceeds of the sales and leases of public privileges and franchises were appropriated to the payment of the expenses of public improvements which were [229] permanent in their character. Whether the money realized from this compromise is to be applied to the payment of the public debt or to make permanent improvements, we do not undertake to decide, but that the compromise itself was within the departmental authority of the city council, and not subject to the control of the Board of Liquidation, is to our minds clear.

It follows that the Circuit Court was right in refusing to set aside the compromise, and its decree to that effect is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[235] G. DE ROSSETT LAMAR, EXR. of GAZAWAY B. LAMAR, Deceased, *Appt.*,
v.
CHARLES F. McCAY.

(See S. C., Reporter's ed., 235-238.)

Evidence of moneys received.

1. In an action to recover moneys received by defendant from the government for certain bales of cotton which it is alleged were included in a recovery by him in the Court of Claims, his admissions that he had received such moneys cannot avail to control the internal evidence afforded by the record from the Court of Claims, that the bales were not included in the recovery in that court.

2. On the question of fact, as to whether the proceeds had been recovered and received from the United States as part of the proceeds of cotton recovered for in the Court of Claims, this court reverses the decree of the Circuit Court.

[No. 882.]

Submitted Oct. 31, 1883. Decided Nov. 19, 1883.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the opinion of the court.

Mr. **Edward N. Dickinson**, for appellant.

Messrs. **J. K. Herbert, S. Shellabarger** and **J. M. Wilson**, for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

The appellee, who was the plaintiff below, seeks to recover from the executor of Gazaway B. Lamar a sum of money, on the allegation that the testator received that money from the United States, as the proceeds of 136 bales of upland cotton, which belonged to the assignor of the plaintiff. Lamar recovered in the Court of Claims, on the 1st of June, 1873, a judgment against the United States for $579,343.51, as the proceeds of 3,184 bales of upland cotton and 91 bales of Sea Island cotton, which Lamar owned in Savannah, Georgia, in December, 1864, at the time that city was captured by the military forces of the United States, and all of which bales were captured by said forces and shipped to the agent of the Treasury Department at New York, and there sold by him, and the proceeds paid into the Treasury of the United States. The amount of the judgment was paid to Lamar in April, 1874. This bill was filed in August, 1879. It alleges that the 136 bales were shipped by the plaintiff's assignor to C. A. L. Lamar, now deceased (the son of G. B. Lamar), who received and held them as the property of such assignor; that, after the death of C. A. L. Lamar, G. B. Lamar came into possession of the 136 bales and retained such possession, as the agent and fiduciary of such assignor; that the suit in the Court of Claims was brought for [236] the recovery of the 136 bales, with other cotton; and that the proceeds of the 136 bales were included in said judgment and were received by G. B. Lamar. The circuit court entered a decree in favor of the plaintiff for the agreed amount of the avails of the 136 bales, and the defendant has appealed to this court.

On the question as to whether the 136 bales were embraced in Lamar's recovery, the circuit court found that they were. We are not able to concur in this conclusion. The question is one altogether of fact. It has involved the examination of the pleadings and proofs and other proceedings in the suit in the Court of Claims, besides a consideration of the effect of the provisions in the will of G. B. Lamar, and of an advertisement he published, and of entries he made in his books, in regard to the 136 bales, after he had received the amount of the judgment. It would not conduce to any good end to review the propositions discussed by the respective counsel, consisting largely of arithmetical calculations, in elucidation of their respective contentions. It must suffice to say that the record and proceedings of the Court of Claims do not show that the 136 bales were embraced in the final petition of G. B. Lamar in that court, or in the 3,275 bales for which judgment was awarded. There is not in the proofs before the Court of Claims any testimony in regard to the 136 bales. It may very well be that they passed into the possession of G. B. Lamar, and were seized and sent to New York and sold, and that their proceeds are now in the Treasury. But the evidence before the Court of Claims was entirely sufficient to show that G. B. Lamar was entitled to recover the proceeds of the 3,275 bales for which he did recover, without including the 136. Every bale of the 3,275 is traced, in that evidence, into the hands of G. B. Lamar, and identified as cotton which he had purchased and paid for, as a buyer of it. The 136 bales were no part of it.

The will was made in September, 1872, nearly eight months before the final petition was filed in the Court of Claims. That petition omitted to mention the 136 bales, they having been specially mentioned in the amended petition filed April 16th, 1872, which was the petition [237] pending when the will was made. The final petition states that it is filed "in lieu of, and as a substitute for, all other petitions and amendments thereto heretofore filed in this cause."

The 136 bales, with other cotton, having been taken from the possession of G. B. Lamar and sold, he made, as he states in his will, "claims upon the Government of the United States for payment for such cotton," which claims, the will says, "are now before the Court of Claims, and also before the Committe on Claims of the

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Congress of the United States." The will directs his executors to press the claims, and gives a list of the cotton, and specifies, among it, the 136 bales, as "belonging to a gentleman in Richmond, Virginia," and as being cotton on which C. A. L. Lamar made advances. G. B. Lamar did, in his amended petition filed in the Court of Claims, April 16, 1872, make a specific claim for the proceeds of that cotton. But he dropped that claim in his final petition and had no recovery for it. He did not receive his money till more than ten months after he obtained judgment. The impression was on his mind that he had recovered for the 136 bales and, under that erroneous belief, he advertised in a newspaper in Richmond for the rightful owner of the cotton to come forward and prove his ownership, and pay advances and expenses of collection, and receive the balance due. The advertisement stated that the cotton was placed in the possession of C. A. L. Lamar, and stored in Lamar's warehouse; that advances were made on it, and there were charges for storage, compressing and cartage; that the cotton was taken by the United States; and that he had received payment for it from the Treasury. He also, in April 1874, made entries in his books stating that he had received so much money from the United States for the 136 bales, "of which the owner is unknown and is advertised for in Richmond, Virginia."

The evidence derived from the advertisement and the entries in the books is of no force except to show Mr. Lamar's own belief at the time, and cannot avail to control the internal evidence afforded by the record from the Court of Claims, that the 136 bales were not included in the recovery in that court.

[238] This conclusion makes it unnecessary to consider any of the other questions raised. *The decree of the Circuit Court is reversed and the case is remanded to that court, with direction to dismiss the bill of complaint.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

BERNHARD ARNSON ET AL., *Plffs. in Err.*,

v.

THOMAS MURPHY, Collector of the PORT OF NEW YORK.

(See S. C., Reporter's ed., 238-243.)

Action for duties illegally exacted—limitation of pendency of appeal—state limitation laws.

1. The common law right of action to recover back money illegally exacted by a collector of customs, as duties upon imported merchandise, has been converted into a statutory liability by the laws of Congress, the remedy under which is exclusive of all others.

2. No action arises to the claimant, in such cases, until after a decision against him by the Secretary of the Treasury; and his suit against the collector is barred, unless brought within ninety days after an adverse decision upon his appeal.

3. If such decision is delayed more than ninety days after the date of his appeal, it is at the claimant's option, either to sue pending the appeal, treating the delay as a denial, or to wait until a decision is in fact made, and then sue within ninety days thereafter.

4. The limitation laws of the State in which the cause of action arose, or in which the suit was brought, do not apply to such action.

[No. 48.]

Submitted Oct. 15, 1883. Decided Nov. 19, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the opinion of the court.

Messrs. **Lewis Sanders** and *John S. Woodward*, for plaintiffs in error.

Mr. **S. F. Phillips**, *Solicitor-Gen.*, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

This action was brought May 8, 1879, by the plaintiffs in error, in the Supreme Court of New York, to recover money alleged to have been illegally exacted by the Collector for Customs duties, and was removed by the defendant by writ of *certiorari* to the Circuit Court of the United States for that district.

On the trial it appeared that the several amounts alleged to have been illegally exacted were paid under protest, duly made, on various dates from April 26, 1871, to November 29, 1871; that within ninety days from the date of each [239] payment an appeal from the decision of the Collector had been duly taken to the Secretary of the Treasury, and that no decision by that officer, in any of the cases, had been rendered prior to the commencement of this action; and that this suit was not brought until after ninety days had elapsed from the date of the latest appeal, and not until after the lapse of more than six years from the expiration of that period.

The defendant pleaded in bar, besides other defenses, that the cause of action sued upon did not accrue within six years, before the commencement thereof, that being the limitation prescribed by the Statute of New York, then in force, for actions upon contracts, obligations or liabilities, express or implied, other than those upon judgments or decrees of courts of the United States, or of courts of any State or Territory within the United States, and those upon sealed instruments.

The court thereupon directed a verdict in favor of the defendant, to which exception was duly taken, and for that alleged error the judgment thereon is now brought into review.

The cause of action arose under the Act of June 30, 1864, 13 Stat. at L., 202, the 14th section of which is now section 2931 of the Revised Statutes. It distinctly provides, that, on the entry of any merchandise, the decision of the Collector of Customs at the port of importation and entry, as to the rate and amount of duties to be paid on such merchandise and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee or agent of the merchandise shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objections thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the

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Treasury. The decision of the Secretary on such appeal shall be final and conclusive, and such merchandise shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the Secretary of the Treas-
[240] ury on such appeal for any duties which shall have been paid before the date of such decision on such merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. "No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless the decision of the Secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains."

The common law right of action, to recover back money illegally exacted by a Collector of Customs as duties upon imported merchandise, rested upon the implied promise of the Collector to refund money which he had received as the agent of the government, but which the law had not authorized him to exact; which had been unwillingly paid, and which, before payment to his principal, he had been notified he would be required to repay; and involved a corresponding right on his part to withhold from the government, as an indemnity, the fund in dispute. The manifest public inconveniences resulting from this situation induced Congress, by the Act of March 3, 1839, ch. 82, 5 Stat. at L., 348, sec. 2, to alter the relation between these officers of the United States by requiring them peremptorily, to pay into the Treasury all moneys received by them officially, without regard to claims for erroneous and illegal exactions. It was provided, however, therein that the Secretary of the Treasury himself, on being satisfied that in any case of duties paid under protest, more money had been paid to the collector than the law required, should refund the excess out of the Treasury. The legal effect of this enactment, as was held in *Cary* v. *Curtis*, 3 How., 236, was to take from the claimant all right of action against the collector by removing the ground on which the implied promise rested. Congress, being in session at the time that decision was announced, passed the explanatory Act of Feb-
[241] ruary 26, 1845, which, by legislative construction of the Act of 1839, restored to the claimant his right of action against the collector, but required the protest to be made in writing at the time of payment of the duties alleged to have been illegally exacted, and took from the Secretary of the Treasury the authority to refund conferred by the Act of 1839, 5 Stat. at L., 349, 727. This Act of 1845 was in force, as was decided in *Barney* v. *Watson*, 92 U. S., 449 [XXIII., 730], until repealed by implication by the Act of June 30, 1864, 13 Stat. at L., 214. The 14th section of the Act last mentioned is, as already cited, in substance, the present section 2931 of the Revised Statutes, providing for the appeal to the Secretary of the Treasury, and the 16th section, being the present section 3012½, R. S., restores to the Secretary of the Treasury, the authority to refund moneys paid under protest and appeal, which he shall be satisfied were illegally exacted, originally conferred upon him by the Act of 1839. And the provision of the Act of 1845, which construed the Act of 1839 so as to restore to the claimant the right of action, judicially declared in *Cary* v. *Curtis*, *supra*, to have been taken away by the latter, now appears as section 3011 of the Revised Statutes. It was in force when the present action was brought and is as follows: "Any person who shall have made payment, under protest and in order to obtain possession of merchandise imported for him, to any collector or person acting as collector of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest and appeal shall have been taken as prescribed in section twenty-nine hundred and thirty one."

By reference to the 14th section of the Act of 1864, now section 2931, R. S., it will appear that the written protest must be made within ten days, and the appeal to the Secretary of the Treasury within thirty days, from the ascertainment and liquidation of the duties [242] by the proper officer. The decision of the Secretary on such appeal shall be final and conclusive, unless, within ninety days after it is made, suit is brought; and no suit shall, in the meantime pending the appeal, be brought unless the decision by the Secretary shall be delayed more than ninety days from the date of the appeal, if arising upon an entry at any port east of the Rocky Mountains.

It appears to us quite plain, from the reading of the statute, that no action arises to the claimant, in such cases, until after a decision against him by the Secretary of the Treasury; and that his suit against the collector is barred unless brought within ninety days after an adverse decision upon his appeal; but with the proviso, that if such decision is delayed more than ninety days after the date of his appeal, it is at the claimant's option either to sue, pending the appeal, treating the delay as a denial, or to wait until a decision is in fact made, and then sue within ninety days thereafter. It cannot be that he is obliged, in case for any reason a decision at the Treasury Department is delayed beyond the appointed time, to treat the delay as an adverse decision, and to bring his suit while the matter is still *sub judice*. There is no language in the Act requiring such a conclusion; it is inconsistent with the terms actually employed, and is not founded on any sufficient reason. The right to sue at all, before the final decision of the appeal, is merely inferred from the form of the exception, and in its nature is permissive and not peremptory. The right to sue at any time, within ninety days after the decision on the appeal, is clearly given in the terms which declare that such decision shall not be conclusive, if suit is brought thereafter, within that period; and the prohibition against suing before such decision is rendered, is express, with the saving only of the right on the part of the claimant to sue before final decision is rendered, if such decision is delayed for more than ninety days after the date of the

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appeal. But there is nothing which requires him to sue, until after such decision has been rendered. The whole purpose of the saving in his favor evidently is, that he shall not be required to wait longer than ninety days after his appeal for an adjudication. There is nothing to [243] forbid his waiting, without suit, as long as he has reason to expect a favorable decision upon his appeal.

From this review of the legislation and judicial history of the subject it is apparent that the common law action recognized as appropriate by the decision in *Elliott* v. *Swartwout*, 10 Pet., 137, has been converted into an action based entirely on a different principle—that of a statutory liability, instead of an implied promise—which if not originated by the Act of Congress, yet is regulated, as to all its incidents, by express statutory provisions. And among them are the conditions which fix the time when the suit may begin, and prescribe the period at the end of which the right to sue shall cease. Congress having undertaken to regulate the whole subject, its legislation is necessarily exclusive. For any inconveniences that may result to outgoing collectors or the representatives of those who have deceased, by the unavoidable delays in deciding appeals in the Treasury Department, and the absence of a definite period of time beyond which no suit shall be brought, it is for Congress alone to apply the needful remedy.

It follows that in such cases, of which the present is one, the limitation laws of the State in which the cause of action arose, or in which the suit was brought, do not, under sec. 721, R. S., furnish the rule of decision, and that it was, therefore, an error in the circuit court to apply, as a bar to the action, the limitation prescribed by the Statute of New York.

For that error the judgment is accordingly reversed and the cause remanded, with instructions to grant a new trial, and it is so ordered.

Mr. Justice **Field** did not sit in this case and took no part in its decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—110 U. S., 275, 642.

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[244] LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Plff. in Err.*,
v.
MANUEL PALMES, Collector of Revenue for the STATE OF FLORIDA AND FOR THE COUNTY OF ESCAMBIA, IN AND FOR ESCAMBIA COUNTY.

(See S. C., Reporter's ed., 244-258.)

Immunity from taxation—transfer of, to another corporation—state decisions, when not followed—rule of property.

1. Immunity from taxation granted to a railroad company does not pass by virtue of a conveyance of the railroad and its franchises, but requires for its transfer some particular and express description, indicating unequivocally the intention of the Legislature that it might pass by an assignment.

2. Where a bill alleges that the exemption passed to and vested in the complainant below, the truth of the allegation is not admitted by a demurrer to the bill. A fact impossible in law cannot be admitted by a demurrer.

3. Under a State Constitution which forbids the Legislature from exempting the property of railroad corporations from taxation, the Legislature cannot create such a corporation capable in law of acquiring and holding property free from liability to taxation.

4. In considering whether the judgment of a state court gave effect to a law of the State which, in violation of the Constitution of the United States, impairs the obligation of a contract, this court decides for itself independently of the decision of the state court, whether there is a contract, and whether its obligation is impaired.

5. If the decision of the question as to the existence of the alleged contract requires a construction of state constitutions and laws, this court is not necessarily governed by previous decisions of the state courts upon the same, or similar points, except where they have been so firmly established as to constitute a rule of property.

[No. 765.]

Argued Nov. 8, 9, 1883. Decided Nov. 19, 1883.

IN ERROR to the Supreme Court of the State of Florida.

The history and facts of the case fully appear in the opinion of the court.

Mr. **John L. Cadwallader,** for plaintiff in error:

We submit, that entirely apart from the Act of 1855, under which the property, as property, was exempted, this property was particularly exempted by special statutes, whereby the Legislature of Florida expressly authorized the transfer of the exemption, holding out to a new purchaser exemption from taxation as one of the benefits accruing, in order to induce a purchase and secure the operation of the road.

Wilson v. *Gaines*, 103 U. S., 421 (XXVI., 402); *R.R. Co.* v. *Hicks*, 9 Baxt., 442; *Humphrey* v. *Pegues*, 16 Wall., 244 (83 U. S., XXI., 326); *R. R. Co.* v. *Gaines*, 97 U. S., 711 (XXIV., 1094); *R.R.Co.* v. *Hamblen Co.*, 102 U. S., 277 (XXVI., 152).

The decision of *Gonzales* v. *Sullivan*, 16 Fla., 791, inures by way of estoppel in favor of the other companies succeeding to the property, as privies in estate with Sullivan, the nominal defendant in error in that case.

Big. Estop., lxiii., 45, 94–5; 284; Cooley, Const. Lim., 5th ed., 59–60; Freem. Judg., sec. 165; Tayl. Ev., sec. 1689; *Blakemore's Case*, 2 Denison (C. C.), 410; *Smith* v. *Kernochen*, 7 How., 198; *Preble* v. *Bd. of Suprs.*, 8 Biss., 358; *Finney* v. *Boyd*, 26 Wis., 366; *State* v. *R. R. Co.*, 13 S. Car., 290.

In fact, such an estoppel by judgment may be fairly said to make part of the title to the property concerned.

Bro. Abr., tit. Estoppels, *pl.* 15; *Adams* v. *Barnes*, 17 Mass., 365; *Kelly* v. *Donlin*, 70 Ill., 386; *State* v. *R. R. Co.*, 13 S. Car., 314.

Even if the question of the power of a State to grant the exemption were open to discussion in this case, that question has long since been definitely settled here.

New Jersey v. *Wilson*, 7 Cranch, 164; *Jefferson Bk.* v. *Skelly*, 1 Black, 436 (66 U. S., XVII., 173); *Home of Friendless* v. *Rouse*, 8 Wall., 438 (75 U. S., XIX., 498); *R. R. Co.* v. *Reid*, 13 Wall., 265 (80 U. S., XX., 568); *R. R. Co.* v. *Reid*, 13 Wall., 269 (80 U. S., XX., 570); *Humphrey* v. *Pegues*, 16 Wall., 249 (83 U. S., XXI., 327).

NOTE.—*Exemption from taxation, whether a contract or not; not implied.* See *note* to Tucker v. Ferguson, 89 U. S., XXII., 805.

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The sale of an exempt railroad, with all its "privileges and immunities," will pass exemption from taxation to the purchaser.

R. R. Co. v. *Hicks*, 9 Baxt., 442; *R. R. Co.* v. *Hamblen Co.*, 102 U. S., 277 (XXVI., 152); *R. R. Co.* v. *Gaines*, 3 Fed. Rep., 266; 2 Flip., 521; *Hand* v. *R. R. Co.*, 17 S. Car., 219; see, also, *New Jersey* v. *Wilson* (*supra*); *State* v. *Whitworth*, 8 Lea., 594); *R. R. Co.* v. *Pfaender*, 23 Minn., 217; *Gonzales* v. *Sullivan*, 16 Fla., 791; *R. R. Co.* v. *Parcher*, 14 Minn., 328; *R. R. Co.* v. *Deuel Co.*, 7 Am. & Eng. R. R. Cas., 348.

Messrs. **E. A. Perry** and *Geo. P. Raney, Atty-Gen. of Florida*, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

This is a writ of error bringing into review a decree of the Supreme Court of Florida, dismissing a bill in equity, filed by the plaintiff in error, which sought to enjoin the defendant, a Collector of Revenue under the laws of Florida for the County of Escambia, from collecting, by a sale of property levied on for that purpose, certain taxes claimed by him, to be due from the complainant.

The ground of our jurisdiction is, as stated and shown in the record, that in the cause wherein the decree complained of was rendered, there was drawn in question the validity of a statute of the State of Florida, to wit: "An Act entitled An Act for the Assessment and Collection of Revenue," approved March 5, 1881, wherein and whereby certain taxes for state and county purposes were imposed upon the line of railroad extending from the City of Pensacola, in the State of Florida, to the northern boundary of the State of Florida, in the direction of Montgomery, Alabama, of which railroad the plaintiff in error is in possession and is owner; the validity of this statute being questioned on the ground that it was repugnant to the Constitution of the United States, in that it impaired the obligation of a contract, and the decision of the Supreme Court of Florida being in favor of its validity.

The contract, the obligation of which it is alleged has been thus impaired, and of which the plaintiff in error claims the benefit, is asserted to arise as follows:

The General Assembly of the State of Florida passed an Act, which took effect January 6, 1855, entitled "An Act to Provide for and Encourage a Liberal System of Internal Improvements in this State," the preamble to which recites that "The Constitution of the State declares 'that a liberal system of internal improvements being essential to the development of the resources of the country, shall be encouraged by the government of this State and it shall be the duty of the General Assembly, as soon as practicable, to ascertain by law proper objects of improvements in relation to roads, canals and navigable streams, and to provide for a suitable application of such funds as may be appropriated for such improvements.'" The Act then proceeds to create an internal improvement fund to aid in the construction of certain described railroads, and other works of internal improvement, by means of corporations organized or to be chartered for that purpose; and the 18th section provides as follows:

[246]

"That the capital stock of any railroad company accepting the provisions of this Act shall be forever exempt from taxation, and the roads, their fixtures and appurtenances, including workshops, warehouses, vehicles and property of every description needed for the purpose of transportation of freight and passengers, or for the repair and maintenance of the roads, shall be exempt from taxation while the roads are under construction and for the period of thirty-five years from their completion, and that all the officers of the companies, and servants and persons in the actual employment of the companies, be and are hereby exempt from performing ordinary patrol or militia duty, working on public roads and serving as jurors."

By an Act of the General Assembly of Florida, approved December 14, 1855, it was enacted "That a line of railroad to be constructed from the City of Pensacola, or any other point or points on the waters of Pensacola Bay or the waters of St. Andrews Bay, to the north line of the State, leading in the direction of Montgomery, Alabama, shall be considered proper improvements to be aided from the internal improvement fund in the manner provided for, or may hereafter be provided for, in 'An Act to Provide for and Encourage a Liberal System of Internal Improvements in the State,' approved January 6, 1855."

The Alabama and Florida Railroad Company, by an Act approved January 8, 1853, had been incorporated to build a railroad falling within that description, to extend from some point on the Bay of Pensacola to some point on the boundary line between the States of Florida and Alabama, to meet and connect with a railroad leading thence to the City of Montgomery. This company, it is alleged in the bill, built and for a time operated the line of railroad contemplated by its charter, and became entitled to the benefits and privileges of the Internal Improvement Act of 1855, by accepting its provisions and complying with its conditions. Its line of railroad was completed about January 1, 1860.

[247]

By virtue of a decree of foreclosure and sale at the suit of trustees of a first mortgage, to satisfy the bonds secured thereby, the railroad of the Alabama and Florida Railroad Company, and all the rights, privileges and franchises of the said company, were sold and conveyed on August 7, 1872, to one A. E. Maxwell, his heirs and assigns, in trust, and by him were sold and conveyed on December 10, 1872, to the Pensacola and Louisville Railroad Company, a corporation created by the laws of Florida.

The original Act incorporating the last named company was passed July 16, 1868, but it appears to have been reorganized by an amendatory Act, which took effect February 4, 1872, the 18th section of which is as follows:

"That the Pensacola and Louisville Railroad Company, having become the assignee of the Alabama and Florida Railroad of Florida, and the franchises of the said corporation, and being in possession of and operating the said line of road, which corporation was exempt from taxation for a limited period, the said Pensacola and Louisville Railroad Company and its property, now owned or hereafter to be acquired, shall also be exempt from taxation during the remainder of said period."

On May 6, 1878, in pursuance of a decree of

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the Circuit Court of the State of Florida, sitting in Leon County, a sale and conveyance was made transferring the title of the Pensacola and Louisville Railroad Company in and to its road and other property, "together with all the franchises, rights, privileges, easements and immunities" of that company, to the Pensacola Railroad Company. This company was a corporation of the State of Florida, created by an Act of the General Assembly, which took effect February 27, 1877. The 2d section of that Act is as follows:

[248] "Sec. 2. *Be it further enacted*, That the said Pensacola Railroad Company be and it is hereby authorized and empowered to acquire by purchase and assignment all the property, rights, franchises, privileges and immunities of the Pensacola and Louisville Railroad Company, a corporation created by an Act of the General Assembly of the State, approved July 16, A. D. 1868, whether the same were acquired under the laws of the States of Florida or Alabama or the laws of the United States, or as the assignee and successor of the Alabama and Florida Railroad Company; and upon completion of the said purchase and assignment, the said Pensacola Railroad Company shall be deemed in law and equity to be fully invested with and entitled to all the said property, rights, franchises, privileges and immunities of said Pensacola and Louisville Railroad Company, as though the same were originally granted to or acquired by the said Pensacola Railroad Company."

By the 18th section of the Act of 1872 amending the charter of the Pensacola and Louisville Railroad Company, it was provided that "It shall be lawful for said company to purchase, lease, acquire an interest in, to unite or consolidate with, lease or sell to any other railroad company in or out of the State, and to make the same one company, with a consolidated stock and property and with one board of directors," etc.

The right under this section to sell and transfer its property and franchises to a corporation of another State, it is claimed, passed from the Pensacola and Louisville Railroad Company to the Pensacola Railroad Company; and accordingly, on October 20, 1880, the Pensacola Railroad Company conveyed to the Louisville and Nashville Railroad Company, the plaintiff in error, its railroad from its junction with the Mobile and Montgomery Railway to its terminus in Pensacola Bay, its property, real and personal, with certain exceptions, all its franchises, except the franchise to be and exist as a corporation, rights, privileges, easements and immunities, by virtue of which conveyance the plaintiff in error claims in the bill, that it became entitled to all the rights, property, privi-
[249] leges, franchises and immunities of the Alabama and Florida Railroad Company, the Pensacola and Louisville Railroad Company and the Pensacola Railroad Company, under the various Acts incorporating these companies and Acts amendatory of the same.

The plaintiff in error, the Louisville and Nashville Railroad Company, is a Corporation of Kentucky, and by an amendment to its charter, which took effect March 6, 1878, reciting that its stockholders had become largely interested in the commerce and railroad business between the States of Kentucky and Tennessee and the southeast, and the several railroad connections in that part of the country, by an extension of its system, was enabled "to operate, lease or purchase, upon such terms or in such manner as they deem best, any railroad in any other State or States deemed necessary for the protection of the interest of the stockholders."

The exemption from taxation, created by the 18th section of the Internal Improvement Act of 1855, is, in every respect, similar to that which was declared in *Morgan* v. *Louisiana*, 93 U. S., 217 [XXIII., 860], to be not assignable. No words of assignability are used by the Legislature of the State in the language creating it; and, from its nature and context, it is to be inferred that the exemption of the property of the company was intended to be of the same character as that declared in reference to its capital stock and to its officers, servants and *employés*, and that all alike were privileges personal to the corporation or to individuals connected with it, entitled to them by the terms of the law. This exemption, therefore, did not [251] pass from the Alabama and Florida Railroad Company to the Pensacola and Louisville Railroad Company by the conveyances which passed the title to the railroad itself, and to the franchises connected with and necessary in its construction and operation.

This conclusion is confirmed by the 18th section of the Act of February 4, 1872, amending the charter of the Pensacola and Louisville Railroad Company. That section recites that the last named company having become assignee of the Alabama and Florida Railroad Company, and of its franchises and property, "Which corporation was exempt from taxation for a limited period, the said Pensacola and Louisville Railroad Company and its property, now owned or hereafter to be acquired, shall also be exempted from taxation during the remainder of said period." Here the original exemption is declared to be the privilege of the Florida and Alabama Railroad Company, the particular corporation to which it was granted, and the necessity for conferring it by a new legislative grant upon the assignee of the property and franchises of the original corporation, rests upon the implication that the exemption did not pass to it by the assignment between the parties. And the further inference is equally necessary, that the exemption transferred or created in the new company by the terms of the legislative grant, is identical in its character as a personal and unassignable privilege to the new grantee, with that it had when it belonged to the first company.

But the 2d section of the Act of February 27, 1877, incorporating the Pensacola Railroad Company, authorized and empowered it to acquire, by purchase and assignment, all the property, rights, franchises, privileges and immunities of the Pensacola and Louisville Railroad Company and, upon completion of such purchase and assignment, declared that the former should be deemed, in law and in equity, to be fully invested with and entitled to all the said property, rights, franchises, privileges and immunities as though the same were originally granted to or acquired by the said Pensacola Railroad Company.

It is claimed that this language is broad [252]

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enough to cover the assignment and transfer of the immunity from taxation granted to the Pensacola and Louisville Railroad Company by the 18th section of its charter. And we are of this opinion. The language is comprehensive and unequivocal, and the word "immunity" is apt to describe the exemption claimed. It admits of no doubt, we think, if the Pensacola and Louisville Railroad Company were entitled to this exemption, and if the legislative grant of authority to make and accept this assignment of it was valid and effective, that the right to be exempt from taxation according to its terms passed to the Pensacola Railroad Company. But it must be borne in mind that it must be taken to have vested in the latter, if at all, precisely as it had in the former; that is, as a personal privilege. The assignment in the particular instance, based upon the express authority of a new enactment, did not impart to the immunity the quality of general assignability to other successors in the title to the property and franchises, claiming only under a conveyance between the parties.

The title of the plaintiff in error, therefore, to the exemption claimed, must be supported by some other authority. This is claimed to be found in the general power, given by the 13th section of its charter, to the Pensacola and Louisville Railroad Company to lease or sell to or consolidate with any other railroad company in or out of the State, which power passed with others to the Pensacola Railroad Company by the 2d section of its charter. But as we have already seen, and as was decided in *Morgan* v. *Louisiana* [*supra*], and *Wilson* v. *Gaines*, 103 U. S., 417 [XXVI., 401], the exemption from taxation does not pass by virtue of a conveyance of the railroad and its franchises, which was all the Pensacola Railroad Company could pass under that authority, but requires for its transfer some particular and express description, indicating unequivocally the intention of the Legislature that it might pass by an assignment. That does not exist in this case, and the exemption claimed by the plaintiff in error fails because it was not and could not be transferred to it, under the law, by the Pensacola Railroad Company.

It is sought to avoid this conclusion by con-
[253] verting the question into one of pleading. It is said that the bill alleges, as a matter of fact, that the exemption passed to and vested in the complainant below, and that the truth of the allegation is admitted by the demurrer. But this is matter of law; the documents of title are exhibited with the bill and constitute part of the record; and we take judicial notice of their legal effect. A fact, impossible in law, cannot be admitted by a demurrer. In *Wilson* v. *Gaines* [*supra*], it was inferred, in the face of a demurrer, claimed to be an admission of a contrary allegation, that the sale did not pass any rights of property, not described, as within the lien of the mortgage.

We have thus shown that the claim of the plaintiff in error to the exemption alleged fails, because the Pensacola Railroad Company, if it possessed it, had no power to convey it. It will appear, on further examination, that it fails for a distinct and deeper reason, namely: because the Pensacola Railroad Company was itself not entitled to any such exemption. That company was incorporated by the Act of February 27, 1877, which undoubtedly did purport to grant to it, as assignee of the Pensacola and Louisville Railroad Company, in terms sufficiently broad, the immunity from taxation, which, by the 18th section of the Act of February 4, 1872, was expressly declared to be granted to the latter.

Both the statutes, however, were passed by the General Assembly of Florida, acting under the Constitution of that State which went into effect in 1868.

Article XII., section 1, of that Constitution, is as follows:

"The Legislature shall provide for a uniform and equal rate of taxation, and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes."

And article XIII., section 24, is as follows:

"The property of all corporations, whether heretofore or hereafter incorporated, shall be subject to taxation, unless such corporation be for religious, educational or charitable purposes."

In 1875 this clause was amended so as to read [254]
as follows:

"The property of all corporations, whether heretofore or hereafter incorporated, shall be subject to taxation, unless such property be held and used exclusively for religious, educational or charitable purposes."

It is under the authority and in pursuance of the mandates of these constitutional provisions that the Legislature passed the Act of March 5, 1881, under which the road of the plaintiff in error is subjected to taxation, and the validity of which is here under review.

It cannot be and is not contended that, under these constitutional limitations, the Legislature of Florida could make an original grant to a railroad corporation exempting its railroad property from taxation.

But the grant to the Pensacola and Louisville Railroad Company by the Act of 1872, and that to the Pensacola Railroad Company by the Act of 1877, though in form the renewal or transfers of previously existing grants, were in fact the creation of new ones. In *Trask* v. *Maguire*, 18 Wall., 391-409 [85 U. S., XXI., 938-947], it was said, speaking of similar provisions in the Constitution of Missouri: "The inhibition of the Constitution applies in all its force against the renewal of an exemption equally as against its original creation;" and in *Shields* v. *Ohio*, 95 U. S., 319 [XXIV., 357], it was decided that in cases of corporations created by consolidation the powers of the new company did not pass to it by transmission from its constituents, but resulted from a new legislative grant, that could not transcend the constitutional authority existing at the time it took effect. It follows that the exemption from taxation in terms contained in the charters of 1872 and 1877 were void, as unauthorized and prohibited by the State Constitution of 1868.

It does not weaken this conclusion to say that the exemption contained in the Internal Improvement Act of 1855 was authorized by the Constitution of the State then in force, which may be admitted, and that it was assignable in its nature or by its terms, in such manner that it became impressed upon the property itself

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into whosesoever hands it should afterwards [255] come, following the title, like an easement or a covenant running with the land, which we have shown, however, not to be the case; for, even on that supposition, the privilege is one that must be exercised by some person capable in law of accepting and exercising it. The conception of an immunity that is impressed upon the thing in respect to which it is granted is purely metaphorical. The grant is to a person in respect of a thing, and it is said to inhere in or be attached to the thing only when by its terms the grant is assignable by a conveyance of the thing, and passes as an incident with the title to each successor. There must always be a person capable not only of receiving the title, but also of accepting the conditions accompanying it, and which constitute the exemption; otherwise the conditions become impossible and void.

After the adoption of the Constitution of Florida of 1868, there could be no corporation created capable in law of accepting and enjoying such an exemption, for that was prohibited by the constitutional provisions that have been cited. In the case of the Pensacola and Louisville Railroad Company, in 1872, the capacity at that time to receive this privilege depended altogether upon the legislative Act amending its charter to that effect; and if any doubt as to this might be reasonably entertained, certainly none can arise as to the Pensacola Railroad Company, which derived all its powers and its very existence from legislation dependent for its validity wholly upon the Constitution of 1868. The prohibition which forbids the Legislature from exempting the property of railroad corporations from taxation, makes it impossible for the Legislature to create such a corporation capable in law of acquiring and holding property free from liability to taxation.

It has, however, been earnestly urged upon us in argument, by counsel for the plaintiff in error, that the Supreme Court of Florida, in the case of *Gonzales* v. *Sullivan*, 16 Fla., 791, explicitly decided, in opposition to the views we have expressed, that the railroad and property, the subject of this litigation, then held by the Pensacola and Louisville Railroad Company were exempt from taxation, according to the terms of the provision in the Internal Improvement Act of 1858; and it is pressed upon [256] us as a conclusive determination of the law of Florida upon the point, particularly authoritative in the present case, for the reason that the plaintiff in error, having, subsequently to that decision, acquired its title, may be presumed to have acted upon the faith of it.

This presumption is not pressed, however, to the extent of establishing a contract between the plaintiff in error and the State of Florida, the obligation of which has been impaired by any law subsequently passed, nor of working an estoppel against the State as *res judicata*, with an equivalent effect. The decision cited, therefore, cannot be allowed any greater effect as an authority than ought to be given, in cases of this description, to the judgments of state tribunals.

The question we have to consider and decide is, whether, in the judgment under review, the Supreme Court of Florida gave effect to a law of the State which, in violation of the Constitution of the United States, impairs the obligation of a contract. In reaching a conclusion on that point, we decide for ourselves, independently of the decision of the state court, whether there is a contract, and whether its obligation is impaired; and if the decision of the question as to the existence of the alleged contract requires a construction of State Constitutions and laws, we are not necessarily governed by previous decisions of the state courts upon the same or similar points, except where they have been so firmly established as to constitute a rule of property. Such has been the uniform and well settled doctrine of this court. *Bank* v. *Knoop*, 16 How., 369-391.

As was said by *Chief Justice* Taney in the case of *L. Ins. & T. Co.* v. *Debolt*, 16 How., 416-432: "But this rule of interpretation is confined to ordinary acts of legislation, and does not extend to the contracts of the State, although they should be made in the form of a law. For it would be impossible for this court to exercise any appellate power in a case of this kind, unless it was at liberty to interpret for itself the instrument relied on as a contract between the parties. It must necessarily decide whether the words used are words of contract, and what is their true meaning, before it can determine whether the obligation, the instrument created, has or has not been impaired by the law com- [257] plained of. Now, in forming its judgment upon this subject, it can make no difference whether the instrument claimed to be a contract is in the form of a law, passed by the Legislature, or of a covenant or agreement by one of its agents acting under the authority of the State."

To the same effect are the cases of *Bank* v. *Skelly*, 1 Black, 436 [66 U. S., XVII., 173], and *Bridge Propr.* v. *Hoboken Co.*, 1 Wall., 116 [68 U. S., XVII., 571].

It is true that in all these cases the state courts, whose judgments were brought into review, had construed the statutes as not creating a contract; but the principle is equally applicable in the converse case. *Burgess* v. *Seligman* [*ante*, 359].

It is undoubtedly true that the opinion of the Supreme Court of Florida in the case of *Gonzales* v. *Sullivan* [*supra*], is not consistent with that which we have expressed upon some of the principal questions involved in this case.

It did declare, speaking of the effect of the Internal Improvement Act of 1855, "That an exemption from taxation resting in contract is annexed, by the terms of the law which created it, to the road itself, and not to the companies;" and that by the Act of 1872 the Pensacola and Louisville Railroad Company, as assignee of the Florida and Alabama Railroad, became entitled to the exemption, because "the property passed, and with it, as an incident, went the exemption."

But the main topics of discussion in the opinion were whether the Florida and Alabama Railroad was within the scope of the Internal Improvement Act of January 6, 1855, by virtue of the Amendment of December 14, 1855, the constitutional authority to pass which was denied in argument but affirmed by the court; and the question as to the effect of the provisions of the Constitution of 1868, which we have considered, upon the capacity of the Pensacola and Louisville Railroad Company and the Pensacola Railroad Company to accept the privilege and benefit of the exemption, by legislative authority exerted in 1872 and in 1877, does not

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seem to have been raised or noticed, much less adjudged.

[258] *In our opinion there is no error in the judgment of the Supreme Court of Florida in the matter complained of, and it is accordingly affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 399; 112 U. S., 617; 113 U. S., 475; 114 U. S., 184, 188.

UNITED STATES To the Use of NATHANIEL WILSON, Admr., etc., of HORATIO AMES, Deceased. *Plff. in Err.*,

v.

DAVID WALKER.

(See S. C., Reporter's ed., 258-267.)

Action by administrator de bonis non—*action for accounting—decree, when void.*

1. An administrator *de bonis non* cannot sue on the bond of the principal administrator, to recover money collected by him and not paid over or accounted for.

2. Where personal property of an estate under administration has been sold or a debt collected, the proceeds are not property of the decedent, but are the individual property of the executor or administrator, and he is liable to an action for not accounting.

3. Although a court may have jurisdiction over the parties and the subject-matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void.

[No. 87.]

Argued Oct. 26, 29, 1883. Decided Nov. 19, 1883.

IN ERROR to the Supreme Court of the District of Columbia.

The history and facts fully appear in the

Statement of the case by *Mr. Justice* **Woods:**

This was an action at law on an administrator's bond. The bond was made by Charlotte L. Ames and Cunningham Hazlett, as administrators of the estate of Horatio L. Ames, deceased, with Frederick P. Sawyer and the defendant in error, David Walker, sureties. It was in a penalty of $120,000, was payable to the United States, and was subject to the condition that the said Ames and Hazlett should well and truly perform the office of administrators of Horatio Ames, deceased, and discharge the duties of them required as such without any injury to any person interested in the faithful performance of said office. Hazlett died at a date not given, and after his death and until January 9, 1875, Charlotte L. Ames continued to be sole administratrix, and on the day last named she [259] was removed from said office by order of a Justice of the Supreme Court of the District of Columbia, and on the same day Nathaniel Wilson was appointed administrator *de bonis non.* On January 22, 1876, Charlotte L. Ames, in the settlement of her account as administratrix, was directed by the decree of a Justice of said Supreme Court, holding a Special Term for the transaction of orphans' court business, to pay over to said Nathaniel Wilson, administrator *de bonis non* of the estate of Horatio Ames, deceased, on or before February 8, 1876, the sum of $34,876.75. She failing to pay this sum or any part of it, Wilson, administrator *de bonis non*, on April 12, 1876, brought this suit in the name of the United States for his use on the bond above mentioned against Charlotte L. Ames, David Walker, and the administrators of the estate of Frederick P. Sawyer, who, on August 31, 1875, had departed this life. The suit was afterwards discontinued as to Charlotte L. Ames and the administrators of Sawyer, and was prosecuted against David Walker alone.

The declaration contained two counts. The first count set out the obligation of the bond without stating the condition. The second count stated the obligation of the bond and averred the condition as above set forth, and assigned as breach the failure of Charlotte L. Ames to pay over to Wilson, the administrator *de bonis non*, the said sum of $34,876.75.

The defendant pleaded to the first count the condition of the bond and its performance.

To the second count he pleaded, first, "That by the condition of the bond the defendant, as surety, became liable to the plaintiff, as administrator *de bonis non*, only for such of the assets of the estate as had not been converted into money by the said administrators or the survivor, and the defendant says that the assets of said estate consisted wholly of a claim or chose in action owing by the Government of the United States, and that the money claimed in this action is the proceeds of said claim or chose in action collected from the Government and thereby converted into money," etc. The second plea to the second count averred that the de fendant, as surety as aforesaid, was liable only [260] for such assets of said estate as had not been administered by said administrators or the survivor, and that the money claimed in this action is for assets which had been administered before the removal of said surviving administrator from office and the appointment of plaintiff. Both these pleas also aver that defendant was not a party to the proceeding in which the order to pay over was made and was served with process therein, nor did he voluntarily appear.

In his replication to the first plea (the plea of condition performed) the plaintiff set out three breaches, each of them consisting in the failure of the administratrix to pay over the money to her successor in compliance with an order of the court.

The plaintiff demurred to the remaining pleas. The defendant demurred to the replication to the first plea.

Issue was joined on both demurrers, and the court, in General Term, overruled the plaintiff's demurrer, sustained that filed by the defendant, and entered judgment for the defendant. The plaintiff thereupon sued out this writ of error.

Messrs. **A. S. Worthington** and *Nathaniel Wilson*, for plaintiff in error:

Mr. **W. D. Davidge**, for defendant in error:

The title of an administrator *de bonis non* appointed in the place of an administrator or executor deceased or removed, extends only to assets which remain *in specie*, and does not embrace authority to sue the bond of such executor or administrator for a *devastavit.*

Beall v. *New Mexico*, 16 Wall., 535 [83 U. S., XXI., 292]; *Ennis* v. *Smith*, 14 How., 400; *De Velengin* v. *Duffy*, 14 Pet., 282; 2 Wms., Exrs., 6th Am. ed., 915, and case cited in Am. Notes; *Hagthorp* v. *Hook*, 1 Gill & J., 270; *Sib-*

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ley v. *Williams*, 3 Gill & J., 52; *Hagthorp* v. *Neale*, 7 Gill & J., 13; *Lemmon* v. *Hall*, 20 Md., 171.

Mr. Justice **Woods** delivered the opinion of the court:

The first question presented by the record is, whether it was competent for the administrator *de bonis non* of the estate of Ames to sue on the bond of the principal administrator, to recover money collected by him from the United States and not paid over or accounted for.

It is well settled at common law that "The title of an administrator *de bonis non* extends only to the goods and personal estate, such as leases for years, household goods, etc., which remain *in specie* and were not administered by the first executor or administrator, as also to all debts due and owing to the testator or intestate."

Bacon, Abr., Title, Executors and Administrators, B. 2, 2, citing *Packman's Case*, 6 Coke, 19.

In illustration of this rule the same authority says:

"It is holden that if an executor receives money in right of the testator, and lays it up by [261] itself and dies intestate, that this money shall go to the administrator *de bonis non*, being as easily distinguished as part of the testator's effects, as goods *in specie*.

But if A dies intestate, and his son takes out administration to him and receives part of a debt, being rent arrear to the intestate, and accepts a promissory note for the residue, and then dies intestate, this acceptance of the note is such an alteration of the property as vests it in the son; and, therefore, on his death, it shall go to his administrator, and not to the administrator *de bonis non*."

An administrator *de bonis non* derives his title from the deceased, and not from the former executor or administrator. To him is committed only the administration of the goods, chattels and credits of the deceased which have not been administered. He is entitled to all the goods and personal estate which remain *in specie*. Money received by the former executor or administrator, in his character as such, and kept by itself will be so regarded; but if mixed with the administrator's own money it is considered as connected, or as, technically speaking, "administered." *Beall* v. *New Mexico*, 16 Wall., 535 [83 U. S., XXI., 292]; *Coleman* v. *McMurdo*, 5 Rand., 51; *Bank* v. *Haldeman*, 1 Pen. & W., 161; *Kendall* v. *Lee* [2 Pen. & W., 482]; *Potts* v. *Smith*, 3 Rawle, 361; *Bell* v. *Speight*, 11 Humph., 451; *Swink* v. *Snodgrass*, 17 Ala., 653; *Slaughter* v. *Froman*, 5 Mon., 19; *Gamble* v. *Hamilton*, 7 Mo., 469; *Adams* v. *Johnson*, 7 Blatchf., 529.

In the case of *Beall* v. *New Mexico* [*supra*], it was said by *Mr. Justice* Bradley, speaking for this court, that "By the English law, as administered by the ecclesiastical courts, the administrator who is displaced, or the representative of a deceased administrator or executor intestate, are required to account directly to the persons beneficially interested in the estate—distributees, next of kin or creditors—and the accounting may be made or enforced in the probate court, which is the proper court to supervise the conduct of administrators and executors. To the administrator *de bonis non* is committed only the administration of the goods, chattels and credits of the deceased which have not been administered.

Such was the law of Maryland before the organization of the District of Columbia, and [262] such it continues to be in the District, unless changed by statute. In the case of *Hagthorp* v. *Hook*, 1 Gill & J., 270, it was held by the Court of Appeals of Maryland that the authority conferred by the letters of administration *de bonis non* issued under the Act of 1798, No. 101, ch. 14, sec. 2, was "To administer all things described in the Act of Assembly as assets not converted into money, and not distributed, delivered or retained by the former executor or administrator under the direction of the orphans' court. Such an administrator can only sue for those goods, chattels, and credits which his letters authorize him to administer."

To the same effect are the cases of *Sibley* v. *Williams*, 3 Gill & J., 52; *Hagthorp* v. *Neale*, 7 Gill & J., 13; and *Lemmon* v. *Hall*, 20 Md., 171.

In the case of *Ennis* v. *Smith*, 14 How., 400, it was said by this court: "We understand by the laws of Maryland, as they stood when Congress assumed jurisdiction over the District of Columbia, that the property of a deceased person was considered to be administered whenever it was sold or converted into money by the administrator or executor, or in any respect changed from the condition in which the deceased left it. It did not go to the administrator *de bonis non* unless, on the death of the executor or administrator, it remained *in specie*, or was the same then that it had been when it came to his hands. When the assets have been changed, it is said in Maryland that they have been administered."

But counsel for appellant contend that this rule applies only to the case where an executor or adminstrator has died, and not to the case where he had been removed; that while the words "not administered," in the commission of an administrator *de bonis non*, still frequently mean not changed in form, yet as applied to an administrator *de bonis non* in place of a living administrator, they have come to mean almost invariably not fully and legally administered, and it is said that this distinction appears in the laws of Maryland in force before the organization of the District of Columbia, and con- [263] tinuing in force until the passage of the Act of February 20, 1846, "To enlarge the powers of the several orphans' courts held in and for the District of Columbia." 9 Stat. at L., 4.

In support of this view we are referred to chapter 101 of the Maryland Act of 1798, 2 Kilty's Laws, by which it is provided in sub-chapter 5, section 5, that where letters testamentary have been granted in a case of the discovery of a will, and consequent revocation of letters of administration, it shall be the duty of the administrators to file their accounts, and "To deliver to the executor, on demand, all the goods, chattels and personal estate in their possession belonging to the deceased," and on failure their administration bonds shall be liable to be put in suit; and to sub-chapter 6, section 13 of the same statute, where it it is provided that if an executor or administrator shall not file his inventory within thirty days, his letters may be revoked and other letters granted, and thereupon the power of such executor or administrator shall cease, and he shall deliver up

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to the person obtaining such letters all the property of the deceased in his hands.

These statutes do not tend to support the distinction relied on by plaintiff in error, for, as is well established by the authorities we have cited, that the goods and chattels, personal estate and property of the deceased are such only as remain unchanged and *in specie*. When a debt due the deceased is collected or a chattel of his estate is sold, the money received becomes the property of the administrator, and he is accountable therefor to those beneficially interested in the estate and, under the Acts referred to, the removed executor or administrator was not bound to turn it over to his successor.

It may be conceded that the words "unadministered assets" as used in statutes, have sometimes been construed to include the proceeds of assets sold or collected and not accounted for or paid over; and that an administrator *de bonis non* might call a removed administrator to account for such proceeds. But whatever may have been the rule elsewhere upon this question, we think that the provisions of the Act of Congress of February 20, 1846, to enlarge the power of the several [264] orphans' courts held in and for the District of Columbia, 9 Stat. at L., 4, reproduced in sections 975, 976, 977, 978 of the Revised Statutes relating to the District of Columbia, the common law is not changed, and that the statute applies the same rule to the case of a removed, as has been applied to the case of a deceased executor or administrator.

Section 974 provides that if the security on the bond of an executor or administrator shall become for any cause insufficient, the court may order him to give further security. Section 975 provides that if he fails to comply with such order the court may remove him, and appoint a new administrator.

Section 976 is as follows:

"The court shall further have power to order and require any assets or estate of the decedent which may remain unadministered to be delivered to the newly appointed administrator *de bonis non*, and to enforce a compliance with such order by fine and attachment or any other legal process."

We think the meaning of this Act is plain. When it was passed, the words "assets or estate of the decedent which remain unadministered," had a uniform and well settled meaning in the statute law of Maryland, in force in the District of Columbia, and that meaning, as we have seen, was assets or estate remaining *in specie* and unchanged in form. The Act of 1846 must be construed as using the words in this well settled signification unless the contrary appears. But there is not a word in the Act of 1846 to indicate that Congress intended to give any new or different meaning to these words.

Independently of this consideration, the meaning of the law is not doubtful. It would be an unnatural construction, to say that the law required the removed executor or administrator to deliver to his successor assets which had been converted or wasted and which no longer existed, and when there remained only a right to sue for their value. When assets have been turned into money by an executor or administrator and the money mingled with his own, the assets have ceased to exist as assets or estate of the decedent.

It is the assets and estate of the decedent that [265] are to be delivered. The authorities we have referred to all concur in the proposition that where personal property of an estate under administration has been sold or a debt collected, the proceeds are not property of the decedent, but are the individual property of the executor or administrator, and he is liable to an action for not accounting.

When assets have been turned into money by an executor or administrator he is bound to account, not for the identical money received, but for an equal amount, and if he fails to account for and pay over this equal amount he is liable in damages, which are measured by the proceeds of the assets so turned into money. The statute surely cannot mean that the removed administrator must deliver damages to his successor.

Our conclusion is, therefore, that the Act of February 20, 1846, does not apply a different rule to the case of an administrator *de bonis non* succeeding a removed administrator from that applied to one succeeding a deceased administrator, and that no action lies on the bond sued on in this case in favor of the administrator *de bonis non* to recover money collected by Mrs. Ames from the United States on a claim belonging to the estate of the decedent. On the contrary, the defendant as surety on the bond of the removed administrator is liable only at the suit of creditors, distributees and legatees entitled to the funds.

The next point taken by the plaintiff in error, that the decree of the Justice of the Supreme Court of the District, directing the administratrix to pay over the fund to her successor, was conclusive, in this suit.

We are of opinion that, in making the order referred to, the Supreme Court of the District exceeded its jurisdiction, and that its order is for that reason void. Its authority and its sole authority for making the order is to be found in section 976, above referred to, of the Revised Statutes relating to the District of Columbia: "The court shall have further power to order and require any assets or estate of the decedent [266] which may remain unadministered to be delivered to the newly appointed administrator *de bonis non*." It appears from the pleadings in the case that the money ordered to be paid was the proceeds of a debt due the decedent, which his administratrix had collected. It was not, therefore, as we have seen, assets or estate of the decedent. It was the property of the removed administrator. The court was, therefore, without power to direct the payment of the money to the administrator *de bonis non*. Although a court may have jurisdiction over the parties and the subject-matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void. The limitation was well expressed by *Mr. Justice* Swayne in *Cornett* [Nash] v. *Williams*, 20 Wall., 226 [87 U. S., XXII., 254], when he said: "The jurisdiction having attached in this case, everything done, within the power of that jurisdiction, when collaterally questioned is held conclusive of the rights of the parties unless impeached for fraud."

The case of *Bigelow* v. *Forrest*, 9 Wall., 339 [76 U. S. XIX., 696], is in point. It was an action of ejectment. Bigelow, who was defend-

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ant in the court below, relied for title on a sale made under a decree of the United States District Court rendered in a proceeding for the confiscation of the premises sued for under the Act of July 17, 1862. Referring to this decree, *Mr. Justice* Strong, speaking for this court, said: "Doubtless a decree of a court having jurisdiction to make the decree cannot be collaterally impeached, but under the Act of Congress the district court had no power to order a sale which should confer on the purchaser rights outlasting the life of French Forrest." And the judgment of the court was that so much of the decree of the district court as was in excess of its powers was void.

In *Ex parte Lange*, 18 Wall., 163 [85 U. S., XXI., 872], *Mr. Justice* Miller delivering the opinion of the court, after stating that the circuit [267] court had exceeded its authority in pronouncing sentence upon Lange, and that its judgment was, therefore, void, said; "It is no answer to this to say that the court had jurisdiction of the person of the prisoner and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case."

In the case of *Windsor* v. *McVeigh*, 93 U. S., 274 [XXIII., 914], *Mr. Justice* Field, after a review of the cases bearing upon this subject, announces their result as follows: "The doctrine invoked by counsel, that when a court has once acquired jurisdiction it has a right to decide every question which arises in the case, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but is subject to many qualifications in its application. It is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it."

In this case the statute gave the court power, on the removal of an executor or administrator, to order the assets of the decedent, which might remain unadministered, to be delivered to the administrator *de bonis non*. The court made an order directing the delivery of the proceeds of administered assets. This was beyond the power conferred by the statute, and not within the jurisdiction of the court. The order was, therefore, void.

The result of these views is, that the judgment of the Supreme Court of the District of Columbia was right, and must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 86, 87; 31 Hun, 460.

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[268] PATRICK G. MEATH, *Plff. in Err.*,
v.
BOARD OF MISSISSIPPI LEVEE COMMISSIONERS.

(See S. C., Reporter's ed., 268-274.)

Special finding when sufficient—general finding—new action for same cause.

1. A special finding of the court for defendant on a plea of the Statute of Limitations is sufficient, although it does not find the contract by which the suit was brought, or fix the date when the cause of action accrued.

2. On a general finding for the defendants on all the issues of fact, no error can be assigned.

3. Where, upon the trial of a suit, the court found that the plaintiff did not have the legal title to the claim sued on when the action was commenced, the action was not defeated for any matter of form, so as to bring it within a statute allowing a new action for the same cause.

[No. 102.]

Submitted Nov. 8, 1883. Decided Nov. 19, 1883.

IN ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

The history and facts fully appear in the

Statement of the case by *Mr. Justice* **Woods:**

The plaintiff in error, Patrick G. Meath, who was the plaintiff below, brought this suit, on December 21, 1878, against the Board of Mississippi Levee Commissioners. It was founded on a contract in writing, under seal, between Meath and the defendants, dated April 13, 1869, by which Meath covenanted to construct certain levees in the State of Mississippi on or before April 1, 1871, and the defendants covenanted to pay him a specified price per cubic yard, in coupon bonds of the Board of Levee Commissioners maturing on January 1, 1876.

The declaration averred that the plaintiff expended large sums of money in the purchase of tools, etc., for the performance of said work, and while he was actually engaged therein and with ample means to accomplish it, the defendants, on January 10, 1870, without any fault or negligence of plaintiff, ordered and coerced him to desist from work on said levees until further orders from them; that he was ready, able and [269] willing to go on with the work and remained awaiting the orders of defendants until April 1, 1871, and was prevented from resuming the work by the wrongful acts of the defendants.

The declaration further averred that "on March 26, 1877, plaintiff brought his suit in the Circuit Court of the United States for the Southern District of Mississippi on said contract, and the same was tried on or about April 5, 1878, and was defeated for matter of form, in this, to wit: because though it appeared in the evidence that one Thomas Boyle had purchased, for the sole use and benefit of plaintiff, the said claim under said covenant against defendants at a sale thereof, made by plaintiff's assignee in bankruptcy, the formal assignment made by him to plaintiff had not in fact been executed and delivered until after the bringing of said action, though antedated to conform to the fact and, therefore, that the said action should have been brought in the name of the said Boyle, for plaintiff's use."

The plaintiff claimed in the present action the sum of $70,000 as due him for work done and accepted under said contract, and a large sum for damages, because he was not permitted to complete the work.

The defendant filed eight pleas, but as the judgment of the court below was based exclusively on the sixth and seventh pleas, the others need not be noticed. The sixth plea averred that "The several supposed causes of action in said declaration mentioned, if any such there were or still are, did not, nor did any or either

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of them, accrue to the said plaintiff at any time within seven years next preceding the commencement of this suit."

The seventh plea set out the facts in regard to such former suit, begun March 26, 1877, referred to in the declaration, denied that it was decided against the plaintiff for matter of form only, and averred that it was so decided on matter of substance; and concluded by averring that "the present action was not brought within seven years after the cause of action accrued," and was, therefore, barred by the statute.

[270] The plaintiff demurred to these pleas, and his demurrer was overruled. Thereupon he filed his replication, taking issue.

The parties waived a jury and submitted the issues of fact to the court by the following agreement:

"In this cause a jury is waived, and it is agreed to submit the cause to the court in lieu of a jury to be decided on the law and the evidence, and separate findings thereof to be rendered by the court, so that the decision may be finally reviewed by the Supreme Court of the United States. The court having, in the decision of the questions arising upon the demurrers to sixth and seventh pleas filed, expressed the opinion that the pending of the former suit could not be availed of to prevent the bar of the Statute of Limitations, and that this action is barred by limitation, it is agreed that that sole question shall be presented upon the pleadings and proof, and that only such evidence as in the judgment of the court bears upon that issue shall be incorporated in its findings and presented to the Supreme Court of the United States; and that the record for said court shall consist of the pleadings and exhibits, the orders of the court, the findings of fact and law in the cause, and this agreement. And it is further agreed that should the Supreme Court differ in opinion with and reverse the circuit court, the cause shall be remanded for trial on its merits on all the other questions in the case."

The cause was tried under this agreement and the court made both a general and special finding of facts. The general finding was as follows: "The court having heard the evidence upon the sixth and seventh pleas of the defendant, and replications thereto, etc., finds said issues in favor of defendants, and that said plaintiff's right of action when this suit was brought was barred by the Statute of Limitations."

The court found, by its special findings, as follows: the plaintiff's cause of action accrued in this case on April 1, 1871, and, what the record also shows, this action was brought December 21, 1878; on March 26, 1877, the plaintiff brought an action against the defendant on [271] the contract set out in and exhibited with the declaration in this cause; the defendant pleaded a transfer of all interest in said contract to an assignee in bankruptcy, under the bankrupt law; to said plea the plaintiff replied that his assignee in bankruptcy had sold the said contract to one Boyle, who purchased it for the plaintiff, and assigned it to him on the — day of January, 1877; issue was joined on this replication; this issue was submitted to the court for trial; on the trial it was shown that the assignment by Boyle to Meath was made on January 28, 1878; on this state of facts the court found that the plaintiff did not have the legal title to the claim sued on when the action was commenced; and judgment therein was rendered in that suit for the defendants.

Upon the general and special findings, the court found, as matter of law, that this action was barred by the limitation of seven years, and rendered judgment for the defendants. To this conclusion of law the plaintiff excepted and sued out the present writ of error.

Messrs. **S. P. Walker,** *George Gantt* and *Josiah Patterson*, for plaintiff in error.

Mr. **James Lowndes,** for defendant in error.

Mr. Justice **Woods** delivered the opinion of the court:

It is insisted, by the plaintiff in error, that the special findings of the court are fatally defective, because they do not find the contract by which the suit was brought or fix the date when the cause of action accrued, and that for this reason the judgment of the circuit court should be reversed. We might dismiss this assignment of error on the ground that there was a general finding for defendants on all the issues of fact, and that no error can be assigned on such a finding. *Tioga R. R. Co.* v. *Blossburg and C. R. R. Co.*, 20 Wall., 137 [87 U. S., XXII., 331]. But the special findings also fix specifically the date when the plaintiff's right of action accrued, to wit: on the first day of April, 1871. In considering the sufficiency of the special findings the stipulation between counsel, for submitting the cause to the court, must be kept in mind. The only questions which, by this agreement, were to be submitted to the court were the issues raised by the replication to the sixth and seventh pleas being pleas of the Statute of Limitations. [272] The contract and breaches, as set out in the declaration, were, for the purpose of this trial, taken for granted; they were confessed by the pleas, and, as a matter of avoidance, the Statute of Limitations was set up. The court, by its general and special findings, has declared, as a conclusion of fact, that the matters set up in the pleas of the Statute of Limitations were proven. We think the findings pass upon every issue submitted to the court, and that they are not imperfect or defective.

The limitation law of Mississippi applicable to this case was as follows:

"Art. 6. All actions of debt or covenant founded upon any bond, obligation or contract, under seal or upon the award of arbitrators, shall be commenced within seven years next after the cause of such action accrued, and not after."

The Revised Code of Mississippi of 1871 failed to provide any limitation for causes of action under seal, which arose after October 1, 1871, the date fixed by section 2938, when that Code should take effect, but did contain the following provision:

"Sec. 2172. The several periods of limitation prescribed by this chapter, shall commence from the date when it shall take effect, but the same shall not apply to any action commenced nor to any cases where the right of action, or of entry, shall have accrued before that time, but the same shall be subject to the laws now in force; but this law may be pleaded in any case where a bar has accrued under the provisions thereof."

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It will appear from these provisions of the statute law that the absence of any limitation of actions upon contracts under seal, between October 1, 1873, and April 19, 1878, can have no effect upon the controversy in this case. When the cause of action in this case arose, as found by the court, to wit: on April 1, 1871, article 6, page 400, of the Code of 1857, above quoted, barring actions or sealed instruments in seven years, was in force, and this limitation was expressly continued by the Revised Code of 1871.

[273] The case of *Furlong* v. *State*, 58 Miss., 717, relied on by counsel for plaintiff in error, can have no application to the case, for in that suit the cause of action accrued after the Code of 1871 had taken effect. Nothing was decided in that case which has any bearing on this.

Therefore, upon the facts specially found, namely: that the cause of action in this case accrued on April 1, 1871, and that this suit was not brought until December 21, 1878, it is apparent that the sixth plea of defendant is sustained, unless this case is saved by the averment in the declaration that the suit was brought within a year after a former suit for the same cause of action had been defeated for matter of form.

It is, therefore, to be considered whether, upon the special findings, the plaintiff is entitled to the saving clause of section 2163 of the Code of 1871, which is as follows:

"If, in any action duly commenced within the time allowed, the writ shall be abated or the action otherwise avoided or defeated by the death or marriage of any party thereto, or for any matter of form, * * * the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original suit."

The findings show that on March 26, 1877, an action, in all respects similar to this, was brought, on the same contract sued on in this case, by the plaintiff in error against the same defendants, and that, upon the trial of that suit, the court found that the plaintiff did not have the legal title to the claim sued on when the said action was commenced, and judgment was accordingly rendered in favor of the defendant and against the plaintiff.

Upon these findings the circuit court was of opinion in this case that the former action was not defeated for any matter of form, and therefore that the plaintiff's cause did not fall within the exception of section 2173 of the Code of 1871, and was barred by the limitation of seven years applicable to contracts under seal.

We are of opinion that the facts thus specially found sustain the judgment of the circuit court [274] in this case. The Supreme Court of Mississippi in the case of *R. R. Co.* v. *Orr*, 48 Miss., 279, has construed the phrase "for matter of form" in section 2163, and declared that it "relates to technical defects in the form of the action or pleadings or proof, or to variances between the one and the other."

This case, it is evident, does not fall within this rule. The action brought by plaintiff on March 26, 1877, was defeated because it appeared from the proof that when it was brought the plaintiff had no cause of action. The issue was deliberately and squarely presented by the pleadings in that former suit whether at the time of its commencement the right of action was in the plaintiff. The defendants averred it to be in the plaintiff's assignee in bankruptcy. The plaintiff replied that the contract on which his action was based had been bought at the assignee's sale and assigned to Thomas Boyle, who before the commencement of the action, to wit: in January, 1877, had assigned and transferred it to him. On this the defendant took issue, and on that issue the cause was tried.

Upon the trial it turned out that the assignment by Boyle to the plaintiff was not made until January 28, 1878, more than ten months after the action was brought, and the finding and judgment on the issue submitted was against the plaintiff and for the defendant.

Upon this state of facts we think the former suit was defeated, not for any matter of form, but for matter of substance. The plaintiff failed in his action because the legal title to the contract on which he brought his suit was in another, because the evidence did not sustain the issue upon which he had staked his cause. The present case, therefore, does not fall within the exception prescribed by section 2137 of the Code of Mississippi of 1871, and is barred by the limitation of seven years prescribed by the Code of 1851 applicable to contracts under seal.

It follows that the judgment of the Circuit Court was right, and must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S

WILLIAM R. GRACE ET AL., *Plffs. in Errr.*, [278]
v.
AMERICAN CENTRAL INSURANCE COMPANY OF ST. LOUIS.

(See S. C., Reporter's ed., 278-285.)

Insurance policy, construction of—usage, to vary—jurisdiction, averment of—judicial notice.

*1. A fire insurance policy contained this clause: "This insurance may be terminated at any time, at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time, at the option of the company, on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term of the policy. It is a part of this contract, that any person other than the assured, who may have procured the insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances whatever; or in any transactions relating to this insurance:" held, that this clause imports nothing more than that the person obtaining the insurance, was to be deemed the agent of the insured in matters immediately connected with the procurement of the policy; that where his employment did not extend beyond the procurement of the insurance, his agency ceased upon the execution of the policy, and subsequent notice to him of its termination by the company was not notice to the insured.

2. Parol evidence of usage or custom among insurance men to give such notice to the person procuring the insurance, was inadmissible to vary the terms of the contract.

3. The doctrine re-affirmed, that when jurisdiction of the Circuit Court depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, must be distinctly and positively averred in the pleadings, or appear affirmatively and with equal distinctness in other

*Head notes by *Mr. Justice* HARLAN.

NOTE.—*Usage and custom, admissibility in construction of contracts.* See *note* to Adams v. Otterback, 56 U. S. (15 How.), 539.

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parts of the record. An averment that parties reside, or that a firm does business, in a particular State, or that a firm is "of" that State, is not sufficient to show citizenship in such State.

4. Where the record does not show a case within the jurisdiction of a Circuit Court, this court will take notice of that fact although no question as to jurisdiction had been raised by the parties.

[No. 60.]

Argued Oct. 19, 1883. Decided Nov. 19, 1883.

IN ERROR to the Circuit Court of the United States for the Eastern District of New York.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **Winchester Britton** and *B. F. Tracy*, for plaintiffs in error:

The notice to Anthony was not such a notice of election to terminate the risk as was required by the terms of the policy.

Whited v. *Ins. Co.*, 76 N. Y., 415; *Rohrbach* v. *Ins. Co.*, 62 N. Y., 47; *Alexander* v. *Ins. Co.*, 66 N. Y., 464; *Van Schoick* v. *Ins. Co.*, 68 N. Y., 434; *Ins. Co.* v. *Myers*, 30 Am. Rep., 521; 55 Miss., 479.

The case of the Standard Oil Co., against the Triumph Ins. Co. (64 N. Y., 85), has no application here. See, *Brueck* v. *Ins. Co.*, 21 Hun, 548.

Nor does the testimony, claimed to establish a custom, charge plaintiffs with this notice to Anthony.

Bradley v. *Wheeler*, 44 N. Y., 500; *Higgins* v. *Moore*, 34 N. Y., 425; *Esterly* v. *Cole*, 3 N. Y., 502; *Dawson* v. *Kittle*, 4 Hill, 107; *Wheeler* v. *Newbould*, 5 Duer, 29; *Brueck* v. *Ins. Co.* (*supra*); *Wallis* v. *Bailey*, 49 N. Y., 464; *Woolen Co.* v. *Proctor*, 7 Cush., 417; *Cunningham* v. *Fonblanque*, 6 Carr. & P., 44; *Garey* v. *Meagher*, 33 Ala., 630; *Bank* v. *Swain*, 29 Md., 483; *Mills* v. *Hallock*, 2 Edw. Ch., 652; *Haskins* v. *Warren*, 115 Mass., 514; *Randall* v. *Smith*, 18 Am. Rep., 200, and *note*; *Adams* v. *Ins. Co.*, 76 Pa., 411; *Harris* v. *Tumbridge*, 83 N. Y., 92; Lawson, Usages and Customs, pp. 23, 48, 52, 55, 63, 89, 97.

Mr. **George W. Parsons**, for defendant in error:

Independent of direct and positive evidence of the fact of the agency, the law interprets the acts of the parties as constituting an agency.

Phil. Ins., sec. 1870; *Meadowcraft* v. *Ins. Co.*, 61 Pa. St., 91; *Bodine* v. *Ins. Co.*, 51 N. Y., 117; *Bergson* v. *Ins. Co.*, 5 Ben. Fire Ins. Cas., 253; Story, Ag., sec. 14.

Notice was given and accepted; and the contract of insurance was then and there, by its express terms, terminated.

Ins. Co. v. *Stark*, 6 Cranch, 272.

In *Standard Oil Co.* v. *Ins. Co.*, 64 N. Y., 85, a case quite parallel with that under discussion, it was held that an insurance broker, employed by a party to effect insurance for him, must be regarded as his agent, and may be regarded by the insurer as clothed with full authority to act for his principal in procuring, modifying or canceling policies; and his acts in these respects are binding upon his principal, the same as if done by the principal.

See, also, *Ins. Co.* v. *Mueller*, 8 Ins. Law Jour., 263; *Armour* v. *Ins. Co.*, 47 N. Y. Sup. Ct., 352; *Bank* v. *Davis*, 2 Hill, 461; *McEwen* v. *Ins. Co.*, 5 Hill, 101; *Bank* v. *Canal Co.*, 4 Paige, 137; *Boyd* v. *Vanderkemp*, 1 Barb. Ch., 273; *Anderson* v. *Coonley*, 21 Wend., 279; *Ins. Co.*, v. *Ins. Co.*, 66 N. Y., 119; *Ins. Co.* v. *Stark*, 6 Cranch, 268.

There was uncontradicted and satisfactory evidence given of a well known custom to give the notice of cancellation in such cases to the agent. The usage is entirely in harmony with the terms of the contract. But even if the contract had been silent on that subject, the law would hold that the parties must have contracted in reference to such custom, which indeed should be taken to be a part of the contract.

Story, Ag., secs. 77, 106; Pars. Cont., 52; *Hinton* v. *Lock*, 5 Hill, 437; *McPherson* v. *Cox*, 86 N. Y., 476; *Duncan* v. *Hill*, 19 W. R., 894; 3 Kent, Com., 389; Lawson, Usages and Customs, sec., 24.

As to the admission of evidence of usage, see, 2 Phil. Ev., 4 Am. ed., 798; *Blackett* v. *Royal Assur. Co.*, 2 Cromp. & J., 244; *Hinton* v. *Locke* (*supra*); *Grant* v. *Maddox*, 15 Mees. & W., 787; *Yates* v. *Pym*, 6 Taunt., 446; *Keener* v. *Bank*, 2 Barr., 287; *Sweet* v. *Jenkins*, 1 R. I., 147; *Mumford* v. *Hallett*, 1 Johns., 439; *Rankin* v. *Ins. Co.*, 1 Hall (N. Y.), 619; *Partridge* v. *Ins. Co.*, 1 Dill., 189; *Barnard* v. *Kellogg*, 10 Wall., 383 (77 U. S., XIX., 987]; *Steinbach* v. *Ins. Co.*, 13 Wall., 183 (80 U. S., XX., 615]; *Blackett* v. *Ins. Co.* (*supra*); *Rogers* v. *Ins. Co.*, 1 Story, 603; *Ins. Co.* v. *Holcrafe*, 58 Ill., 516.

Mr. Justice **Harlan** delivered the opinion of the court:

This is an action upon a policy of fire insurance issued September 26, 1877, by the American Central Insurance Company of St. Louis to the firm of Wm. R. Grace & Co.

The circumstances under which it was issued are these: a clerk of Wm. R. Grace & Co., [279] charged with the duty of effecting insurance against loss by fire upon their property, employed one W. R. Moyes, a broker in the City of New York, to obtain insurance, in a specified amount, for his principals. Moyes instructed one Anthony, an insurance broker and agent in Brooklyn, who had on previous occasions obtained policies for Grace & Co., to procure the required amount of insurance. Anthony obtained the policy in suit from the general agents in New York City, of the defendant Company, mailed or delivered it to Moyes, and by the latter it was delivered to Grace & Co. not later than the day succeeding its date. On the morning of October 6, one Carrol, for the Insurance Company, verbally notified Anthony that the Company refused to carry the risk and required the policy to be returned. There is some conflict in the testimony as to what occurred between Carrol and Anthony on this occasion. But, in the view which the court takes of this case, it may be conceded that Anthony gave Carrol to understand that the policy would be returned to the Company or its agents. The property insured was destroyed by fire on the night of October 6, 1877, or early on the morning of the 7th. Prior to the fire neither the insured, nor their clerk by whose instructions the policy was obtained, had any knowledge or notice of the conversation between Carrol and Anthony, or of the fact that the Company had elected not to carry the risk. At the trial it was admitted that the contract between the parties was fully executed upon the delivery of the policy to the insured.

The eighth clause of the policy is in these

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words: "This insurance may be terminated at any time at the request of the assured, in which case the Company shall retain only the customary short rates, for the time the policy has been in force. The insurance may also be terminated at any time at the option of the Company, on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term of the policy. It is a part of this contract that any person other than the assured, who may have procured the insurance to be taken by this Company, shall be deemed to be [280] the agent of the assured named in this policy, and not of this Company under any circumstances whatever, or in any transaction relating to this insurance."

The court refused, although so requested by plaintiffs, to rule that Anthony was not, within the meaning of the policy, their agent for the purpose of receiving notice of its termination; but charged the jury, in substance, that Anthony was, for such purpose, to be deemed the agent of the insured. Exception was taken in proper form by plaintiffs, as well to the refusal to give their instruction, as to that given by the court to the jury. A verdict was returned for the Company, and judgment thereon was entered.

The charge, in connection with the opinion delivered by the learned Judge who presided at the trial, indicates that, in his judgment, the words in the eighth clause: "It is a part of this contract that any person, other than the assured, who may have procured the insurance to be taken by this Company, shall be deemed to be the agent of the assured named in this policy," were intended to be qualified by the words "in any transaction relating to this insurance." Upon this ground it was ruled that notice of the termination of the policy was properly given to Anthony, who personally procured the insurance. We do not concur in this interpretation of the contract. The words in their natural and ordinary signification import nothing more than that the person obtaining the insurance was to be deemed the agent of the insured in all matters immediately connected with the procurement of the policy. Representations by that person in procuring the policy, were to be regarded as made by him in the capacity of agent of the insured. His knowledge or information, [282] pending negotiations for insurance, touching the subject-matter of the contract, was to be deemed the knowledge or information of the insured. When the contract was consummated by the delivery of the policy he ceased to be the agent of the insured, if his employment was solely to procure the insurance. What the Company meant by the clause in question, so far as it relates to the agency, for the one party or the other, of the person procuring the insurance, was, to exclude the possibility of such person being regarded as its agent, under any circumstances whatever, or in any transaction relating to this insurance. This, we think, is not only the proper interpretation of the contract, but the only one at all consistent with the intention of the parties as gathered from the words used. There is, in our opinion, no room for a different interpretation. If the construction were doubtful, then the case would be one for the application of the familiar rule that the words of an instrument are to be taken most strongly against the party employing them and, therefore, in cases like this, most favorably to the insured. The words are those of the Company, not of the assured. If their meaning be obscure, it is the fault of the Company. If its purpose was to make notice, to the person procuring the insurance, of the termination of the policy, equivalent to notice to the insured, a form of expression should have been adopted which would clearly convey that idea, and thus prevent either party from being caught or misled.

As the uncontradicted evidence was that Anthony's agency or employment extended only to the procurement of the insurance, the jury should have been instructed that his agency ceased when the policy was executed, and that notice to him, subsequently, of its termination was ineffectual to work a rescission of the contract.

At the trial below, evidence was offered by the Company and was permitted, over the objection of plaintiffs, to go to the jury, to the effect that, when this contract was made, there existed in the Cities of New York and Brooklyn an established, well known general custom in fire insurance business, which authorized an insurance company, entitled upon notice to terminate its policy, to give such notice to the broker by or through whom the insurance was procured. [283] This evidence was inadmissible because it contradicted the manifest intention of the parties as indicated by the policy. The objection to its introduction should have been sustained. The contract, as we have seen, did not authorize the Company to cancel it upon notice merely to the party procuring the insurance—his agency, according to the evidence, not extending beyond the consummation of the contract. The contract, by necessary implication, required notice to be given to the insured, or to some one who was his agent to receive such notice. An express written contract, embodying in clear and positive terms the intention of the parties, cannot be varied by evidence of usage or custom. In *Barnard* v. *Kellogg*, 10 Wall., 383 [77 U. S., XIX., 987], this court quotes with approval the language of *Lord* Lyndhurst in *Blackett* v. *Royal Exchange Assur. Co.*, 2 Cromp. & J., 249, that "Usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain." This rule is based upon the theory that the parties, if aware of any usage or custom relating to the subject-matter of their negotiations, have so expressed their intention as to take the contract out of the operation of any rules established by mere usage or custom. Whatever apparent conflict exists in the adjudged cases as to the office of custom or usage in the interpretation of contracts, the established doctrine of this court is as we have stated. *Partridge* v. *Ins. Co.*, 15 Wall., 573 [82 U. S., XXI., 229]; *Robinson* v. *U. S.*, 13 Wall., 365; [80 U. S., XX., 654]; *The Delaware*, 14 Wall., 603 [81 U. S., XX., 783]; *Nat. Bk.* v. *Burkhardt*, 100 U. S., 692 [XXV., 769].

The record in this case presents a question of jurisdiction which, although not raised by either party in the court below or in this court, we do not feel at liberty to pass without notice. *Sullivan* v. *Steamboat Co.*, 6 Wheat., 450. As the jurisdiction of the Circuit Court is limited, in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of

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the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears. *Turner* v. *Bank*, 4 Dall., 8; *Ex parte Smith*, 94 U. S., 456 [XXIV., 165]; *Robertson* v. *Cease*, 97 Id., 649 [XXIV., 1058]. In the last case it is said that, "Where jurisdiction depends upon the citizenship of the [284] parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively and with equal distinctness in other parts of the record." *R. Co.* v. *Ramsey*, 22 Wall., 322 [89 U. S., XXII., 823]; *Briges* v. *Sperry*, 95 U. S., 401 [XXIV., 390]. In *Brown* v. *Keene*, 8 Pet., 115, it is declared not to be sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings; that the averments should be positive.

The present case was commenced in the Supreme Court of New York and was thence removed, on the petition of the defendant, to the Circuit Court of the United States for the Eastern District of New York. The record does not satisfactorily show the citizenship of the parties. The complaint filed in the state court shows that the firm of Wm. R. Grace & Co., composed of Wm. R. Grace, Michael P. Grace and Charles R. Flint, is doing business in New York, and that Wm. R. Grace and Charles R. Flint are residents of that State. The petition for the removal of the cause shows that the defendant is a Corporation of the State of Missouri; that Wm. R. Grace and Charles R. Flint reside in New York; and that Michael P. Grace is a resident of some State or country unknown to defendant, but other than the State of Missouri. The record, however, fails to show of what State the plaintiffs are citizens. They may be doing business in and have a residence in New York without, necessarily, being citizens of that State. They are not shown to be citizens of some State other than Missouri. *Bingham* v. *Cabot*, 3 Dall., 383; *Abercrombie* v. *Dupuis*, 1 Cranch, 343; *Jackson* v. *Twentyman*, 2 Pet., 136; *Sullivan* v. *Steamboat Co.*, *supra*; *Hornthall* v. *Collector*, 9 Wall., 565 [76 U. S., XIX., 562]; *Brown* v. *Keene*, *supra*; *Robertson* v. *Cease*, *supra*.

It is true that the petition for removal, after stating the residence of the plaintiffs, alleges "that there is, and was at the time when this action was brought, a controversy therein between citizens of different States." But that is to be deemed the unauthorized conclusion of law which the petitioner draws from the facts previously averred. Then there is the bond given by the defendant on the removal of the cause, which recites the names of the firm of Wm. R. [285] Grace & Co., and describes it as "of the County of Kings and State of New York." If that bond may be considered as part of the record for the purpose of ascertaining the citizenship of the parties, the averment that the plaintiffs are "of the County of Kings and State of New York" is insufficient to show citizenship. *Bingham* v. *Cabot*, 3 Dall., 382; *Wood* v. *Wagnon*, 2 Cranch, 9.

As the judgment must be reversed and a new trial had, we have felt it to be our duty, notwithstanding the record, as presented to us, fails to disclose a case of which the court below could take cognizance, to indicate, for the benefit of parties at another trial, the conclusion reached by us on the merits. And we have called attention to the insufficient showing as to the jurisdiction of the Circuit Court so that, upon the return of the cause, the parties may take such further steps, touching that matter, as they may be advised.

The judgment is reversed and the cause remanded, with directions to set aside the judgment, and for such further proceedings as may not be inconsistent with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 355, 342, 382, 386; 33 Hun, 588.

MONONGAHELA NATIONAL BANK OF BROWNSVILLE, PA., *Plff. in Err.*, [275]
v.
SAMUEL H. JACOBUS.

(See S. C., Reporter's ed., 275-277.)

Competency of witnesses.

In proceedings subsequent to judgment on an execution attachment against property claimed by a third person, the deceased debtor's administrator and the claimant of the property are competent witnesses under sec. 858, R. S., to prove the alleged transfer of such property from such debtor to claimant, and its consideration.

[No. 84.]

Submitted Oct. 26, 1883. Decided Nov. 19, 1883.

IN ERROR to the Circuit Court of the United States for the Western District of Pennsylvania.

The history and facts of the case appear in the opinion of the court.

Messrs. **D. T. Watson** and *Knox & Reed*, for plaintiff in error.

Messrs. **Thos. C. Lazear** and *J. W. Douglass* for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The plaintiff in error, having recovered a judgment for $9,056.12 against Alfred Patterson, in the Circuit Court of the United States for the Western District of Pennsylvania, caused an execution attachment to be issued against the Fayette County Railroad Company and Samuel H. Jacobus, the defendant in error, attaching, as the property of Patterson, certain shares of the capital stock of that company, which stood in the name of Jacobus. The attachment was duly served upon Patterson, Jacobus and the railroad company. The controlling issue in the case is, whether the stock was the property of Alfred Patterson, and liable to be attached in satisfaction of the judgment [276] against him. Jacobus claims that the stock became his property in virtue of an unrecorded assignment and transfer, for a valuable consideration, by Alfred Patterson prior to the rendition of that judgment; consequently, that it is not liable to the Bank's attachment.

In the progress of the litigation, Patterson died and his administrator was substituted of record as a party defendant.

The contention on the part of the Bank is, that the assignment was by an insolvent debtor in trust for certain preferred creditors, and that

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it must have been recorded in order to protect the stock from the attachment of judgment creditors; that of Jacobus is, that the assignment was made in consideration of his assumption of certain liabilities of the debtor, and without any intent upon the part of either himself or Patterson to hinder, delay or defraud the creditors of the latter.

At the trial, Jacobus, a witness in his own behalf, was allowed, over the objections of plaintiff, to testify as to what took place between him and Patterson at the time the stock in question was assigned by the latter to the former. The administrator was also permitted, over the objection of the plaintiff, to prove—he being present, on the occasion of the assignment—that the assumption by Jacobus of certain debts of Patterson's was in consideration and on the faith, of the transfer of this stock. This testimony bore directly upon the controlling issue in the case between the Bank and Jacobus.

Whether Jacobus and the administrator of Patterson were competent witnesses, depends upon the construction of section 858 of the Revised Statutes, which provides that "In the courts of the United States no witness shall be excluded in any action on account of color or in any civil action because he is a party to or interested in the issue tried; *Provided*, That in actions by or against executors, administrators or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party or required to testify thereto by the court."

[277] In *Potter* v. *Nat. Bk.*, 102 U. S., 163 [XXVI., 111], we held that in actions in which judgment may be rendered for or against an executor, administrator or guardian, it is no objection to the competency of the witness that he is interested in the issue to be tried; because, in such cases, the statute excluded only parties to the record, that is, those who, according to the established rules of pleading and evidence, are parties to the issue. It is now argued by plaintiff in error that Jacobus, as well as the administrator of Alfred Patterson, are parties to the record, and, unless called by the court or the opposite party, are incompetent to testify as to any transactions or statements by the intestate.

We are of opinion that they were each competent as a witness on the issue between the Bank and Jacobus, as to whether these shares of stock were the property of the latter, and subject to the former's attachment. The liability of Alfred Patterson to the Bank had become fixed by the judgment against him for the debt. There can be no judgment against his estate, in this action, by which the amount of the Bank's claim can be increased, or whereby Patterson's estate can be released from liability in whole or in part. The real issue was between the Bank and Jacobus and, consequently, the case is within the first clause of section 858, which provides that "No witness shall be excluded * * * in any civil action because he is a party to or interested in the issue tried." Within the meaning and object of the proviso, this is not an action by or against an administrator, on which judgment may be rendered for or against him.

We are of opinion that there was no error in admitting Jacobus or the administrator of Patterson to testify on their own motion.

In reference to the merits of the case, we do not perceive that any error was committed by the circuit court. The jury were properly instructed as to the law of the case.

The judgment is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

STATE OF LOUISIANA, *ex rel.* FOLSOM BROTHERS, A Firm Composed of GEORGE FOLSOM and HENRY FOLSOM, *Plffs. in Err.*, *v.* MAYOR AND ADMINISTRATORS OF THE CITY OF NEW ORLEANS.

(See S. C., Reporter's ed., 285-296.)

Action for damages caused by a mob—liability of city—judgment when not a contract—valid state law.

1. The right to re-imbursement from a city for damages caused by a mob, is not founded upon any contract between the city and the sufferers, but is created by a law of the Legislature, and can be withdrawn or limited at its pleasure, either in the extent of the liability or in the means of its enforcement.

2. The obligation to make indemnity, created by the Statute, has no more element of contract in it, because merged in a judgment, than it had previously.

3. A judgment for damages for a tort is not a contract, within the meaning of the Federal Constitution.

4. A state law, limiting the power of a city to raise money by taxation, is not unconstitutional because it prevents the collection of a judgment against the city for damages caused by a mob; it does not violate the 14th Amendment because the owner is not deprived of his property in the judgment, (art. 1. sec. 10); because the judgment is not a contract.

[No. 34.]

Argued Apr. 9, 10, 1883. Decided Nov. 19, 1883.

IN ERROR to the Supreme Court of the State of Louisiana.

This case arose upon the petition of the State of Louisiana, on the relation of the plaintiff in

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NOTE.—*Liability of municipal corporation for property destroyed by a mob.*

Municipal corporations are not liable at common law to pay for the property of individuals, destroyed by mobs or in riots. Western College v. Cleveland, 12 Ohio St., 375; Mayor of Baltimore v. Poultney, 25 Md., 107; Prather v. Lexington, 13 B. Mon., 559; County of Allegheny v. Gibson, 90 Pa. St., 397; S. C., 35 Am. Rep., 670; Mayor, etc., v. Poultney, 25 Md., 107.

The Legislature may constitutionally give a remedy applicable to such a case and may regulate the mode of assessing the damages. Sarles v. Mayor of N. Y., 47 Barb., 447; *In re* Pennsylvania Hall, 5 Pa. St., 204; Atchison v. Twine, 9 Kan., 350; Underhill v. Manchester, 45 N. H., 214; Palmer v. Concord, 48 N. H., 211; Wing Chung v. Los Angeles, 47 Cal., 531; Solomon v. Kingston, 24 Hun, 562; Duffy v. Baltimore, Taney, 200; Luke v. Brooklyn, 43 Barb., 54; Loomis v. Supervisors, 6 Lans., 269; Brightman v. Bristol, 65 Me., 426.

A person injured while aiding the police of a city, in accordance with a city ordinance, in arresting disturbers of the peace, cannot recover damages against the city. Cobb v. Portland, 55 Me., 381.

Municipal corporations are not liable for injuries caused by the failure of its officers to suppress a mob. Campbell v. City of Montgomery, 53 Ala., 527; S. C., 25 Am. Rep., 656; Hart v. Bridgeport, 13 Blatchf., 289; Prather v. Lexington, 13 B. Mon., 559.

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error, filed in the Third District Court for the Parish of Orleans, for a writ of *mandamus* to enforce the payment of certain judgments against the City of New Orleans.

The said court gave judgment for the relators. This judgment having been reversed, on appeal, by the Supreme Court of Louisiana, the relators sued out this writ of error.

The case is further stated by the court.

Messrs. **Thomas J. Semmes,** *Robert Mott* and *Henry B. Kelly*, for plaintiffs in error.

Messrs. **M. F. Morris,** *Henry C. Miller*, *R. T. Merrick* and *E. H. McCaleb*, for defendants in error.

Mr. Justice **Field** delivered the opinion of the court:

The relators are the holders of two judgments against the City of New Orleans, one for $26,850, the other for $2,000. Both were recovered in the courts of Louisiana; the first in June, 1877, by the relators; the second in June, 1874, by parties who assigned it to them. Both judgments were for damages done to the property of the plaintiffs therein by a mob or riotous assemblage of people in the year 1873. A statute of the State made municipal corporations liable for damages thus caused within their limits. R. S. of La., 1870, sec. 2453.

The judgments were duly registered in the office of the Comptroller of the city, pursuant to the provisions of the Act known as No. 5 of the Extra Session of 1870, and the present proceeding was taken by the relators to compel the authorities of the city to provide for their payment. At the time the injuries complained of were committed and one of the judgments was recovered, the City of New Orleans was authorized to levy and collect a tax upon property within its limits of one dollar and seventy-five cents upon every one hundred dollars of its assessed value. At the time the other judgment was recovered this limit of taxation was reduced [287] to one dollar and fifty cents on every one hundred dollars of the assessed value of the property. By the Constitution of the State, adopted in 1879, the power of the city to impose taxes on property within its limits was further restricted to ten mills on the dollar of the valuation.

The effect of this last limitation is to prevent the relators, who are not allowed to issue executions against the city, from collecting their judgments, as the funds receivable from the tax thus authorized to be levied are exhausted by the current expenses of the city, which must first be met.

The relator sought in the state courts to compel a levy by the city of taxes to meet their judgments at the rate permitted when the damages were done for which the judgments were obtained. They contended that the subsequent limitation imposed upon its power violated that clause of the Federal Constitution which prohibits a State from passing a law impairing the obligation of contracts, and also that clause of the 14th Amendment which forbids a State to deprive any person of life, liberty or property without due process of law. The Supreme Court of the State, reversing the lower court, decided against the relators, and the same contention is renewed here.

The right to re-imbursement for damages caused by a mob or riotous assemblage of people is not founded upon any contract between the city and the sufferers. Its liability for the damages is created by a law of the Legislature, and can be withdrawn or limited at its pleasure. Municipal corporations are instrumentalities of the State for the convenient administration of government within their limits. They are invested with authority to establish a police to guard against disturbance; and it is their duty to exercise their authority so as to prevent violence from any cause, and particularly from mobs and riotous assemblages. It has, therefore, been generally considered as a just burden cast upon them, to require them to make good any loss sustained from the acts of such assemblages which they should have repressed. The imposition has been supposed to create, in the holders of property liable to taxation within their limits, an interest to discourage and pre- [288] vent any movements tending to such violent proceedings. But, however considered, the imposition is simply a measure of legislative policy, in no respect resting upon contract, and subject, like all other measures of policy, to any change the Legislature may see fit to make, either in the extent of the liability or in the means of its enforcement. And its character is not at all changed by the fact that the amount of loss, in pecuniary estimation, has been ascertained and established by the judgments rendered. The obligation to make indemnity, created by the statute, has no more element of contract in it because merged in the judgments than it had previously. The term "contract" is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds for considerations proceeding from one to the other to do, or not to do, certain acts. Mutual assent to its terms is of its very essence.

A judgment for damages, estimated in money, is sometimes called by text writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered; and, by a fiction of law, a promise to pay is implied where such legal obligation exists. It is on this principle that an action *ex contractu* will lie upon a judgment. Chit. Cont., Perkins' ed., 87. But this fiction cannot convert a transaction wanting the assent of parties into one which necessarily implies it. Judgments for torts are usually the result of violent contests and, as observed by the court below, are imposed upon the losing party by a higher authority against his will and protest. The prohibition of the Federal Constitution was intended to secure the observance of good faith in the stipulation of parties against any state action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it; and no case arises for the operation of the prohibition. *Garrison* v. *New York*, 21 Wall., 203 [88 U. S., XXII., 614]. There is, therefore, nothing in the liabilities of the city by reason of which the relators recovered their judgments, that precluded the State from changing the taxing power of the city, even though the taxation be so limited as to postpone the payment of the judgments.

The clause of the 14th Amendment cited is equally inoperative to restrain the action [289] of the State. Conceding that the judgments, though founded upon claims to indemnity for unlawful acts of mobs or riotous assem-

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blages, are property in the sense that they are capable of ownership and may have a pecuniary value, the relators cannot be said to be deprived of them so long as they continue an existing liability against the city. Although the present limitation of the taxing power of the city may prevent the receipt of sufficient funds to pay the judgments, the Legislature of the State may, upon proper appeal, make other provision for their satisfaction. The judgments may also perhaps be used by the relators or their assignees as offsets to demands of the city; at least it is possible that they may be available in various ways. Be this as it may, the relators have no such vested right in the taxing power of the city as to render its diminution by the State, to a degree affecting the present collection of their judgments, a deprivation of their property in the sense of the constitutional prohibition. A party cannot be said to be deprived of his property in a judgment because at the time he is unable to collect it.

The cases, in which we have held that the taxing power of a municipality continues, notwithstanding a legislative Act of limitation or repeal, are founded upon contracts; and decisions in them do not rest upon the principle that the party affected in the enforcement of his contract rights has been thereby deprived of any property, but upon the principle that the remedies for the enforcement of his contracts, existing when they were made, have been by such legislation impaired. The usual mode in which municipal bodies meet their pecuniary contracts is by taxation. And when, upon the faith that such taxation will be levied, contracts have been made, the constitutional inhibition has been held to restrain the State from repealing or diminishing the power of the corporation so as to deprive the holder of the contract of all adequate and efficacious remedy. As we have often said, the power of taxation belongs exclusively to the Legislative Department of the Government, and the extent to which it shall be delegated to a municipal body is a matter of discretion; and may be limited or revoked, at the [290] pleasure of the Legislature. But, as we held in *Wolff* v. *New Orleans*, at October Term, 1880 [XXVI., 395], and repeated in *Louisiana* v. *Pilsbury*, at October Term, 1881 [XXVI., 1090], in both cases by the unanimous judgment of the court, the legislation in that respect is subject to this qualification, which attends all state legislation, that it "Shall not conflict with the prohibitions of the Constitution of the United States and, among other things, shall not operate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. Legislation producing this latter result, not indirectly as a consequence of legitimate measures taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the Constitution and must be disregarded—treated as if never enacted—by all courts recognizing the Constitution as the paramount law of the land. This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed. * * * However great the control of the Legislature over the corporation while it is in existence, it must be exercised in subordination to the principle which secures the inviolability of contracts."

This doctrine can have no application to claims against municipal corporations founded upon torts of the character mentioned. Whether or not the State, in so limiting the power of the city to raise funds by taxation that it cannot satisfy all claims against it recognized by law, though not resting upon contract, does a wrong to the relators, which a wise policy and a just sense of public honor should not sanction, is not a question upon which this court can pass. If the action of the State does not fall within any prohibition of the Federal Constitution, it lies beyond the reach of our authority.

The question of the effect of legislation upon the means of enforcing an ordinary judgment of damages for a tort, rendered against the person committing it, in favor of the person injured, may involve other considerations, and is not presented by the case before us.

Judgment affirmed.

Mr. Justice **Bradley**:

I concur in the judgment in this case, on [291] the special ground that remedies against municipal bodies for damages caused by mobs, or other violators of law, unconnected with the municipal government, are purely matters of legislative policy, depending on positive law, which may at any time be repealed or modified, either before or after the damage has occurred, and the repeal of which causes the remedy to cease. In giving or withholding remedies of this kind, it is simply a question whether the public shall or shall not indemnify those who sustain losses from the unlawful acts or combinations of individuals; and whether it shall or shall not do so, is a matter of legislative discretion; just as it is, whether the public shall or shall not indemnify those who suffer losses at the hands of a public enemy, or from intestine commotions or rebellion. And, as the judgments in the present case were founded upon a law giving this kind of remedy, I agree with the court, that any restraint of taxation which may affect the means of enforcing them is within the constitutional power of the Legislature. Until the claim is reduced to possession, it is subject to legislative regulation. But an ordinary judgment of damages for a tort, rendered against the person committing it, in favor of the person injured, stands upon a very different footing. Such a judgment is founded upon an absolute right, and is as much an article of property as anything else that a party owns; and the Legislature can no more violate it without due process of law, than it can any other property. To abrogate the remedy for enforcing it, and to give no other adequate remedy in its stead, is to deprive the owner of his property, within the meaning of the 14th Amendment. The remedy for enforcing a judgment is the life of the judgment, just asmuch as the remedy for enforcing a contract is the life of the contract. Whilst the original Constitution protected only contracts from being impaired by state laws, the 14th Amendment protects every species of property alike, except such as in its nature and origin is subject to legislative control. Hence I regard it important clearly to distinguish be-

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tween this kind of judgment, now under consideration, and other judgments for claims based upon the absolute right of the party.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[292] *Mr. Justice* **Harlan**, dissenting:

By the Constitution of Louisiana adopted in 1879, and which went into effect January 1, 1880, it is declared, "No parish or municipal tax, for all purposes whatever, shall exceed ten mills on the dollar of valuation."

The judgments held by plaintiff in error against the City of New Orleans were rendered and became final long before the adoption of that constitutional provision. At the time of their rendition, the law forbade execution against the defendant, but the city had the power and was under a duty, which the courts could compel it to discharge, to include in its budget or annual estimate for contingent expenses, a sum sufficient to pay these judgments. At that time, also, the rate of taxation prescribed by law was ample to enable the city to meet all such obligations. But if the limitation upon taxation imposed by the State Constitution be applied to the judgments in question, then, it is conceded, the city cannot raise more money than will be required to meet the ordinary and necessary expenses of municipal administration. Consequently, under the limit of ten mills on the dollar of valuation, the judgments of plaintiffs become as valueless as they would be had the State Constitution, in terms, forbidden the city from paying them.

1. Are the judgments in question contracts? This question is answered by the Court of Appeals of New York, speaking by Woodruff, *J.*, in *Taylor* v. *Root*, 4 Keyes, 344. It is there said:

"Contracts are of three kinds: simple contracts, contracts by specialty, and contracts of record. A judgment is a contract of the highest nature known to the law. * * * The cause or consideration of the judgment is of no possible importance; that is merged in the judgment. When recovered, the judgment stands as a conclusive declaration that the plaintiff therein is entitled to the sum of money recovered. No matter what may have been the original cause of action, the judgment forever settles the plaintiff's claim and the defendant's assent thereto; this assent may have been reluctant, but in law it is an assent, and the defendant is estopped by the judgment to dissent. Forever thereafter, any claim on the [293] judgment is setting up a cause of action on contract."

Blackstone says that "When any specific sum is adjudged to be due from the defendant to the plaintiff on an action or suit at law, this is a contract of the highest nature, being established by the sentence of a court of judicature." 3 Bl., 465. Chitty enumerates judgments among contracts or obligations of record, and observes that they "are of superior force, because they have been promulgated by, or are founded upon, the authority and have received the sanction of, a court of record." Chitty, Contracts, 8. An action in form *ex contractu* will lie on a judgment of a court of record, because the law implies a contract to pay it from the fact of there being a legal obligation to do so, "although," says Chitty, "the transaction in its origin was totally unconnected with contract, and there has been no promise in fact." *Id.*, 87.

It seems to me that these judgments are contracts, within any reasonable interpretation of the contract clause of the National Constitution. It can hardly be that the framers of that instrument attached less consequence to contracts of record than to simple contracts. If this view be correct, then the withdrawal from the City of New Orleans of the authority which it possessed when they were rendered, to levy taxes sufficient for their payment, impaired the obligation of the contracts evidenced by those judgments.

2. But if this view be erroneous, it seems quite clear that the State Constitution of 1879 cannot be applied to these judgments without bringing it into conflict with that provision of the Constitution, which declares that no State shall deprive any person of property without due process of law. That these judgments are property within the meaning of the Constitution cannot, it seems to me, be doubted. They are none the less property because the original cause of action did not arise out of contract, in the literal meaning of that word, but rests upon a statute making municipal corporations liable for property destroyed by a mob. If a judgment giving damages for such a tort is not a contract within the meaning of the Constitution, it is, nevertheless, property, of which the owner [294] may not be deprived without due process of law.

Its value as property depends in every legal sense upon the remedies which the law gives to enforce its collection. To withhold from the citizen who has a judgment for money, the judicial means of enforcing its collection; or, what is, in effect, the same thing, to withdraw from the judgment debtor, a municipal corporation, the authority to levy taxes for its payment, is to destroy the value of the judgment as property. In *Pumpelly* v. *Green Bay Co.*, 13 Wall., 166, this court had occasion to consider the meaning of that provision in the Constitutions of the several States which forbids private property from being taken for public purposes without just compensation therefor. Under the authority of Statutes of Wisconsin, certain dams were constructed across a public navigable stream of that State. The dams so constructed caused the waters to overflow the land of a citizen, resulting in the almost complete destruction of its value. The argument was there made that the land was not *taken* within the meaning of the Constitution, and that the damage was only the consequential result of such use of a navigable stream as the government had a right to make for the purposes of navigation. But, touching that suggestion, this court said:

"It would be a very curious and unsatisfactory result if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of

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the public, it can destroy its value entirely; can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen as those rights stood at the common law, instead of the government, and make it an authority for [295] invasion of private rights under the pretext of the public good, which had no warrant in the laws or practice of our ancestors."

These principles of constitutional construction have an important bearing upon the present case. If the property of the citizen is "taken," within the meaning of the Constitution, when its value is destroyed or permanently impaired through the act of the government, or by the acts of others under the sanction or authority of the government, it would seem that the citizen holding a judgment for money against a municipal corporation—which judgment is capable of enforcement by judicial proceedings at the time of its rendition—is deprived of his property without due process of law, if the State, by a subsequent law, so reduces the rate of taxation as to make it impossible for the corporation to satisfy such judgment. Since the value of the judgment, as property, depends necessarily upon the remedies given for its enforcement, the withdrawal of all remedies for its enforcement, and compelling the owner to rely exclusively upon the generosity of the judgment debtor, is, I submit, to deprive the owner of his property.

But it is said that the plaintiffs are not deprived of their judgments, so long as they continue to be existing liabilities against the city. My answer is, that such liability upon the part of the city is of no consequence, unless, when payment is refused, it can be enforced by legal proceedings. A money judgment which cannot be collected is of as little value as Pumpelly's farm was, when covered by water to such an extent that it could not be used for any of the purposes for which land is desired.

It is also said by my brethren that plaintiffs are not deprived of their property in these judgments, because at the time they are unable to collect them. No State shall "deprive any person of life, liberty or property without due process of law," is the mandate of the Constitution. Could a state law depriving a person of his liberty be sustained upon the ground that such deprivation was only for a time? Pumpelly's land was adjudged to have been *taken* within the meaning of the Constitution, although it was possible that, at some future time, [296] the dams constructed under the authority of the State might be abandoned, or might give way, causing the waters to retire within their original limits, and thereby enabling the owner to re-occupy his farm. It is barely possible that the people of Louisiana may, at some future period in their history, amend her Constitution, so as to permit the City of New Orleans to levy taxes sufficient to meet its indebtedness, as established by the judicial tribunals of that State. But such a possibility cannot properly be recognized as an element in the legal inquiry whether the State may so reduce the rate of taxation by one of its municipal corporations, as to deprive it altogether of the power to pay valid judgments against it, which at the time of their rendition, and under the rate of taxation which then obtained, were collectible through judicial proceedings.

It is further said that these judgments may also, "perhaps," be used by the relators or their assignees as offsets to demands of the city. My answer is, that the city may never have such demands. The possibility that it may have ought not to control the determination of this case, involving, I submit, a present deprivation of property, without due process of law.

In this case, before the adoption of the Constitution of 1879-80, before even the Convention that framed it met, the plaintiffs had obtained, in the inferior state court, a final order in a *mandamus* suit, requiring the City of New Orleans to include in its next budget or statement of liabilities and in succeeding budgets, until they were paid, the amounts of existing judgments against it, including those held by plaintiffs, and to levy a tax to the extent of $1.75 on every $100 of valuation to meet them. This judgment in the *mandamus* suit was in accordance with the law of the State as it then was. Plaintiffs, by the application of the constitutional limitation upon municipal taxation, *adopted after rendition of judgment in the* mandamus *suit*, is thus deprived not only of the benefit of that judgment but of all power to enforce the collection of the original judgments, in the only way they can be enforced or be made of any value. If this be not a deprivation of property without due process of law, it is, I think, difficult to conceive of a case involving such a deprivation.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 720; 95 N. Y., 431; 47 Am. Rep., 66.

WILLIAM C. WALSH, Commissioner of the [297] General Land-Office of the STATE OF TEXAS, *Appt.*,

v.

WILLIAM PRESTON.

WILLIAM PRESTON, *Appt.*,

v.

WILLIAM C. WALSH, Commissioner of the General Land-Office of the STATE OF TEXAS.

(See S. C., Reporter's ed., 297-329.)

Action on stale demand—specific performance of contract.

1. A decree on a bill for relief upon an executory contract for public lands long since settled by third persons, which has the effect to embarrass numerous people who have had no opportunity to be heard, and tie the hands of a State in dealing with its public lands, in a suit to which it is not a party, will be set aside where the time of the performance of the contract has expired for many years.

2. The failure on the part of the party applying for specific performance to perform his own part of a contract wholly executory, or to show any sufficient reason for the failure, is ground to refuse relief and turn the party over to his action at law, particularly where the rights of third parties have intervened.

[Nos. 552, 553.]

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Argued Mar. 13, 14, 1883. Decided Nov. 19, 1883.

CROSS appeals from the Circuit Court of the United States for the Western District of Texas.

The history and facts of the case fully appear in the opinion of the court.

See, also, the report of the opinion of *Mr. Justice* Woods, Circuit Judge in this case. *Hancock* v. *Walsh*, 3 Woods, 351.

Messrs. **John Mason Brown, George M. Davie** and *William Preston*, for complainant:

The Mercer Colony contract of January 29, 1844, was unconstitutional and void.

1 Pasch. Dig., Tex. Stat., 156, 234, 235; *Melton* v. *Cobb*, 21 Tex., 539; *Bryan* v. *Shirley*, 53 Tex., 440.

That contract was a "contract" in the constitutional sense, which could not be subsequently impaired by Texas.

Green v. *Biddle*, 8 Wheat., 92; *Hamilton* v. *Flinn*, 21 Tex., 716; 8 Ops. Atty-Gen., 530; *Hall* v. *Wisconsin*, 103 U. S., 5 (XXVI., 302).

That contract by its terms created and made a "reservation" of the lands within "Mercer's Colony;" and the State and its officers were thereby forbidden to subsequently convey those lands to others.

Melton v. *Cobb*, 21 Tex., 543; *Wilcox* v. *Jackson*, 13 Pet., 498; *Leavenworth* v. *R. R. Co.*, 92 U. S., 741 (XXIII., 637); *State* v. *Delesdenier*, 7 Tex., 108; *Kimmell* v. *Wheeler*, 22 Tex., 77; *Fowler* v. *Alfred*, 24 Tex., 184; *Johnson* v. *Towsley*, 13 Wall., 85 (80 U. S., XX., 487); *Wirth* v. *Branson*, 98 U. S. 121 (XXV., 87).

It was a grant, *in præsenti*, creating a vested interest, as in cases of railroad grants of alternate sections on such roads as may be thereafter built, under which "the title passes to the sections to be afterwards located."

Schulenberg v. *Harriman*, 21 Wall., 60 (88 U. S., XXII., 554); *Frémont* v. *U. S.*, 17 How., 559 (58 U. S., XV., 241); *Hornsby* v. *U. S.*, 10 Wall., 233 (77 U.S., XIX., 902); *R.R. Co.* v. *U. S.*, 92 U.S., 741 (XXIII., 637); *Mo. R. R. Co.* v. *Kan. R. R. Co.*, 97 U. S., 497 (XXIV., 1097); *Railway Co.* v. *Alling*, 99 U.S., 475 (XXV., 443); *Wood* v. *R. R. Co.*, 104 U.S., 332 (XXVI., 773); *Grinnell* v. *R. R. Co.*, 103 U. S., 742 (XXVI., 458).

A grant of a smaller portion out of a larger described boundary is valid and operates to create a vested estate.

Frémont v. *U. S.* (*supra*); *Hornsby* v. *U. S.* (*supra*).

This duty of the Land Commissioner is a ministerial duty, which can be enforced by *mandamus*.

1 Pasch. Dig. Stat., art. 1407; Tex. Gen. Stat. (1879), art. 1198, clause 18; *U. S.* v. *Schurz*, 102 U. S., 379 (XXVI., 167); *Land Comr.* v. *Bell*, Dall. Dec., 366; *Land Comr.* v. *Smith*, 5 Tex., 471; *R. R. Co.* v. *Land Comr.*, 36 Tex., 384; *Davis* v. *Gray*, 16 Wall., 203 (83 U.S., XXI., 447).

And it can, in a case like this, also be enforced by a mandatory injunction, prohibiting and enjoining the respondent Walsh from further withholding from complainant the land certificates to which he is entitled.

High, Injunc., sec. 358; Story, Eq. Jur., sec. 959; *Kershaw* v. *Thompson*, 4 Johns. Ch., 609.

Relief, by compelling the Land Commissioner to do his duty by issuing the land certificates to complainant, can be given without the State of Texas being a party to the record. The court will act on the equitable rights when the trustee of the legal title cannot be made a party.

Perry, Trusts, sec. 878; *Whalley* v. *Whalley*, 1 Vern., 487; *Heath* v. *Percival*, 1 P. Wms., 684; *Atty-Gen.* v. *Beloit College*, 9 Mod., 409; *Osborn* v. *Bank*, 9 Wheat., 738; *Davis* v. *Gray* (*supra*).

The proceeding against respondent Walsh is not against the State; and it is within the power and jurisdiction of the court to make him issue to the complainant the land certificates and patents to which complainant is entitled, and which it is his duty to issue.

Osborn v. *Bank* (*supra*); *Davis* v. *Gray* (*supra*); *Board of Liquidation* v. *McComb*, 92 U. S., 531 (XXIII., 623); *Arlington Case* (*ante*, 171); Tex. Gen. Stats. (1879), art. 3893; *Louisiana* v. *Jumel* (*ante*, 448).

Messrs. **A. J. Peeler** and *S. R. Fisher*, for defendant.

Mr. Justice **Miller** delivered the opinion of the court:

These cases, as they stand on our docket, are cross appeals from the decree of the Circuit Court of the United States for the Western District of Texas, in a suit wherein William Preston was plaintiff, and William C. Walsh, in his character of Commissioner of the General Land-Office of the State of Texas, was defendant.

The suit was commenced originally by George Hancock, a citizen of Kentucky, by a bill in chancery against John S. Groos, who was then Commissioner of the land-office and, after the death of Hancock, was revived in the name of Preston as plaintiff, and Walsh became substituted for Groos as his successor in office. The original bill is long, and after Preston became plaintiff he filed a very full amended bill.

To these the defendant demurred and the demurrers being overruled, the defendant Walsh filed his plea in bar and his answer, under oath, to which there was a replication.

The bill is founded on a colonization contract between the State of Texas and Charles Fenton Mercer, a class of contracts well known to the history of Mexico, resting on a policy which was continued by Texas after separation from that government.

The contract on which the present suit is brought is dated January 29, 1844, and is signed by Sam. Houston, President of Texas, and Charles F. Mercer, for himself and such associates as he may choose, and is attested by Anson Jones, Secretary of State.

In making this contract the President acted under authority of an Act of the Congress of Texas of February 5, 1842, which declared "That the provisions of an Act entitled 'An Act for the Granting of Lands to Emigrants,' approved January 4, 1841, so far as relates to the authority thereby given to the President to enter into a contract with W. S. Peters and others to introduce colonists, upon certain terms therein expressed and set forth, be, and the same are hereby, extended to such other company or companies which may be organized for like purposes, as the President in his judgment may approve. [299]

"2. That all the rights accruing to said company by the provisions of said Act, and all the duties, obligations and conditions imposed by the same upon the said W. S. Peters and his as-

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sociates, be and the same are hereby extended to such other companies as may be organized under the provisions of this Act."

To the Act of 1841, therefore, are we to look for the kind of contract which the President of Texas could make in 1844 with Mercer and his associates; for though a Joint Resolution of the Congress, dated January 16, 1843, is relied on as introducing some modification of the Act of 1841, that Resolution seems carefully limited in its operation to contracts already in existence, and does not affect the power of the President in any contract he may make with other parties.

It is true, this Joint Resolution authorizes an extension of the period within which the contracts, to which it specifically refers by name, may be performed, from three years to five years and the contract in Mercer's case allowed five years, when the Act of 1841 required performance within three years; but no point is raised that the Mercer contract is, for that reason, void, and we are not called on to declare the effect of this departure from the Act of 1841 in this case.

This agreement is in conformity with the Act of 1841 authorizing the contract with W. S. Peters and his associates, and as a substantial summary of the material parts of the Mercer contract, except the location of the land and the names of the parties, that statute is given here.

[300] The first three sections of the Act relate to the rights conferred on all immigrants to the State.

Section 4 enacts that the president of the Republic be and he is hereby authorized to make a contract with W. S. Peters, Daniel S. Carroll and others, naming them, collectively, for the purpose of colonizing and settling a portion of the vacant and unappropriated lands of the republic, on the following conditions, to wit: "The said contractors on their part agree to introduce a number of families, to be specified in the contract, within three years from the date of the contract; *Provided*, They shall commence the settlement within one year from the date of said contract."

It then proceeds:

"Art. 2009. (5) *Be it further enacted*, That the said contract shall be drawn up by the Secretary of State, setting forth such regulations and stipulations as shall not be contrary to the general principles of this law and the Constitution; which contract shall be signed by the President and the party or parties, and attested by the Secretary of State, who will also preserve a copy in his department.

Art. 2010. (6) *Be it further enacted*, That the president shall designate certain boundaries, to be above the limits of the present settlements, within which the emigrants under the said contract must reside; *Provided, however*, That all legal grants and surveys that may have been located within the boundaries, so designated previously to the date of said contract, shall be respected; and any locations or surveys made by the contractors or their emigrants on such grants and surveys, shall be null and void.

Art. 2011. (7) *Be it further enacted*, That not more than one section of six hundred and forty acres of land, to be located in a square, shall be given to any family comprehended in said contract; nor more than three hundred and twenty acres to a single man over the age of seventeen years.

Art. 2012. (8) *Be it further enacted*, That no individual contract made between any contractor and the families or single persons which he may introduce, for a portion of the land to which respectively they may be entitled, by [301] way of recompense for passage, expense of transportation, removal or otherwise, shall be binding, if such contract embrace more than one half of the land which he, she, or they may be entitled to under this law; nor shall any contract act as a lien on any larger portion of such land; nor shall any emigrant be entitled to any land, or receive a title for such land, until such person or persons shall have built a good and comfortable cabin upon it, and shall keep in cultivation, and under good fence, at least fifteen acres on the tract which he may have received.

Art. 2013. (9) *Be it further enacted*, That all the expenses attending the selection of the land, surveying, title, and other fees, shall be paid by the contractor to the persons respectively authorized to receive them; *Provided, however*, That this provision shall not release the colonist from the obligation of remunerating the contractor in the amount of all such fees, so soon as it can be done, without a sale of their land; *And further*, The President may donate to every settlement of one hundred families, made under the provisions of this Act, one section of six hundred and forty acres of land, to aid and assist the settlement in the erection of a building for religious public worship.

Art. 2014. (10) *Be it further enacted*, That the President may allow the contractors a compensation for their services, and in recompense of their labor and expense attendant on the introduction and settlement of the families introduced by him, ten sections for every hundred families; and in the same ratio of half sections for every hundred single men introduced and settled; it being understood that no fractional number less than one hundred will be allowed any premium.

Art. 2015. (11) *Be it further enacted*, That the premium lands must be selected from the vacant lands within the territorial limits defined in the contract; *and further*, all fees incidental to the issue of patents for lands acquired under the provisions of this law, shall be paid to the Commissioner of the General Land-Office, for the use and benefit of the public treasury.

Art. 2016. (12) *Be it further enacted*, That a failure on the part of the contractors, and a forfeiture of their contract, shall not be prejudicial to the rights of such families and single persons as they may introduce; who shall be entitled to their respective quotas of land, agreeable to the provisions of this law.

Art. 2017. (13) *Be it further enacted*, That [302] the contractors shall be required to have one third of the whole number of the families and single persons, for which they contract within the limits of the Republic before the expiration of one year, from the date of the contract, under the penalty of a forfeiture of the same; and it shall be the duty of the Secretary of State forthwith, after the expiration of such term, and failure on the part of the contractors

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to comply with this provision, to publish and declare said forfeiture; unless the President, for good and sufficient reasons, shall extend the term six months, which he can do; and all substitutions of families living within the limits of the Republic, by the contractors, shall not entitle them to any premium for such families, nor shall it operate in favor of them, for the number of families which they are bound to introduce. And this Act shall take effect from and after its passage."

The contract with Mercer designated a large tract of land about six thousand square miles in extent, the outer boundaries of which were described so as to be capable of identification by survey, within which he was to settle at least one hundred families within each period of a year for the five years, succeeding the date of his contract, and the right to introduce new emigrants terminated at the end of that time.

What he was to do under this contract and what he was to receive for it when done, as found in the instrument executed by him and the President, differ but little from the requirements of the foregoing statute. Where there may be found any difference material to the view we take of this controversy it will be pointed out in the course of the opinion.

The complaint, after setting forth this agreement, alleges that Mercer performed the obligations it imposed on him, introducing and settling within the prescribed limits and within the five years allowed him twelve hundred and fifty-six (1,256) families, and that in all other respects he fulfilled the obligation of his contract. It charges that for all this he has received no lands at the hands of the State, as he is entitled to, neither any evidence or certificate of his right to them, and that the State of Texas, and the officers in charge of the land department deny all right of said Mercer or Hancock, his assignee, or Preston, Hancock's devisee, or any of their associates, to receive [303] such lands or such certificates, or any compensation for the services rendered under Mercer's contract in colonizing the families so introduced.

And it is specifically charged against the defendant that, as Commissioner of the General Land-Office having charge of such matters, he not only utterly refuses to recognize their rights, and refuses to issue them patents or certificates for the number of sections and half sections to which they are entitled, but that he is constantly issuing to others land certificates and patents, whereby the land within the reservation in which their claims must be satisfied is rapidly passing into the hands of private owners with title from the State.

The prayer of the bill is that defendant Walsh, by a mandatory injunction, be required "To refrain and desist from longer withholding from your orator the certificates for location of land to which your orator is entitled under the contract between Charles Fenton Mercer and the Republic of Texas, of date of January 29, 1844, and from further refusing to execute and deliver to your orator the certificates for land to which on final hearing it may be decreed that your orator is entitled;" and if it be found there is not land enough within the bounds of the Mercer Colony grant, remaining free from occupancy, sufficient to satisfy the orator's claim, that he may, by appropriate decree, receive certificates from the defendant for lands of equal value by way of recompense for lands wrongfully alienated to others. It is also prayed that the defendant and all his subordinates be enjoined and restrained from doing any act whereby there may issue any patent, certificate, plat, grant, survey or location of lands outside and beyond the limit of the Mercer grant, save only to your orator, and until complainant's just claims are satisfied.

The answer of the defendant denies that the contract is a valid contract; alleges that in a suit by the Governor of the State of Texas in a court of competent jurisdiction, against said Mercer and his associates, the contract was by a decree of that court annulled and declared void, and all rights under it forfeited, and relies on that decree in bar of the present suit. He denies that Mercer or his privies ever per- [304] formed their obligations under the contract, and denies that they ever introduced into the State and settled on the land described any immigrants or colonists, and expressly denies that the 1,256 families found in the Crockett list, on which complainant relies, were introduced or in any manner brought into Texas by Mercer or his associates. He denies that he ever surveyed the outside boundaries of the grant, or made the surveys into sections or half sections which he was bound by his contract to make, and by which alone could the settlements, houses and improvements of the settlers, or any of them, be so identified or described as to entitle complainant to receive certificates or patents for them, or for the premium lands mentioned in the contract.

The plea and demurrer rely on the incapacity of plaintiff to maintain against this defendant the suit in which the State of Texas is a necessary party, when the State is not made a party, and cannot be made a party in that court.

The decree of the court, after the introduction of much testimony, documentary and otherwise, and after full hearing, declares: "That complainant's allegations are found to be true and supported by proof, and that the defendant and all his subordinates, of any description, are restrained and prohibited and forever enjoined from issuing or delivering, to any person or corporation any certificates, patents or plats for any land within the boundaries of the Mercer Colony as set forth in the bill, except to complainant, William Preston, or to such person as he may in writing direct.

It further decrees that defendant and all his clerks and subordinates are enjoined from hindering or obstructing said Preston or his agents in the surveying selecting, platting, recording, entering, or claiming any and all lands lying within the limits and boundaries of the so-called Mercer Colony; and they are also enjoined from hindering, obstructing, preventing or delaying the said Preston, and his associates, from performing, completing and perfecting all the several conditions, duties, obligations and acts [305] devolving upon him, the said Preston, or said association, under the terms and stipulations of the colonization contract. And it orders that defendant pay the costs of the litigation.

It is not very easy to see on what principle this decree can be sustained.

There is no decree by which the right of

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plaintiff to any specific land is affirmed, nor to any ascertained quantity of land to be located generally.

There is no attempt, as there can be none in this suit, to adjust the conflicting rights of the State of Texas and the plaintiff in this land. There is no attempt to define the number of acres to which plaintiff is entitled, or what he is yet to do or what he *may* do to perfect his right to any land whatever.

And yet, without establishing any such right or deciding what plaintiff may yet do to establish a right, the hands of the government are tied absolutely as to all the vacant land which belongs to it within the colony limits. Not only are the hands of the government thus tied, but other persons having rights, inchoate or vested, in those lands, with undisputed claims to patents, to certificates, to surveys perhaps, are all arrested in the precise condition they may be at the time this decree was rendered. The whole land-office business and functions of the commissioner within that colony, no matter whose interests are involved, are paralyzed by this decree. And what is more, it is paralyzed forever, for the language is that the commissioner and all his clerks, agents, etc., are enjoined *forever* from doing the forbidden acts.

This is also done in a case where the court, having exhausted its powers (for the decree is final), has found itself unable to grant any positive relief to plaintiff, gives him no land, no certificates, no right to land in other places, but leaves him also suspended, except what he may do now to perform the obligation which the contract imposed upon him. The time within which he was to do all that the contract required or permitted him to do, expired by its terms January 29, 1849, now nearly thirty-five years ago. We can see nothing whatever in the case by which he can now be authorized to do [306] with effect what he was required to do within the five years his contract was in force. Can he now introduce and settle colonists in a country filled with an active population? Can he now survey and cultivate the land and build the cabins which he did not survey, settle and improve then? Can he, after the vast vacant prairies which he then agreed to convert into homes for families have been covered by a population of thousands, perform in that same territory where now are thriving cities the things he bound himself to do thirty-five years ago, so as to secure the lands rendered valuable by the enterprise of others?

If he can do none of this; if the court can give him no affirmative relief; if it has no other jurisdiction of this case but to tie up everybody's hands and preserve forever the present *status* of things, why should it do that?

A court of equity will not thus do a vain thing, the only effect of which is to embarrass thousands of people without a hearing or an opportunity to assert what they claim to be their rights, and tie the hands of a great State in dealing with her public lands in a suit to which she is not a party.

But the plaintiff below insists, by his appeal from this decree, that the circuit court should have granted him the relief which he prays, and especially insists that for every hundred families of the twelve hundred and fifty-six which he located in the limits of his grant, there should now be issued to him certificates, which he may locate on the vacant lands within the contract limits, or, if they cannot be found, then on other vacant lands of the State.

We will examine into the merits of this claim.

It must be remembered that this examination is made on proceedings in a court where the real party in interest is not before it, and over which that court has no jurisdiction. That if the decree asked for is rendered, it must be satisfied out of the property of this party. That the circuit court, in undertaking to control the State of Texas in the disposition of its public lands, by a decree against one of its officers, is, in effect, rendering a decree of specific performance against the State.

But waiving this for the present, we proceed to inquire whether, if the State were before this court as an ordinary party, plaintiff has made [307] a case for specific performance.

It must be confessed that Texas, both as an independent Republic and as a State of the Union, has done all she could to prevent the making of this contract, and since it was made has denied its validity and refused to do anything under it, and has always denied any such performance on the part of Mercer and his successors and associates as entitled them to any rights under it, if it be valid.

The contract bears date January 29, 1844, and on the next day, January 30, 1844, the Congress of Texas passed a statute repealing all laws authorizing the President to make colonization contracts, and forfeiting such of those already made as had not been complied with by the contractors. The legislative history of this repealing Act shows that it had been presented to the President and vetoed, and while the matter was thus suspended the contract was signed, the day before Congress passed the bill over his veto, which terminated all power in him to make such contracts. The aversion, with which this contract was received has never been removed from the minds of the governing authorities in that State, and its Congress, on the 3d February, 1845, passed the following Joint Resolution:

"*Hartley, p. 660.*

Joint Resolution to establish the limits of the Mercer Colony.

Art. 2245. (1.) *Be it resolved by the Senate and House of Representatives of the Republic of Texas in Congress assembled,* That General Charles Fenton Mercer and his associates be and they are hereby required to have the lines of their colony land actually surveyed and marked by the first day of April next.

Art. 2146. (2.) *Be it further resolved,* That a failure to comply with the provisions of the above section shall work a forfeiture of their contract.

Art. 2147. (3.) *Be it further resolved,* That no person shall be recognized as provided for in said contracts who were not specially introduced by the said contractors, so far as the premium lands are concerned; but the citizens so introduced shall be entitled to the same amount of lands as though they had been introduced, as provided for in said contract; and that this Act take effect from and after its passage."

On the 11th day of October, 1846, the suit of [308] the Governor of the State against Mercer and

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his associates was commenced in the District Court of Navarro County, in which a decree was rendered Sep. 25, 1848, declaring the contract null and void on the verdict of a jury. Of this decree it is as well to say now, that while it would, if valid, dispose of the whole case, we are not satisfied, in the absence of personal service on the defendants and of any personal appearance by them, that there was such substituted service by publication as gave the court jurisdiction. The decree, therefore, is no bar to the rights of the present plaintiff, and the matter is here referred to as showing the unvarying hostility of the state authorities to this contract.

Mr. Mercer was by these proceedings and many others found in the statute-book of the State, put upon his guard that in order to establish any rights whatever under that contract, he must comply strictly and promptly with all the conditions and obligations which it imposed upon him.

In order to see exactly what it was that Mercer and his associates undertook to do, it may not be amiss to inquire for what purpose Texas desired the settlement of these colonists on her lands. This policy of colonization is one which Mexico had inaugurated long before Texas separated from that confederacy. It was founded on the idea that the government was abundantly rich in lands and deficient in population; that it owned large bodies of vacant lands which were rather a trouble than a profit, as resorts of Indians and beasts of prey, while they were much in need of an active and industrious agricultural population.

In the case of Texas it was desirable also that this population should be fighting men, as they were in a state of smoldering war with Mexico, which might break out at any moment, as that government had not acknowledged the independence of Texas, and still asserted dominion over that country—an assertion which led to the war a year or two later between Mexico and the United States.

What Texas desired then, in these colonization contracts, was first, an accession to her population capable of military duty; second, the set-
[309] tlement of this new population on her large tracts of vacant lands; and, third, that this should be done in a manner which would add to the value of those which would remain.

The first obligation, therefore, which the contractors, under the 4th section of the Act authorizing the contract with Peters and others, assume is, that they agree "To introduce a number of families to be specified in the contract within three years from the date of the contract."

The persons thus to be introduced are always spoken of in the statute as emigrants, and the 13th section contains a provision "That all substitution of families living within the limits of the Republic by the contractors shall not entitle them to any premium for such families, nor operate in favor of them for the number of families which they are bound to introduce."

In the first clause of the contract, now under consideration, after the recital of the authority by which it is made, Mercer agrees to introduce and settle within the limits hereafter described, and in accordance with the provisions of the Act aforesaid, and within five years from the date hereof, as many *emigrant* families as he and his associates can settle within said limit.

Throughout this contract also the persons to be so introduced and settled are spoken of as emigrant families.

Another provision of the contract, in defining what shall constitute a family, speaks of males over seventeen years of age. And still another requires the contractors "To cause each male emigrant of the age of seventeen years and upward to be supplied and bring with him a good rifle, yager or musket, and a sufficient supply of ammunition; and the party of the second part (the contractors) shall keep on hand, at all times, in some convenient place of deposit, such quantity of prime ammunition as will supply to each male emigrant of the age of seventeen years and upwards, settled by them, not less than one hundred rounds."

It was another condition of this contract that the contractors should survey the outside lines of the land within which they were to settle these emigrants, "And cause the unappropriated lands within the prescribed limits to be surveyed, as needed for purposes of settlement, into [310] sections of six hundred and forty acres, or half sections of three hundred and twenty acres, each at his option, and shall cause to be built log cabins, etc., etc." For each family so settled, the contractors were to receive a section of six hundred and forty acres, or two half sections of three hundred and twenty acres. But these were to be located on alternate sections as they were surveyed and numbered, and the other alternate section was to remain to the public; thus introducing the system which the Government of the United States has adopted in all her railroad grants, of reserving every alternate section, that it might profit by the increased value which these sections acquired by the settlement of an agricultural population in their midst.

What compliance has plaintiff shown with this first and most important duty of *introducing, from without the Republic, emigrant* families and settling them upon lands within the limits prescribed by the contract?

We feel constrained to say that there is no satisfactory evidence to our minds that Mr. Mercer or any of his associates or any agent of his ever introduced into the State of Texas a single family from without the State, or that any such family ever came into the State by means of any request or any offer of help or of land, or of any inducement offered by Mercer or his associates.

The first piece of evidence offered on that subject is a list of 119 names, with corresponding numbers on the left of the column, a statement at the head of the column called "Date of introduction;" then the names of the heads of the families, and in another column the names of the witnesses. These witnesses are, with a single exception, P. J. Philians, Thomas C. Bean and James Hilhouse.

This list of names is signed to a statement that they have each received of Charles Fenton Mercer and his associates a certificate issued in accordance with Mercer's contract with the State, and that the families have been introduced and settled in manner and form as expressed in the contract. These certificates are nowhere intro-

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duced or found in the record, nor is a copy of any one of them produced.

[311] The parties signing this paper do not state that they were emigrants from abroad introduced into the State by Mercer or his associates, and none of them swear to the statement which they sign. Daniel Rowlett, who describes himself as one of the Texas Association, and Philians and Bean, who say they are disinterested persons, each make affidavit at the end of the list that it contains a true and accurate statement of emigrant families introduced and settled by Charles Fenton Mercer and his associates upon and within the limits of the Mercer grant.

But the deposition of Philians in regard to this list is taken, and he swears that he got up the list and issued the certificates to the parties found by him on the lands when he went there in 1844 as the agent of Mercer, and to others who came afterwards, until he left in May, 1845. He is asked in a long and pointed cross-interrogatory if he knew where these settlers came from, who introduced them, etc., etc. To this he answered as follows:

"Many of the queries herein I cannot now, nor could I at any time, have answered. I rarely if ever knew where the colonists came from, or what induced such to come to the colony. The first that came selected grounds in the northeastern part of the colony, east of the Sabine River. They built under contract with us their own cabins, brought their own arms, but a large supply of ammunition was stored ready for distribution, bought by General Mercer. I presume the colonists came at the solicitations of the colony agents elsewhere, and because land could then be had without price. After I had ceased to be the agent I never entered the colony, save, perhaps, when riding through some portion of it when on a journey."

No deposition of Bean or Rowlett is found in the record.

A deposition of Richard T. Berchett is taken for plaintiffs, who says he was one of Mercer's associates in the contract, and was intimate with him, but says he knows nothing about the introduction of colonists by Mr. Mercer.

An effort is made to prove an advertisement by Mercer, of his colonization scheme and its inducements to emigrants, making it an exhibit in the interrogatories filed for several witnesses, [312] but each of them says he knows nothing of the paper, nor can it be inferred from anything in it whether it was a circular or a newspaper advertisement or what circulation it ever had.

With the exception of Crockett's report, which will be presently considered, this is about all that can be called evidence of the introduction by Mercer, or through his agents or associates, of emigrants into the State of Texas.

The report of John M. Crockett of 1,256 families settled within the colony limits, which is introduced by plaintiff and relied on by him exclusively as giving the number and names of the emigrants for whose settlement he claims land under the contract, was, as it states on its face, made under the Act of February 2, 1850, of the Legislature of the State.

It is manifest from a perusal of that Act that it was designed, as its title imports, "For the relief of the citizens of Mercer's Colony," and that it was in no sense either a recognition of the validity of Mercer's contract or of his performance of its conditions.

"Section 1 enacts that every colonist, or the heirs or administrators of such colonist, citizens of the Colony of Charles Fenton Mercer, and his associates on the 28th of October, 1848, shall receive the quantity of land to which such colonist may be enlitled, to wit: 640 acres to each family and 320 acres to each single man over the age of seventeen years; *Provided, That nothing herein contained shall be construed so as to place the contractors of said colony in a better condition in regard to the State of Texas than they would be if this law had not been passed.*"

A commissioner is to be appointed to hear proofs and to decide who is entitled to lands, and to issue to them certificates, which may be located on vacant lands within the colony.

Section 8, which prescribes what is necessary to be proved to entitle the party to a certificate, is as follows:

"Art. 2316. (8) That to entitle the colonists to the benefits of this Act, they shall be required to prove, by their own oaths, supported by the oaths of two respectable witnesses, that they emigrated to Texas and became citizens of said colony prior to the twenty-fifth of October, 1848; that they are citizens thereof; [313] that they have performed all the duties required of them as citizens; and said applicants shall also swear that they have never received any land of this government by virtue of their emigration hither; *Provided*, That they shall not be required to prove that they have cultivated land."

Here is no requirement that the parties shall have complied with the conditions of Mercer's grant, and no consent of Mercer required, nor even any condition that they should have been introduced by Mercer or settled under his contract. It is not even required that they should have come to Texas or settled in the colony within the five years during which his contract was in force, but if they emigrated to *Texas* any time before 1848, though it had been twenty years before his contract was made, and became citizens of the colony before October, 1848, their claim was respected.

And the 5th section declared "That no change shall be made in the boundaries of the surveys of settlers, whether they be with or without the consent of the contractors, so that the boundaries thereof are justly and definitely marked."

Provision is also made for appeal by the claimant, from the decision of the commissioner, but never a word of recognition of any legal right of the contractors or of their contract as furnishing the rule of decision.

The report itself contained no allusion to Mercer or his contract or his associates, except as a designation of the locality in its heading, thus: "Record of certificates issued to citizens of Mercer's Colony, concluded 30th September, 1851, by John M. Crockett, commissioner." Here follows a list of 1,256 names, with the quantity of land for which a certificate has been issued by him, Crockett, to each, in every instance 640 or 320 acres, but no description or definite location of section or half section.

At the end, Crockett swears that the forego-

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ing is a full, complete and correct list and description of the certificates issued by him to the settlers of said colony.

[314] There is not here the slightest evidence that these men were brought to Texas by Mercer or any of his associates, or that he placed them on this land, or that he or they belong to the class which his contract required, or that he or they performed the conditions of that contract or any of them. And as the statute under which Crockett acted did not require proof of compliance with the Mercer contract, the inference that they had been so introduced is of little, if any, force.

It is quite remarkable that no attempt is made by plaintiff to prove that any of these settlers were introduced into Texas or settled on this land under his contract. The period when such settlement must have been made, if at all, was only about thirty years before the beginning of this suit, and in an agricultural community there must have been, at the time this suit was tried, many of the four thousand persons of whom these settlers were composed still living, whose testimony could have been procured. They could have told when they came to Texas, and who brought or sent them or induced them to come, and when and how they came to settle within the limits of this colony grant. They could not only have spoken for themselves, but for the body of the settlers who came about the same time. It is significant that plaintiff has wholly neglected to avail himself of this testimony, which, if in his favor, was the best to be had, since he has no documentary evidence which is satisfactory, though the archives of the State have been open to the inspection of himself and his agents.

Nor does the inference which the absence of this and other satisfactory evidence forces on the mind stand upon its mere absence, for the defendant has introduced some strong negative evidence of that character.

Mr. Crockett's testimony is taken by the defense, and a large number of the names found in his report is given in an interrogatory, and he is asked in others if any of these were settlers in Mercer's Colony, and if he knows the date when they became settlers, and by whom they were introduced, to which he answers he has no means of knowing the date of their settlement.

To other interrogatories he answers that he [315] went upon the ground among the different settlements to facilitate the settlers in their proofs according to the Act under which he was appointed; that the general opinion among the settlers was, that there was no validity in the claims of the Mercer colonists, as such, and the settlers did not base their claims to lands on Mercer's Colony contract, believing that Mercer had forfeited his claims under it. That, he says, was the opinion, without exception, as he recollects. They thought he had failed in not surveying the lands or performing any other act stipulated in his contract.

To the 17th interrogatory he answers:

"It was the common report in the colony in 1849 and 1850 that Mercer and his associates had done nothing in the settlement of the country, in the surveying of the lands, furnishing houses, ammunition, etc.; but it was then understood that the settlers had located there without the aid of Mercer and his associates, and that they had no connection or relation with Mercer and his associates. The settlers had their own land surveyed. During all my visit I never heard a settler in Mercer's Colony claim that he was introduced or brought into the country by Mercer or his associates, or base his claim to lands under the Mercer Colony contract."

These were the men on whose introduction and settlement plaintiff relies altogether to prove his performance of that contract, and not one of whom has he called as witnesses to that performance.

The defendant also took the deposition of John A. Harlan, who came to Texas in 1846, and settled in Navarro County, within the limits of the colony, and resided there twenty-one years. He says a good many persons came with him from Illinois at that time and settled in Navarro County. He says they came and settled of their own accord, brought their own guns and ammunition, built their own houses, and had nothing to do with Mercer in coming to the colony or in settling there, and he remembers the names of twenty men over seventeen years old of that class. In answer to a cross-interrogatory, he says he never knew of any effort of Mercer to settle the colony.

The defendant also took the depositions of P. P. Martin and H. W. Young, each of whom [316] were settlers in the colony. Young says he came to Texas in 1843. He says his father settled in the colony before the contract with Mercer was made. Martin says he came to Texas from Tennessee in 1846 to the northern part of the Mercer Colony. No one induced him to do so. He was introduced to Mercer but had no conversation with him about the colony.

Mr. Terrill, a surveyor by profession, says a great many families settled in the colony during the years 1844, 1845 and 1846. Some of them claimed to be colonists and some were old Texans. He was surveying in the colony during these dates and never knew or heard of Mercer or any of his associates assisting any settler in any way.

While there is this failure to prove satisfactory performance of the main obligation to introduce emigrants into Texas and settle them on the grant, and this testimony of witnesses on the ground that it was not done, there is a total absence of proof of an important condition in regard to the surveys.

We are of opinion that the outer boundary of the grant was surveyed, so as to comply substantially with the contract in that respect. But the obligation to survey the land into sections and half sections, which Mercer undertook in the agreement, so that the settlers could know and identify that to which they became entitled, and so that the Republic could know which were her alternate sections and half sections and sell them to others, and so that both parties could know where the premium sections for each one hundred families, to which the contractors might become entitled, could be located, all of which, we think, were essential parts of the contract, remained wholly unperformed.

There is not the slightest evidence of such surveys by Mercer or his associates in the record. Mr. B. J. Chambers, a witness for plaint-

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iff, who was a professional surveyor residing in Texas, says he made an agreement with Mr. Mercer to sectionize or survey certain lands for him in Navarro and Ellis Counties, west of the Trinity River, and, at his request, accompanied him into the bounds of the grant. But he says he did not do any surveying or any work for Mercer or his associates. He adds: "I did not [317] do it, because I was advised by nearly all the settlers I saw not to do it; that Mercer had not assisted them in their settlement in any way."

And this is the nearest approach to sectionizing these lands, as Mr. Chambers calls it, which the record discloses.

The importance of this matter can be readily seen now. If the court should be of opinion that all these settlers reported by Crockett were colonists under a compliance with his contract by Mercer, and if, as plaintiff claims, the contract is a grant *in præsenti*, how can either Mercer, or these colonists through him, have a decree for specific performance by an instrument which will carry a legal title to land described by metes and bounds as sections and half sections, would enable the court to do, if the necessary legal surveys had been made? Plaintiff does not ask for such relief. If they had surveyed this land, and settled the colonists on the enumerated sections and half sections of such surveys, they could now name the section and half section for which they ask a decree.

If they had made these surveys and had settled each of their colonists on a distinct section or half section, which could be thus identified as his cabin and improvement, and had performed the other conditions of introducing these settlers as emigrants from abroad, the argument that the present case comes within that of *Davis* v. *Gray*, 16 Wall., 203 [83 U. S., XXI., 447], would have more force. In that case the railroad company to which the grant was made had made the necessary surveys, and the track of the road having been definitely located through those surveys, the sections and parts of sections to which they were entitled were specifically identified without any difficulty, and the officer was restrained from certifying or patenting them to others.

In the present case, while the circuit court seemed inclined to grant similar relief, it found itself unable to do so for want of these very surveys, which the plaintiff's predecessor [318] had promised to make as an important part of the contract now relied on as the foundation of the relief sought.

If this were a case between individuals, there could be no doubt of the decision which a court of equity would be compelled to make on this application for specific performance. The failure on the part of the party applying for it to perform his own part of a contract wholly executory, or to show any sufficient reason for the failure, has always been held to be ground to refuse relief and turn the party over to his action at law.

What has the plaintiff or his predecessors done to secure his title to the lands now prayed for? Almost nothing. If we are correct in holding that he introduced no emigrants and made no surveys, what else has he done? Has he or they given any time or labor in earnest effort towards the business? If so, the evidence of it is not found in the record.

Have they spent any money in the enterprise? A feeble attempt to show an outlay of $12,000 or $15,000 is made, but by no means successfully. If plaintiff were now suing in an action for damages before a jury and he had proved a right to recover, the sum which he could get for his services and expenditures under the testimony in this record would be small, indeed, compared to the magnitude of the claim here set up.

We do not think it necessary to consider the argument that the contract is a grant *in præsenti*, with title to the land in the plaintiff, nor the idea that there is a trust by which these lands are held for his benefit, and that this trust is in some way made stronger by the legislation under which the Republic of Texas became a State in the Union.

In any view that can be taken of the contract, it was when made wholly executory. Mercer had not then paid anything or done anything to entitle him to land. It was all to be earned by actions to be performed thereafter. The Republic conveyed him no title. It was a mere executory contract for the sale and purchase of land, in which the price was to be paid within five years, and the lands so earned, an unknown quantity, were to be then conveyed by an instrument called a certificate.

The total failure of Mercer to perform left him no rights under the contract. The State seeks nothing against him for non-performance, [319] and so the affair is ended.

The plaintiff and his predecessors in interest have not only not performed, but they have not shown any sufficient excuse for non-performance. They have not, in the language of the authorities, shown themselves ready, willing and able to perform. On the contrary, they have permitted the matter to rest for thirty years without an effort to do so, and now, if they would, the state of matters in the colony is so changed that it is impossible that they can perform their agreement.

The result of these views is, that upon the appeal of Walsh the decree of the Circuit Court is reversed and the case remanded, with directions to dismiss the bill, and this necessarily disposes of the plaintiff's appeal.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Harlan**, dissenting:

Mr. Justice **Field** and myself differ from the court in our view of the facts of this case, and therefore dissent from its judgment.

The circuit court found that the complainant had satisfactorily established the contract between the Republic of Texas, through its President, and Charles Fenton Mercer and his associates, as alleged in the bill and amended bill; the entrance of Mercer upon the duties devolving upon him under the contract; the organization of the Texas Association; the appointment of surveyors and colonization agents; the running of lines and surveys; the introduction of one hundred and nineteen families within the first year of the grant; the making of the survey of the boundary limits of the colony granted by April 1, 1845; the settlement of twelve hundred and fifty-six families within the limits of

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the colony prior to October 25, 1848; the appointment of Mercer as chief agent and trustee for the association; the subsequent appointment of Hancock as chief agent; Hancock's death and the appointment of Preston, ratified by the association, as chief agent; the entrance of those persons upon the performance of their duties as agents of the association, and the activity displayed by them, respectively, in furthering the objects and interests of the colony and the as- [320] sociation; the employment of counsel; the expenditure of money; and the persistent applications made to the political departments of the State of Texas for relief. It further found that Mercer, as agent, made reports to the government of Texas, as required by the contract, up to and for the year 1847; that Mercer is dead long since; and that all his papers and documents, among which were copies of his correspondence and reports in relation to the Mercer Colony, have been lost and destroyed.

The evidence adduced by the complainant has, it seems to us, been subjected by this court to the same rules of strictness and technicality which would be applied to an indictment for a criminal offense. We are of opinion that the circuit court did not misapprehend the effect of the testimony, and that a case is made entitling complainant substantially to the relief granted in the decree below.

By the contract between Mercer and the Republic of Texas the latter agreed to convey to the former and his associates or their legal representatives one section of 640 acres of land, or two half sections of 320 acres, for each family which they should introduce and settle upon the lands set apart for colonization by Mercer and his associates, each alternate section or half section of 640 or 320 acres being reserved to the Republic, to be purchased or not by Mercer and his associates on certain stipulated terms. It was also agreed that a perfect title should be made in the usual mode and form to Mercer and his associates or their legal representatives for each section, half section or other fractional part of a section to which they became entitled under the contract, and that the same should be conveyed to the parties as soon and whenever they should exhibit to the Commissioner of the General Land-Office of the Republic, or other proper officer thereof, in the manner and form prescribed in the contract, the evidence of having surveyed the portion of land for which such conveyance was desired, and that there were comfortable small houses or cabins erected thereon, and families residing therein who had been settled thereon by Mercer and his associates or their legal representatives.

The Republic of Texas further agreed that Mercer and his associates should receive from [321] it as further compensation for their services and for their labor and expense in introducing and settling the families provided for in the contract, a premium of ten sections of 640 acres or twenty sections of 320 acres of land for every hundred families introduced and settled as required; further, that upon Mercer and his associates paying into the public treasury twelve dollars and obtaining the treasurer's or other proper officer's receipt for that sum paid into the same, and also of the delivery for cancelment of any bonds, promissory notes, or other audited liabilities of the Republic to the amount of $640, they or their legal representatives should be entitled to demand and should receive from the government a full and absolute title to 640 acres of the reserved alternate sections. The right to purchase the alternate sections was, however, made to depend on certain conditions, which, in the view taken of the case by the court, need not be here set out.

It was provided in the contract that whenever Mercer and his associates or their authorized agent or legal representative "Shall exhibit to to the Commissioner of the General Land-Office of the Republic a certificate, under oath, subscribed by two witnesses, and certified by some person qualified by the laws of Texas to administer an oath, that the said parties of the second part, or their legal representatives, have caused to be built a small comfortable house or cabin, or any number of such houses or cabins, on the parcel or parcels of land which they are obligated by this contract to convey to each family, or the several families respectively, and have actually settled a family or several families respectively therein, they shall immediately receive thereafter a full and absolute conveyance from the government of the Republic for as many sections of land of 640 acres, or half sections, or other fractional parts of sections equal in amount to 640 acres, as there shall be families certified to in such certificate or certificates."

It was further provided that the unlocated lands included in the boundaries described in the contract should remain and be held by the government of the Republic for the purposes set forth in the contract, until the end of five years from its date, and "Shall be considered as set apart, *exclusively of all future claims*, to be colonized in the manner aforesaid, by and for the benefit of the party of the second part and [322] of this Republic."

It was also stipulated that unless Mercer and his associates, or their legal representatives, "Shall, prior to the first day of May, 1845, have introduced and settled on the land above mentioned, according to the tenor of this contract, one hundred families, all right and title of the party of the second part, or their legal representatives, to proceed further in the execution of this contract, shall cease and determine from the moment of such default, but such default shall not work or operate retrospectively, but leave to the party of the second part, and all persons claiming under them, whatever right, title, or interest they may have acquired from the action of the party of the second part and their legal representatives prior to such default, to the same extent as if no such default or failure had occurred; and in like manner, and under like qualifications, the right of the said party to proceed further under this contract shall cease and determine; provided 250 families be not introduced and settled by them, in manner aforesaid, on or before the expiration of two years from the date hereof; and so in like manner 150 additional families shall be settled on the said lands, according to the terms of this contract, by the said parties of the second part or their legal representatives, within each of the three remaining years, or the right of the said party to proceed further under this contract, through the full term of five years from the date hereof, shall, on the occurrence of any default as aforesaid, utterly cease and determine; pro-

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vided, as before expressed, no such default shall operate otherwise than prospectively, either in relation to the said second party to this contract, or to the emigrant families actually settled, or any person or persons claiming by, through or under them or any of them."

To what extent did Mercer and his associates comply with their contract? The inference to be drawn from the opinion of the court is, that the record furnishes no evidence whatever that Mercer and his associates did anything of a substantial character entitling them to the benefit of their contract with the Republic of Texas. But we are of opinion that this is an erroneous view of the evidence. We cannot avoid the conclusion that the contrary is abundantly shown [323] by the record. That Mercer and his associates introduced and settled one hundred and nineteen families prior to the first day of May, 1845, the evidence leaves on our minds no reasonable doubt. There was produced from the records of the General Land-Office of Texas, certified by the Commissioner of that office, a copy of what is styled the original agreement of covenant, signed by the heads of that number of families, showing the date of their introduction into and settlement upon the Mercer Colony lands, the signature of each emigrant being duly witnessed.

That agreement is in these words:

"This instrument witnesseth, that the persons who have subscribed and undersigned their names hereto do hereby severally, but not jointly, agree and covenant as follows, to wit:

That each of us has received of Charles Fenton Mercer and his associates, known as and comprising the 'Texas Association,' a certificate issued in accordance with a contract made on the 29th day of January, A. D. 1844, between them and Sam. Houston, then President of the Republic of Texas, acting in behalf of the said Republic, authorizing them, among other things, to introduce and settle emigrant families upon the lands within the limits specified in said contract; the number and date of each certificate granted by said association, and by us received, being expressed and written in spaces to the left hand of our respective names, which certificates are received and held for the benefit of the respective families mentioned therein, each one of us forming a member of the family described in the certificate delivered to him, *which families have been specially introduced and settled at the times and in manner and form as stated and expressed in said certificates respectively by the said Mercer and his associates, and have emigrated as the said certificates declare and show.* And in consideration of the premises and the benefits from said certificates and the contract aforesaid, accruing and to arise, that we will severally observe and perform, as far as may be in our power, the several duties and requirements devolving upon us as settlers under said contract, whether prescribed by the terms thereof, or by the laws of the land in such behalf especially. We bind ourselves severally not to give, sell or in any [324] way furnish to any Indian any spirituous liquor, nor any gunpowder, lead or fire-arms, or warlike weapons of any description; and, moreover, to abstain from any waste or trespass upon the half sections adjoining those on which we have respectively settled, and on the whole sections adjoining thereto; and to guard the same from waste or trespass by others, and to protect the same from settlement by any other persons not authorized to settle thereon by the said association, or some legally authorized agent thereof; and to pay the sum of five dollars in materials, labor or money, towards the building of a school-house of such dimensions and on such site as the said association or its agent may direct. Also that each family specified or referred to herein, each one certifying alone for his own family, has and occupies a suitable cabin or house as described in said contract, and that each male member thereof of the age of seventeen years and upwards is supplied with a good rifle, yager or musket, and a sufficient supply of prime ammunition."

This paper was supported by the signatures and the oath of one of the Texas Association, and two disinterested persons, to the effect that the list contained "A true and accurate account and statement of emigrant families as certified to by the heads thereof to have been specially introduced and settled by Charles Fenton Mercer and his associates, known as and comprising the Texas Association, prior to the first day of May, 1845, upon and within the limits of the grant made by the Republic of Texas to said Mercer and his associates on the 29th of January, 1844, and referred to in the certificate subscribed to by the heads of the families respectively," etc. The record contains no evidence that the Republic of Texas by any of its officers ever made any objection to this certificate as defective either in form or substance. It brought the work of Mercer and his associates as to these 119 families within the terms of that portion of the contract already quoted. They did "exhibit to the Commissioner of the General Land-Office of Texas a certificate under oath subscribed by two witnesses," under date of August 2, 1845, and certified on the same day by a "person qualified by the laws of Texas to administer an oath," showing that Mercer and his associates had caused to be [325] built a comfortable house or cabin on the lands settled upon by said families, and showing also that they had actually settled said families on the lands for which they received the certificates mentioned in the agreement between Mercer and such settlers. The criticism which is made in the opinion of the court upon the language of this agreement and certificate impresses us as exceedingly technical. It is said that the parties signing it do not state that they were *emigrants from abroad* introduced into the State by Mercer or his associates; they, however, do state and certify that they have each received a certificate in accordance with the contract of January 29, 1844, describing it as one which authorized Mercer and his associates "to introduce and settle *emigrant* families upon the lands within the limits specified in said contract;" and they certify that they were "specially introduced and settled," as set forth in the certificates, and that they "have *emigrated* as the said certificates declare and show." That the persons who signed that agreement did not mean to certify that they had emigrated from State or country without the Republic of Texas is a suggestion which it did not occur to the Attorney-General of Texas in his very elaborate brief to make. It is for the first time found in the opinion of this court. That Philians, one

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of the persons who verified under oath the certificate relating to these 119 families, did not know "where the colonists came from," is a fact of no consequence; nor was it material to inquire from what particular State or country, other than Texas, they came. Philians in his affidavit refers to them as "emigrant families," meaning thereby that they came from without the Republic of Texas. We have been unable to find any evidence that the persons embraced in these 119 families did not go to the Mercer Colony tract from some place outside of Texas, and there is no suggestion to that effect in the argument of counsel.

It is said that none of these persons made oath to the papers they signed. Our answer is, that neither the contract nor the law of Texas required any such oath, but only the oath of two witnesses.

It seems to us that the complainant has made a clear case as to the 119 families introduced [326] by Mercer and his associates prior to May 1, 1845. The next inquiry is as to the effect to be given to the report of John M. Crockett in 1851. That report was made under the authority of an Act of the Legislature passed February 2, 1850, the 1st section of which provided that "Every colonist, or the heirs or administrators of such colonists, citizens of the Colony of Charles Fenton Mercer and his associates, on the 25th of October, 1848, shall receive the quantity of land to which such colonist may be entitled, to wit: 640 acres to each family, and 320 acres to each single man over the age of 17 years; *Provided*, That nothing herein contained shall be construed so as to place the contractors of said colony in a better condition in regard to the State of Texas than they would be if this law had not been passed." In this language we have a distinct recognition of the fact that there was, at the passage of that Act, a body of citizens in Texas known as "citizens *of the colony of Charles Fenton Mercer and his associates*," and that, *as "such colonists*," they were entitled to a certain quantity of land. Persons within the limits of the Mercer grant, who did not settle there in pursuance of some arrangement with Mercer and his associates, could not have been regarded as citizens of "the Colony of Charles Fenton Mercer and his associates." Nor could such persons have been described as of that colony and *entitled*, as "such colonists," to receive 640 acres, or any other quantity, of land, unless they had entered upon the land under the contract between the Republic of Texas and Mercer and his associates. The proviso in the section quoted does not at all militate against this view. That only shows the purpose of the State not to give "the contractors of said colony" any advantage they did not then have under their contract with the Republic.

The next section of the foregoing Act provided for the appointment by the Governor, by and with the advice and consent of the Senate, of a commissioner, "whose duty it shall be to *hear proof* and *determine* what *colonists* shall be entitled to land as aforesaid; and said commissioner shall issue to parties entitled to the same, or to the heirs or legal representatives of such [327] parties, certificates for *their proper quantity* of land." Plainly, the purpose of the Legislature was, through that officer, to ascertain who were entitled to land in virtue of the contract with Mercer and his associates. It was in violation of the contract for the State thus to pass over the contractors and treat directly with the colonists, but it is none the less clear that she proceeded upon the basis of giving land only to those who were "of the Colony of Charles Fenton Mercer and his associates." The official report of Crockett contains the names of all such persons. His action was judicial in its nature, and his determination as to who were entitled to land as colonists aforesaid, was a determination that Mercer and his associates had complied with their contract to the extent, at least, of the persons named in his report. The State gave land to all persons reported by Crockett as of the Mercer Colony and, consequently, she was bound by her contract to compensate Mercer. By the articles of her annexation to the United States it was provided that she shall "retain all the vacant and unappropriated land lying within her limits to be applied to the payment of the debts and *liabilities* of said Republic of Texas, and the residue of said lands, *after discharging* said debts and *liabilities*, to be disposed of as such State may direct." Her liability under her contract with Mercer was one of the liabilities for the discharge of which she was bound to apply the unappropriated lands within her limits. Had the articles of annexation been silent as to the debts and liabilities, and made no provision as to the unappropriated lands of the Republic of Texas, and had the United States taken such lands, then, according to the settled principles of public law, they would have been bound to meet the debts and liabilities of the late Republic, at least such as had been made a charge upon its public property. To avoid all difficulty upon that subject, it was expressly stipulated in the articles of annexation that Texas should retain her public lands, with power to dispose of them *after* discharging the debts and liabilities of the Republic, and that "In no event are said debts and liabilities to become a charge upon the Government of the United States." Thus was created, by Treaty between the United States and the Republic of Texas, an express trust for the benefit of those, to whom the latter, at the time, was [328] indebted or under liability. The agreement between the United States and Texas constituted, within the meaning of the Constitution, a contract, the violation of which, upon the part of the officers of that State, it is competent for the courts to prevent.

In the opinion of the court it is stated, among other things, that, since the contract was made with Mercer, Texas, both as an independent Republic and as a State of the Union, has denied its validity and refused to do anything under it. There is a serious obstacle in the way of our acceding to the correctness of this statement. It is found in the decision of the Supreme Court of Texas in *Melton* v. *Cobb*, 21 Tex., 540. Referring to this colonization contract with Mercer, that court said: "That the contract of the 29th of January, 1844, if valid, reserved the land in question from location and appropriation by the plaintiff's certificate, cannot be doubted. But it is insisted that the contract was invalid, for the want of authority, on the part of the President of the Republic, to confer on the grantee the benefits contemplated by the Joint

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Resolution of the 16th of February, 1843. He undoubtedly had authority under the Act of the 4th of February, 1841, and the amendatory Act of the 5th of February, 1842, to contract with the grantee to colonize vacant lands of the Republic for that purpose, and to set apart and reserve from location the territory within certain boundaries, which he should designate, for the period of three years from the date of the contract." Referring to the Act of February 3, 1845, copied in the opinion of this court, the Supreme Court of Texas said: "This Act cannot be regarded as anything less *than a virtual ratification by the Government, of the act of its agent in making the contract, and its legislative affirmation of its validity.* * * * The contract was *again expressly recognized and treated as an existing contract by the Act of 25th June,* 1845, and these Acts were passed prior to the plaintiff's location and survey. It is unnecessary to refer to more recent Acts containing *similar recognitions of the validity of the contract.* It will [329] suffice to say that these legislative recognitions of its validity *must be deemed to have put that question at rest. Houston* v. *Robertson*, 2 Tex., 23; *Hancock* v. *McKinney*, 7 Ib., 384, 441-2."

In view of the grounds upon which the court rests its decision, it is unnecessary for us to discuss the extent of relief to which Preston is entitled.

For the reasons stated we cannot assent to the opinion and judgment in this case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

DUBUQUE & SIOUX CITY RAILROAD COMPANY AND THE IOWA HOMESTEAD COMPANY, *Plffs. in Err.*,

v.

DES MOINES VALLEY RAILROAD COMPANY.

(See S. C., Reporter's ed., 329-336.)

Iowa railroad grant—construction of reservation—estoppel.

1. There was no Indian title in the way of the grant made by the Act of July 12, 1862, ch. 161, 12 Stat. at L., 543, and the title of the Des Moines Valley company, the grantee of the State of Iowa, was thereby perfected.

2. A mistake in officers of the government, in construing a reservation in a grant, does not constitute an estoppel, and the reservation must, nevertheless, be construed by the court and have effect according to its terms.

[No. 71.]

Argued Oct. 29, 30, 1883. Decided Nov. 19, 1883.

IN ERROR to the Supreme Court of the State of Iowa.

The petition in this case was filed in the District Court of Humboldt County, Iowa, by the plaintiffs in error, to quiet its title to certain tracts of land containing over 10,000 acres, which they claimed under the Act of May 15, 1856, granting lands to the State of Iowa to aid in building a railroad from Dubuque to Sioux City.

The defendant claims that the lands in question were excluded from the grant of 1856; that said lands were granted to the State of Iowa by the Acts of Aug. 8, 1846 and July 12, 1862, and that the State has granted said lands to the Des Moines Valley Railroad Company, the defendant.

The district court entered a decree in favor of the plaintiffs, declaring their title valid, and canceling all certificates or patents, under which defendant claims title to said lands.

The Supreme Court of the State having reversed this decree on appeal, the plaintiffs sued out this writ of error.

Additional facts appear in the opinion of the court.

Messrs. **Charles A. Clark** and *N. M. Hubbard*, for plaintiffs in error.

Messrs. **C. C. Nourse** and *B. F. Kauffman*, for defendant in error:

This court in December, 1859, in the case of *R. R. Co.* v. *Litchfield*, decided that this grant of land made to the State of Iowa for the improvement of the Des Moines River, approved August 8, 1846, did not extend to the north boundary of the State, as claimed by the State of Iowa, but that it embraced only the lands below the Raccoon Fork of the Des Moines River. *R. R. Co.* v. *Litchfield*, 23 How., 66 (64 U. S., XVI., 500). The department, however, continued the reservation, in order that Congress might take some action in the premises.

By Act approved July 12, 1862, Congress extended the grant of 1846, and confirmed the title of the State to all the lands within five miles of the Des Moines River in the alternate sections, to the northern boundary of the State, and consented to a diversion of the lands to build a railroad up and along the river.

Under the Act of 1862, the lands in controversy were certified to the State and were by the State granted and certified to the defendant, the Des Moines Valley Railroad Company.

In May, 1860, after the Litchfield decision, the agent of the Dubuque and Sioux City R. R. Co. made a claim on behalf of said Company, to have the lands in controversy certified to the State under the grant of 1856.

This the department expressly refused, on the ground that the lands were reserved.

This court has decided the question of the reservation of these lands, and that they did not pass to the State of Iowa, under the Act of July 15, 1856, in the following well considered cases: *Wolcott* v. *Des Moines Co.*, 5 Wall., 681 (72 U. S., XVIII., 689); *Riley* v. *Welles*, not reported (see, XIX., 648); *Williams* v. *Baker*, 17 Wall., 144 (84 U. S., XXI., 561); *Homestead Co.* v. *R. R. Co.*, 17 Wall., 153 (84 U. S., XXI., 622).

Mr. Chief Justice **Waite** delivered the opinion of the court:

The following are no longer open questions in this court:

1. That the grant of lands to the Territory of Iowa for the improvement of the Des Moines River, made by the Act of August 8, 1846, ch. 103, 9 Stat. at L., 77, did not extend above the Raccoon Fork. *R. R. Co.* v. *Litchfield*, 23 How., 66 [64 U. S., XVI., 500].

2. That, notwithstanding this, the odd numbered sections within five miles of the river, on each side above the Raccoon Fork, and below the east branch, to which the Indian title had been extinguished, were so far reserved, "by competent authority," for the purpose of aiding

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in the improvement of the Des Moines, that they did not pass under the Act of May 15, 1856, ch. 28, 11 Stat. at L., 9, granting lands to the State of Iowa to aid in the construction of certain railroads; and

3. That the Act of July 12, 1862, ch. 161, 12 Stat. at L., 543, "transferred the title from the United States and vested it in the State of Iowa, for the use of its grantees under the river grant." *Wolcott* v. *Des Moines Co.*, 5 Wall., 681 [72 U. [331] S., XVIII., 689]; *Williams* v. *Baker*, 17 Wall., 144 [84 U. S., XXI., 561]; *Homestead Co.* v. *R. R. Co.*, Id., 153 [84 U. S., XXI., 622]; *Wolsey* v. *Chapman* 101 U. S., 767 [XXV., 919].

The lands involved in this suit are odd numbered sections, located in Iowa, within five miles of the Des Moines, above the east fork, and it is insisted that they did not pass under the Act of 1862, because,

1. When the reservation for the river improvement was made, the Indian title had not been extinguished, and they were not then part of the public lands of the United States; and

2. The reservation, as in fact made, was along the east branch and not the main river where these lands are.

These objections present the only questions we have now to consider.

1. As to the Indian title.

It is conceded that when the Act of 1846 was passed, all Indian titles had been extinguished, except such as belonged to certain bands of the Sioux. By a Treaty between the United States and the Sacs and Foxes, the Medawah-Kanton, Wahpacoota, Wahpeton and Sissetong Bands or Tribes of Sioux, and the Ottawas, Iowas, Ottoes and Missourias, concluded on the 15th of July, 1830, and proclaimed on the 24th of February, 1831, 7 Stat. at L., 328, certain lands were ceded and relinquished to the United States "To be assigned and allotted, under the direction of the President of the United States, to the Tribes now living thereon, or to such other Tribes as the President may locate thereon for hunting and other purposes." The north line of this cession is described in the Treaty as follows: "Beginning at the upper fork of the Des Moines River and passing the source of the Little Sioux and Floyds Rivers, to the fork of the first creek which falls into the Big Sioux or Calumet on the east side." The lands north of this line were occupied by the Sioux, and those south were held by the United States for the purposes set forth in the Treaty. Whether the lands in controversy in this suit are situated north or south of this boundary line depends on whether the east branch or the Lizard made the upper fork [332] of the Des Moines, as understood by the parties when the Treaty was concluded. If the Lizard, then all are north of the line; if the east branch, all, or nearly all, are south.

On the 28th of July and the 5th of August, 1851, treaties were negotiated by the Sioux, by which they surrendered all their title to lands in Iowa. The ratification of these Treaties, in the form they were originally made, was not advised by the Senate, but on the 23d of June, 1852, certain amendments were proposed, on the acceptance of which the President was authorized to conclude the Treaties "as amended." The amendments were agreed to by the Indians on the 4th and 8th of September, 1852, and the ratification of the Treaties was duly proclaimed on the 24th of February, 1853.

The grant to Iowa under the Act of 1846 was of "One equal moiety, in alternate sections, of the public lands (remaining unsold, and not otherwise disposed of, incumbered, or appropriated), in a strip five miles in width on each side of said river, to be selected," etc., and the odd numbered sections were afterwards selected. A question arose as to the extent of this grant, and as early as February 23, 1848, the Commissioner of the General Land-Office certified to the officers of the State that, in the opinion of "his office," the State was "entitled to the alternate sections within five miles of the Des Moines River throughout the whole extent of that river within the limits of Iowa." The State claimed that the grant extended from the mouth of the river to its source. Notwithstanding the opinion of the land-office, and the claim of the State, a proclamation was issued by the President on the 19th of June, 1848, ordering into market some of the lands which lay above the Raccoon Fork. This led to a protest on the part of the officers of the State, and a correspondence between the representatives of the State in Congress and the Secretary of the Treasury, whose department then had charge of the public lands, which resulted in the announcement by the Secretary, on the 2d of March, 1849, of his opinion that the grant extended from the mouth to the source of the river, not, however, including any lands in the State of Missouri. In accordance with this opinion, instructions were issued from the general land officers to the land officers in Iowa, [333] on the first of June, 1849, "to withhold from sale all the lands situated in the odd numbered sections within five miles on each side of the river above the Raccoon Forks." This, however, did not settle the matter, and conflicting opinions were announced at various times by different officers of the executive departments of the government. Finally, on the 22d of February, 1851, the state officers formally notified the Secretary of the Interior, to whose department the charge of the public lands had before that time been assigned, of the demand by the State of "all the odd sections of land within five miles of the Des Moines River above the Raccoon Fork." After this the whole matter was brought before the President and Cabinet, and the decision arrived at by them is indicated in the following letter of the Secretary of the Interior:

"Department of the Interior,
Washington, *October* 29, 1851.

Sir: I herewith return all the papers in the Des Moines case, which were recalled from your office about the first of the present month.

I have considered and carefully reviewed my decision of the 26th July last, and in doing so find that no decision which I can make will be final, as the question involved partakes more of a judicial than an executive character, which must ultimately be determined by the judicial tribunals of the country; and although my own opinion on the true construction of the grant is unchanged, yet in view of the great conflict of opinion among the executive officers of the government, and also in view of the opinions of several eminent jurists which have been

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presented to me in favor of the construction contended for by the State, I am willing to recognize the claim of the State, and to approve the selections without prejudice to the rights, if any there be, of other parties, thus leaving the question as to the proper construction of the statute entirely open to the action of the judiciary. You will please, therefore, as soon as may be practicable, submit for my approval such lists as may have been prepared, and proceed to report for like approval lists of the alternate sections claimed by the State of Iowa above the Raccoon Forks, as far as the surveys have progressed or may hereafter be completed [334] and returned.

Very respectfully, &c., &c.,
A. H. H. Stuart, *Secretary.*

The Commissioner of the General Land-Office."

In obedience to these instructions, lists were made out as the surveys progressed, and submitted to the Secretary for his approval. His last approval, before the passage of the railroad grant of 1856, was on the 17th of December, 1853. The lands now in controversy were not surveyed at that time, and were not included in this or any of the lists previously made.

It is undoubtedly true, as was said in *R. R. Co.* v. *U. S.*, 92 U. S. 743 [XXIII., 638], that, "in the absence of words of unmistakable import," it will not be presumed that Congress has made a grant of lands to which the Indian title has not been extinguished; but there are, nevertheless, instances, as in the case of the Pacific railroads, where this has been done. Confessedly, however, in this case the congressional grant of 1846 did not include the lands now in controversy. Whatever reservation there was to interfere with the railroad grant of 1856, grew out of what was done by the executive officers of the Government after the Act of 1846 was passed and while its effect was in doubt. That the State claimed all the alternate sections within five miles of the river on each side and as far north as the state line, is not denied. That the intention of the President and his Cabinet was to make the reservation as broad as the claim, is to our minds perfectly apparent from the language of the instructions of the Secretary of the Interior to the Commissioner of the General Land-Office in his communication of the 29th of October, 1851. His words are: "I am willing to recognize the claim of the State and approve the selections without prejudice to the rights, if any there be, of others, thus leaving the question as to the proper construction of the statute entirely open to the action of the judiciary." He then directed lists of selections to be prepared and submitted for [335] his approval as the surveys were completed and returned. At this time all the Indian title that could, by any possibility, interfere with the grant as claimed by the State was in the process of extinguishment. Treaties which were to have that effect had already been negotiated with the Indians and were waiting ratification by the United States. There could hardly have been a doubt in the minds of any of the parties that long before any judicial determination of the matters in dispute every vestige of Indian title would be gone. Hence, to leave "the question of the construction of the statute," that is to say, the effect of the grant, "entirely open," all the lands within the limit, surveyed or unsurveyed, and, as we think, incumbered by an Indian title or unincumbered, were reserved from sale until the "action of the judiciary." This reservation was in force when the Act of 1856 was passed, and it is *the* reservation which this court has held prevented the grant under that Act from attaching to the lands within the limits of the river grant, as claimed by the State. The Act of 1862 afterwards, in express terms, granted to the State, for the use of its grantees, "The alternate sections designated by odd numbers lying within five miles of said river, between the Raccoon Fork and the northern boundary of the State." At this time there was no Indian title in the way of the grant, and if the reservation was good as against the railroad companies in 1856, the title of the Des Moines Valley Company, the grantee of the State, was perfected.

2. As to the east branch.

Much of what has been said about the Indian title applies to this objection. The State claimed the lands along the river, and the reservation as promulgated was of what was claimed. No one now supposes the east branch was, in fact, the Des Moines River. It is undoubtedly true that at some time some officers of the government, as well as some officers of the State, supposed the branch was the main river and acted accordingly, but that does not change the geographical fact that what was taken for the river was only a branch. The lists of selections along the branch, and their approval by the Secretary, were mistakes, which the record shows were corrected in the final settlements between the [336] State and the United States by allowances in account. The same may be said of the marks on the plats sent out from the General Land-Office to the local land officers. They were clerical mistakes, growing out of an imperfect knowledge of the geography of the country. They did not change the reservation, but only gave wrong information as to what it was. There is no question of estoppel as a consequence of the mistake involved. The railroad grant of 1856 was subject to the reservation for the river grant. There is no pretense of fraud anywhere, and the record does not show that the conduct of the appellants or their grantors has been in any way influenced by the plats or the unauthorized selections and certificates. They knew or ought to have known that the reservation was confined to the river lands, and that the branch was not the river. Hence the reservation is to have effect according to its terms, and not according to any mistaken interpretation which may at some time have been given to it.

We find no error in the record, and the judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

EDWARD L. KEYES, *Appt.*,
v.
UNITED STATES.

(See S. C., Reporter's ed., 336-340.)

Removal of army officer—power of President—court-martial, sentence of.

*1. The President has the power to supersede or

* Head notes by *Mr. Justice* BLATCHFORD.

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remove an officer of the army by appointing another in his place, by and with the advice and consent of the Senate.

2. Such power was not withdrawn by the provision in section 5 of the Act of July 13, 1866, ch., 176, 14 Stat. at L., 92, now embodied in section 1229 of the Revised Statutes, that "No officer in the military or naval service shall, in time of peace, be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."

3. Where a court-martial has cognizance of the charges made, and has jurisdiction of the person of the accused, its sentence is valid, when questioned collaterally, although irregularities or errors are alleged to have occurred in its proceedings, in that the prosecutor was a member of the court and a witness on the trial.

4. No opinion is expressed as to the propriety of such proceedings.

[No. 114.]

Submitted Nov. 13, 1883. Decided Nov. 26, 1883.

APPEAL from the Court of Claims.

The history and facts of the case appear in the opinion of the court.

Messrs. **James Coleman** and *Matt. H. Carpenter*, for appellant:

It is well settled that courts-martial are courts of limited and special jurisdiction, and it is essential to their validity that it should be affirmatively shown that they acted upon a case clearly within their jurisdiction, and that their proceedings were strictly regular. No presumption can be indulged in favor of the validity of the judgment of such a court, and its judgment is everywhere treated as a nullity, unless the record affirmatively shows both jurisdiction and regularity of proceedings.

3 Greenl. Ev., sec. 470; *Duffield* v. *Smith*, 8 Serg. & R., 590; *Brooks* v. *Adams*, 11 Pick., 441; *Mills* v. *Martin*, 19 Johns., 7; *Brooks* v. *Davis*, 17 Pick., 148; *Jones* v. *Reed*, 1 Johns. Cas., 20, and cases cited; 1 Ops. Attys-Gen., 177, *Op. of Atty-Gen. Rush*; *Sheldon* v. *Sill*, 8 How., 441; *State* v. *Gachenheimer*, 30 Ind., 63; *State* v. *Ely*, 43 Ala., 568; *R. R. Co.* v. *Shultz*, 31 Ind., 150.

Courts of limited and special jurisdiction must observe all the principles of the common law, except in so far as special statutes have imposed a different rule for such courts.

3 Greenl. Ev., sec. 469; Adye, Courts-Martial, 45; Benet, Courts-Martial, 244; De Hart, Military Law, 322; *Mustratt's Case*, 2 MacArth., 158; Simmons, Courts-Martial, 485-487.

An officer, preferring charges and being the only witness to establish the same, cannot sit as a judge for the trial of such charges, and pass upon the weight and effect of his own testimony.

Hickman, L. and P. of Naval Courts-Martial, 246, ch. 1, p. 18; DeHart, Military Law, 122, 123; Harwood, Naval Courts-Martial, 21; Benet, Courts-Martial, 19; Scott, Military Law, sec. 634; Simmons, Courts-Martial, 222; *Queen* v. *Justices of Hertfordshire*, 6 Q. B., 753; Broom, Leg. Max., 4th ed., 119-122; *Stockwell* v. *White Lake*, 22 Mich., 341; 3 Chit. Pr., 9; *Sigourney* v. *Sibley*, 21 Pick., 101; *David Cottle, Appt.*, 5 Pick., 482; *Coffin* v. *Cottle*, 9 Pick., 287; *Brooks* v. *Adams*, 11 Pick., 441; *Brooks* v. *Davis*, 17 Pick., 149.

It is a proposition that may be laid down without qualification, that consent cannot confer jurisdiction.

Mordecai v. *Lindsey* 19 How., 199 (60 U. S., XV., 624); *Montgomery* v. *Anderson*, 21 How., 386 (62 U. S., XVI., 160); *Walker* v. *Kynett*, 32 Iowa, 524; *Rice* v. *State*, 3 Kan., 142; *Lindsey* v. *McClelland*, 1 Bibb, 262; *Bent* v. *Graves*, 3 McCord, 280; *Foley* v. *People*, Breese, 31; *Falkenburgh* v. *Cramer*, Coxe, 31; *Parker* v. *Munday*, Coxe, 70; *Ballance* v. *Forsyth*, 21 How., 389 (62 U. S., XVI., 148); *Jackson* v. *Ashton*, 8 Pet., 148; *R. R. Co.* v. *Campbell*, 62 Mo., 585; *State* v. *Judge*, 21 La. Ann., 258; *People* v. *Cancemi*, 7 Abb. Pr., 271; *Dodson* v. *Scoggs*, 47 Mo., 285; *Cones* v. *Ward*, 47 Mo., 289; *Nasro* v. *Cragin*, 3 Dill., 474; *Davis* v. *Packard*, 7 Pet., 276; *Low* v. *Rice*, 8 Johns., 409; *Clayton* v. *Per Dun*, 13 Johns., 218; *Edwards* v. *Russell*, 21 Wend., 63; *Sigourney* v. *Sibley*, 21 Pick., 101.

Confession of guilt does not estop the accused from questioning the jurisdiction of the court.

Duffield v. *Smith*, 3 Serg. & R. 590; *Peacock* v. *Bell*, 1 Saund., 73; *Turner* v. *Bank*, 4 Dall., 11; *Perkin* v. *Proctor*, 2 Wils., 385; *Higginson* v. *Martin*, 1 Freem., 322; 2 Mod., 29; Bull. *N. P.*, 83; 10 Coke, 51; *The Marshalsea Case*, 10 Coke, 68; *Oakley* v. *Aspinwall*, 3 N. Y., 547, and cases cited.

Mr. **William A. Maury**, *Asst. Atty-Gen.*, for appellee:

A brief was also filed in the case in January, 1881, by *Messrs. Chas. Devens, Atty-Gen.*, and *George C. Wing*.

Jurisdiction attached to the court as it was constituted, and every thing done within the power of that jurisdiction, when collaterally questioned, must be held conclusive.

Cornett v. *Williams*, 20 Wall., 250 (87 U. S. XXII., 259).

When the only witness is a judge, the propriety and duty of testifying is unquestioned.

Greenl. Ev., sec. 487.

The text writers unite in this doctrine.

2 MacArthur, 89; Maltby, 48; 2 Hawk., 46, 517; Kennedy, 109; Hughes, 68; Tyler, 270; Simmons, 304; McComb., sec. 129; Ives, 333.

Mr. Justice **Blatchford** delivered the opinion of the court:

The appellant brought a suit against the United States, in the Court of Claims, on the 2d [337] of February, 1880, claiming to recover the sum of $4,236.36, for his pay as a second lieutenant in the 5th Regiment of Cavalry, in the Army of the United States, from the 28th of April, 1877. That court dismissed his petition, on the following facts found by it: in February, 1877, the appellant was tried on four charges and specifications, before a general court-martial composed of ten officers. One of them, Colonel Merritt, was the Colonel of the 5th Cavalry. They were all present. The appellant being before the court, and the order appointing it being read, he was asked if he had any objection to any member of the court present, named in the order, to which he replied in the negative. The oaths were then administered to the members of the court in the presence of the appellant. The first three of the charges and specifications were preferred by the Lieutenant-Colonel of the 5th Cavalry and the fourth by Colonel Merritt. The appellant was represented by counsel of his own selection. He pleaded, not guilty. Colonel Merritt was sworn as a witness on the part of the Government, and gave testimony in support of the charge and specifications preferred by him, but gave no testimony in regard to the other charges and specifications. The day after the appellant pleaded, not guilty, he withdrew, by leave of the court, his plea of

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not guilty to the second charge and its specifications, and entered a plea of, guilty, thereto. Colonel Merritt continued to sit as a member of the court throughout the trial, and participated in rendering the final judgment. At the close of the evidence, the appellant submitted, in writing, a statement of his defense, which was read to the court. It contained no objection or reference to the participation of Colonel Merritt in the trial, as a member of the court, or to his having been so sworn and examined as a witness on behalf of the Government. The court found the appellant guilty of all the charges and specifications and sentenced him to be dismissed from the service. The proceedings, findings and sentence of the court were approved by the President of the United States, who ordered that the sentence should take effect on the 28th of April, 1877. On the 27th of June, 1877, the Senate not being in session, the President ap- [338] pointed Henry J. Goldman to be a second lieutenant in the 5th Regiment of Cavalry and, on the 15th of October, 1877, he nominated Goldman to the Senate for appointment as second lieutenant in said regiment, in the place of the appellant, dismissed, to date from June 15, 1877. The Senate advised and consented to the appointment of Goldman, and he was accordingly commissioned and still holds the office of such second lieutenant.

So far as regards the time after June 15, 1877, the fact that Goldman was appointed by the President, by and with the advice and consent of the Senate, a second lieutenant in the 5th Cavalry, in the place of the appellant, from June 15, 1877, and was commissioned as such, and accepted and held the appointment, is a bar to the suit of the appellant. It was held by this court, in *Blake* v. *U. S.*, 103 U. S., 227 [XXVI., 462], that the President has the power to supersede or remove an officer of the army by the appointment of another in his place, by and with the advice and consent of the Senate, and that such power was not withdrawn by the provision in section 5 of the Act of July 13, 1866, ch. 176, 14 Stat. at L., 92, now embodied in section 1229 of the Revised Statutes, that "No officer in the military or naval service shall, in time of peace, be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof." It was held that this provision did not restrict the power of the President, by and with the advice and consent of the Senate, to displace officers of the army or navy, by the appointment of others in their places.

In regard to the rest of the time covered by the suit, it becomes necessary to decide the [339] question raised as to the validity of the sentence of the court-martial. It is contended for the appellant that the court-martial had no jurisdiction to try him; that the fact that he made no objection to any member of the court was not a consent upon his part which conferred jurisdiction on the court-martial; and that the fact that Colonel Merritt was prosecutor, witness and judge rendered the proceedings of the court-martial void. The position is taken that, although there is no statute or regulation which forbids what was done in this case, the sentence of a court-martial in which one of the judges is prosecutor and witness is absolutely void, and that neither what the appellant said nor what he omitted to say, at the time, can cure the defect in the organization of the court.

That the court-martial, as a general court-martial, had cognizance of the charges made, and had jurisdiction of the person of the appellant, is not disputed. This being so, whatever irregularities or errors are alleged to have occurred in the proceedings, the sentence of dismissal must be held valid when it is questioned in this collateral way. *Thompson* v. *Tolmie*, 2 Pet., 157; *Voorhees* v. *Bank of U. S.*, 10 Id., 449; *Cornett* (*Nash*) v. *Williams*, 20 Wall., 226, 249 [87 U. S., XXII., 254, 258]. This doctrine has been applied by this court to the judgment and sentence of a naval general court-martial, which was sought to be reviewed on a writ of *habeas corpus*. *Ex parte Reed*, 100 U. S., 13 [XXV., 538].

Where there is no law authorizing the court-martial, or where the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment. Of that character are the authorities cited and relied on by the appellant; but they do not apply to the present case.

Under the foregoing views, we express no opinion as to the propriety of the proceedings of the court-martial in the respects in which they are assailed.

The judgment of the Court of Claims is affirmed.

Mr. Justice **Field** did not sit in this case nor take part in its decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

INHABITANTS OF TOWNSHIP OF BERNARDS IN COUNTY OF SOMERSET AND STATE OF N. J., *Appts.*, [341]

v.

GEORGE N. STEBBINS, EXR. of CYRUS CURTIS, Deceased.

SAME, *Appts.*,

v.

THOMAS H. MORRISON AND GARDNER S. HUTCHINSON.

(See S. C., "*Bernards Township* v. *Stebbins*," Reporter's ed., 341-356.)

Omission of seals on town bonds—bill in equity to relieve against.

*1. If commissioners, authorized by statute to subscribe in the corporate name of a town for stock in a railroad company, and, upon obtaining the consent of a certain majority of taxpayers, to issue bonds of the town under the hands and seals of the commissioners, and to sell the bonds and invest the proceeds of the sale in stock of the railroad company, which shall be held by the town with all the rights of other stockholders, issue, without obtaining the requisite consent of taxpayers, to the railroad company, in exchange for stock, such bonds signed by the commissioners, but on which the seals are omitted by oversight and mistake; and the town sets up the want of seals in defense of an action at

*Head notes by *Mr. Justice* GRAY.

NOTE.—*Removal of causes under Act of 1875; citizenship.* See, *note* to Removal Cases, 100 U. S., XXV., 593.

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law afterwards brought against it by one who has purchased such bonds for value, in good faith and without observing the omission, to recover interest on the bonds, a court of equity, at his suit, will decree that the bonds be held as valid as if actually sealed before being issued and will restrain the setting up of the want of seals in the action at law.

2. A bill in equity in the Circuit Court of the United States against a town in one State by a citizen of another, for relief against the accidental omission of seals from bonds of the defendant, payable to bearer, and held by the plaintiff, some of which are owned by him, and others of which are owned in different amounts, part by citizens of the State in which the town is, and part by citizens of other States, and have been transferred to him by the real owners for the mere purpose of being sued, should be dismissed, under the Act of March 3, 1875, ch. 137, section 5, so far as regards all bonds held by citizens of the same State as the defendant, and bonds held by a citizen of another State to a less amount than $500.

[Nos. 96, 97.]

Argued Nov. 7, 8, 1883. Decided Nov. 26, 1883.

APPEALS from the Circuit Court of the United States for the District of New Jersey.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **Alvah A. Clark** and **Thomas N. McCarter,** for appellants.

Mr. **Henry C. Pitney,** for Stebbins, appellee.

Mr. **Cortlandt Parker,** for Morrison *et al.*, appellees.

[342] *Mr. Justice* **Gray** delivered the opinion of the court:

These are appeals by a Township in New Jersey from decrees of the Circuit Court of the United States for the District of New Jersey, upon bills in equity by the appellees for relief against the accidental omission of seals on its bonds. The facts, appearing by the record, are as follows:

By the general laws of New Jersey, the inhabitants of each township of the State are a body politic and corporate, by the name of "The Inhabitants of the township of ——— in the county of ————." R. S. of N. J. of 1877, 1191.

On the 9th of April, 1868, the Legislature of New Jersey passed a statute entitled "An Act to Authorize Certain Towns in the Counties of Somerset, Morris, Essex and Union, to Issue Bonds and Take Stock in the Passaic Valley and Peapack Railroad Company," the 1st section of which directed the circuit court of either of those counties, on the application of twelve or more freeholders and residents of any township therein, situated along the route of the railroad, to appoint three "commissioners for such township to carry into effect the purposes and provisions of this Act." The next two sections are as follows:

"Sec. 2. It shall be lawful for said commissioners to borrow, on the faith and credit of their respective townships, such sum of money, not exceeding ten per centum of the valuation of the real estate and landed property of such township, to be ascertained by the assessment rolls thereof respectively for the year eighteen hundred and sixty-seven, for a term not exceeding twenty-five years, at a rate of interest not exceeding seven per centum per annum, payable semi-annually, and to execute bonds therefor, under their hands and seals respectively; the bonds so to be executed may be in such sums and payable at such times and places, as the said commissioners and their successors may deem expedient; but no such debt shall be contracted or bonds issued by said commissioners of or for either of said townships, until the written consent shall have been obtained of the majority of the taxpayers of such township, or their legal representatives, appearing upon the last assessment roll, as shall represent a majority of the landed property of such township (including lands owned by non-residents) appearing upon the last assessment roll of such township; such consent shall state the amount of money authorized to be raised in such township, and that the same is to be invested in the stock of the said railroad company, and the signatures shall be proved by one or more of the commissioners; the fact that the persons signing such consent are a majority of the taxpayers of such township and represent a majority of the real property of such township shall be proved by the affidavit of the assessor of such township, indorsed upon or annexed to such written consent, and the assessor of such township is hereby required to perform such service; such consent and affidavit shall be filed in the office of the clerk of the county in which such township is situated, and a certified copy thereof in the town clerk's office of such township, and the same or a certified copy thereof shall be evidence of the facts therein contained, and received as evidence in any court in this State, and before any judge or justice thereof. [343]

Sec. 3. The said commissioners authorized by this Act may, in their discretion, dispose of such bonds, or any part thereof, to such persons or corporations and upon such terms as they shall deem most advantageous for their said township, but not for less than par; and the money that shall be raised by any loan or sale of bonds shall be invested in the stock of said railroad company for the purpose of building the aforesaid railroad, and said money shall be applied and used in the construction of said railroad, its buildings, equipment and necessary appurtenances, and for no other purpose; the commissioners respectively, in the corporate name of each of their said townships, shall subscribe for and purchase stock in said railroad company, to the amount they may have severally borrowed as aforesaid; and by virtue of such subscription or purchase of stock, upon receiving certificates for the amount of said stock so subscribed for or purchased by them, the said townships shall acquire all the rights and privileges respectively of other stockholders of said company, and it shall be lawful for the commisioners provided for in this Act, or either of them with the consent of the others, or a majority of the said commissioners, to participate in and to act in all the regular and legally authorized meetings of the stockholders, and either of them may act as director of said company if he shall be duly elected as such."

By section 4, the commissioners were directed to report annually to the township committee the amount required for the next year to pay the interest or principal of the bonds, and to apply in payment thereof the dividends on the stock subscribed or purchased for the township; and any deficiency was to be assessed and levied upon the landed property of the township, like other taxes. By section 5, the rail- [344]

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road company might agree with the commissioners, "in behalf of their respective townships," to pay the interest accruing "on the bonds issued by such townships," for three years or until the railroad should be completed and earning sufficient to pay dividends equal to the interest. By section 6, the commissioners might, after acquiring stock, exchange it for bonds issued and cancel the bonds so received; or they might, with such consent as mentioned in section 2, sell the stock for cash at public sale, and apply the proceeds to the purchase or redemption of the bonds. And by section 7, at the end of twenty-five years, the sum due for principal and interest on the bonds, as reported by the commissioners, was to be assessed and levied on the landed property."

By section 9, the commissioners were required, before entering upon the discharge of their duties, to give bond to the township, with sureties approved by the township committee or by the the judge of the county court. By section 11, their pay and disbursements were to be "audited and paid by the township committee, the same as other township expenses." By section 12, the commissioners in each township were to "constitute a board to act for their said townships respectively." And by section 14, all bonds issued were required to be registered in the office of the county clerk, and the words "registered in the county clerk's office" be printed or written across the face of each bond, attested by the signature of the county clerk, "and no bond shall be valid unless so registered."

Commissioners for the Township of Bernards in the County of Somerset were appointed, and gave bond to the township, according to sections 1, 9. On the 17th of December, 1868, they filed in the county clerk's office the written consent of a number of taxpayers, not being a majority of all the taxpayers in the township, but being a majority in number and value of the owners of real estate therein; with an [345] affidavit of one of the commissioners to the signatures; and an affidavit of the assessor that the signers were a majority of the taxpayers of the township and represented a majority of the real property of the township, and also that they were a majority of the taxpayers of the township appearing upon its assessment roll for 1867, or their legal representatives, and represented a a majority of the landed property of the township appearing upon that assessment roll.

In the same month of December, 1868, the commissioners subscribed in behalf of the township, for stock in the railroad company, of the value of $127,000, which did not exceed ten per cent of the assessed valuation of the landed property of the township in 1867; and caused bonds of the township to an equal amount to be printed in the form hereinafter set forth; and made an arrangement with the railroad company to exchange the bonds of the township for stock in the company, and to deliver the bonds to the company in installments, as calls for payments on subscriptions were made, and as the work on the railroad progressed. The railroad was afterwards built and put in operation through the town; and the commissioners issued to the railroad company, in exchange for stock, instruments to the amount aforesaid, in the form of bonds, of the denominations of $1,000, $500 and $100 respectively, signed by the commissioners, but not sealed, with interest coupons annexed. The form of the bonds and of the coupons were as follows: "No. United States of America. $500. Township of Bernards, Somerset County, State of New Jersey.

The Inhabitants of the Township of Bernards in the County of Somerset acknowledge themselves to owe to bearer $500, which sum they promise to pay the holder hereof, at the American Exchange National Bank in the City of New York, twenty-three years after the date hereof, and interest thereon at the rate of seven per cent per annum, payable semi-annually, on the first days of July and January in each year, until the said principal sum shall be paid, on the [346] presentation of the annexed interest coupons at the said bank.

This bond is one of a series of like tenor, amounting in the whole to the sum of one hundred and twenty-seven thousand dollars, issued on the faith and credit of said township in pursuance of an Act entitled 'An Act to Authorize Certain Towns in the Counties of Somerset, Morris, Essex and Union to Issue Bonds and Take Stock in the Passaic Valley and Paupack Railroad Company,' approved April 9, 1868.

In testimony whereof the undersigned, commissioners of the said Township of Bernards in the County of Somerset to carry into effect the purposes and provisions of the said Act, duly appointed, commissioned and sworn, have hereunto set our hands and seals the first day of January in the year of our Lord one thousand eight hundred and sixty-nine.

John H. Anderson,
John Guerin,
Oliver R. Steele,
Commissioners.

Registered in the county clerk's office.
William Ross, Jr.,
County Clerk.

$17.50. The Inhabitants of the Township of Bernards in the County of Somerset will pay the bearer, at the Amercan Exchange National Bank in the City of New York, seventeen $\frac{50}{100}$ dollars, on the first day of January, 1869, for six months' interest on bond No.

John H. Anderson,
John Guerin,
Oliver R. Steele,
Commissioners."

One fifth of the whole amount of bonds was signed by the commissioners and delivered to the railroad company on the 16th of January, 1869, was registered on the 18th of the same month, and was afterwards put in circulation by the company. Upon a bill filed by certain taxpayers of an adjoining township in the spring of 1869, the Court of Chancery of New Jersey restrained the issue of like bonds, for want of the consent of a majority of all the taxpayers of [347] the township. *Lane* v. *Schomp*, 5 C. E. Green, 82. The commissioners thereupon obtained, and filed in the county clerk's office on the 1st of September, 1869, the written consent of other taxpayers, which, with those whose consent had been previously filed, constituted a majority of all the taxpayers in the township, with similar affidavits of commissioner and assessor; and the remaining four fifths of the bonds were afterwards issued and registered and put in

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circulation. Of the bonds in controversy, some were issued before and some after the 1st of September, 1869.

The commissioners intended to issue and supposed that they had issued perfect bonds, and their failure to affix their seals to the bonds was by oversight and mistake. The bonds were purchased by the present owners in good faith, in open market, for the then market price of from eighty-five to a hundred cents on a dollar, and without observing that they had no seals.

Cyrus Curtis, a citizen of New York (of whom the appellee in the first case is the executor), held and owned such bonds to the amount of $2,000; and held like bonds to the amount of $3,000, owned by other citizens of New York, in amounts varying from $1,300 to $500 each, except that one owned only $200, and delivered by them to him solely for the purpose of bringing suit on the coupons; and also held coupons past due and unpaid upon like bonds to the amount of $18,600, owned by citizens of New Jersey, who had assigned those coupons to him for the sole purpose of collecting the amount thereof.

Thomas H. Morrison and Gardner S. Hutchinson, citizens of New York (the appellees in the second case), held and owned such bonds to the amount of $10,000; and also held like bonds to the amount of $12,000, owned by other persons, citizens of New York or Pennsylvania, in amounts varying from $6,000 to $500 each, as well as bonds to the amount of $5,100, owned by citizens of New Jersey, all which bonds had been transferred to them by the owners for the mere purpose of collecting the unpaid coupons thereon.

In April, 1874, actions of debt were brought by Curtis, and by Morrison and Hutchinson, against the township, in the Circuit Court of the [348] United States for the District of New Jersey, to recover the amount of unpaid coupons for three years' interest on all the bonds so held by the plaintiffs; to which the township pleaded that the bonds were not sealed by the commissioners.

The plaintiffs in each of those actions thereupon, in the spring of 1876, after requesting the two surviving commissioners (the third having died meanwhile) to affix their seals to the bonds, which they declined to do unless by order of some court of competent jurisdiction, filed a bill in equity in the same court, praying for a reformation of the bonds; for an order that the surviving commissioners affix seals opposite the signatures; for a decree that the bonds should be deemed and taken to be as valid and effectual in law as if they had been in fact sealed by the commissioners before being issued; for a perpetual injunction against the setting up of the want of seals as a defense in the action already brought, or in any future action by the plaintiffs to recover principal or interest, due or to grow due, on the bonds; and for further relief. Demurrers to the bills were interposed and overruled; answers and replications were filed, and a hearing was had upon pleadings and proofs.

At the hearing it was objected in behalf of the township, that the plaintiffs, if entitled to any relief, could maintain their bills so far only as concerned the bonds that were both owned and held by them, and not as regarded the bonds owned by other persons. The court overruled the objection, and entered a final decree upon each bill that the bonds, or writings in the nature of bonds, therein described, be held and deemed to be as valid and effectual in law as if they had been in fact sealed by the commissioners before being issued; and that the township be perpetually enjoined from setting up the want of seals in the action at law already brought or in any action to be thereafter brought, upon any of these bonds or coupons. From those decrees the township has appealed to this court.

It was contended in behalf of the township that the bonds were void: First. Because they were not under the seals of the commissioners, as required by the statute. Second. Because the statute did not authorize the issue of bonds with [349] annexed and detachable coupons not under seal. Third. Because the consent of the taxpayers to the borrowing of money and issue of the bonds was obtained by fraud. Fourth. Because the consent of a majority of all the taxpayers, as well as of those who represented a majority of the landed property of the township, was not obtained before the subscription for stock and the issue of the bonds. Fifth. Because the bonds were issued by the commissioners directly to the railroad corporation in exchange for stock, instead of being sold or disposed of by the commissioners and the money thus obtained applied to the purchase of stock, as required by the statute.

In dealing with these objections, it must be borne in mind that the cases before us are not actions at law upon the bonds or coupons, but bills in equity to restrain the township from setting up the want of seals in the actions at law heretofore brought by these plaintiffs against the township to recover the amount of the coupons; and the objections above recited are to be considered so far only as they affect the question whether the bills can be maintained.

It has been settled upon fundamental principles of equity jurisprudence, by many precedents of high authority, that when the seal of a party, required to make an instrument valid and effectual at law, has been omitted by accident or mistake, a court of chancery, in order to carry out his intention, will, at the suit of those who are justly and equitably entitled to the benefit of the instrument, adjudge it to be as valid as if it had been sealed, and will grant relief accordingly, either by compelling the seal to be affixed or by restraining the setting up of the want of it to defeat a recovery at law. *Smith* v. *Ashton*, Freem. Ch., 308; *S. C.*, Cas. t. Finch, 273; *Cockerell* v. *Cholmeley*, 1 Russ. & M., 418, 424; *Wadsworth* v. *Wendell*, 5 Johns. Ch., 224; *Montville* v. *Haughton*, 7 Conn., 543; *Rutland* v. *Paige*, 24 Vt., 181. See, also, *Wiser* v. *Blachly*, 1 Johns. Ch., 607; *Green* v. *R. R. Co.*, 1 Beasley, 165, and 2 McCarter, 469; *Bruff* v. *Parker*, L. R., 5 Eq., 131.

By the necessary effect and the very terms of the Statute of New Jersey of 1868, the money is borrowed on the credit of the township, the stock obtained by the disposal of the bonds belongs to the township the bonds are issued on [350] behalf of the township, and are the bonds of the township, and the commissioners, though not elected by the township but otherwise appointed as provided by the statute, act, in issuing the bonds and in doing everything else that they are required by the statute to do, as the agents of the township. This view has been af-

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firmed by the judgment of the Supreme Court of New Jersey, construing this very statute, in *Morrison* v. *Bernards*, 7 Vroom [36 N.J.L.], 219, and by the judgment of this court upon the effect of a similar statute of New York in *Draper* v. *Springport*, 104 U. S., 501 [XXVI., 812].

In *Draper* v. *Springport*, it was held that the mere fact that the commissioners had only signed, without sealing, the bonds, did not exempt the town from liability to a purchaser thereof in good faith and for valuable consideration. And *Mr. Justice* Bradley in delivering judgment said: "It is apparent from the law that the substantial thing authorized to be done on behalf of the town was to pledge the credit of the town in aid of the railroad company in the construction of its road, by subscribing to its capital stock and issuing the obligations of the town in payment thereof. The technical form of the obligations was a matter of form rather than of substance. The issue of bonds under seal, as contradistinguished from bonds or obligations without a seal, was merely a directory requirement. The town, indeed, had no seal; and the individual seals of the commissioners would have had no legal efficacy; for the bonds were not their obligations, but the obligations of the town; and their seals could have added nothing to the solemnity of the instruments." "We cannot agree with the courts of the State that the form of a seal was an essential part of the transaction."

It was argued that the power conferred upon the commissioners to issue bonds was a statutory power, defects in the execution of which could not be supplied or relieved against in equity. There is much learning on this subject in the books. But Mr. Chance, upon a full review of the older cases, has clearly demonstrated that the true ground upon which equity grants relief is "The same as that on which it relieves [351] against the want of livery, the want of enrollment, or any other ceremony required, either at common law or by statute, but considered as not meant to be positively essential. The main point to be ascertained, at least with reference to forms prescribed by Act of Parliament, is whether the Legislature has attached a decisive weight to the observance of the forms." Chance, Powers, section 2989. See, also, 2 Sugd. Pow. (7th ed.), 125-129.

In *Darlington*, v. *Pulteney*, Cowp., 260, 267, *Lord* Mansfield said that the reason why equity could not relieve from defects in the execution of statutory powers to make leases was, "that there is nothing to affect the conscience of the remainder man." And in *De Riemer* v. *Cantillon*, 4 Johns. Ch., 85, where a sheriff's deed of land sold by him on execution omitted, by mistake in the description, an important part of the estate advertised and intended to be sold and purchased, and the purchaser, with the consent of the judgment debtors, took possession of and improved the whole, and afterwards, at their request, sold it and conveyed by a like description, all parties understanding and believing that the whole was included in both deeds, and the price paid by the second purchaser being estimated on this basis, *Chancellor* Kent, upon a bill in equity filed by the last purchaser against the debtors, restrained them from prosecuting suits brought against him for the recovery of the land not included in the description, and decreed that they should release it to him.

In the present case, the commissioners, in issuing the bonds, acted rather in the capacity of agents of the township, than as donees of a statutory power in the ordinary sense; and the direction of the statute that the bonds should be under the seals as well as the hands of the commissioners, was declared by this court in *Draper* v. *Springport*, above cited, to be "a matter of form rather than of substance," "merely a directory requirement," and not "an essential part of the transaction." The bonds are in other respects in the form prescribed by the statute. The commissioners intended to issue them in behalf of the town, pursuant to the statute; and stated on the face of the bonds that they had done so and that they had thereto set their hands and seals. The town received full con- [352] sideration for the bonds, and the purchaser bought them in open market, in good faith and for value and in ignorance of the want of seals. These facts present a strong case for the interposition of a court of equity, having jurisdiction of the cause and of the parties, to prevent the formal defect of the want of the seals of the commissioners from being set up to defeat an action at law upon the bonds or coupons. The mere fact that the purchasers, at the time of their purchase, did not observe the omission of seals upon securities having in all other respects the appearance of municipal bonds, is not such negligence as should prevent them from applying to a court of equity to correct a mistake of this character. See, *Wadsworth* v. *Wendell* and *Montville* v. *Haughton*, above cited; *Harris* v. *Pepperell*, L. R., 5 Eq., 1; *Elliott* v. *Sackett* [*ante*, 678].

The objection that the statute did not authorize the bonds to be issued with coupons, if it is of any validity (which we do not intimate), will be fully open to the defendant in the actions at law upon the coupons.

The suggestion that the consent of the taxpayers to the issue of the bonds was obtained by fraud is not supported by the evidence.

The consent of a majority of all the taxpayers of the township has been held necessary by the Court of Chancery and by the Supreme Court of New Jersey. The Chancellor, in granting an injunction against the issue of bonds without such consent, expressed the opinion that the want of such consent would afford no defense at law after the bonds had been once issued, and had come into the hands of innocent holders for value. The Supreme Court decided otherwise. *Lane* v. *Schomp*, 5 C. E. Green [20 N. J. Ch.], 82; *Morrison* v. *Bernards*, 7 Vroom [36 N. J. L.], 219. The question has not, so far as we are informed, been passed upon by the Court of Errors.

The exchange of the bonds directly for railroad stock would seem, in the absence of any decision in the courts of the State upon the point, to be a substantial compliance with the statute, or, at the most, a matter which would not defeat the rights of a *bona fide* purchaser. See, *Scipio* v. *Wright*, 101 U.S., 665 [XXV., 1037]; *Montclair* v. *Ramsdell* [*ante*, 431].

But if either the want of a written consent of [353] a majority of all the taxpayers, or the fact that the bonds were issued directly in exchange for stock, is a fatal objection as against a purchaser

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for value and in good faith, it may be availed of by the township in the actions at law on the coupons. If these objections are not of that character, they do not impair the equity of the purchasers to relief against the accidental omission of the seals of the commissioners. The validity of both these objections, therefore, may be more appropriately determined in the actions at law.

The remaining question argued at the bar is how far the citizenship of the real parties in interest, and the amount of the claim of each, should affect the exercise of jurisdiction, and the extent of the decree.

The position of the plaintiffs is, that the bonds and coupons being payable to bearer, they are entitled to sue, at law or in equity, on all the coupons held by them; that the combination of the holders of several claims of moderate amount against the same defendant for the purpose of diminishing and sharing the expense of litigation, was entirely proper, and should be encouraged by the court; that the bonds and coupons owned as well as held by the plaintiffs, and by others not citizens of New Jersey, clearly brought the case within the jurisdiction of the court, and that to deny to citizens of New Jersey the right to transfer their claims to the plaintiffs for the purpose of collection in the same suit would be to discriminate unjustly between the citizens of New Jersey and the citizens of other States.

But, in the matter of the jurisdiction of the Federal Courts, the discrimination between suits between citizens of the same State and suits between citizens of different States is established by the Constitution and laws of the United States. And it has been the constant effort of Congress and of this court to prevent this discrimination from being evaded by bringing into the Federal Courts controversies between citizens of the same State.

In the Judiciary Act of 1789, the only express provision to this end was that the circuit court [354] should not "Have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." Stat. September 24, 1789, ch. 20, sec. 11; 1 Stat. at L., 78; Rev. Stat., sec. 629, cl. 1. That provision has been held not to be restricted to actions at law, but to include bills in equity to foreclose mortgages, or to compel the specific performance or enforce the stipulation of contracts. *Sheldon* v. *Sill*, 8 How., 441; *Corbin* v. *Black Hawk Co.*, 105 U. S., 659 [XXVI., 1136].

In *Barney* v. *Baltimore*, 6 Wall., 280 [73 U. S., XVIII., 825], a bill in equity for the partition of real estate and for an account of rents and profits, in the Circuit Court of the United States for the District of Maryland, by a citizen of Delaware, owning a share in the estate, against citizens of Maryland, owning other shares therein, and to whom the owners of the remaining shares, being citizens of the District of Columbia, and not of any State, and therefore not authorized to sue in the Circuit Court of the United States, had conveyed their shares without consideration, under an agreement to reconvey upon request, and for the sole purpose of giving jurisdiction to the Federal Courts, was dismissed, because the grantors were necessary parties to the suit, and because their conveyance, not transferring their real interests, to the other parties, was a fraud upon the court.

The Act of March 3, 1875, ch. 137, sec. 5, directs that if "In any suit commenced in a circuit court" it shall appear to the satisfaction of the court, "at any time after such suit has been brought," "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable" by the circuit court, that court "shall proceed no further therein, but shall dismiss the suit," and shall make such order as to costs as shall be just, and its order of dismissal shall be reviewable in this court on writ of error or appeal. 18 Stat. at L., pt. 3, 470.

In *Williams* v. *Nottawa*, 104 U.S., 209 [XXVI., [355] 719], decided by this court since the hearing of these cases in the circuit court, an action was brought by Williams, a citizen of Indiana, in the Circuit Court of the United States for the Western District of Michigan against a township in that State and district, upon its bonds payable to bearer. The action, as the record on file shows, was brought in September, 1874, about six months before the passage of the Act of 1875. It appeared that Williams personally owned only three of the bonds, of $100 each, and that the other bonds in suit had been transferred to him solely for the purpose of collection with his own, by the owners thereof, all of whom were citizens of Michigan, except one Tobey, whose bonds amounted to $300 only, and whose citizenship was not disclosed by the record. The circuit court gave judgment for the plaintiff for the amount of the bonds belonging to Williams and to Tobey, and in favor of the township for the remainder. Upon a writ of error sued out by Williams to reverse the judgment in favor of the township, this court held that, in obedience to the Act of 1875, the action should be wholly dismissed; because, so far as concerned the bonds owned by citizens of Michigan, who could not sue a Michigan township in the courts of the United States, it could not be doubted that the transfer to the plaintiff, being colorable only and never intended to change the ownership, was made for the purpose of "creating a cause cognizable in the courts of the United States;" and, as to the bonds owned by Williams and by Tobey, there was a collusive joinder, because, when the suit was begun, the amount due to each was less than $500, and therefore insufficient to maintain a suit in the Federal Courts.

The decision in *Williams* v. *Nottawa* establishes that the Circuit Court of the United States cannot, since the Act of 1875, entertain a suit upon municipal bonds payable to bearer, the real owners of which have transferred them to the plaintiffs of record for the sole purpose of suing thereon in the courts of the United States for the benefit of such owners, who could not have sued there in their own names, either by reason of their being citizens of the same State as the defendant, or by reason of the insufficient

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value of their claims. The principle of that decision is equally applicable to suits in equity to [356] assert equitable rights under such bonds.

It was argued that these bills in equity were only auxiliary to the actions at law, which were brought before the passage of the Act of 1875, and therefore that Act had no application. The answer to this is twofold: First. The bills in equity, filed since the passage of the Act are independent suits, of broader aim than the actions at law. The actions at law are to recover the amount of coupons only; the bills in equity seek, not merely an injunction against setting up the defense of want of seals in the pending actions on the coupons, but also a decree declaring that the bonds shall be deemed valid. Second. Even the actions at law, brought before the passage of the Act of 1875, are subject, under the adjudication in *Williams* v. *Nottawa*, to be dismissed, in whole or in part, as the facts may require, in the court in which they are pending.

It follows, that these bills should have been dismissed, so far as regarded the bond for $200, owned by a citizen of New York in the first case, and also as to all the bonds owned by citizens of New Jersey in either case. But no valid objection has been shown to the maintenance of these bills, so far as regards those bonds of which the plaintiffs are the bearers, and which are actually owned, either by themselves or by other citizens of New York or Pennsylvania, to a sufficient amount by each owner to sustain the jurisdiction of the circuit court. *Thompson* v. *Perrine* [*ante*, 298]; *Chickaming* v. *Carpenter* [*ante*, 307]; *Comrs.* v. *Bolles*, 94 U. S., 104, 109 [XXIV., 46, 47]; *Cromwell* v. *Sac Co.*, 94 U. S., 351, 360 [XXIV., 195, 200]. The decrees of the circuit court must be modified accordingly.

The decrees in favor of the appellees being reversed as to a large part of their claims, they should pay costs in this court; but as they still maintain their bills as to the rest of their claims, they should recover costs in the court below.

The decrees of the Circuit Court are reversed, and the cases remanded with directions to enter decrees in conformity with this opinion.

Mr. Justice **Field** took no part in this decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[357] RISSA J. WARNER, Formerly RISSA J. BEERS, AND MARY C. FOSTER, *Appts.*,

v.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

(See S. C., Reporter's ed., 357-371.)

Execution of a power conferred by will—mortgaging estate.

1. The donee of a power under a will by doing a thing which, independently of the power, would be nugatory, conclusively evinces an intention to execute the power, and the Act, if within the scope of the power, must be regarded as a valid execution of it.

2. The power to encumber an estate "by way of mortgage or trust-deed or otherwise, and renew the same," is broad enough to include the renewal and extension of an existing incumbrance, as well as the creation of a new one; although the power is accompanied with the declaration that it is to be "for the purpose of raising money to pay off any and all incumbrances now on said property."

[No. 125.]

Argued Nov. 14, 1883. Decided Nov. 26, 1883.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The bill in this case was filed in the court below, by the appellee, to foreclose a mortgage, securing an indebtedness of $20,000, on certain premises situated in Chicago.

The appellants, who are heirs and devisees of the mortgagor, filed a cross-bill setting up an extension of the mortgage in question, which they claimed was invalid, and prayed that the mortgage be discharged of record, and the premises freed from the cloud thereof.

The hearing resulted in a decree in favor of the complainant for $27,191.73, and for the foreclosure of the mortgage and sale of the premises. The decree also dismissed the cross-bill, on general demurrer, for want of equity; whereupon the defendant appealed to this court.

The facts of the case are fully stated by the court.

Messrs. **John S. Miller** and *Geo. Herbert*, for appellants:

Mary Beers, appellants' mother and testator, in executing the mortgage upon her separate property to secure the indebtedness of Cyrenius Beers, occupied the position of surety; and appellants as her devisees succeeded to the same position and rights as such surety, and are entitled to every defense which could have availed to their mother had she lived. *Bank* v. *Burns*, 46 N. Y., 170; *Smith* v. *Townsend*, 25 N. Y., 479; *Gahn* v. *Niemcewicz*, 11 Wend., 312; *S. C.*, 3 Paige, 614; *Johns* v. *Rearden*, 11 Md., 465; *Purvis* v. *Carstaphan*, 73 N. C., 575; *Aguilar* v. *Aguilar*, 5 Madd., 414; *Stamford Banking Co.* v. *Bell*, 4 DeG. F. & J., 310; *Earl* v. *Countess of Huntingdon*, 2 Bro. P. C., 1; 2 Lead. Cas. in Eq., part II., 4th Am. and 4th London ed., 1933, Hare & W.'s *Notes*.

A construction will be favored by the court, both of the power and of the agreement of extension, which will favor the surety.

Law v. *East India Co.*, 4 Ves., 833; *Kingsbury* v. *Westfall*, 61 N. Y., 360; *Wright* v. *Johnson*, 8 Wend., 512; *Chase* v. *McDonald*, 7 Harr. & J., 193; *Stratton* v. *Rastall*, 2 T. R., 370; *Wright* v. *Russell*, 3 Wils., 539.

The extension of the time of payment of the bond of Cyrenius Beers, released the premises from the lien and operation of said mortgage to secure said bond. *Bank* v. *Burns* (*supra*); *Smith* v. *Townsend*, 25 N. Y., 479; *Gahn* v. *Niemcewicz* (*supra*); *Purvis* v. *Carstaphan* (*supra*).

By the said will an estate for his own life only was devised to said Cyrenius Beers, and a vested remainder in fee was devised to the children of the testatrix. *Doe* v. *Considine*, 6 Wall., 458 (73 U. S., XVIII., 869); 1 Prest. Est., 70; *Doe* v. *Martin*, 4 T. R., 39; *Lambert* v. *Thwaites*, L. R., 2 Eq. Cas., 151; *Minors* v. *Battison*, L. R., 1 App. Cas., 428; *Hoyt* v. *Jaques*, 129 Mass., 286.

The extension was not authorized by the power in the will. *Ward* v. *Bank*, 7 T. B. Mon., 93; *Seitzinger* v. *Weaver*, 1 Rawle, 377; *Horwitz* v. *Norris*, 49 Pa., 213; *Slifer* v. *Beates*, 9 S. & R., 166; *Hetzel* v. *Barber*, 69 N. Y., 12.

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The agreement of extension was not in execution of the power.

Clere's Case, 6 Coke, 17; *Blagge* v. *Miles*, 1 Story, 446; 4 Kent, 335; *Doe* v. *Roake*, 2 Bing., 497; *Roake* v. *Denn*, 1 Dow. & C., 437; *Nowell* v. *Roake*, 2 Bing., 497; *Denn* v. *Roake*, 6 Bing., 475; *S. C.*, 2 Bing., 497; Story Eq. Jur., sec. 1062 *a*; Lewin, Trusts, 22; 6th Lond. ed., 19; 3 Redf. Wills, 469; Hill, Trust., 67; 2 Sugd. Pow., 159; *Eldridge* v. *Heard*, 106 Mass., 579.

In the construction of wills, courts have manifested a solicitude to protect the interests of heirs, and every fair intendment is made in their favor. *Moone* v. *Heaseman*, Willes, 141; *Roe* v. *Blackett*, Cowp., 235; *Areson* v. *Areson*, 3 Den., 458; *Bender* v. *Deitrick*, 7 W. & S., 284; *Luce* v. *Harris*, 79 Pa., 432; 1 Redf. Wills, 434, 435; 2 Jarm. Wills, 741, Rule V.

Mr. **Edward S. Isham**, for appellee:

Regarded merely as a surety, consent was given to the extension by the will of Mrs. Beers. No other consent was of any importance.

Cyrenius was authorized to make a contract by which the estate should be incumbered, to provide for its liability on an existing mortgage.

In *Tasker* v. *Small*, 6 Sim., 625, one having under a settlement a power to raise £15,000 "by mortgage, annuity," or "otherwise;" it was held he might sell the estate for that purpose.

1 Sugd. Pow., 514.

Regarding the case as one merely of the execution of a power, there was no defect in the execution. 1 Lead. Cas. in Eq., pt. 1, pp. 229, 230, 234, 241; *Notes* to *Tollett* v. *Tollet*; *Blagge* v. *Miles*, 1 Story, 426; *Clere's Case*, 6 Coke, 17; *Maundrell* v. *Maundrell*, 10 Ves., 258.

Under the will of Mary Beers her estate became no longer a surety merely, but the principal debtor.

Mr. Justice **Matthews** delivered the opinion of the court:

This appeal brings into review a decree for the foreclosure of a mortgage, of real estate and sale of the mortgaged premises, and dismissing a cross-bill filed by the appellants, praying that the mortgage might be declared not to be a lien on the premises and delivered up to be canceled.

The mortgage in question was dated February 24, 1869, and was made by Cyrenius Beers and Mary Beers, his wife, to secure payment of a debt due from the husband to the mortgagee, according to the terms of his bond, conditioned for the payment thereof on February 24, 1874, with interest at the rate of eight per cent per annum, payable semi-annually. The title to the real estate mortgaged is recited in the mortgage to be in the wife.

Mary Beers died, leaving a will, which was duly admitted to probate in March, 1872. It is as follows:

"I, Mary Beers, wife of Cyrenius Beers, of Chicago, of lawful age and sound mind, in view of the uncertainty of human life, do make, publish and declare this my last will and testament:

First. I order all of my debts to be paid, including the expenses of my funeral and last illness.

Second. I give and bequeath to my husband, Cyrenius Beers, all the estate, both real, personal and mixed, of which I die seised or possessed, to be held by him in trust for the following uses, purposes and trusts, and none other, that is to say: to receive the rents, income and profits thereof during his life, with the remainder to my children, Mary C. Foster, wife of Orrington C. Foster, Rissa J. Beers and Charles G. Beers, share and share alike to them, their heirs and assigns forever.

But, provided that said Cyrenius Beers may incumber the same by way of mortgage or trust-deed or otherwise, and renew the same, for the purpose of raising money to pay off any and all encumbrances now on said property, and which trust-deed or mortgage so made shall be as valid as though he held an absolute estate in said property.

But provided further; that the said Cyrenius Beers may, in his discretion, during his life, sell and dispose of any or all the real estate of which I may die seised or possessed, as though he held an absolute estate in the same, and out of the proceeds pay any of the incumbrances upon any of the property of which I may die seized and possessed, and the remainder, over and above what may be required to pay the indebtedness upon said property, the same being now incumbered, to re-invest in such way as he may see proper, and from time to time to sell and re-invest, such re-investment to continue to be held in trust the same as the estate of which I may die possessed; that is to say, the said Cyrenius Beers only to have the use during his life of said estate, with the right of sale and to encumber and re-invest, the remainder after his death to go to my children and their heirs forever.

Third. I hereby appoint said Cyrenius Beers [359] executor of this my last will and testament, hereby waiving from him all bail and security, as I have a right to do under the statute in such cases made and provided, as such executor."

Cyrenius Beers qualified and acted as executor, administered the estate fully, and was discharged September 20, 1877.

The appellants are children and devisees of the testatrix, and the only ones interested in the mortgaged premises, as such, a brother, the only other child, Charles G. Beers, having released his interest to them. The life estate of Cyrenius Beers was determined by his death, on or about February 25, 1878.

The accruing interest on the mortgage debt had been duly paid by him until the maturity of the principal sum, February 24, 1874, when the appellee and Cyrenius Beers entered into a written agreement whereby the time of payment of the principal of the mortgage debt was extended and postponed until February 24, 1879, in consideration of the agreement of Cyrenius Beers to pay the same when due, and interest thereon in the meantime at the rate of nine per centum per annum, payable semi-annually.

This extension of the time of payment of the mortgage debt was made without any consent thereto on the part of the appellants.

It is claimed on their behalf that, as owners of the estate mortgaged by the testatrix to secure the debt of her husband, they are in the position of sureties, and that the extension of time for the payment of the debt, without authority from them, is, in equity, a discharge of the lien of the mortgage.

The appellee insists, in reply to this claim, that the agreement by which further time was

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given for the payment of the debt, during which the mortgage was continued in force, was au-
[363] thorized by the will of Mary Beers and binds her devisees. Whether this be so is the precise question we are required to decide.

We are reminded, at the outset of the argument, by the counsel for the appellants, that being sureties, they are favorites of the law; that their contract is *strictissimi juris;* and that nothing is to be taken against them by intendment or construction. It is quite true that "The extent of the liability to be incurred must be expressed by the surety, or necessarily comprised in the terms used in the obligation or contract;" that is, "the obligation is not to be extended to any other subject, to any other person, or to any other period of time than is expressed or necessarily included in it." "In this sense only," continues Mr. Burge, Law of Suretyship, 1st Am. ed., p. 40, "must be understood the expression that the contract of the surety is to be construed strictly. It is subject to the same rules of construction and interpretation as every other contract." Besides, the rule of construction applies only to the contract itself, and not to matters collateral and incidental, or which arise in execution of it, which are to be governed by the same rules that apply in like circumstances, whatever the relation of the parties. So that, the fact that the appellants occupy the relation of sureties cannot control the determination of the question whether the agreement, extending the time of payment of the mortgage debt, and the continuance of the mortgage as an incumbrance upon the estate, was a valid execution of the powers conferred by the will of the testatrix. That question must be answered according to its own rules.

It is further said, however, on the part of the appellants, that the agreement of February 24, 1874, cannot be sustained in support of a continuation of the mortgage lien, as an execution of the powers conferred by the will of Mary Beers, because it does not appear that it was so intended by Cyrenius Beers, the donee of those powers. It is argued that the agreement of extension makes no reference either to the power or to the property of the testatrix, which is the subject of the power; that every provision contained in it can have its full operation and effect; that is, all that it professes to do or provide for can be done, according to its full tenor, with-
[364] out referring the act to the power, and by referring it solely to the individual interest of Cyrenius Beers, as the debtor of the appellee.

This, however, on an examination of its terms, will appear to be an erroneous view of the true meaning and legal effect of the agreement of extension. It recites the indebtedness of Cyrenius Beers to the appellee, as then due and unpaid; that he had applied to them to extend the time for the payment of the principal sum; that Cyrenius Beers and Mary, his wife, had executed and delivered their deed of mortgage to secure the payment thereof; it is thereupon witnessed that the Connecticut Mutual Life Insurance Company doth thereby extend and postpone the time of payment of the principal sum until February 24, 1879, interest to be paid thereon at the rate of nine per centum per annum; and in consideration thereof Cyrenius Beers agrees to pay the principal sum on the day named therefor, and the interest thereon as stipulated, it being understood that on failure to pay any installment of interest, the whole of the principal sum shall thereupon become due, and may be collected without notice, together with all arrearages of interest. It is also understood and agreed between the parties, that nothing in the agreement shall operate to discharge or release Cyrenius Beers from his liability upon the bond originally given for the payment of the debt, "But it is expressly understood that this instrument is to be taken as collateral and additional security for the payment of said bond." It is also expressly understood and agreed between the parties that in the event of failure on the part of Cyrenius Beers, "to fulfill, keep and promptly perform, as well in spirit as in letter, the covenants in said mortgage contained, given by said Cyrenius Beers to said Company, then, at the election of the said Company, "the whole of said principal sum in the condition of said bond mentioned shall thereupon at once become due and payable, and may be collected without notice, together with all accrued interest thereon at said rate of nine per centum per annum, anything hereinbefore contained to the contrary notwithstanding."

Taking the instrument in all its parts and looking at its entire scope and purpose, it must be admitted that, notwithstanding its omission [365] of any direct and express stipulation of that character, its meaning and legal effect are to continue in force, so far as the parties to it had lawful authority to do so, the covenants and lien of the mortgage as security for the payment of the original debt, with the interest reserved at the increased rate until the expiration of the extended time of payment. This effect was undoubtedly intended by the parties, and this intention could not take effect except by virtue of the powers contained in the will of Mary Beers. Cyrenius Beers, as debtor, had no power to continue the mortgage in force, nor as tenant for life to renew it as a mortgage in fee. This is a demonstration, therefore, that the instrument must be treated as an execution of those powers, because, if it cannot otherwise operate according to the intention of the parties, it must be referred to the power which alone can make it effectual in all its provisions.

The rule applicable in such cases, it is claimed, is that deduced as the doctrine of *Sir Edward Clere's Case*, 6 Coke, 17 *b*, as stated by 1 Sugd. Pow., 417, 7th Lond. ed., that "where the disposition, however general it may be, will be absolutely void if it do not inure as an execution of the power, effect will be given to it by that construction." Mr. Chance, however, says: "There are, indeed, in the case *dicta* apparently to this effect, that if the instrument refer not to the power and can have some effect by means of the interest of the party, though not all the effect which the words seem to import, still the instrument shall not operate as an execution of the power, the intention being thus contravened. It appears quite clear, however, at this day, and a reference to the authorities will, it is apprehended, show that it has been considered clear for nearly two centuries that the rule is not thus confined; indeed, it may well be asked why, admitting that the intention can be discovered to pass all, the intention should not prevail in the

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one case as well as in the other? What rule of law or construction would be thereby violated?" Chance, Powers, sec. 1597, Vol. 2, p. 72, Lond. ed., 1831. And Sir Edward Sugden said: "And [366] notwithstanding *Sir Edward Clere's Case*, an intent, apparent upon the face of the instrument, to dispose of all the estate, would be deemed a sufficient reference to the power to make the instrument operate as an execution of it, inasmuch as the words of the instrument could not otherwise be satisfied." 2 Sugd. Pow., ch. VI., sec. VIII., p. 412, 7th Lond. ed. In the present case, as we have seen, the legal effect and meaning of the instrument cannot be satisfied without treating it as an execution of the powers under the will, for Cyrenius Beers, merely as debtor, as mortgagor and as owner of the life estate under the will of his wife, could not lawfully agree to keep in force and renew a mortgage upon the estate of which the appellants were devisees in remainder in fee.

The Supreme Court of Illinois in the case of *Funk* v. *Eggleston*, 92 Ill., 515, had the question under consideration, and in a learned opinion, in which a large number of authorities, both English and American is reviewed, discarded even the modified English rule of later date, and adopted that formulated by *Mr. Justice* Story in *Blagge* v. *Miles*, 1 Story, 427, as follows: "The main point is to arrive at the intention and object of the donee of the power in the instrument of execution, and that being once ascertained, effect is given to it accordingly. If the donee of the power intends to execute, and the mode be in other respects unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. I agree that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful, under all the circumstances, then that doubt will prevent it from being deemed an execution of the power. All the authorities agree that it is not necessary that the intention to execute the power should appear by express terms or recitals in the instrument. It is sufficient that it should appear by words, acts or deeds demonstrating the intention."

[367] The rule as adopted by this court was tersely stated by *Mr. Justice* Strong in delivering its opinion in *Blake* v. *Hawkins*, 98 U. S., 315-326 [XXV., 139-141], in this form: "If the will contains no expressed intent to exert the power, yet if it may reasonably be gathered from the gifts and directions made that their purpose and object were to execute it, the will must be regarded as an execution. After all, an appointment under a power is an intent to appoint carried out, and if made by will the intent and its execution are to be sought for through the whole instrument."

In the case of *Munson* v. *Berdan*, 35 N. J. Eq., 376, it is said: "It is sufficient if the Act shows that the donee had in view the subject of the power."

And in *White* v. *Hicks*, 33 N. Y., 383-392, Denio, *Ch. J.*, said: "This doctrine proceeds upon the argument that by doing a thing which, independently of the power, would be nugatory, she (the donee of the power) conclusively evinced her intention to execute the power."

And in *Sewall* v. *Wilmer*, 132 Mass., 131-134, the Supreme Judicial Court of Massachusetts, in reference to a will made in Maryland, which was the domicil of the testatrix, but the provisions of which related to both real and personal estate situated in Massachusetts, held it to be a valid execution of a power contained in the will of her father, whose domicil was in that State, although it would have been otherwise, held in Maryland. Gray, *C. J.*, said: "But in this Commonwealth the decisions in England since our Revolution, and before the Stat. of 7 Will. IV., and 1 Vict., ch. 26, section 27, have not been followed; the court has leaned toward the adoption of the rule enacted by that statute as to wills thereafter made in England, namely: that a general devise or bequest should be construed to include any real or personal estate of which the testator has a general power of appointment, unless a contrary intention should appear by his [368] will; and it has been adjudged that the mere facts that the will relied on as an execution of the power does not refer to the power, nor designate the property subject to it, and that the donee of the power has other property of his own upon which his will may operate, are not conclusive against the validity of the execution of the power; but that the question is in every case a question of the intention of the donee of the power, taking into consideration not only the terms of his will, but the circumstances surrounding him at the time of its execution, such as the source of the power, the terms of the instrument creating it, and the extent of his present or past interest in the property subject to it."

We cannot doubt that Cyrenius Beers, in the agreement of February 24, 1874, intended to exert whatever power had been conferred upon him by the will of his wife to continue in force the mortgage to the appellee, as an incumbrance upon her estate, for the reason that it is upon that supposition alone that it can have its due legal effect, *Ut res magis valeat quam pereat;* and by force of the rules which we have seen ought to govern in such cases, we hold that, if the agreement, as made, is within the scope of the power, it must be regarded as a valid execution of it.

The question next to be considered, therefore, is, whether Cyrenius Beers was empowered by the will of his wife to consent to an extension of the time of payment of the mortgage debt, and a continuance thereby of the lien on the mortgaged estate.

It is to be observed, in the first place, that he is made executor of the will, tenant for life for his own use of all the property of the testatrix, and trustee of the legal title. Whether his title as trustee is to be considered as a fee simple or for life, or a chattel interest only, it is not necessary to decide. Its duration is to be measured by the nature of the purposes for which it was created, and they include the power to mortgage, to sell and to re-invest in his own name as trustee. And it is not without significance, although of how much importance is not material, that the remainder in fee limited to the children of the testatrix, and which is described as a limitation of all the estate, of which the testatrix should [369] die, seised or possessed, is subsequently referred to, as what shall remain after the death of the tenant for life, and after the exercise by him of the power of mortgaging or selling and re-in-

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vesting has been exercised for the purpose of paying the indebtedness upon the property. It is further to be noticed that the powers to mortgage and to sell are authorized to be exercised by him for the purpose specified "as though he held an absolute estate in said property." The specific power given is to "incumber the same by way of mortgage or trust-deed or otherwise, and renew the same, for the purpose of raising money to pay off any and all incumbrances now on said property," and the additional power to "sell and dispose of any or all the real estate of which I may die seised or possessed, as though he held an absolute estate to the same, and out of the proceeds pay any of the incumbrances upon any of the property upon which I may die seised and possessed," and "the remainder over and above what may be required to pay the indebtedness upon said property, the same now being incumbered, to re-invest in such way as he may see proper, and from time to time sell and re-invest, such re-investment to continue to be held in trust the same as the estate of which I may die possessed."

It is too plain to admit of dispute that under these ample powers Cyrenius Beers might have secured, by a new mortgage, a loan of the sum of money, at the stipulated rate of interest, necessary to pay his indebtedness to the appellee, and that he might, by a new loan from the appellee itself, secured by a new mortgage, upon the same terms and for the same time as granted by the agreement of extension, have raised the money and discharged the mortgage now in suit. Such a transaction would have been strictly within the letter of the authority. And yet it would, in fact, have been nothing but what was accomplished by the agreement of extension, namely: a continuance of the old loan, secured by the old mortgage, for a new term, and at a higher rate of interest. The two transactions, though not the same in form, are so in substance, and a substantial execution of the power is all that is required. In the case of *Bullock* v. *Fladgate*, 1 Ves. & B., 471, where the [370] power was to convert an estate into money and to purchase other lands, which were the subject of the appointment, the Master of the Rolls, Sir Wm. Grant, no conversion having taken place, but the original estate having been appointed, said: "I apprehend that equity will uphold an appointment of the estate itself as amounting substantially to the same thing; on which principle it is that appointments deviating considerably from the title of the powers under which they were made, have frequently been supported."

The power to incumber the estate "by way of mortgage or trust-deed or otherwise, and renew the same," is broad enough to include the renewal and extension of an existing incumbrance as well as the creation of a new one; and this is not inconsistent with the declaration that it is to be "for the purpose of raising money to pay off any and all incumbrances now on said property." The object clearly was to meet the demand of the existing mortgagee for punctual payment of the debt secured, and to prevent the possible sacrifice of a forced sale to satisfy the demand, if not complied with; an object which could as well be accomplished by extending the existing mortgage, as by substituting a new one in its place. The power to renew a mortgage given for the purpose of raising money to pay off an existing incumbrance is expressly given; to renew an existing one, to avoid the necessity of creating a new incumbrance, is, we think, reasonably and fairly to be implied, as equally within the intention of the testatrix, and within the scope of the powers created by the will. The extension of a mortgage debt and continuance of a mortgage lien is one mode of incumbering the property, and may be a step, and possibly, under some circumstances, a very important and necessary one, in preparing for its payment and extinguishment. Indeed, it might well be, as the transaction shows the parties to it so understood, that Cyrenius Beers, uniting in himself the various characters of principal debtor and joint mortgagor, and of executor of his wife's will, tenant for life of the estate devised, and trustee with the ample powers conferred upon him of dealing with the incumbrance, was, in reality, constituted by the testa- [371] trix, as the representative of all the interests created by the will, fully authorized, as if he were absolute owner of the estate, even as she could have done in her lifetime, to consent to the extension of the time of payment of the mortgage debt without prejudice to the mortgage security.

There is no error in the record, and the decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 404.

WILLIAM FLASH, ET AL., Copartners, under the Firm Name of FLASH, LEWIS & CO., *Plffs. in Err.*

v.

ADNA C. CONN.

(See S. C., Reporter's ed., 371-381.)

Individual liability of stockholders—state statute—action against stockholder—when brought.

1. The individual liability of stockholders, provided for by the New York Act of 1848, is not in the nature of a penalty, but is founded on a contract between the stockholders and the creditors of the company, and may be enforced in any court sitting beyond the limits of the State, having jurisdiction of the subject-matter and the parties.

2. The construction, by the state courts, of a clause regulating the liability of stockholders in a state statute authorizing the formation of corporations, will be followed by this court.

3. In an action brought to enforce the personal liability of a stockholder, an adjudication in bankruptcy of the company excuses a compliance with the condition which requires a suit to be brought against the company within a year after the maturity of the debt, and a judgment to be recovered and an execution to be issued thereon and returned unsatisfied.

4. Where the state statute makes every stockholder individually liable for the debts of the company for an amount equal to the amount of his stock, any creditor who has taken the proper steps may sue any stockholder on such liability in an action at law.

[No. 121.]

Argued Nov. 13, 1883. Decided Nov. 26, 1883.

NOTE.—*Individual liability of stockholders for corporate debts.* See *note* to Hatch v. Dana, 101 U. S., XXV., 885.

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IN ERROR to the Circuit Court of the United States for the Northern District of Florida.

The history and facts appear in the

Statement of the case by *Mr. Justice* **Woods:**

The plaintiffs in error, who were the plaintiffs below, brought this suit in the Circuit Court of Escambia County, in the State of Florida, on January 27, 1876. It was afterwards, on the petition of defendant, removed to the Circuit Court of the United States for the Northern District of Florida.

The declaration alleged that the defendant, on [372] or before April 1, 1874, was a stockholder in the Pensacola Lumber Company, a corporation organized in the State of New York, under the provisions of an Act of the Legislature of that State, passed February 17, 1848, entitled "An Act to Authorize the Formation of Corporations for Manufacturing, Mining, etc., Purposes," and various amendments thereof; that the defendant was the holder of $75,000 of the stock of said company, the entire stock being $300,000; that the company carried on business and had an office and an agent in said County of Escambia, State of Florida; that the company, while the defendant was the holder of the stock aforesaid, became largely indebted to the plaintiffs, which indebtedness was evidenced by two promissory notes, one for $5,000, dated September 11, 1864, and one for $5,946.20, of like date, and an account stated for $2,646.47; that the plaintiffs, on February 16, 1875, instituted their suit in the Circuit Court of said Escambia County against the said company to recover the amount due on said notes and account, and on March 15, 1875, judgment was rendered by said court in favor of plaintiffs, for the sum of $14,120.50 and costs; that the company having been adjudged bankrupt by the United States District Court for the Southern District of New York in the year 1875, its property could not be taken in execution to satisfy said judgment, nevertheless an execution was issued thereon and returned wholly unsatisfied; that the property of the company had been sold by order of the bankrupt court, and its proceeds would not more than pay the costs of the bankrupt proceedings, leaving nothing to be applied to the payment of said judgment or claims of other creditors against the company; that by the provisions of the Act under which the company was organized, all the stockholders were severally individually liable to the creditors of the company to an amount equal to the amount of stock held by them respectively for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company should have been paid in, and a certificate thereof made, signed and sworn to by the president of said company and a majority of its trustees, and recorded in the office of the clerk of the county where the business of the company was [373] carried on. It is averred that the company failed to comply with the said provisions of the Act, and did not, by its president and a majority of its trustees, make, sign, swear to and record said certificate, either in the County of New York, the county in which the operations of said company were by its articles to be carried on, or in the said County of Escambia, in which the company carried on business, or in anywise as required by the Act, so as to exempt the defendant from his individual liability. Wherefore, the declaration alleged, the defendant became liable to the plaintiffs for the said debt and contract made by the company, and the plaintiffs claimed $28,000.

The defendant filed six pleas, to some of which the plaintiffs demurred and to others filed replications. The defendant filed a rejoinder to one of the replications, to which the plaintiffs demurred.

The cause was heard upon the several demurrers, and the court rendered the following judgment:

"This cause came on to be heard upon the plaintiffs' demurrers to defendant's first, second, fifth and sixth pleas, and to defendant's rejoinder to plaintiffs' replication to defendant's third plea, and the court having determined that the plaintiffs' declaration is insufficient in law, it is, therefore, considered by the court that plaintiffs take nothing by their said suit," etc.

From this judgment this writ of error is prosecuted.

Messrs. **E. A. Perry** and *Wilkinson Call*, for plaintiff in error:

The defendant's liability can as well be enforced in Florida as in New York, under the statute of which State his liability is fixed.

Dennick v. *R. R. Co.*, 103 U. S., 11 (XXVI., 439).

It is by the courts of New York well settled that the stockholder's liability, such as in this case is sought to be enforced, is not in the nature of a penalty, but is to be enforced as a contract.

Allen v. *Sewall*, 2 Wend., 338; *Moss* v. *Oakley*, 2 Hill, 265; *Bailey* v. *Bancker*, 3 Hill, 188; *Harger* v. *McCullough*, 2 Den., 119; *Ex parte Van Riper*, 20 Wend., 614; *Corning* v. *McCullough*, 1 N. Y., 47.

The provision that the plaintiffs must first obtain judgment against the company, does not affect their rights to the personal liability of the defendant stockholder.

It simply defers the remedy.

Corning v. *McCullough* (*supra*); *Harger* v. *McCullough* (*supra*); *Moss* v. *Oakley* (*supra*); Ang. & Ames, Corp., sec. 611, *note* 5.

Messrs. **Michael L. Woods**, *C. W. Jones* and *R. L. Campbell*, for defendant in error:

The judgment of the Supreme Court of Florida upon the writ of error presented no obstacle to the removal of the case, under the Act of March 3, 1875.

Hewitt v. *Phelps*, 105 U. S., 393 (XXVI., 1072).

Being properly removed, the parties are subject to that administration of law which is approved in the judicial tribunals of the United States, whose jurisdiction is invoked.

Hewitt v. *Phelps* (*supra*); *King* v. *Worthington*, 104 U. S., 44 (XXVI., 652).

The Circuit Court of the United States was not bound to follow and repeat the judgment of the state court upon the demurrer to the declaration, when the sufficiency of the latter was again questioned upon demurrers to the subsequent pleadings.

A demurrer seeks the first fault in pleading.

Terry v. *Tubman*, 92 U. S., 160 (XXIII., 539).

It is well settled that no State will enforce penalties imposed by the laws of other States. Such laws are universally considered as having no extraterritorial operation or effect.

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First Nat. Bk. v. *Price*, 33 Md., 492; *Note* to Story, Confl. L., 10 Wheat., 123, 8th ed., 845; *Bettys* v. *R. R. Co.*, 37 Wis., 323.

When a statute confers a right and imposes a liability, without providing a distinct remedy, the common law supplies an adequate remedy by giving to a party an appropriate action. But it is equally well settled that when a statute confers a right and prescribes a remedy, that remedy and that only can be pursued.

Knowlton v. *Ackley*, 8 Cush., 97; *Pollard* v. *Bailey*, 20 Wall., 527 (87 U. S., XXII., 378).

The liability set forth in the declaration, being in the nature of a penalty imposed by a statute of New York, cannot be enforced in Florida. *Halsey* v. *McLean*, 12 Allen, 438; *Bird* v. *Hayden*, 1 Rob. (N. Y.), 383; *Derrickson* v. *Smith*, 3 Dutch. (N. J.), 166; *First Nat. Bk.* v. *Price*, 23 Md., 487; *Gale* v. *Eastman*, 7 Met., 14; *State* v. *John*, 5 Ohio, 217; *Cable* v. *McCune*, 26 Mo., 371; *Lawler* v. *Burt*, 7 Ohio St., 341; *Dane* v. *Dane Mfg. Co.*, 14 Gray, 488; *Merch. Bk.* v. *Bliss*, 1 Rob. N. Y., 391.

The declaration is bad, because it does not show that the liability it sets up had been fixed and made actionable by legal proceedings against the corporation in the State of New York.

Statute of N. Y., secs. 10. 24.

These sections show that it is the return of the *fi. fa.* unsatisfied, which makes the liability of the stockholder absolute, fixed and actionable.

To have that effect, the execution must necessarily be issued by the court of the State, which declares by statute it shall have such effect, as only the statutory remedy can be pursued.

Pollard v. *Bailey*, 20 Wall., 520 (87 U. S., XXII., 376); *Knowlton* v. *Ackley* (*supra*).

The force and effect of an execution issued by a Florida court, against a New York Corporation, must be determined by the laws of Florida, not those of the State of New York.

Story, Confl. L., secs. 556-9; *Hinkley* v. *Marean*, 3 Mason, 88.

The case made by the declaration and the sixth plea, upon the demurrer to the latter, is not the subject of a common law action, but of a bill in equity.

See, *Terry* v. *Tubman*, 92 U. S., 156 (XXIII., 537); *Pollard* v. *Bailey* (*supra*).

Mr. Justice **Woods** delivered the opinion of the court:

The only question arising upon the record is whether the declaration presents a cause which entitles the plaintiffs to recover in this action. This was the question considered by the court below, and upon what it deemed the insufficiency of that declaration its judgment was based. The sufficiency of the pleas and rejoinder were not considered, for, if the declaration was bad, the question whether the pleadings of the defendant were good was an immaterial one. If the pleas and rejoinder of the defendant had been adjudged good, that would not have been a final judgment to which a writ of error would lie, but the plaintiffs would have had leave to reply and surrejoin. We are, therefore, limited to the consideration of the sufficiency of the declaration.

The liability which this suit was brought to enforce arises, as the plaintiffs contend, on the 10th section of the Act mentioned in the declaration, namely: the Act of the Legislature of New York passed February 17, 1848, entitled "AN Act to Authorize the Formation of Corporations for Manufacturing, etc., Purposes." The 10th section of the Act and the 11th and 24th, which also have reference to the liability of stockholders of the company, were as follows:

"Sec. 10. All the stockholders of every company incorporated under this Act shall be severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded as prescribed in the following section:

Sec. 11. The president and a majority of the trustees, within thirty days after the payment of the last installment of the capital stock so fixed and limited by the company, shall make a certificate stating the amount of the capital so fixed and paid in, which certificate shall be signed and sworn to by the president and a majority of the trustees; and they shall within the said thirty days record the same in the office of the county clerk of the county wherein the business of said company is carried on. [376]

Sec. 24. No stockholder shall be personally liable for the payment of any debt contracted by any company formed under this Act, which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall become due; and no suit shall be brought against any stockholder * * * until an execution against the company shall have been returned, unsatisfied, in whole or in part."

Section 12 of the Act will also throw some light on the present controversy. It provided that within twenty days from January first in every year every company organized under the Act should make a report, which should be published, which should state the amount of the capital of the company, the proportion paid in, and its existing debts, and which should be signed by the president and a majority of the trustees, and verified by the oath of the president and filed in the office of the clerk of the county where the business of the company was carried on; and if any of said companies should fail to do so, all the trustees of the company so failing should be jointly and severally liable for its debts then existing.

The defendant contended on several grounds that the declaration set out no cause of action on which the suit could be maintained against him. The first ground was that the liability of the stockholders under section 10 of the Act under which the company was organized, and which the suit was brought to enforce, was in the nature of a penalty and could not be enforced in any court sitting beyond the limits of the State by which the law was passed.

It is well settled, and is not denied by plaintiff's counsel, that the penal laws of one State can have no operation in another. They are strictly local and affect nothing more than they

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can reach. *The Antelope*, 10 Wheat., 66; *Scoville* v. *Canfield*, 14 Johns., 338; *Western Trans. Co.* v. *Kilderhouse*, 87 N. Y., 430; *Lemmon* v. *People*, 20 N. Y., 562; *Henry* v. *Sargeant*, 13 N. H., 321; Story, Confl. L. (8th ed)., sec. 621.

[377] Upon this branch of the case the question for solution is, therefore, whether the individual liability of stockholders provided for by section 10, above quoted, is in the nature of a penalty, or whether it is, as plaintiffs contend, based on a contract between the stockholders and the creditors of the company.

We think the liability imposed by section 10, is a liability arising upon contract. The stockholders of the company are by that section made, severally and individually, liable within certain limits to the creditors of the company for its debts and contracts. Everyone who becomes a member of the company by subscribing to its stock assumes this liability, which continues until the capital stock is all paid up and a certificate of that fact is made, published and recorded. The fact that the liability ceases when these events take place does not change its nature and make that a penalty which would, without such limitation, be a liability founded on contract.

Such has been the construction given to section 10 by the Court of Appeals of New York. In the case of *Wiles* v. *Suydam*, 64 N. Y., 173, that court had under consideration sections 10 and 12 of the Act under which the Pensacola Lumber Company was organized. The complaint alleged the liability of the defendant, both as a stockholder under section 10 and as a trustee under section 12. The complaint was demurred to, on the ground that two causes of action were improperly joined. The court sustained the demurrer. In giving the reasons for its judgment it said:

"The cause of action against the defendant as a stockholder consists of the debt and the liability created by statute against stockholders where the stock has not been paid in and a certificate of that fact recorded. In effect the statute in such a case withdraws the protection of the corporation from the stockholders, and regards them liable to the extent of the amount of their stock as copartners. *Corning* v. *McCullough*, 1 N. Y., 47. The allegations in the complaint are sufficient to establish a perfect [378] cause of action against the defendant as a stockholder, primarily liable for the debts to the amount of his stock.

The allegations against the defendant as trustee also constitute a distinct and perfect cause of action, but of an entirely different character. Here the liability is created by statute, and is in the nature of a penalty imposed for neglect of duty in not filing a report showing the situation of the company. The object of the action is the same, *viz.*: the collection of a debt, but the liability and the grounds of it are entirely distinct and unlike. That there are two causes of action in this complaint seems too clear to require much argument. The first cause of action against the defendant as a stockholder is an action on contract. The six years' Statute of Limitation applies. 1 N. Y., *supra*. The defendant is entitled to contribution. But in respect to the action against defendant as trustee, this court held, in *Merch. Bk.* v. *Bliss*, 35 N. Y. 412, that the three years' Statute of Limitations applied under the following provision of the Code: 'An action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved.'"

This decision is upon the precise point of the controversy in this case. It declares that the liability such as that which the plaintiffs in this action seek to enforce is one arising upon contract, and is not in the nature of a penalty. This decision has never been modified or overruled by the Court of Appeals of New York.

We think this is a case where the construction of the state court is entitled to great if not conclusive weight with us. It is the settled construction of a law of the State upon which the rights and liabilities of a large number of its citizens must depend. If the liability of a stockholder under section 10 arises upon contract, the six years' limitation applies to it; if the liability is in the nature of a penalty, the three years' limitation applies. It is clear that confusion and uncertainty would result should the State and Federal Courts place different constructions on the section. Such a result ought, if possible, to be avoided.

It is true that this decision was made after the defendant had become a stockholder in the Pensacola Lumber Company, but there had been no previous contrary decision. As said by [379] this court in *Burgess* v. *Seligman* [*ante*, 359], "Even in such cases, for the sake of harmony and to avoid confusion, the Federal Courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt."

If this were a case arising in the State of New York we should therefore follow the construction put upon the statute by the courts of that State. The circumstance that the case comes here from the State of Florida should not leave the statute open to a different construction. It would be an anomaly for this court to put one interpretation on the statute in a case arising in New York and a different interpretation in a case arising in Florida. Our conclusion, therefore, is that this action was not brought to enforce a liability in the nature of a penalty.

The right of the plaintiffs to sue upon this liability in any court having jurisdiction of the subject-matter and the parties is, therefore, clear. *Dennick* v. *R. R. Co.*, 103 U. S., 11 [XXVI., 439].

The next contention of the defendant is that the recovery of a judgment against the company in the State of New York on the debt due the plaintiffs, and the issue of an execution thereon, returned unsatisfied, is a necessary condition to the liability of the defendant; and as the declaration only avers the recovery of a judgment in the State of Florida it is insufficient.

It appears from the declaration that, before the year allowed by section 24 of the statute, for bringing suits against the company on the debts due the plaintiffs had expired, the company had been adjudicated a bankrupt by the District Court of the United States for the Southern District of New York; that all its property had been sold and the proceeds thereof were insufficient to pay the costs and expenses of the bankruptcy proceedings.

Although it has been held by the Court of Appeals in the case of *Bank* v. *Bliss*, 89 N. Y., 331, that a judgment in a court of the State of

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New York was necessary to fix the liability of a stockholder under section 10 of the Act under [380] consideration, yet the same court, in the case of *Shellington* v. *Howland*, 53 N. Y., 371, held that in an action brought to charge a defendant as stockholder in a company organized under the same law, an adjudication in bankruptcy of the company excused a compliance with the condition, which required a suit to be brought against the company within a year after the maturity of the debt and a judgment to be recovered and an execution to be issued thereon and returned unsatisfied. We see no reason why we should not follow this decision, and it is conclusive of the question under consideration.

The object of section 24 was to compel the creditor to exhaust the assets of the company before seeking to enforce the liability of the stockholder. When the declaration shows that this was done, and that a literal performance of the condition would have been vain and fruitless, the performance of the condition may well be held to have been excused.

Lastly, it is objected that the declaration sets out a case which should have been prosecuted in equity and not at law. There is no ground for this objection to rest on. In the cases of *Pollard* v. *Bailey*, 20 Wall., 520 [87 U.S., XXII., 376], and *Terry* v. *Tubman*, 92 U.S., 156 [XXIII., 587], to which we are referred in its support, the liability of the stockholders was in proportion to the stock held by them. Each stockholder was, therefore, only liable for his proportion of his debts. This proportion could only be ascertained upon an account of the debts and stock, and a *pro rata* distribution of the indebtedness among the several stockholders. This, the court held, could only be done by a suit in equity.

But, in this case the statute makes every stockholder individually liable for the debts of the company for an amount equal to the amount of his stock. This liability is fixed and does not depend on the liability of other stockholders. There is no necessity for bringing in other stockholders or creditors. Any creditor who has recovered judgment against the company and sued out an execution thereon, which has been returned unsatisfied, may sue any stockholder, and no other creditor can. Such actions are maintained without objection in the courts of New York under section 10 of the statute relied on in this case. *Shellington* v. *Howland* (*supra*); *Wiles* v. *Suydam*, 64 N. Y., 178; *Handy* v. *Draper*, 89 N. Y., 334; *Bank* v. *Bliss*, Id., [381] 338.

We have considered all the objections made to the declaration. In our opinion none of them are well founded.

Our conclusion is, therefore, that the declaration was sufficient, and it follows that the judgment of the Circuit Court declaring it insufficient must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

The case of *John I. Adams et al.*, v. *Adna C. Conn*, No 122, is in all respects similar to the case just decided, and was submitted on the same arguments and briefs. *The judgment in that case must, therefore, be reversed, and the cause remanded to the Circuit Court for further proceedings, in conformity with the opinion announced in the case No. 121.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

TERRE HAUTE AND INDIANAPOLIS RAILWAY COMPANY, *Plff. in Err.*,
v.
ISAAC J. STRUBLE.

(See S. C., Reporter's ed., 381-385.)

Damages on contract.

1. Where, in consideration that a party will keep a stock yard, a railroad company contracts to send all live stock coming over its road to his yard, except such as may be specially ordered otherwise by shippers or owners, the company is liable for damages for failure to send such stock as agreed.
2. The action of the court below in refusing a new trial is not subject to review here.

[No. 123.]

Argued Nov. 14, 1883. *Decided Nov. 26, 1883.*

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The history and facts of the case appear in the opinion of the court.

Messrs. **Jno. G. Williams** and *Jno. B. Bowman*, for plaintiff in error.

Mr. **Jeff. Chandler**, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought by Struble, the defendant in error, to recover damages for an alleged breach of a written contract entered into between him and the Terre Haute and Indianapolis Railroad Company. A verdict and judgment were rendered in favor of plaintiff for the sum of $10,440. The defendant moved for a new trial and in arrest of judgment, and both motions having been denied, the case has been brought here for review.

By the contract in question, Struble obligated himself to build and keep in good order on his leased grounds, in East St. Louis, Illinois, all necessary stock yards and feeding pens suitable for the reception, feeding, handling, loading and unloading of live stock which might be shipped or transported over the Terre Haute and Indianapolis Railroad to and from East St. Louis; to receive and unload all live stock over that road; to collect all freight and charges on same, and pay over to the Company or its authorized agents all moneys so collected; to order from the proper agent of the Company all cars necessary for the transportation of live stock from East St. Louis; to load in a proper manner all live stock for transportation from that place by that Company; to bed such cars at a cost to shippers of not more than one dollar per car to be collected by him from shippers; and to attend to all other necessary matters pertaining to the safe and prompt loading of all such live stock for transportation over that road.

The Company, in consideration of the performance by Struble of the stipulation of the contract, agreed to build all necessary loading chutes for the use of the Company connected with said yards; to send all live stock coming to East St. Louis over its road to Struble's yards,

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except such as may be specially ordered otherwise by shippers or owners; to pay him fifty [383] cents per load for all stock received by him over the road and unloaded in his yards, and two dollars for each and every car of live stock loaded by him to be transported by the Company from East St. Louis; and to give him the loading of all live stock which may be transported over its road from that city.

Struble's yards were completed and opened for business in December, 1870. From that date until some time in October, 1873, all live stock coming to East St. Louis over defendant's line was unloaded at those yards, and live stock shipped over that road from that city was loaded by Struble. Early, however, in the fall of 1873 the National Stock Yards were completed and opened for business. They were just outside of the corporate limits of East St. Louis, and near defendant's road.

The plaintiff claimed that up to October, 1873, he performed all the conditions of the contract, and was ready, willing and able to comply with it in all respects, until it should, by its own terms, be terminated; but that he was prevented by defendant after that date from fully executing it. All this the defendant denied.

The record contains numerous assignments of error, but we shall notice only such as are relied on in argument. They seem to embrace every essential question in the case.

1. It is claimed that the court below erred in admitting evidence offered by the plaintiff. The specification under this head refers to evidence as to the number of cars, loaded with live stock, and taken by the defendant from the National Stock Yards between August 1, 1874, and April 1, 1880. The contention of plaintiff was that, within the meaning of the contract, he was entitled to load those cars, and recover therefor from the defendant the price fixed in the contract for such services; this, upon the alleged ground that that stock had not been specially ordered by shippers or owners to the National Stock Yards, and could have been directed by the defendant to Struble's yards had it made any or proper effort to do so. In this view the evidence objected to was competent, as furnishing a basis to estimate the damages which [384] plaintiff sustained by reason of the breach of the contract, if such breach was established by the evidence.

2. The court, among other things, said to the jury that in determining the quantity of stock that would probably have been shipped from the plaintiff's yards, they should include only such as the jury believed would have been possible for the defendant to direct to those yards. In the same connection the court said: "The jury in considering the meaning of the words 'all live stock which may be transported over the said railroad from East St. Louis,' found in the last clause of the contract sued on, must determine from all the evidence before them what stock is included. The words evidently apply to such stock as in the ordinary course of the defendant's business should be shipped from that point over their line of railroad. It applies to all such stock whether loaded at plaintiff's yards or some other yards used for loading stock so shipped. As already suggested, it should be applied only to stock which it was possible for defendant to have loaded by plaintiff. It does not apply to stock, the owner or shipper of which directed the loading to be done by some person other than the plaintiff, and over the loading of which defendant had no control."

We are of opinion that there was no error in these instructions. The contract contemplated, upon the part of Struble, all the preparations necessary in and about his yards to meet the necessities of the Company's business in the transportation of live stock; and upon the part of the Company that it would do all it could, in the absence of special orders from shippers, to bring live stock to plaintiff's yards, to be by him loaded in cars for transportation over defendant's road. Such was, in substance, the direction given to the jury. The court could not, under any reasonable interpretation of the contract, have said less than it did.

3. It is assigned for error that the court overruled defendant's motion for a new trial. A large part of the printed argument on behalf of defendant is devoted to a discussion of the grounds assigned in support of the motion for a new trial. But the action of the court below [385] in refusing a new trial is not subject to review here. This has long been settled by the decisions of this court. *R. R. Co.* v. *Fraloff*, 100 U. S., 24 [XXV., 531]; *R. Co.* v. *McDaniels* [*ante*, 606].

The judgment must be affirmed. It is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ABRAHAM B. MILLER, *Appt.*,
v.
MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, CITY OF BROOKLYN ET AL.

(See S. C., Reporter's ed., 385-398.)

Bridge over navigable river—when a lawful structure—official action—what are navigable waters.

1. Congress may declare that, upon a certain fact being established, a bridge over a navigable river shall be deemed a lawful structure, and may employ the Secretary of War as an agent to ascertain that fact; it thereby abdicates none of its authority.

2. When a secretary of the government is required to give information on any subject, he may act through officers under him.

3. A bridge constructed over a navigable river in accordance with the legislation of both the State and Federal Governments must be deemed a lawful structure, however much it may interfere with the public right of navigation.

4. By "Navigable waters of the United States" is meant such as are navigable in fact, and which by themselves or their connection with other waters form a continuous channel for commerce with foreign countries or among the States.

[No. 99.]

Argued Nov. 6, 1883. Decided Nov. 26, 1883.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

NOTE.—*Bridges; different kinds; legislative power to grant right to erect; duty to repair.* See *note* to Weightman v. Washington, 66 U. S., XVII., 52.

Navigable waters; what are in the United States; streams and inland waters as highways. See *note* to U. S. v. The Montello, 87 U. S., XXII., 391.

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The history and facts of the case appear in the opinion of the court.

Mr. **William H. Arnoux,** for appellant:

The special injury to complainant's business resulting from the construction of this bridge, gives him a standing in a court of equity to have the work enjoined and declared to be a nuisance.

Pa. v. *Wheeling Bridge Co.*, 13 How., 564; *State* v. *Dibble*, 4 Jones, L. (N. C.), 107; *U. S.* v. *New Bedford Bridge*, 1 Wood. & M., 401; *Rose* v. *Miles*, 4 Mau. & S., 101; *Atty-Gen.* v. *Birmingham*, 4 Kay & J., 528; *Broadbent* v. *Imp. Gas Co.*, 7 De G., M. & G., 436.

If an individual receives special damage from a public nuisance it becomes, as regards him, a private nuisance, he having suffered to that extent beyond the rest of the community, and he may maintain an action on the case for such special damage as if it were a private nuisance.

Ang. Tide-Wat., 119; *Carey* v. *Brooks*, 1 Hill (S. C.), 365; *Georgetown* v. *Canal Co.*, 12 Pet., 91; *Smith* v. *Boston*, 7 Cush., 254; *Corning* v. *Lowerre*, 6 Johns. Ch., 439; *Spencer* v. *Lon. & Bir. R. R. Co.*, 1 Eng. Can. & R. R. Cas., 159; *Sampson* v. *Smith*, 8 Sim., 272; *Lansing* v. *Smith*, 4 Wend., 1; *Reg.* v. *Great N. Ry. Co.*, 14 Ad. & E. (N. S.), 25; *E. & W. Ind. Docks* v. *Bir. Junc. Ry. Co.*, 3 Macn. & G., 155; *Glover* v. *N. S. Ry. Co.*, 16 Ad. & E. (N. S.), 912; *Chamberlain* v. *West End Ry. Co.*, 2 Best & S., 617; *Senior* v. *Met. Ry. Co.*, 32 L. J. Exch., 225; *Cameron* v. *Charing Cross Ry.*, 19 C. B. (N. S.), 764; 2 Story, Eq., sec. 926.

As matter of fact, the bridge, as constructed, does "obstruct the free and common navigation of the East River," which is forbidden by the laws of the State of New York, and it does "obstruct, impair and injuriously modify the navigation of the river," which is forbidden by the Act of Congress.

The people have the *jus publicum* to all navigable waters and public ports, which right is paramount to all others.

Ex parte Jennings, 6 Cow., 536; *Cox* v. *State*, 3 Blackf., 193; Ang. Tide-Wat., 80-83; *Hogg* v. *Canal Co.*, 5 Ohio, 410; *Atty-Gen.* v. *Pat. & Hud. Riv. R. R. Co.*, 9 N. J. Eq., 526; *Silliman* v. *Troy Bridge*, 11 Blatchf., 283; *Rex* v. *Grosvenor*, 2 Stark, 511; *Mayor of Colchester* v. *Brooke*, 7 Q. B., 339; *Blanchard* v. *W. U. Tel. Co.*, 60 N. Y., 518; *Post* v. *Munn*, 4 N. J. L. (1 South.), 61; *Pa.* v. *Wheeling Bridge*, 13 How., 568.

Any law that affects public rights is to be strictly construed against the grantee and in favor of the public.

Bridge Co. v. *Hoboken Co.*, 13 N. J. Eq. (2 Beas.), 84; *S. C.* affirmed, 13 N. J. Eq. (2 Beas.), 503; Dwar. Stat., 688, 702, and cases cited.

Nothing passes by legislative grant unless it is contained in express words.

Case of Mines, Plowd., 310-336; *Royal Fisheries of the Banne*, Davies, 149; *Case of Customs*, Davies, 45; *King* v. *Capper*, 5 Price, 258; *Stourbridge Can.* v. *Wheeley*, 2 B. & Ad., 792; *Leeds Can.* v. *Hustler*, 1 Barn. & C., 424; *Dock Co.* v. *LaMarche*, 8 Barn. & C., 42; *Zylstra* v. *Charleston*, 1 Bay, 382; *Wilkinson* v. *Leland*, 2 Pet., 657.

The authority given by the Act of Congress to the Secretary of War in this case was only *prima facie*, not irrevocable and absolute. His power was similar to the power of the Commissioner of Patents to issue patents, which gives the patentee a *prima facie*, but not irrevocable right.

Reckendorfer v. *Faber*, 92 U. S., 347 (XXIII., 719); see, also, *Smith* v. *Shaw*, 12 Johns., 257; *Ex parte Lange*, 18 Wall., 163 (85 U. S., XXI., 872); *Christie* v. *Unwin*, 11 Ad. & E., 373; *Houlden* v. *Smith*, 14 Q. B., 841.

Congress cannot refer the determination of the question whether the bridge conforms to law, to the decision of the Executive, because it involves a judicial determination.

See, *Marbury* v. *Madison*, 1 Cranch, 137.

This court is not bound by executive acts, which turn upon the construction of laws.

Decatur v. *Paulding*, 14 Pet., 497.

The authority conferred on the Secretary of War could not be delegated, and the notice given was not legal. It was not in compliance with the Act.

Lyon v. *Jerome*, 26 Wend., 485; *Board of Excise* v. *Sackrider*, 35 N. Y., 154.

Messrs. **Joseph H. Choate, Wm. M. Evarts** and *C. F. Southmayd*, for appellee:

The right of the plaintiff to maintain the suit at all depends upon his special damage. For the rule is, that no one can maintain a private action for a public nuisance, unless he sustains a special damage therefrom different from that sustained by the rest of the public.

Wood, Nuis., 655; *Lansing* v. *Smith*, 8 Cow., 152; *Pierce* v. *Dart*, 7 Cow., 609; *Dougherty* v. *Bunting*, 1 Sandf., 1; *Bridge Co.* v. *Smith*, 30 N. Y., 44.

The defendants having the authority of Congress and the State Legislature for the construction of the bridge, it is a legal structure.

Trans. Co. v. *Chicago*, 99 U. S., 635 (XXV., 336); *Phœnix* v. *Comr.*, 12 How. Pr., 1; *People* v. *Gas-Light Co.*, 64 Barb., 55; *Clinton Bridge Case*, 10 Wall., 455 (77 U.S., XIX., 969); *Wheeling Bridge Case* (*Pa.*, v. *Bg. Co.*), 13 How., 518; *Bridge Co.* v. *U. S.*, 105 U. S., 470 (XXVI., 1143); *Gilman* v. *Phila.*, 3 Wall., 713 (70 U. S., XVIII., 96); *Huse* v. *Glover*, 15 Fed. R., 292; *Escanaba Co.* v. *Chicago* (*ante*, 442); *People* v. *Kelly*, 76 N. Y., 475.

Mr. Justice **Field** delivered the opinion of the court: [392]

This suit was commenced in May, 1876, to restrain the erection of the suspension bridge, then under construction, over East River, in the State of New York, between the Cities of New York and Brooklyn, at the height of 135 feet above the river at high water mark, which was the proposed elevation of the structure. As the bridge has since been completed, if the plaintiff can make good his contention and establish that when he filed his bill he was entitled to the relief prayed, he may claim that the bridge shall be raised to a greater elevation or be entirely abated. He is the lessee of certain warehouses on the banks of the river above the point of the proposed crossing of the bridge, and he states that he brings the suit on behalf of himself and of all others similarly situated. No one, however, has united with him in its prosecution. He stands alone as complainant and alleges that the bridge, if erected as projected and intended to the height designated, would be built without lawful power and authority; that it would be a nuisance, and obstruct, impair and

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injuriously modify the navigation of the river; and might seriously and prejudicially affect the commerce of the Port of New York; that merchant vessels from the New England States and British Provinces, and from ports south of New York, and vessels engaged in foreign commerce, pass and repass on the river the intended location of the bridge; that the masts of a large proportion of these vessels exceed 135 feet in height; and that the expense to them of striking parts of their masts in passing under the bridge, if built as proposed, with the detention and additional towage rendered necessary, would be so great as to destroy his warehouse business and be a private and irreparable injury to him, for which an action at law would afford no adequate redress. He accordingly prays an adjudication of the court upon the character and effect of the proposed bridge in conformity with these allegations, and an injunction restraining the further prosecution of the work of building it at the height of 135 feet above mean high water, or at any other height that would obstruct, impair or injuriously modify the navigation of the river.

The court below did not find in the allega-
[393] tions of a possible loss to the plaintiff in his warehouse business, or in the proofs offered to sustain them, sufficient ground to restrain the completion of the work. It dismissed his complaint as being without substantial merit.

We approve of its action and decree. The erection of the bridge at the elevation proposed was authorized by the action of both the State and Federal Governments. It would, therefore, when completed, be a lawful structure. If, as now completed, it obstructs in any respect the navigation of the river, it does so merely to an extent permitted by the only authorities which could act upon the subject. And the injury then apprehended and alleged by the plaintiff and now sustained, is only such as is common to all persons engaged in commerce on the river and doing business on its banks and, therefore, not the subject of judicial cognizance. These conclusions will clearly appear by a reference to the legislation under which the work was commenced and prosecuted.

On the 16th of April, 1867, the Legislature of New York passed an Act creating a corporation by the name of the New York Bridge Com-
[386] pany, for the purpose of constructing and maintaining a permanent bridge over East River, between the Cities of New York and Brooklyn. Laws of 1867, ch. 399. The Act, among other things, authorized the corporation to acquire and hold so much real estate as might be necessary for the site of the bridge, and of all piers, abutments, walls, toll houses and other structures proper to it, and for the opening of suitable avenues of approach, but no land under water beyond the pier lines established by law. It declared that the bridge at the middle of the river should not be at a less elevation than 130 feet above high tide and should not be so constructed as to obstruct "the free and common navigation of the river;" that it should not obstruct any street it might cross, but span such street by an arch or suspended platform of suitable height to afford passage under it for all purposes of public travel and transportation; and that no street running on a line of the bridge should be closed without full compensation to the owners of the property upon it; and designated the points of the commencement and termination of the bridge.

On the 20th of February, 1869, the Legislature passed an Act amending the Act of incorporation and providing for the representation of the two Cities of New York and Brooklyn in the board of directors of the bridge company, and directing that the company should proceed without delay to construct the bridge, authorizing it for that purpose to use and occupy so much of the lands under the water of the river, not exceeding a front on either side of 250 feet, nor extending beyond the pier lines, as might be necessary for the construction of the towers of the bridge.

On the 3d of March of the same year, Congress passed an Act entitled "An Act to Establish a Bridge across East River between the Cities of Brooklyn and New York, in the State of New York (as) a Post-Road." In it the Acts of the Legislature of New York are referred to, and the bridge to be constructed under them was declared to be "a lawful structure and post-road for the conveyance of the mails of the United States," provided the bridge should be so constructed and built as "not to obstruct, impair or injuriously modify the navigation of the river." To secure a compliance with this condition, the company was required, previous to commencing the construction of the bridge, to submit to the Secretary of War a [387
plan of it, with a detailed map of the river at its proposed site and for the distance of a mile above and below, exhibiting the depths and currents of the stream, together with such other information as might be deemed requisite by the Secretary to determine whether the bridge, when built, would conform to the prescribed conditions of the Act, "not to obstruct, impair or injuriously modify the navigation of the river."

The Secretary of War was by the Act authorized and directed, upon receiving the plan and map and other information and upon being satisfied that a bridge built on such a plan and at said locality would conform to these conditions, to notify the company that he approved the same; and, upon receiving such notification the Act declared that such company might proceed to the erection of the bridge, conforming strictly to the approved plan and location. But, until the Secretary approved the plan and location and notified the company of the same in writing, the bridge should not be built or commenced.

Soon after the passage of this Act, the company had the required plan and maps prepared and submitted to the Secretary of War. It is conceded that in this respect the provisions of the Act were complied with. The Secretary then appointed a commission of engineers, consisting of three officers of the army, two of them having the rank of lieutenant-colonel of engineers, and the third, a captain of engineers, to examine and report upon the proposed bridge, its height, strength, plan, location and practicability, the effect of its piers and foundations and abutments upon the navigation of the river and the approaches to the harbor, and to what extent the bridge might obstruct or interrupt the passage of vessels and the free access to the United States navy yard at Brooklyn. The commission heard all parties interested, and made

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an elaborate report upon the subject to the chief engineer of the United States Army at Washington, and through him the report was submitted to the Secretary of War. A majority of the commission was of opinion that the height of the center of the main span of the bridge above high water should be increased from 130 to 185 feet. They also made various recommendations with reference to the dimensions and strength of various parts of the structure, to the projection of the pier or tower foundations of the bridge, and to the attachment of guys or stays to its main span. They reported as their conclusions:

1. That there was no doubt of the entire practicability of the structure nor of its stability when completed.

2. That no sensible effect would be produced by the pier or tower foundations and abutments upon the navigation of the river, nor upon the approaches to the harbor of New York.

3. That the bridge would not offer any important impediment to the free access of naval vessels to the United States navy yard at Brooklyn, nor any obstruction or interruption to the passage of merchant vessels under it, further than requiring the larger class of ships to send down or house their royals, and in some cases their top-gallant masts.

4. That the bridge, as projected, would conform to the prescribed conditions of the Act of Congress relating to it, unless it be decided that the words "obstruct or impair" implied that it should not necessitate any such preparation for passing it, on the part of vessels of the larger class, as is involved in housing or sending down of top-gallant, royal or sky-sail masts.

On the 19th of June, 1869, the Secretary of War approved the report of the commission with the views and recommendations it contained, provided that the height of the center of the main span of the bridge should not be less than 185 feet in the clear at mean high water of the spring tides, and that the structure should conform in all other respects to the conditions recommended by the commission. The Secretary also directed the chief of engineers to furnish the bridge company with a copy of the Act of Congress establishing the bridge, a copy of the report of the commission and of his own report, and to notify the company that the span and location of the bridge were approved, subject to the conditions mentioned.

This action of the Secretary was indorsed on the report. In accordance with his direction, the chief engineer notified the company of the approval of the Secretary and of the conditions which accompanied it. Upon receiving the notification, the company commenced the construction of the bridge and prosecuted the same until the year 1875, when the Legislature of the State passed an Act dissolving the company and declaring the bridge to be a public work of the Cities of New York and Brooklyn, and providing for its completion by them. It is conceded by stipulation of the parties that the provisions of this Act were complied with and that the management of the work was devolved upon trustees to be appointed by the two cities. When this suit was commenced, the work had progressed so far that the towers and anchorages on both sides of the river had been completed and upwards of $6,000,000 had been expended; and, as already said, since that time the bridge has been completed and opened to the public.

It is contended by the plaintiff with much earnestness that the approval of the Secretary of War of the plan and location of the bridge was not conclusive as to its character and effect upon the navigation of the river, and that it was still open to him to show that, if constructed as proposed, it would be an obstruction to such navigation, as fully as though such approval had not been had. It is argued that Congress could not give any such effect to the action of the Secretary, it being judicial in its character. There is in this position a misapprehension of the purport of the Act. By submitting the matter to the Secretary, Congress did not abdicate any of its authority to determine what should or should not be deemed an obstruction to the navigation of the river. It simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the Secretary of War as an agent to ascertain that fact. Having power to regulate commerce with foreign Nations and among the several States, and navigation being a branch of that commerce, it has the control of all navigable waters between the States, or connecting with the ocean, so as to preserve and protect [394] their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive. It may, in direct terms declare absolutely, or on conditions, that a bridge of a particular height shall not be deemed such an obstruction; and, in the latter case, make its declaration take effect when those conditions are complied with. The Act in question, in requiring the approval of the Secretary before the construction of the bridge was permitted, was not essentially different from a great mass of legislation directing certain measures to be taken upon the happening of particular contingencies or the ascertainment of particular information. The execution of a vast number of measures authorized by Congress, and carried out under the direction of heads of departments, would be defeated if such were not the case. The efficiency of an Act as a declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingency upon which the Act shall take effect may be left to such agencies as it may designate. *S. C.* v. *Ga.*, 93 U. S., 13 [XXIII., 784].

It is also objected that the notice given by the chief engineer to the company was not a compliance with the requirement that notification should be given by the Secretary; but there is no force in the objection. When a secretary of the government is required to give information on any subject, he may act and generally does act, through officers under him. He is not expected to make over his own signature all the communications required from the department of which he is the head. It would be impracticable for him to do so. The official communication is deemed made by him when it is made under his sanction and direction.

The bridge being constructed in accordance with the legislation of both the State and Federal Governments must be deemed a lawful structure. It cannot after such legislation be treated as a public nuisance; and however much

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it may interfere with the public right of navigation in the East River, and thereby affect the profits or business of private persons, it cannot, on that ground, be the subject of complaint before the courts. The plaintiff is not deprived [395] of his property nor of the enjoyment of it; nor does he from that cause suffer any damage different in character from the rest of the public. He alleges that his business of a warehouse keeper on the banks of the river above the bridge will be in some degree lessened by the delay attending the passage under it of vessels with high masts. The inconvenience and possible loss of business from this cause are not different from that which others on the banks of the river above the bridge may suffer. Every public improvement, whilst adding to the convenience of the people at large, affects, more or less injuriously, the interests of some. A new channel of commerce opened, turning trade into it from other courses, may affect the business and interests of persons who live on the old routes. A new mode of transportation may render of little value old conveyances. Every railway in a new country interferes with the business of stage coaches and side-way taverns; and it would not be more absurd for their owners to complain of and object to its construction than for parties on the banks of the East River to complain of and object to the improvement which connects the two great cities on the harbor of New York.

Several cases have been before this court relating to bridges over navigable waters of the United States in which questions were raised as to the authority by which the bridges could be constructed, the extent to which they could be permitted to obstruct the free navigation of the waters, and the right of private parties to interfere with their construction or continuance. In these cases all the questions presented in the case at bar have been considered and determined, and what we hereafter say in this opinion will be little more than a condensation of what was there declared. The power vested in Congress to regulate commerce with foreign Nations and among the several States includes the control of the navigable waters of the United States, so far as may be necessary to insure their free navigation; and by "navigable waters of the United States" are meant such as are navigable in fact, and which by themselves or their connection with other waters form a continuous channel for commerce with foreign countries or among the [396] States. *The Daniel Ball*, 10 Wall., 557 [77 U. S., XIX., 999]. East River is such a navigable water. It enters the harbor of New York and connects it with Long Island Sound. Whatever, therefore, may be necessary to preserve or improve its navigation the General Government may direct; and to that end it can determine what shall and what shall not be deemed an interference with or an obstruction to such navigation.

In the *Wheeling Bridge Case* a bridge erected over the Ohio River at Wheeling, under an Act of the Legislature of Virginia, which prevented the passage of steamboats with high chimneys, was adjudged to be an unlawful structure; and the court ordered that it should be raised so as to afford a free passage to the steamers, or that some other plan should be adopted by a day designated which would relieve the navigation from the obstruction, or that the bridge should be abated. Congress thereupon interfered and declared the bridge, as it was built at its existing elevation, to be a lawful structure. The court then held that the objection to the bridge as an obstruction to the navigation of the river was removed; that although it might still be an obstruction in fact, it was not so in contemplation of law, and the decree of the court for the abatement of the bridge could not be enforced. "There was no longer," said the court, "any interference with the enjoyment of the public right, inconsistent with the law, no more than there would be where the plaintiff himself had consented to it after the rendition of the decree." For its interference with the public use of the stream no individual could complain, as the power which could control and regulate that use had made the structure creating the interference a lawful one. 18 How., 430 [59 U. S., XV., 436].

The case of *Gilman* v. *Philadelphia*, 3 Wall., 713 [70 U. S., XVIII., 96], is much stronger than the *Wheeling Bridge Case*, and is conclusive against the pretensions of the plaintiff. It there appeared that a bridge was about to be built over the Schuylkill River at Chestnut Street in the City of Philadelphia under the authority of an Act of the Legislature of Pennsylvania, when a party owning valuable coal wharves just above Chestnut Street filed a bill to prevent its erection, alleging, as in the present case, that it would be an unlawful obstruc- [397] tion to the navigation of the river and a public nuisance, inflicting upon him special damage, and claiming that he was entitled to be protected by an injunction to restrain the progress of the work, and to a decree of abatement should it be completed. The river was tide-water and navigable to the wharves of the plaintiff by vessels drawing from eighteen to twenty feet of water; and, for years, commerce to them had been carried on in all kinds of vessels. The bridge was to be only thirty feet high and without draws and, of course, would cut off all ascent above it of vessels carrying masts. The city justified its intended action under the Act of the Legislature, setting up that the bridge was a necessity for public convenience to a large population residing on both sides of the stream. The court below dismissed the bill, and this court affirmed its decree, holding that as the river was wholly within her limits the State could authorize the construction of a bridge until Congress should by appropriate legislation interfere and assume control of the subject. In giving its opinion, the court observed that it should not be forgotten, that bridges which are connecting parts of turnpikes, streets and railroads are means of commercial transportation as well as navigable waters, and that the commerce over them may be greater than on the water; that it was for the municipal power to determine which should be preferred and how far either should be made subservient to the other; and that this power could be exercised by the State until Congress interfered and took control of the matter. All the considerations which governed the decision of that case operate with equal, if not greater, force in the present case. In that case different parts of a city separated by a navigable water were connected by a bridge; in this case two cities thus separated are united. In that case the obstruction was complete and permanent to all vessels having masts; in this case the ob-

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struction does not exist except to a limited class of vessels having high masts, and to them it is little more than a temporary inconvenience. In that case there was no approval of the structure by Congress, except such as may be inferred from its silence; in this case there is its direct authorization of the bridge after a careful consideration of its effect upon navigation by a commission of distinguished engineers. In that case the bridge was held to be a lawful structure [398] against all private parties, the Federal Government alone having the right to object to the obstruction to the navigation of the river which it might cause and to remove it; in this case that Government does not object, but approves and sanctions the structure; and the public benefit from it far outweighs any inconvenience arising from its interference with the navigation of the stream.

The recent case of *Escanaba Co.* v. *Chicago* [*ante*, 442], follows the decision in *Gilman* v. *Philadelphia*, and is equally pointed and decisive.

In the light of these cases, and others of the same purport might be cited, the claim of the plaintiff that the construction of the great work which was to connect, and which has since then connected, the Cities of New York and Brooklyn should have been suspended, appears to be wholly without merit.

The decree of the court below dismissing his bill must, therefore, be affirmed; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MEMPHIS GAS-LIGHT CO., *Plff. in Err.*,

v.

TAXING DISTRICT OF SHELBY COUNTY, TENNESSEE.

(See S. C., Reporter's ed., 398-401.)

Contract against taxation—provision in charter—constitutional protection.

1. A contract against taxation of a company cannot be implied, because permitting the State to tax the company by a license tax for the privilege granted by its charter would destroy that privilege.
2. To have an exemption from taxation, it is necessary to have a provision to that effect in the charter, in clear and unmistakable language.
3. The Constitution of the United States does not profess in all cases to protect property from unjust or oppressive taxation by the States. That is left to the state constitutions and state laws.

[No. 926].

Submitted Nov. 13, 1883. Decided Nov. 26, 1883.

IN ERROR to the Supreme Court of the State of Tennessee.

On the 26th of April, 1883, Joseph Craig, Secretary of the Memphis Gas-Light Company, was arrested upon a warrant issued by the President of the Fire and Police Commissioners of the Taxing District of Shelby County, Tennessee, charging that said Company had committed the offense of doing business without a license within the Taxing District of Shelby County, Tennessee, in violation of law and the ordinances of said Taxing District.

He was tried before the said President of the Fire and Police Commissioners of said District, and found guilty as charged, and the said Memphis Gas-Light Company was fined $50, and said Joseph Craig, Secretary, was ordered to be committed to the "work-house, the district prison", until said fine and costs were paid.

From this judgment, the defendant appealed to the Circuit Court of Shelby County, Tennessee. The case was tried in said circuit court on the 2d of May, 1883, when a judgment was rendered against the defendant, and the fine was assessed at $50, and a judgment entered against the defendant and securities on the appeal bond for $50, and all the costs.

This judgment having been affirmed, on appeal, by the court below, the defendant sued out this writ of error.

The facts of the case are sufficiently stated by the court.

Messrs. **Geo. Gantt, Henry Craft** and **Josiah Patterson,** for plaintiff in error.

Messrs. **J. B. Heiskell** and *C. W. Heiskell*, for defendant in error.

Mr. Justice **Miller** delivered the opinion of [399] the court:

This is a writ of error to the Supreme Court of Tennessee.

The question presented is, whether the statute of the State under which the defendant assessed a license tax of $250 against plaintiff in error is void, because it violates the contract found in the charter of the Company.

This charter was enacted November 20, 1851, and, after giving the name of the new Corporation and the names of the corporators, it refers for the rights, privileges, powers and restrictions of the Company, to the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth sections of an Act incorporating the Nashville Gas-Light Company, passed November 21, 1849, and declares that those sections, not inconsistent with the first section of this Act, shall apply to the Memphis Gas-Light Company as fully and completely as though the same were fully set forth and incorporated.

For any contract of exemption from taxation we must, therefore, look to the provisions of those sections in the charter of the Nashville Company.

These sections contain the usual powers necessary for the successful conduct of the business of the Company, its organization, its shares of stock, mode of payment, laying pipes in the street and the like, and after a careful examination of them we are unable to see anything whatever which expresses a contract for any limitation of the power of the Legislature to tax the Company or its property.

Such was the opinion of the Supreme Court of Tennessee, delivered on rendering the judgment to which this writ of error is taken.

And though this court is bound for itself to inquire in every such case as this, whether there existed a contract which might be impaired, on which subject the court has very recently, at the present Term, collated the authorities in the case of *R. R. Co.* v. *Palmes* [*ante*, 922] we are

NOTE.—*Exemption from taxation, whether a contract or not; not implied.* See *note* to Tucker v. Ferguson, 89 U. S., XXII., 805.

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unable to discover any reason for dissenting [400] from the opinion of the Supreme Court of Tennessee on that point.

The section of the charter on which plaintiff's counsel mainly rely as showing a contract is the fifth section, which reads as follows:

"Sec. 5. The said Company shall have the privilege of erecting, establishing and constructing gas-works, and manufacturing and vending gas in the City of Nashville, by means of public works, for a term of fifty years from and after the date of this Act. A reasonable price per thousand feet for gas shall be charged in the case of private individuals, to be regulated by the prices in other southwestern cities; and for public lights, such sum as may be agreed upon by the Company and the public authorities of Nashville; *Provided*, said Company shall never charge more than one cent for every cubic foot of gas used, as may be indicated by the gas-meter, or computed by the ordinary rules in such cases; nor shall they ever charge the corporation of the City of Nashville more per cubic foot than they shall be getting at the same time from the majority of the inhabitants of the city using such gas."

The argument of counsel is that if no express contract against taxation can be found here it must be implied, because to permit the State to tax this Company by a license tax for the privilege granted by its charter, is to destroy that privilege.

But the answer is, that the Company took its charter subject to the same right of taxation in the State that applies to all other privileges and to all other property. If it wished or intended to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of its business, it should have required a provision to that effect in its charter.

The Constitution of the United States does not profess in all cases to protect property from unjust or oppressive taxation by the States. That is left to the state constitutions and state laws.

In the case of *R. R. Co.* v. *Pa.*, 21 Wall., 492 [88 U. S., XXII., 595], it was said:

"This court has in the most emphatic terms [401] and on every occasion declared that the language in which the surrender (of the right of taxation) is made must be clear and unmistakable. The covenant or enactment must distinctly express that there shall be no other or further taxation. A State cannot strip herself of this most essential power by doubtful words. It cannot, by ambiguous language, be deprived of this highest attribute of sovereignty. The principle has been distinctly laid down in each of the cases referred to. It has never been departed from."

See, also, *Bank* v. *Billings*, 4 Pet., 514; *Herrick* v. *Randolph*, 13 Vt., 531; *R. R. Co.* v. *Maguire*, 20 Wall., 40 [87 U. S., XXII., 282; *Delaware R. R. Tax*, 18 Wall., 206 [85 U. S., XXI., 888].

There is in this case no language which attempts to exempt plaintiff from taxation, nor is there even the most remote implication of such exemption.

The judgment of the Supreme Court of Tennessee is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—21 N. W. Rep., 831.

JOHN J. GILFILLAN, *Plf. in Err.*, *v.* UNION CANAL COMPANY OF PENNSYLVANIA.

(See S. C., Reporter's ed., 401-407.)

Statute impairing contracts—legislative power.

1. A Statute authorizing an agreement between a company pecuniarily embarrassed and its creditors, for funding its debts, providing for notice to the bondholders to appear and express in writing their assents or dissents, and for the preservation of all the original rights of such as dissented, which made the failure of a bondholder to signify his refusal to concur in the agreement of settlement within the specified time equivalent to an express assent in writing does not impair the obligation of his bond.

2. It is within the just scope of legislative power to require bondholders, interested in common with others in a trust security, to signify their assent to, or dissent from, a plan proposed by proper persons for the compromise and adjustment of matters of difference affecting their common interests.

[No. 41.]

Submitted Oct. 12, 1883. Decided Nov. 26, 1883.

IN ERROR to the Supreme Court of the State of Pennsylvania.

The history and facts of the case appear in the opinion of the court.

Mr. **Jas. Duval Rodney**, for plaintiff in error.

Mr. **Thomas Hart, Jr.**, for defendant in error:

The Union Canal Acts are simple Acts of limitation, giving every bondholder three months within which he must act, if at all. A course is provided, by following which, his rights will be preserved, but he must pursue it within the time prescribed? Such Acts are constitutional.

Korn v. *Browne*, 64 Pa., 55; *Chadwick* v. *Moore*, 8 Watts & S., 49; *Breitenbach* v. *Bush*, 44 Pa., 313; *Coxe* v. *Martin*, 44 Pa., 322; *Terry* v. *Anderson*, 95 U. S., 628 (XXIV., 365).

The single question is: did not the plaintiff in error assent to it? He did if the Legislature of Pennsylvania could call upon him to signify his dissent, with notice in the event of inaction, that he would be taken to have assented.

Martin v. *R. R. Co.*, 8 Fla., 370; *R. R. Co.* v. *Leach*, 4 Jones, L. (N. C.), 340; *Ireland* v. *Turnpike Co.*, 19 Ohio St., 369; *R. R. Co.* v. *Cowell*, 28 Pa., 329.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The Union Canal Company of Pennsylvania, a Corporation of the State of Pennsylvania, issued, in 1853, a series of bonds for the payment of money, amounting in the aggregate to $2,500,000, with coupons for semi-annual interest attached. These bonds and coupons were secured by a mortgage to trustees on the property of the Company.

Prior to 1862 the Company became pecuniarily embarrassed, and a plan was devised by parties in interest for the settlement of its affairs and liabilities, by which the entire indebtedness, whether secured or unsecured, was to be converted into a funded debt, secured by mortgage, on which interest was to be paid only "out of and from the clear net income and profits of the business of the Corporation," but the right of voting at elections and meetings of the Corporation was to be given to bondholders as well as

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stockholders. On the 10th of April, 1862, the Legislature of Pennsylvania passed a statute, the purpose of which was to give authority for such an agreement between the Company and its creditors. The statute provided in express terms that the agreement, if entered into, should only be binding on such of the holders of the bonds of 1853 "As shall signify their assent in writing thereto; and in case any such bondholder shall fail to file with the president of such Corporation his or her refusal, in writing, to concur in the said agreement within three months from the date thereof, such bondholder shall be taken to have assented to the same." Ample provision was made for notice to the bondholders to appear and express in writing [403] their assents, or dissents, and for the preservation of all the original rights of such as dissented.

Pursuant to this legislative authority, the contemplated agreement was entered into between the Corporation, with the assent of its stockholders, and the creditors. The notice required by the statute was given, and bondholders to the amount of only $85,000 out of the $2,500,000 filed in writing their refusal to concur. All the rest either assented in writing or failed to signify their dissent.

At the time the agreement was made Gilfillan, the plaintiff in error, owned $4,200 of the bonds of 1853, and the coupons thereon from November 1, 1857. He had actual notice of the agreement and the proceedings for its execution, but he neither signified his assent thereto in writing nor filed with the president of the Company his refusal to concur. Between the time of making the agreement and the commencement of this suit there was not "any clear net income and profits of the business" of the Company.

This suit was brought against the Company by Gilfillan on his coupons running from November 1, 1857, to May 1, 1877, inclusive. At the trial, a case was stated which presented for determination the single question whether the agreement of settlement barred the action. The Supreme Court of the State decided that it did, and gave judgment accordingly. To reverse that judgment this writ of error was brought.

The precise point we have to decide is, whether the statute which made the failure of a bondholder to signify his refusal to concur in the agreement of settlement within the specified time equivalent to an express assent in writing, impaired the obligation of his bond. Mortgages of the kind of that executed by this Company are of a peculiar character, and each bondholder under them enters by fair implication into certain contract relations with his associates. Such bondholders are not, like stockholders in a corporation, necessarily bound, in the absence of fraud or undue influence, by the will of the majority, when expressed in the way provided by law, but they occupy, to some extent, an analogous position towards each other. The mortgage, with the issue and distribution of bonds under it, creates a trust, of which the [404] selected mortgagee, or his duly constituted successor, is the trustee, and the bondholders primarily and the stockholders ultimately, the beneficiaries. It not unfrequently happens that compromises and adjustments of conflicting interests become necessary in the course of the administration of such trusts. As in the present case, a very large majority of the bondholders sometimes think it is for their own interest as well as that of their associates to surrender a part of their rights and accept others instead, and they prepare and submit for execution an agreement, the object of which is to carry their plan into effect. No majority, however large, can compel a minority, small though it be, to enter into such an agreement against their will, and under the Constitution of the United States, it is probable that no statute of a State, passed after the bonds were issued, subjecting the minority to the provisions of the agreement without their consent, would be valid. But it seems to us a proper exercise of legislative power to require a minority to act whenever such an arrangement is proposed, and to provide that all shall be bound who do not, in some direct way, within a reasonable time after notice, signify their refusal to concur. To sustain such legislation it is only necessary to invoke the principle enforced in statutes of limitations, which make neglect to sue within a specified time conclusive evidence of the abandonment of a cause of action. As was said in *Terry* v. *Anderson*, 95 U. S., 634 [XXIV., 366], where the limitation was of actions upon certain legal obligations that embarrassed the entire community at the close of the late civil war, "the obligation of old contracts could not" in this way "be impaired, but their prompt enforcement could be insisted upon or their abandonment claimed."

As to statutes of limitations, it has always been held that shortening the time within which actions on existing contracts must be brought, impairs no obligation of the contract, if a reasonable time is given to bring a suit before the bar attaches. In *Terry* v. *Anderson*, *supra*, it was said: "In all such cases the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, rea- [405] sonable. * * * In judging of that we must place ourselves in the position of the legislators, and must measure the time of limitation in the midst of the circumstances which surround them as nearly as possible; for what is reasonable in a particular case depends upon its particular facts."

What was said there seems to us equally applicable to the present case. There "the business interests of the entire people of the State had been overwhelmed by a calamity common to all. Society demanded that extraordinary efforts be made to get rid of old embarrassments, and permit a reorganization on the basis of the new order of things." Here a Canal Company, encumbered with a large bonded and floating debt, was bankrupt. The payment of its debts in the ordinary way was impossible. It is fair to infer from the case stated that the interest on the mortgage debt had been in arrear for years, and the floating debt which was unsecured amounted to at least $500,000, or one fifth of the amount of the mortgage. In this condition of things undoubtedly the bondholders might have foreclosed their mortgage and thus secured the proceeds of a sale of the mortgaged property, but to a very large majority this seemed unadvisable, and the reason is apparent. The property they had as security was a canal and its appurtenances. Purchasers of such property at advantageous prices were not easily found. Unless the bondholders themselves

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bought, a large sacrifice must almost necessarily be made and but a small sum realized for distribution. If the bondholders did buy, it might be necessary for them to operate the canal and assume corresponding liabilities. The experience of the Company in the past gave no encouragement of success in such an undertaking, and so a majority of the bondholders came to the conclusion that if they could be permitted to take part to some extent in the control of the business, it was better to let the property remain in the hands of the Company without a foreclosure, and to demand their interest only as it could be paid out of profits actually realized. The question now is, not whether this scheme was or was not a wise one. A majority of the bondholders thought it was, while some did not. Unless all or nearly all agreed, nothing could well be done. Hence application was made to the Legislature, not to require all bondholders to adopt the plan and become bound by it, but to indicate whether they would or would not. If any said they would not, then it would be necessary for those who favored the scheme to determine whether, in view of such a dissent, they would go on and leave the dissenters at liberty to assert their rights. That would, of course, depend in a large degree upon the number of those who dissented and the amount of bonds they held. Prompt action was also important. In view of this, three months was fixed as the time within which the election must be made. There is no complaint of the length of time given, and if there was it could make no difference in this case, because Gilfillan had actual notice, and three months was certainly time enough for him to determine in his own mind whether an assent or dissent was most for his interest. So that the only question really presented to us is, whether it was unreasonable to provide that a failure to dissent should be taken as an assent. What the majority wanted to know was how many would not come into the scheme, and the way the assent or dissent should be signified was a matter of but little importance, provided it was understood by the bondholders. The Legislature, in the exercise of its discretion, saw fit to provide that every bondholder should be taken to have elected to become bound by the agreement, unless he filed in writing with the president of the Company his refusal to concur. This was the way the vote was to be taken and the will of the bondholders ascertained. All who did not vote against, were to be counted in favor of the plan. This being understood no bondholder can complain, if it was within the power of the Legislature to require him to act at all. If he does not wish to abandon his old rights and accept the new, all he has to do is to say so in writing to the president of the Company. Inaction will be taken as conclusive evidence of abandonment, just as the failure to bring suit within the time allowed by a statute of limitation is evidence of the abandonment of an existing cause of action.

[406]

The same principle was applied in *Vance* v. *Vance* [*ante*, 808], where it was held that an article in the Constitution of Louisiana, adopted in 1868, which provided that existing secret mortgages and privileges should cease to have effect against third persons after the 1st January, 1870, unless before that time recorded, did not impair the obligation of a contract between an infant and her natural tutor. *Mr. Justice* Miller, in delivering the opinion of the court, after stating that the strong current of modern legislation and judicial opinion was against the enforcement of secret liens on property, said: "We think that the law in requiring the owner of this tacit mortgage for the protection of innocent persons dealing with the obligor to do this much to secure his own right, and protect those in ignorance of those rights, did not impair the obligation of the contract, since it gave ample time and opportunity to do what was required and what was eminently just to everybody." And in *Jackson* v. *Lamphire*, 3 Pet., 290, it was said: "It is within the undoubted power of State Legislatures to pass recording Acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same, whether the deed is dated before or after the recording Act."

[407]

We conclude, therefore, that it is within the just scope of legislative power to require bondholders, interested in common with others in a trust security, to signify their assent to or dissent from a plan proposed by proper persons for the compromise and adjustment of matters of difference affecting their common interests, and that the statute involved in this suit is of that character and valid.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 534.

J. A. FAY AND COMPANY, *Appt.*, [403]

v.

CORDESMAN BROTHERS, HARRY J. CORDESMAN, JR., and CLEMENS A. CORDESMAN.

(See S. C., Reporter's ed., 408-421.)

Patent as to scroll-saws—re-issue—claims considered—infringements of.

*1. Claim 4 of re-issued letters patent No. 1527, granted to John Richards, August 25, 1868, for a "guide and support for scroll-saws," the original patent, No. 35390, having been granted to him, May 25, 1862, for an "improved guide and support for scroll-saws," namely: "4. An anti-friction guide which is adjustable so as to accommodate different thicknesses of saw-blades, and to compensate for wear, in combination with the upper portion of a web saw-blade, substantially as set forth," does not cover an arrangement in which a band-saw is used, passing over wheels, and running constantly in one direction, towards the table on which the stuff lies, and having a tension over the peripheries of the wheels.

2. Claim 5 of said re-issue, namely, "5. The combination of the anti-friction saw-support and guide, or the equivalent thereof, with an adjustable guard, or its equivalent, substantially as and for the purpose set forth," is not infringed by an arrangement in which such a band-saw is used and the guard does not hold down the stuff against the upward lifting action of the saw, because the saw is constantly passing downward.

3. The claim of letters patent No. 78880, granted to J. A. Fay & Co., June 16, 1868, for an "improvement in guides for band-saws," on the invention of John Lemman, namely: "The combination of the roller *b* with fixed lateral guides, *c c c*, one or more,

*Head notes by *Mr. Justice* BLATCHFORD.

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arranged and operated substantially in the manner and for the purposes specified," is for the combination of an anti-friction smooth faced wheel to support the back or thin edge of the saw, and to have lateral adjustment, presenting different points to wear, with the fixed guides, and is not infringed by an arrangement in which the wheel has two grooves in it, in one of which the saw runs, and in the other of which it can be made to run by lateral adjustment.

4. Claim 1 of letters patent No. 120949, granted to J. A. Fay & Co., November 14, 1871, for an "improvement in band-sawing machines," on the invention of William H. Doane and William P. McKee, namely: "1. The frame A, A', A'', in combination with the lower arbor-bearing, said frame being constructed as herein described, with a depression A''', permitting the ready removal of the arbor, as explained," is not infringed by an arrangement in which the depression does not leave exposed a seat which is entirely open upward, and the arbor-bearing cannot be removed without detaching the pulley from the arbor.

5. Claim 2, namely: "2. The arrangement of frame A A' A'' A''', and of the horizontally and vertically adjustable arbor-bearing C, D, D', E, E', G, H, A," is not infringed by an arrangement which does not have the frame and depression of claim 1, or the elements D D', or the same or equivalent means of adjusting such arbor-bearing either horizontally or vertically.

6. Claim 3, namely: "3. The arrangement of step or saddle K and its contained box or bearing L L'," covers, as an element of the arrangement, among other things, a spring which carries the weight of the saddle, and gives an elastic tension to the saw, and is not infringed by an arrangement in which there is a rigid saddle and no spring.

7. Claim 4, namely: "4. In combination with the upper arbor L', the lower arbor-bearing E, adjustable both vertically and horizontally, as shown and described and for the purpose set forth," is not infringed by an arrangement which does not infringe claims 2 and 3.

[No. 126.]

Argued Nov. 14, 15, 1883. Decided Dec. 3, 1883.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The bill in this case was filed in the court below, by the appellant, a Corporation duly established under the laws of Ohio, to recover damages alleged to have resulted from the infringement of certain letters patent, and for an injunction.

The court below having found for the defendants and entered a decree dismissing the bill, the complainant appealed to this court.

The facts of the case are further stated by the court.

Messrs. **Robert H. Parkinson** and *John E. Hatch*, for appellant.

Messrs. **E. E. Wood** and *E. Boyd*, for appellees.

Mr. Justice **Blatchford** delivered the opinion of the court:

This suit in equity was brought for the infringement of three several letters patent. The first is re-issue No. 1527, granted to John Richards, August 25, 1863, for a "guide and support for scroll-saws," the original patent, No. 35390, having been patented to him May 27, 1862, for an "improved guide and support for scroll-saws." The specification of the re-issue is as follows, including what is inside of brackets and what is outside of brackets, omitting what is in italics: "To all whom it may concern: Be it known that I, John Richards, of Columbus, in the County of Franklin, and State of Ohio, have invented a new and useful [method of guiding and supporting] *combined guide, guard and support for* scroll-saws; and I do hereby declare that the following is a full, clear and exact description of [one practical means of carrying out my invention] *the same*, reference being had to the accompanying drawings forming part of this specification, in which [Figure] *Fig.* 1 is a perspective view of a portion of [a] *the* table and [a] *the* saw blade [of a 'scroll saw-mill,' with my invention applied to the same.] *and my improved upper combined guide, guard and support.* [Figure] *Fig.* 2, a longitudinal section of the same connected to the suspended stud of the building. [Figure] *Fig.* 3 is a horizontal section [through the guide and support.] *in the line x x of Fig.* 2. [The same] *Similar* letters of reference [where used] in [different] *the several* figures indicate corresponding parts. [It has long been a *desideratum* to obtain a scroll saw-mill which will work successfully while the upper end of the saw blade is left free from a sash or upper straining device; and this has never been attained until the development] *The nature* of my invention [which] *under this patent* consists: [1st, in working the saw at a point above the table in a groove which is inclosed by anti-friction material, such as steel, polished iron or glass, or any other known and suitable metal or substance, the upper end of the saw being disconnected from any upper suspender or sash, but supported and guided at its back edges and at its sides or broad faces, and its lower end connected to any mechanical device that will produce the desired motion in the saw. It consists, 2d, in an adjustable guide and support whereby different thicknesses of scroll or web saw may be used at will. It consists, 3d, in attaching the anti-friction guide and support to an adjustable device which constitutes a guard to hold down the stuff being sawed, and also insures a support of the saw at the point near where the sawing is performed as well as above this point. My principle of operating a scroll or web saw must not be confounded with the 'muley saw,' as in the 'muley saw' it is common to employ guides attached to the saw, such guides running in or upon bearings independent of the saw-plate; whereas, with the web or scroll saw worked according to my discovery, the back of the blade or plate is supported upon a hardened steel or other durable anti-friction surface, and is guided laterally by similar surfaces, so that the saw is supported and guided without any means of tension being employed. Furthermore, 'muley' saws are supported at each end by cross-heads and only in the center by lateral guides; and a saw must be employed that is strong enough in its cross-section to stand the work. Now, with my plan, I support the saw down to the top of the wood being sawed, which is a new thing in this class of saw-mills, and enables me to use small, light saw blades. Previously to my discovery of running the upper end of the web or scroll-saw in frictional contact with an upper guide it was deemed an impracticable thing, and it is now only by practical demonstration and long use that saw-mill men are convinced that such method of working scroll or web saws will not cut through and rapidly wear out the guide. The non-destruction of the guide in a short period of time, although the pressure upon it is immense, is due to the fact of the guide being of hardened steel or other smooth, hard material, over which the saw plate glides with but little frictional wear] *in the guide and back supporting bars or plates*

[410]

[411]

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in connection with the sliding guard, the same constituting a combined guide, guard and support for the free or disconnected upper portions of a scroll-saw blade. To enable others skilled in the art to make and use my invention, I will proceed to describe [one practical means in which I have embodied it with great success; but, in doing so, I do not wish to be understood as limiting myself to these mechanical devices in themselves, as the principle may be embodied in various other means and still not depart from the discovery embodied in machinery that I desire to patent.] *its construction and operation with reference to the drawings.* [Not using] *I do not use* a sash [or] *nor* other means of straining the saw S, [1] *but* fasten the lower end of the [blade] *same* to the upper end of a stock or slide, S', of [a] *the* pitman, by a set-screw, S², or [I may otherwise connect this end of the blade to a device which will properly operate the saw. The] *in any other similar manner, and have its top or* upper [end of the saw] *portion disconnected* above the table [T,] T. [I leave entirely disconnected, but in order to steady or guide and support this free end during the sawing operation, I attach a grooved steel guide to a] *The said upper portion of the saw is supported and guided by means of the two parallel bars a a, and the angular plate b. The bars have a lateral adjustment to accommodate saws of different thicknesses, their purpose being to keep the saw in a true vertical line, and to keep it from twisting, while the office of the back plate, b b', is to support the saw against the strain of the stuff on the teeth, when the work is being shoved against it. The guides a a and back plate b b' are all made of hardened steel, to prevent friction and wear. This device a a b b' is fastened to the lower end of the sliding* strip or *guard piece* A, [other device which will answer as a firm support to the guide, and as a guard to keep down the lumber being sawed. The device A is attached to a] *which is fitted in a groove of a suspended* stud [or timber] B. of the building, [and is better if made adjustable by means of a slot and clamp-bolt, such as designated by the letters *e c d;* but other known means for adjusting this device may be adopted. The guide, as shown, is formed of three parts, [412] to wit: a back plate, *b*, and two side plates *a*, *a*, which latter are bolted or screwed firmly to the former, as shown. The slots S through which the bolts *f f* pass are large enough to allow the plates *a a* a slight lateral adjustment whenever it is desired to use a saw with a greater thickness or a thinner saw. The same end, *viz.:* the formation of a steel guide, or a guide of hard anti-friction surface, would be attained if a groove was formed in a thick steel plate, or other hard substance, except the advantage of accommodating saws of various thicknesses. I believe I am the first to use the grooved anti-friction guide, as well as the first to have the groove variable in width and, therefore, I do not confine myself to adjustable guides and supports. The office of the back part of the groove or guide is to support the saw against the strain of the timber on the teeth when the work is being shoved against it, while the office of the lateral portions of the groove or guide is to keep the saw in a true vertical line and prevent it from twisting. The office of the guard A, which extends down nearly to the top of the table, is to hold down or prevent flying up of the 'stuff' or timber being sawed, and at the same time bring the supporting guide to the saw right down to the place where the sawing is being performed, and thus insure the most perfect operation as well as an effectual supporting and guiding of the saw.] *and confined accordingly, as the thickness of stuff being sawed requires, by means of a clamping screw-bolt, e, and hand-nut, d. The bolt passes loosely through an oblong slot, e, of the guard-strip, but fastens firmly in the stud B, as shown. This guard rests in close contact, or nearly so, with the stuff being sawed, and keeps the same firmly down upon the table, while the device a a and b b' guides and supports the saw, as above stated. It will be seen that screw-bolts, f f, confine the plate b and bars to the strip or guard A, and that the holes or slots through the bars a are elongated so as to allow the guide-bars a a chance to move nearer together or further apart to admit different thicknesses of saw blade. It will also be seen that the guides, by being attached to the strip, are adjusted with it up and down, the said up and down adjustment being allowed by the slot e'' of the strip; and thus the angular part b' of the plate b aids also in holding down the stuff, it having a vertical kerf, g, cut in it, to admit the saw blade, and the guide and supporting plates or bars are always in proper position.* This [guard by its] arrangement *also* obviates the [heretofore] necessity of leaving the upper end of the [413] saw blade above the table unsupported and unguided, as it allows of the work or [timber] *stuff* being freely turned while the sawing is progressing, a clear open space between the guard and the table being left. [In the drawing I have shown the lower end of the guide forming an angle; this is to give a larger guard surface. This angular portion has a kerf, *g*, cut in it, to admit the saw plate to the back of the guide. I, however, do not limit myself to this form of guide.] *The plate b might be made without the angular part b', but not answer so good a purpose. I do not claim operating a scroll-saw without straining, nor do I claim the application of lateral guides to saws; neither do I claim an adjustable guard to prevent the stuff rising with the saw."* Reading, in the foregoing, what is outside of brackets, including what is in italic, and omitting what is inside of brackets, gives the text of the original specification. The original patent contained one claim, as follows: "The guide-bars *a a*, and the back plate *b*, in connection with the sliding guard-strip A, the same constituting a combined guide, guard and support for the top of a scroll-saw, and operating substantially as herein described." The re-issue contains five claims, as follows: "1. Running the upper portion of a web or scroll-saw above the table, in a groove of an anti-friction guide and support, substantially as and for the purpose described. 2. Operating practically an unstrained web or scroll-saw, by combining with such saw-mills an upper anti-friction guide, which supports the back of the saw-blade, and also sustains the saw blade at its sides or faces, substantially as set forth. 3. The use of anti-friction guides as a substitute for straining devices, in combination with web or scroll saw blades, the guide to be raised and lowered to suit the thickness of the stuff, substantially as set forth. 4. An anti-friction guide which is adjustable so as to accommodate different thicknesses of saw blades, and to compensate for wear, in combination

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with the upper portion of a web-saw blade, substantially as set forth. 5. The combination of the anti-friction saw support and guide, or the equivalent thereof, with an adjustable guard, [414] or its equivalent, substantially as and for the purpose set forth."

Infringement of only claims 4 and 5 of the re-issue is alleged. It is apparent, in reading the specification of the original patent and that of the re-issue, that Richards contemplated the use of his improvements only in connection with a saw-blade the upper end of which was free from any suspender or sash, and the lower end of which was so connected with mechanism as to obtain the desired motion in the saw. Claim 4 of the re-issue claims as an element in the combination covered by that claim, "the upper portion of a web saw blade." The saw blade shown in the drawings, and the only saw blade which can have an upper portion capable of being free or disconnected, in the sense in which those words are used, is a reciprocating saw-blade, actuated from below, and alternately pushed and pulled. The specification of the re-issue states that Richards' saw is supported and guided "without any means of tension being employed." The defendants use a band saw, which is an endless saw, passing over wheels, and running constantly in one direction, towards the table on which the stuff lies, and having a tension over the peripheries of the wheels. For this reason, the defendants do not need nor do they have any guard which performs the function of a guard embraced as an element in the combination covered by claim 5 of the re-issue, of holding down the stuff against the upward lifting action of the saw, because the saw is constantly passing downward. There is, therefore, no infringement of either claim 4 or claim 5.

The second patent sued on is No. 78,880, granted to J. A. Fay & Co., June 16, 1868, for an "improvement in guides for band-saws," on the invention of John Lemman. The specification says: "Figure 1 is a front elevation of one of my improved guides: Figure 2 is a side elevation of the same; Figure 3 is an elevation of the anti-friction roller *b*, removed from the guide; and Figure 4 is a partial plan, showing the manner of adjusting the lateral guides. Similar letters of reference in the different figures indicate corresponding parts. In operat- [415] ing endless saws, guides are needed both above and below the wood. As is well known, the high speed at which these saws are driven, and the small amount of surface presented to the guide from the edge of the saw plate, cause fixed guides to wear away very fast, even if made of hardened steel or glass, particularly when heavy sawing is done, and the strain of the feed falls on the saw. Rolling guides, while they have partially overcome the difficulty of friction and wear on the back of the saw, cannot be constructed to give a proper lateral support to the saw, as will hereafter be alluded to. The object of the invention here illustrated is to obviate these several difficulties, and give important advantages in operating saws of this kind. Its nature consists in a combination of anti-friction rollers and fixed guides, the first to support the back or thin edge of the saw, and to have lateral adjustment, presenting different points to wear; the fixed guides as a lateral support, and so constructed as to accommodate saws of different widths as hereinafter explained. To enable others skilled in the art to make and use my invention, I will proceed to describe its mode of construction and the manner of operating the same, with the aid of the drawings. *a* is a frame or support for the guides. It is cored out to receive the wheel *b*, with room for lateral adjustment. On the top is a cylindrical extension *h*, intended to be connected to a bar, on which the whole structure is adjusted up and down, to suit the thickness of the wood being sawed. *B* is an anti-friction wheel, of hardened steel or other suitable material, mounted on an axis *f*, as shown in Fig. 3, and by red lines in Fig. 1. This axis has conical bearings formed in the piece *g*, which allows of compensation for wear; and by loosening the screws *s s*, the wheel *b* and bearings *g g* can be adjusted laterally, so as to bring different points of the periphery of wheel *b* in contact with the saw. c^1 c^1 c^1 are lateral guides to keep the saw from turning and in a true line. These guides are so arranged that two or more of them can be used and the others removed or adjusted to receive a narrow saw, as shown in Fig. 4. The holes through which the screws *d d* pass are slotted, as shown by red lines, Fig. 1. E is a section of a band saw, sufficiently wide to allow of all the plates, *c c c*, being used. The wheel *b* is so arranged as to barely pass through the plate *m*, and come in contact with the saw E. Oil-holes are formed at *i i*, Fig. 1, communicating with the bearings of axis *f*, as shown in Fig. 1. The operation will be readily understood. Having thus explained the nature and objects of my invention, I do not claim the use of an anti-friction roller [416] applied to the back of the saw; neither do I claim the fixed lateral guides." There is only one claim, in these words: "The combination of the roller *b* with fixed lateral guides, *c c c*, one or more, arranged and operating substantially in the manner and for the purposes specified."

This patent stands on very narrow ground. Anti-friction rollers applied to the back of the saw are disclaimed and were old. Fixed lateral guides, for the faces of the saw, are disclaimed and were old. The text of the specification limits the invention to a combination of an anti-friction wheel to support the back or thin edge of the saw, and to have lateral adjustment, presenting different points to wear, with fixed guides to support laterally the faces of the saw, the fixed guides being so constructed as to accommodate saws of different widths. The anti-friction wheel, by means of its conical bearings, can be advanced nearer, as it wears, to the back edge of the saw, and the wheel and its bearings are capable of being adjusted laterally, so as to bring different points of the periphery of the wheel in contact with the back edge of the saw. The arrangement of fixed guides referred to is manifestly that described in the Richards patent. The only point of invention dwelt on in the Lemman specification is the lateral adjustability of the wheel, which, though it is to be an anti-friction wheel, and so is to be made of hardened steel or other suitable material, will still wear away on the surface presented to the edge of the saw; and the lateral adjustment enables different points of the periphery of the wheel to

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be brought into contact with the saw, so as to present different points to wear from time to time. Thus the entire width of the periphery of a wheel may be utilized. The defendants have used a wheel which has two groves in it, in one of which the saw runs and in either of which it can run. The wheel can be adjusted laterally, so as to bring the one or the other of the two grooves into use. But there is no adjustment to bring different points of the periphery of a smooth-faced wheel into use. In view of the state of the art and of the limitations of the specification, there has been no infringement. [417] Merely adjusting a wheel laterally so as to give it different positions at different times, was a thing well known to mechanics; and running the back edge of a saw in a groove in a roller existed in the prior Closterman device.

The third patent sued on is No. 120,949, granted to J. A. Fay & Co., November 14, 1871, for an "improvement in band-sawing machines," on the invention of William H. Doane and William P. McKee. Claims 1, 2, 3 and 4 of this patent are alleged to have been infringed, there being 7 claims. The specification, so far as it is material to be cited, says: "The first part of our invention relates to an improved form of supporting frame and of the upper and lower arbor-bearings, whereby the said bearings, with their inclosed abors, are made easily accessible and removable for inspection and repair, and relatively adjustable, so as to be brought into exact line, and otherwise so regulated as to insure the perfect operation of the saw, as hereinafter explained. * * * Figure 1 is a perspective view of a machine embodying our improvements. Figure 2 is a vertical section of the machine in the plane of its arbors. * * * Figure 5 is a plan of the lower arbor-bearing. The frame which supports the operative parts of our machine consists of a single casting of the peculiar form here represented, that is to say, a base, A, from whose rear end there rises the main column or standard A^1 (supporting the upper arbor-bearing and saw guide), and from whose front end there rises a shorter column or pedestal, A'', which latter supports and is surmounted by the bench or table B, on which the stuff rests. The depression which intervenes between the columns A^1 and A'' leaves exposed a seat, which extends below the center of the lower arbor and is entirely open upward, which seat forms an accessible and convenient place for the attachment, inspection and regulation, and, when necessary, the ready detachment, of the lower arbor-bearing, which bearing is constructed as follows: bolted or otherwise securely fastened to the top of base A is a pillow-block, C, having vertical flanges $c\,c^1$. The flanges $c\,c^1$ are traversed near their front end by two co-axial horizontal bolts D D^1, which, entering orifices in the box or bearing E E^1 of the lower pulley-arbor F, constitute a pivoted fastening for the said bearing. [418] A set-screw, G, tapped in the bottom of the pedestal C, and pressing upwards against the box E E^1, enables its adjustment and retention to horizontality, or such approximation thereto as may be desired. Other set-screws, H H^1, passing horizontally through the the flanges $c\,c^1$, near their rear end, enable the adjustment and retention of said box to a common vertical plane with the upper arbor. The end of the lower arbor most remote from the pulley I carries the driving-pulley J. It will be seen that, on the loosening of four screws, the entire lower arbor and journal-box may be lifted bodily upward and detached from the machine, without detaching the pulley from the arbor. The upper part of the standard A^1 is curved forward, as represented, and has a slot, *a*, to hold and guide to a vertical path a step or saddle, K, to which is pivoted a lug, *l*, that depends rigidly from the upper arbor-bearing L L^1. The saddle K has a horizontal extension, *k*, which bears on the point of a screw, M, occupying a nut, T, that rests on a spring or cushion, O, in the bottom of the slot *a*. The screw M being turned to the right or left elevates or depresses the upper arbor-bearing and, in so doing, causes the proper tension to be imparted to the saw. Another screw, N, that is tapped in the lug *l*, bears against the face of the saddle K, and enables the regulation, or angular adjustment, in a vertical plane, of the upper arbor-bearing. The above described capacity for angular adjustment of the band-pulley arbors in their common plane enables the operator to confine the path of the saw nicely to the middle of the pulleys, or to shift it more or less toward the front or back portions of their peripheries, so as to cause all parts to be equally worn. The spring O, while co-acting with the screw M to preserve the proper tension of the saw, also imparts an elastic and yielding quality to the tension. * * * While preferring the described relative positions of the pivot-screws D D^1, and laterally adjusting screws H H^1, we do not confine ourselves thereto, as the pivot screws may be situated near the rear and the adjusting screws near the front portion of the box." The first 6 claims are as follows: "1, The frame A A^1 A'', in combination with the lower arbor-bearing, said frame being constructed as herein described with a depression, A''', permitting the ready removal of the arbor, as explained. 2. The arrangement of frame A A^1 A'' A''', and of the horizontally and vertically adjustable arbor-bearing C D D^1 E E^1 G H A. 3. The arrangement of step or saddle K and its contained box or bearing L L^1. 4. In combination with the [419] upper arbor L^1 the lower arbor-bearing E, adjustable both vertically and horizontally, as shown and described and for the purpose set forth. 5. In combination with the lower arbor, the upper arbor-bearing, adjustable in a vertical plane by means of the screw M, nut T, and spring O, as and for the purpose designated. 6. The combination of the slotted standard A^1 *a*, saddle K *k*, arbor-bearing L L^1 *l*, nut T, screws M N, and spring or cushion O, as shown and described, for the purpose set forth."

As to claim 1, it is for a combination of the three-sided frame A A' A'', with the lower arbor-bearing, when the frame is constructed with a depression, A''', intervening between the columns A' and A'', which leaves exposed a seat which is entirely open upward, so as to give convenient access to the lower arbor-bearing, to attach, inspect, and regulate it, and also detach it, with its journal-box, by lifting the arbor and journal-box bodily upward, without removing the pulley from the arbor. In the defendants' machine the seat is not entirely open upward, and there is a hole through the body of the frame to receive the lower arbor-bearing, and the arbor-

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bearing cannot be removed without detaching the pulley from the arbor. This claim is not infringed.

As to claim 2, it is for the arrangement and combination of the three-sided frame A A' A'' and the depression A''' with the horizontally and vertically adjustable arbor-bearing, consisting of the pillow-block or pedestal C, the two co-axial horizontal bolts, D D', the box or bearing E E', the vertical set screw G which adjusts the box E E' to horizontality, the horizontal set screw H which adjusts the box E E' to a common vertical plane with the upper arbor, and the base A which carries the pillow-block or pedestal C. All these features in combination are made necessary in claim 2. It claims a combination of the frame and depression of claim 1 with the special construction of arbor-bearing set forth. The defendants do not have the frame and depression of claim 1, as already shown, and thus do not have that element of the combination covered by claim 2. Moreover the co-axial [420] bolts D D' are a necessary feature of the peculiar arbor-bearing of the patent, and no such bolts are found in the defendants' machine; and, if it has any means of adjusting the lower arbor-bearing, either horizontally or vertically, in the sense in which such adjustment is described in the patent, it has not the same means or equivalent means to what is found in the patent.

As to claim 3, it is for the arrangement of the step or saddle K with the upper arbor-bearing L L' contained in it. What is the arrangement of the step or saddle K in connection with the arbor-bearing? The saddle moves through vertical slide-ways and it has pivoted to it a lug, *l*, which depends rigidly from the arbor-bearing. A screw N tapped into the lug *l* bears against the face of the saddle, so as to allow of the adjustment in a vertical plane, of the upper arbor-bearing. The saddle has also a horizontal extension, *k*, which bears on the point of a screw, M, occupying a nut, T, which rests on a spring or cushion, O, in the bottom of the slot. By turning the screw M to the right or the left, the upper arbor-bearing is elevated or depressed, and thus more or less tension is given to the saw. The spring O gives an elastic character to the tension. The effect of the arrangement or combination is to give an elastic vertical adjustment and also a horizontal adjustment. The whole object of the saddle with the lug *l* and the extension *k* is to adjust the arbor-bearing up and down and sidewise and at the same time give an elastic tension to the saw. The spring carries the weight of the saddle. There can be no operative arrangement of the saddle with the arbor-bearing which does not include the lug *l*, the screw N, the extension *k*, the screw M, the nut T and the spring O. These are all elements in the arrangement or combination covered by claim 3. The spring is essential in the patent, as a part of claim 2. The defendants have a rigid saddle, and no spring. The fact that the spring is an element in claims 5 and 6 does not prevent its being an element in claim 3.

There being no infringements of claims 2 and 3 there is none of claim 4.

The claims of the patents sued on in this case are claims for combinations. In such a claim, if the patentee specifies any element as entering into the combination, either directly by the language of the claim or by such a reference to the [421] descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question, whether an omitted part is supplied by an equivalent device or instrumentality. *Water Meter Co.* v. *Desper*, 101 U. S., 332, 337 [XXV., 1024, 1026]; *Gage* v. *Herring* [*ante*, 602].

The Circuit Court decreed a dismissal of the bill and, the plaintiff having appealed, the decree is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—114 U. S., 86, 98.

MOSES FEIBELMAN, Admr. of NATHAN FEIBELMAN, Deceased, *Plff. in Err.*,

v.

S. B. PACKARD, United States Marshal, MICHAEL GERNON ET AL.

(See S. C., Reporter's ed., 421-426.)

Removal of cause—jurisdiction in bankruptcy.

1. An action founded on the official bond of a Marshal of the United States, his sureties being joined as co-defendants, and the acts complained of as illegal and injurious being charged to be breaches of its condition, arises under a law of the United States, and may be removed from a state court to a circuit court, if the matter in dispute exceeds $500 in value, exclusive of costs.

2. Under the Bankrupt Act of 1867, the District Court of the United States, sitting in bankruptcy, has jurisdiction to order the seizure and detention of goods, the property of the bankrupt, although in possession of another under claim of title; and in a subsequent action against the officer for obedience to such an order, he may justify the seizure by proof that the title to the property was, at the time, in the bankrupt.

[No. 108.]

Submitted Nov. 8, 1883. Decided Dec. 3, 1883.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The history and facts of the case appear in the opinion of the court.

Mr. **John Ray**, for plaintiff in error.

Mr. **J. R. Beckwith**, for defendants in error.

Mr. Justice **Matthews** delivered the opinion of the court:

This action was originally brought by Nathan Feibelman, since deceased, and revived by [422] his administrator, the plaintiff in error, by petition filed April 24, 1873, in the Fourth District Court for the Parish of Orleans, in the State of Louisiana. Its object was to recover damages for unlawfully seizing and taking forcible possession of a stock of merchandise alleged by the plaintiff to have been his property and in his possession. The defendant Packard was alleged to be the Marshal of the United States for the District of Louisiana, and the seizure and taking of the property is stated to have been under a claim of authority based upon a writ or warrant

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issued by the Judge of the District Court of the United States for the District of Louisiana, in certain proceedings in bankruptcy instituted in that court by D. Valentine & Co. as creditors against E. Dreyfus & Co., but it is averred that the writ did not justify the acts complained of. The other defendants below were sureties on the official bond of Packard as Marshal, and by an amendment to the original petition it is alleged "That all the acts charged and complained of in said original petition by which the petitioners suffered the damages therein set forth were done by said Packard in his capacity of Marshal aforesaid, and are breaches of the conditions of said bond, and give unto your petitioner this right of action on said bond against said Marshal and his sureties."

On April 7, 1865, the defendants filed in the state court their petition for the removal of the cause to the Circuit Court of the United States for that district, accompanied by a sufficient bond, conditioned according to law, upon the ground that the suit arose under a law of the United States, but the application was denied; and thereafter, on April 22, 1875, they filed in the circuit court a petition for a writ of *certiorari* to remove the same into that court, which was granted. Thereafter the cause proceeded to final judgment in favor of the defendants in that court.

The action of the circuit court in the removal of the cause from the state court is assigned for error, and is first to be considered.

The suit was pending in the state court, but was not at issue, when the Removal Act of March 3, 1875 [18 Stat. at L., 470], took effect, and the right of removal is regulated by its provisions.

The ground of the removal was that the suit, being one of a civil nature at law, in which the matter in dispute, exclusive of costs, exceeded $500 in value, arose under the Constitution and laws of the United States.

It is clear that the circuit court did not err in directing the removal of the suit from the state court; for, if we look at the nature of the plaintiff's cause of action and the grounds of the defense, as set forth in his petition, it is apparent that the suit arose under a law of the United States.

The action, as we have seen, was founded on [424] the official bond of Packard as Marshal of the United States for that district, his sureties being joined as co-defendants, and the acts complained of as illegal and injurious being charged to be breaches of its condition. The bond was required to be given by section 783, Revised Statutes, and section 784 expressly gives the right of action, as follows:

"In the case of a breach of the condition of a marshal's bond, any person thereby injured may institute, in his own name and for his sole use, a suit on said bond and thereupon recover such damages as shall be legally assessed, with costs of suit, for which execution may issue for him in due form. If such party fails to recover in the suit, judgment shall be rendered and execution may issue against him for costs in favor of the defendant; and the United States shall in no case be liable for the same."

Sections 785 and 786 contain provisions regulating the suit, the latter prescribing the limitation of six years after the cause of action has accrued, after which no such suit shall be maintained, with the usual saving in behalf of persons under disabilities.

The counsel for plaintiff in error assumes in argument that the suit was to recover damages for alleged trespasses. It was plainly upon the bond itself and, therefore arose directly under the provisions of an Act of Congress. *Gwin* v. *Breedlove*, 2 How., 29; *Gwin* v. *Burton*, 6 How., 7.

In *McKee* v. *Rains*, 10 Wall., 22 [77 U. S., XIX., 860], the removal of which was held to be unlawful, was made under the supposed authority of the Act of March 3, 1863 [12 Stat. at L., 755], and that of April 9, 1866 [14 Stat. at L., 27].

After the removal of the cause it was put at issue by the filing, on the part of the defendants, of an answer and an amended answer. In these answers it was alleged, that in a proceeding in bankruptcy against Dreyfus & Co., duly commenced in the district court for that district by David Valentine & Co. as creditors, an order was made directing "That the marshal take provisional possession of all the property of the said defendants, real and personal belonging to the said firm of E. Dreyfus & Co., or the individual members thereof, and particularly the merchandise pretended to have been transferred to Moses Feibelman at Delta, Louisiana, and all of the books of account, bank books and papers [425] of or relating to the business of said firm of E. Dreyfus & Co., and hold the same subject to the further orders of this court;" that a writ was issued in pursuance of that order to the defendant Packard, commanding him to execute said order, which is the writ mentioned in the plaintiff's petition; that, in obedience to the command of the said writ, the said Marshal did take into his possession and custody the goods and property therein described and referred to, and none other; and that the said goods and property so taken and held are the same as those mentioned in the plaintiff's petition, the same having come into the possession of the plaintiff, in pursuance of a fraudulent conspiracy between the plaintiff and Moses Feibelman, and the members of the firm of E. Dreyfus & Co., the bankrupts, the object of which was to prevent the same from coming into the possession of the assignee in bankruptcy of said bankrupts, and so to cheat and defraud their creditors, the said goods and property being, when so seized, the property of said bankrupts, and not of the said Moses Feibelman, nor of the plaintiff, neither of whom were entitled to the possession of the same.

The plaintiff moved to strike from the answer the foregoing defense, which motion was overruled. This ruling of the court is assigned for error.

The ground on which this assignment of error is predicated is, that by the law of Louisiana a person in possession of personal property as owner, claiming title, cannot be disturbed in that possession by a seizure under judicial process running against another person; that a transfer in fraud of creditors cannot be attacked by a seizure by the marshal or sheriff, under an execution against the debtor, of the property in the hands of a third possessor; and that, consequently, in this suit, in which it was admitted that the goods had been taken out of the

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possession of the plaintiff, it was not competent to set up as a defense actual title in the bankrupts.

In support of this proposition, we are referred by counsel to various sections of the Revised Civil Code of Louisiana, and to numerous decisions thereon by the Supreme Court of that State; and the statement is made that the decision of this court in *Hosey* v. *Buchanan*, 16 Pet., [426] 215, which, it is admitted, is not reconcilable with the conclusion insisted upon, was made without the point having been made or considered as to the law of Louisiana, under which the case arose.

But it is entirely immaterial, in our view of the case, what the law of Louisiana upon the point is, for the reason that that law has no application to it. The question relates, not to any law of that State, but to a law of the United States, and is, whether under the Bankrupt Act of 1867 [14 Stat. at L., 517], the District Court of the United States, sitting in bankruptcy, has jurisdiction to order the seizure and detention of goods, the property of the bankrupt, although in possession of another under claim of title, and, whether, in a subsequent action against the officer for obedience to such an order, he may justify the seizure by proof that the title to the property was, at the time, in the bankrupt.

This was the very point decided by this court in *Sharpe* v. *Doyle*, 102 U. S., 686 [XXVI., 277], a reference to which makes it unnecessary to repeat the grounds of the conclusion, that in such a case the defense here allowed, if established, should prevail.

All the other exceptions taken during the trial were directed to the admission of testimony in support of this defense, and are disposed of when the defense itself is adjudged to be valid.

There is, therefore, no error in the record, and the judgment is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

W. J. SMITH ET AL., *Plffs. in Err.*,

v.

MALCOLM McNEAL ET AL.

(See S. C., Reporter's ed., 426-431.)

Judgment of dismissal—when conclusive.

1. The judgment of a court, dismissing a suit for want of jurisdiction, does not conclude the plaintiff's right of action.

2. Cases may be supposed, perhaps, where the want of jurisdiction in a court is so clear that the bringing of a suit therein would show such gross negligence and indifference as to cut the party off from the benefit of a statute, which gives additional time for suing after a judgment which does not conclude the right of action.

[No. 127.]

Argued Nov. 15, 16, 1883. Decided Dec. 3, 1883.

IN ERROR to the Circuit Court of the United States for the Western District of Tennessee.

The history and facts appear in the

Statement of the case by *Mr. Justice* **Woods**:

On December 31st, 1873, the plaintiffs in error brought suit against defendants in the Circuit Court of the United States for the Western District of Tennessee, to recover forty acres of land. The declaration described the land and averred, that the plaintiffs were possessed thereof, claiming in fee through a certificate of the United States district tax commissioners, naming them under an Act of Congress entitled "An Act for the Collection of Taxes in Insurrectionary Districts within the United States and for Other Purposes," and the Acts amending the same of January 1, 1865, and that after such possession accrued, the defendants, on December 1, 1865, entered upon the premises and unlawfully withhold and detain the same, etc.

Two of the defendants, McNeal and Caruthers, demurred to the declaration: first, because it did not sufficiently describe the property sought to be recovered; and, second, because it did not show that the plaintiffs were not citizens of the State of Tennessee, so as to give the court jurisdiction of the cause.

On February 24, 1877, the court sustained the demurrer upon the ground that it had "no jurisdiction of the cause of action in plaintiffs' declaration alleged and set forth," and dismissed the suit.

Afterwards, on October 20, 1877, the plaintiffs in error brought the present suit against the same defendants in the same court, to recover the same tract of land. The declaration [428] in this cause was identical with that in the former action, except that in this case the following averment was added: "Defendants do not claim under, but adversely to, and deny the validity of plaintiff's claim of title under the aforesaid Acts of Congress, and the validity of plaintiffs' claim of title under the aforesaid Acts of Congress is the only question in controversy between the plaintiffs and defendants."

The defendants pleaded the seven years' limitation prescribed by the Statute of Tennessee, to which the plaintiffs pleaded the following replication:

"Now come the plaintiffs, by attorneys, and as to defendants' plea herein pleaded say, that on the 31st of December, 1873, and within seven years from the time the plaintiffs' cause of action accrued, the plaintiffs brought suit against defendants in this court to recover possession of the same premises whereof plaintiffs here now seek to recover possession; and the said suit was commenced upon the same cause of action that the plaintiffs' now writ and action are founded. That the said action, so commenced as aforesaid, was duly prosecuted by plaintiffs until the 1st of September, 1877, upon which day a judgment (which said judgment remaining of record in this court is referred to) was therein rendered by said circuit court upon a ground not concluding their said right of action. The record of said former suit remains in this court, and plaintiffs here make profert of the same; all of which plaintiffs are willing to certify."

The defendants demurred to this replication on two grounds: first, because it appeared by the judgment referred to and made a part of the replication, that said judgment was upon the merits; and, second, because it appeared from the record of said former suit that the

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NOTE.—*Estoppel by judgment.* See *note* to Aspden v. Nixon, 45 U. S. (4 How.), 467.

Consequences of nonsuit or dismissal of the complaint; distinction in actions for equitable relief; a nonsuit is no bar to another action for same cause. See *note* to Homer v. Brown, 57 U. S. (16 How.), 354.

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court in which it was brought had no jurisdiction thereof, and said suit was dismissed for want of jurisdiction.

The cause was heard upon this demurrer, which the court sustained and entered judgment dismissing plaintiffs' suit.

To reverse that judgment this writ of error is prosecuted.

Messrs. **S. Shellabarger**, *D. E. Meyers*, *W. M. Sneed* and *S. P. Walker*, for plaintiffs in error.

Messrs. **P. Phillips** and *W. Hallett Phillips*, for defendants in error.

[429] *Mr. Justice* **Woods** delivered the opinion of the court:

The question presented by the record is the sufficiency of the plaintiffs' replication to the defendants' plea of the seven years' Statute of Limitation.

The limitation relied on by defendants is that prescribed by article 2765 of the Code of Tennessee, which is as follows: "No person, or anyone claiming under him, shall have any action, either at law or in equity, for any lands, etc., but within seven years after the right of action has accrued."

The plaintiffs in error contend that their present action is saved from the bar of this statute by the provision of article 2755 of the Code, which is as follows:

"If the action is commenced within the time limited, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or when the judgment or decree is rendered in favor of the plaintiff and is arrested or reversed on appeal, the plaintiff or his representatives or privies may commence a new action within one year after the reversal in arrest."

The question of law upon which the parties are at issue is, whether the judgment rendered February 24, 1877, by which the suit begun December 31, 1873, was dismissed, the dismissal being on the ground that the court had no jurisdiction of the cause of action set out in the declaration, falls within the saving of this section as being rendered on a ground not concluding the plaintiffs' right of action.

It is well settled that the judgment of a court dismissing a suit for want of jurisdiction does not conclude the plaintiff's right of action.

In *Walden* v. *Bodley*, 14 Pet., 156, it was said by this court: "A decree dismissing a bill generally may be set up in bar of a second bill [430] having the same object in view, but when the bill has been dismissed on the ground that the court had no jurisdiction, which shows that the merits were not heard, the dismissal is not a bar to the second suit."

So in the case of *Hughes* v. *U. S.*, 4 Wall., 232 [71 U. S., XVIII., 303], this court declared: "In order that a judgment may constitute a bar to another suit it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases and must be determined on its merits. If the first suit was dismissed for defect of pleadings or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." See, also, Greenl. Ev., secs. 529, 530, and cases there cited.

These cases would seem to settle the question against defendants in error, for they decide that the dismissal of a suit for want of jurisdiction is upon a ground not concluding the right of action. Defendants in error, however, contend that the bringing of a suit in a court having no jurisdiction thereof was gross negligence, and that the current of authority is against extending the terms of the statute to let in one guilty of it.

Cases might be supposed, perhaps, where the want of jurisdiction in the court was so clear that the bringing of a suit therein would show such gross negligence and indifference as to cut the party off from the benefit of the saving statute, as if an action of ejectment should be brought in a court of admiralty, or a bill in equity should be filed before a justice of the peace.

But the suit between these parties, which was begun December 31, 1873, is far from being such a case. There is nothing in the record to show that it was dismissed for any inherent want of jurisdiction in the court in which it was brought.

We think that on December 31, 1873, when said first suit was brought, the Circuit Courts of the United States, under the 2d section of the Act of Congress of March 3, 1833, entitled, An Act Further to Provide for the Collection of Duties on Imports, 4 Stat. at L., 632, had jurisdiction of a suit brought to recover lands purchased at a sale for taxes made under [431] authority of the Act of June 7, 1862 [12 Stat. at L., 422], for the collection of taxes in insurrectionary districts, where the title so derived was disputed by defendants. The defect was in the declaration which, although it averred that plaintiffs claimed title under the revenue laws of the United States, did not aver that their title in that respect was disputed by defendants. Had such an averment been made, the jurisdiction of the court would have appeared on the face of the declaration. *Ex parte Smith*, 94 U. S., 455 [XXIV., 165].

The first suit was, therefore, dismissed, because the declaration did not state the jurisdictional facts upon which the right of the court to entertain the suit was brought. In other words, the case was dismissed for a defect in pleading. In the present suit the defect of the declaration in the first suit is supplied.

We are of opinion, therefore, that the plaintiffs in error are entitled to the benefit of article 2755 of the Code of Tennessee, for their judgment in the first suit was not upon any ground concluding their right of action, nor have they been guilty of such negligence or carelessness in the bringing of their first suit as should exclude them from the benefit of the said article.

In support of the proposition that plaintiffs in error have not been guilty of such negligence as should exclude them from the benefit of article 2755, the case of *Cole* v. *Nashville*, 5 Cold. (Tenn.), 639, is much in point. See, also, *B. R. Co.* v. *Pillow*, 9 Heisk. (Tenn.), 248; *Weatherely* v. *Weatherely*, 31 Miss., 602; *Woods* v. *Houghton*, 1 Gray, 580; *Coffin* v. *Cottle*, 16 Pick., 383; *Givens* v. *Robbins*, 11 Ala., 156; *Skillington* v. *Allison*, 2 Hawks (N. C.), 347; *Lansdale* v. *Cox*, 7 J. J. Marsh, 391; *Phelps* v. *Wood*, 9 Vt.,

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399; *Spear* v. *Newell*, 13 Vt., 424; *Matthews* v. *Phillips*, 2 Salk. [424]; *Kinsey* v. *Heyward*, 1 Ld. Raym., 432.

The judgment of the Circuit Court must be reversed, and the cause remanded to the Circuit Court for further proceedings in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[432] WILLIAM BAILEY ET AL., *Appts.*,
v.
UNITED STATES.

(See S. C., Reporter's ed., 432-440.)

Payment to attorney, when valid.

*Payment to an attorney in fact, constituted such by power of attorney executed by the claimants before the allowance of their claim by Congress or by the proper department, is good as between the Government and such claimants, where the power of attorney has not been revoked at the time payment is made: notwithstanding the provisions of the Act of July 29, 1846, entitled "An Act in Relation to the Payment of Claims," and the Act of February 26, 1853, entitled "An Act to Prevent Frauds upon the Treasury of the United States." 9 Stat. at L., 41 and 10 *Ib.*, 170.

[No. 86.]
Submitted Oct. 29, 1883. Decided Dec. 3, 1883.

APPEAL from the Court of Claims.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **J. Hubley Ashton** and *Nathaniel Wilson*, for appellants:

By the express provisions of the Act of February 26, 1853, every power of attorney, order, or other authority, for receiving payment of any claim, whether allowed by a resolution or Act of Congress, or otherwise, is rendered absolutely null and void, unless freely made and executed after the ascertainment of the amount due and the issuing of a warrant for the payment thereof.

Nothing could be more general or more precise and peremptory, than this enactment.

It strikes down every power or warrant of attorney for the collection of any claim upon the United States, not freely made in conformity with its requirements, and deprived it of all legal efficacy whatever.

Cote v. *U. S.*, 3 Ct. Cl., 69; *Cooper* v. *U. S.*, 8 Ct. Cl., 199; *Pierce* v. *U. S.*, 1 Ct. Cl., 289; *U. S.* v. *Gillis*, 95 U. S., 414 (XXIV., 504); *Spofford* v. *Kirk*, 97 U. S., 489 (XXIV., 1034); *Becker* v. *Sweetzer*, 15 Minn., 435.

It follows that A. E. Godeffroy, to whom the money of these parties was paid, was not authorized to receive it, and there was no warrant for its payment to him at the Treasury.

The money due, under the Act of 1870, having been thus paid to an unauthorized person, the claim was not extinguished, and the United States are liable for the amount to the claimants.

The authorities place a payment to an unauthorized person upon the same legal footing as a payment on a forged signature; and the rule is settled in regard to the latter, that forgery can confer no powers nor transfer any rights. 2 Pars. Notes and Bills, 211; *Eaves* v. *Bank*, 27 Conn., 282; *Morgan* v. *Bank*, 1 Duer, 434.

The principle is settled in our jurisprudence, that no one is presumed to know the law of a foreign country. The maxim, *Ignorantia legis neminem excusat*, applies only to citizens. It has no application to foreigners. The law is presumed to be known only by the persons subject to it.

1 Story, Eq. Jur., sec. 140; *Haven* v. *Foster*, 9 Pick., 112; *Leslie* v. *Baillie*, 2 Younge & C. Ch. Cas., 91.

Mr. **S. F. Phillips**, *Solicitor-Gen.*, for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

By a decree passed March 25, 1868, in the District Court of the United States for the Southern District of New York, certain sums of money were ascertained to be due on account of the illegal capture of the British steamer Labuan and her cargo by a cruiser of the United States.

On the 6th day of February, 1869, William Bailey, William Leetham, James Leetham and Elizabeth Leetham, British subjects, executed and delivered a power of attorney—in which they described themselves as then or late owners of said steamer—constituting one A. E. Godeffroy, of New York, their attorney, with authority to receive from the Government of the United States, and from all and every person or persons whom it might concern to pay or satisfy the same, all moneys then or which might thereafter become due and payable to them with reference to said vessel Labuan; upon receipt thereof, to execute acquittances, releases and discharges for the same; and, upon non-payment thereof, to collect said moneys by such necessary actions, suits or expedients as their attorney deemed proper.

By an Act of Congress, approved July 7, 1870 [16 Stat. at L., 649], it was, among other things, provided "That there be paid, out of any money in the Treasury not otherwise appropriated, to William Bailey, William Leetham and John Leetham, of England, or their legal representatives, owners of the British steamer Labuan, $131,221.80, with interest from June 2, 1862, to the time of payment, and $5,000 without interest." The Act declares that such sums are due under the before mentioned decree of March 25, 1868. [433]

At the date of this Act the owners, in different proportions, of The Labuan were William Bailey, William Leetham, and the executors and executrix of John Leetham, who were William Leetham, James Leetham and Elizabeth Leetham.

An account between the United States and said owners, based upon the said Act of July 7, 1870, having been examined, adjusted, admitted and certified by the proper officers of the Treasury, a warrant was made, upon which a draft was issued on the Treasurer of the United States for the sum of $200,070.34, payable "to Wm. Bailey, Wm. Leetham and John Leetham, of England, or their legal representatives, or order." This draft was delivered to Godeffroy, with this indorsement thereon: "Pay on the indorsement of A. E. Godeffroy, atty. in fact. R. W. Taylor, comptroller." The draft having been indorsed in the names of the payees, by himself

* Head note by *Mr. Justice* HARLAN.

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as their attorney in fact, Godeffroy received the proceeds, but has never paid to the parties named in the Act of Congress, or to anyone for them, any part of the sum collected by him from the United States.

The Treasury Department refused, although requested by appellants or their agents, to make further payment. Thereupon this action was brought in the Court of Claims to recover the amount specified in the Act of Congress. Judgment was rendered for the United States, and the present appeal questions the correctness of that judgment.

It is contended, on behalf of appellants, that the power of attorney executed in 1869 to Godeffroy—upon the authority of which alone was payment made to him—was, under the laws of [436] the United States, absolutely null and void; consequently, no payment under it could bind the claimants or discharge the Government from its obligation to pay the sums specified in the Act of 1870. This presents the controlling question on the present appeal. Its determination depends upon the construction to be given to the Act of July 29, 1846, 9 Stat. at L., 41, entitled "An Act in Relation to the Payment of Claims," and to the 1st and 7th sections of the Act of February 26, 1853, 10 Stat. at L., 170, entitled "An Act to Prevent Frauds upon the Treasury of the United States."

The Act of 1846 related to claims against the United States allowed by a resolution or Act of Congress. That statute directed that they should not be paid to any other person than the claimant, his executor or administrator, unless upon the production to the proper disbursing officer of a warrant of attorney executed "after the enactment of the resolution or Act allowing the claim." The 1st section of the Act of 1853 declares that "All transfers and assignments hereafter made of any claim upon the United States, or any part or share thereof, or interest thereon, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, or orders, or other authorities for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless the same shall be freely made and executed in the presence of at least two attesting witnesses, after the allowance of such claim the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." That Act further provides (section 7) that its provisions and those of the Act of 1846 shall "apply and extend to all claims against the United States, whether allowed by special Acts of Congress, or arising under general laws or treaties, or in any other manner whatever."

These enactments have been under examination in several cases heretofore decided in this court, some of which are now relied on to support the proposition that officers of the Treasury were forbidden, by statute, from recognizing Godeffroy, under any circumstances, as agent of claimants, with authority, as between them [437] and the Government, to receive the warrant and draft when issued. But we do not understand that any of these cases involved the precise question now presented for determination.

In *U. S.* v. *Gillis*, 95 U. S., 407 [XXIV., 504], it was ruled that a claim against the United States could not be assigned so as to enable the assignee to bring suit against the Government in his own name in the Court of Claims. In *Spofford* v. *Kirk*, 97 U. S., 484 [XXIV., 1082], the question was as to the validity of certain orders drawn by a claimant, before the allowance of his claim, upon the attorneys having it in charge, directing the latter to pay certain sums out of the proceeds when collected, and which orders, being accepted by the attorneys, were purchased by Spofford in good faith and for value. Upon the treasury warrant being issued, the claimant refused to admit the validity either of the orders he had given or the acceptances made by his attorneys. Thereupon Spofford sought, by suit against the claimant and his attorneys, to enforce a compliance with the orders and acceptances of which he had become assignee and holder. The court adjudged that the transfer or assignment to Spofford was, under the Act of 1853—carried into the Revised Statutes, section 3477—a nullity as between him and the claimant. No question arose in that case as to what would have been the effect upon the rights of the claimant had the officers of the Government recognized the assignment to Spofford. In *Erwin* v. *U. S.*, 97 U. S., 392 [XXIV., 1065], it was ruled that the Act of 1853 applied to cases of voluntary assignments of demands against the Government, and did not embrace cases where the title is transferred by operation of law. "The passing of claims to heirs, devisees or assignees in bankruptcy," said the court, "are not within the evil at which the statute aimed."

But what was said in *Goodman* v. *Niblack*, 102 U. S., 556 [XXVI., 230], seems to be more directly in point. That was the case of a voluntary assignment by a debtor of his property for the benefit of creditors, including his rights, credits, effects and estate of every description. The assignment embraced a claim of the assignor arising under a contract with the United States. It was adjudged in the court of original jurisdiction that, as to that claim, the as- [438] signment was rendered invalid by the Act of 1853. But the language of this court, speaking by *Mr. Justice* Miller, was: "It is understood that the circuit court sustained the demurrer under the pressure of the strong language of the opinion in *Spofford* v. *Kirk*. We do not think, however, that the circumstances of the present case bring it within the one then under consideration, or the principles there laid down. That was a case of the transfer or assignment of a part of a disputed claim, then in controversy, and it was clearly within all the mischiefs designed to be remedied by the statute. Those mischiefs, as laid down in that opinion and in the others referred to, are mainly two: 1. The danger that the rights of the Government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction; 2. That by a transfer of such a claim against the Government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts or the Congress, as desperate cases, where the reward is contingent on success, so often suggest." "But these considerations," the court proceeded to say, "as well as a careful examination of the statute, leave no doubt that its sole purpose was to protect the Govern-

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ment and not the parties to the assignment."

These cases show that the statutes in question are not to be interpreted according to the literal acceptation of the words used. They show that there may be assignments or transfers of claims against the Government—such, for instance, as those passed upon in *Erwin* v. *U. S.* [*supra*], and in *Goodman* v. *Niblack* [*supra*]—which are not forbidden by those statutes.

In the case before us no question arises as to the transfer or assignment of a claim against the Government. The question is whether payment to one, who has been authorized to receive it, by the power of attorney executed before the allowance of the claim by the Act of Congress, was good as between the Government and the claimant, where, at the time of payment, such power of attorney was unrevoked. [439] If, in respect of transfers or assignments of claims, the purpose of the statute, as ruled in *Goodman* v. *Niblack*, was to protect the Government, not the claimant in his dealings with the Government, it is difficult to perceive upon what ground it could be held that the statutory inhibition upon powers of attorney in advance of the allowance of the claim and the issuing of the warrant, can be used to compel a second payment after the amount thereof has been paid to the person authorized by the claimant to receive it. A mere power of attorney given before the warrant is issued—so long, at least, as it is unexecuted—may undoubtedly be treated by the claimant as absolutely null and void in any contest between him and his attorney in fact. And it may be so regarded by the officers of the Government whose duty it is to adjust the claim and issue a warrant for its amount. But if those officers chose to make payment to the person whom the claimant, by formal power of attorney, has accredited to them as authorized to receive payment, the claimant cannot be permitted to make his own disregard of the statute the basis for impeaching the settlement had with his agent. To hold otherwise would be inconsistent with the ruling heretofore made—and with which, upon consideration, we are entirely satisfied—that the purpose of Congress, by the enactments in question, was to protect the Government against frauds upon the part of claimants and those who might become interested with them in the prosecution of claims, whether before Congress or the several departments. The title of the Act of 1853 suggests this purpose. It is to prevent frauds upon the Treasury. An effectual means to that end was to authorize the officers of the Government to disregard any assignment or transfer of a claim, or any power of attorney to collect it, unless made or executed after the allowance of the claim, the ascertainment of the amount due thereon, and the issuing of the warrant for the payment thereof. Other sections of the statute—those forbidding officers of the Government and members of Congress from prosecuting or becoming interested in claims against the government, and those punishing the bribery or undue influencing of such officers or members—[440] sustain the view that what was in the mind of Congress was to protect the Government in the matter of claims against it. But if the protection of claimants was at all in the mind of Congress when passing the Acts of 1846 and 1853, it is quite certain that the courts should not, to the injury of the Government, extend that protection to those who elected not to avail themselves of the provisions of those statutes. Here it is not denied that the power of attorney executed in 1869 embraces and was intended to embrace the claims arising out of the decree of 1868, from whatever source the money in satisfaction of it might be derived. Nor is it pretended that such power of attorney had been revoked prior to the adjustment and payment of the claims in question.

It seems to us—looking at the mischiefs intended to be remedied by these statutes and giving the words of Congress a reasonable interpretation—that the claimants were not at liberty as between the Government and themselves to question the right of the officers of the Treasury to recognize the unrevoked authority which the latter had given to Godeffroy, without restriction as to time, to receive from anyone whom it might concern to pay all sums of money due or to become due and payable on account of the seizure of the vessel Labuan.

The judgment must, therefore, be affirmed. It is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

RELIEF JACKSON, *Plf. in Err.*,
v.
JOHN D. ROBY ET AL.

JOHN D. ROBY ET AL., *Plfs. in Err.*,
v.
RELIEF JACKSON.

(See S. C., Reporter's ed., 440–445.)

Mining claim—what expenditure will sustain.

1. The extension of a flume over premises sought to be held as a mining claim, and their use as a place of deposit for the waste material from an adjoining claim owned by the same person, is not such an expenditure upon them as will sustain the claim under the Act of 1872, re-enacted in the Revised Statutes.

2. In a suit to determine conflicting mining claims to public lands under sec. 2326 R. S., if there has been no work done by either claimant, plaintiff or defendant, on the premises in controversy, the finding should properly be against both.

[Nos. 671, 815.]

Submitted Oct. 31, 1883. Decided Dec. 3, 1883.

IN ERROR to the Circuit Court of the United States for the District of Colorado.

The history and facts of the case appear in the opinion of the court.

Mr. **John D. Pope,** for Jackson, plaintiff.

Messrs. **Amos Steck,** *M. B. Carpenter* and *A. D. Bullis,* for Robey and Rankin, defendants.

Mr. Justice **Field** delivered the opinion of the court:

Previous to the legislation of Congress in 1866, mining claims upon the public lands of the United States were held under rules framed by miners themselves in different localities. These rules prescribed the extent of ground which miners could severally appropriate for mining, and the conditions upon which such ground could be acquired and held. They bore

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a general similarity in different districts, varying only according to the extent and character of the mines. They all agreed in one particular, in recognizing discovery and appropriation as the source of title, and development by working as the condition of continued possession. The first discoverer could derive no benefit from his discovery unless he followed it up by work for the development of his claim; and what that work should be, the nature and extent of it, how soon it should commence after the discovery, and when its suspension should be deemed an abandonment of the claim, were specifically declared.

The Act of Congress of 1866, gave the sanction of law to these rules of miners, so far as they were not in conflict with the laws of the United States. 14 Stat. at L., 251, ch. 262, sec. 1. Subsequent legislation specified with great-
[442] er particularity the modes of location and appropriation and extent of each mining claim, recognizing, however, the essential features of the rules framed by miners, and among others that which required work on the claim for its development as a condition of its continued ownership. The Act of 1872—and its provisions are re-enacted in the Revised Statutes—declares that on each claim subsequently located, until a patent for it is issued, there shall be annually expended for labor or improvements $100, and on claims previously located an annual expenditure of $10 for each one hundred feet in length along the vein; and provides that when such claims are held in common, the expenditure may be upon any one of them. And it declares that upon a failure to comply with these conditions the claim shall be opened for relocation in the same manner as if no location of the same had ever been made, provided the original locators, their assigns or representatives, have not resumed work upon it after failure and before relocation. 17 Stat. at L., 93, ch. 152, sec. 5.

The Act also points out various steps which must be followed by a party who seeks to obtain a patent for his mining claim. Among other things he must file an application in the proper land-office under oath, showing a compliance with the law, together with a plat and the field notes of his claim or claims made under the direction of the Surveyor-General of the United States, showing its or their boundaries. He must also at the time, or within sixty days thereafter, file with the register a certificate of the Surveyor-General that $500 worth of labor has been expended, or improvements to that amount have been made upon the claim by himself or grantors. If within sixty days thereafter an adverse claim is filed, accompanied by the oath of the party making it, showing its nature, boundaries and extent, proceedings are to be stayed until the controversy has been settled by the decision of a court of competent jurisdiction, or the adverse claim is waived. And it is made the duty of the adverse claimant, within thirty days afterwards, to commence legal proceedings to determine the question of the right of possession.

In this case it appears that the defendants
[443] claimed the premises in controversy as their mining ground, and made application for a patent. The premises are situated on Blue River, in the County of Summit, in the State of Colorado, and embrace twenty-three acres and forty-eight hundredths of an acre. The plaintiff asserted an adverse right to them as part of what is called in the record "The Thomas Klak Claim," and brought the present action to determine his right of possession. In his complaint, he alleges that on the 9th of August, 1876, he was the owner of the Klak claim, and ever since has been such owner and entitled to its possession; that he worked the same as a placer mining claim in connection with other claims adjacent and contiguous to it; that the defendants some time in 1880 entered upon a part of said claim, that portion now in controversy, and have ever since wrongfully withheld its possession from him. He avers that the premises are worth $50,000; that the action is brought in support of his adverse claim; and he asks judgment for possession of the premises.

The defendants, besides denying the allegations of the plaintiff, set up a right to a portion of the premises by location and occupation under the mining rules of the district, and to the remainder by purchase from the original locators.

On the trial, the plaintiff produced and gave in evidence a certificate of location of the Klak claim made by his grantors in 1869, and also showed that they were owners of claims in what is called Lomax Gulch, adjoining and contiguous to the Klak claim, and began to work such adjoining claims in 1872, and continued the work until and during 1880; that in prosecuting the work they used a flume which extended over the premises in controversy a distance of one hundred and fifty feet, by means of which the tailings from the Lomax gulch, that is, the waste material, were carried and deposited on the premises, so that at the end they covered a greater portion of them; more than one third thereof. From them the plaintiff traced his title. With the exception of the extension of the flume over the premises, and their use as a place of deposit for the waste material from the adjoining claims, it was not shown that either he or his grantors ever did any work upon them, or ever had possession of them. He insisted, [444]
however, that this extension of the flume and use of the premises were sufficient to give him the right of possession under that clause of the statute which provides that where several mining claims are held in common the labor or expenditure required may be made on any one of them. The court below held, and so instructed the jury, that these facts were insufficient to establish any possession or right of possession in him, and that therefore he was not entitled to a verdict.

The defendants proved the location in July, 1880, of a portion of the premises in controversy, then vacant and unoccupied, and a purchase of the remainder from previous locators; but they gave no evidence that any work on the claim was done by themselves or their grantors; and the court held that they had not established a title for the consideration of the jury, who were directed so to find. The jury brought in a verdict that neither party had proven title to the property. The effect of this verdict was to leave the defendants, who had applied for a patent, without any right to it, so far as the premises in controversy were concerned, and to leave the plaintiff in no better situation.

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The contention of the plaintiff was made upon a singular misapprehension of the meaning of the Act of Congress, where the work or expenditure on one of several claims held in common is allowed, in place of the required expenditure on the claims separately. In such case the work or expenditure must be for the purpose of developing all the claims. It does not mean that all the expenditure upon one claim —which has no reference to the development of the others—will answer. As was said in *Smelting Co.* v. *Kemp*: "Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several when the labor is performed, or the improvements are made for its development, that is to facilitate the extraction of the metals it may contain, though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is per- [445] formed for the turning of a stream or the introduction of water, or where the improvement consists of the construction of a flume to carry off the *débris* or waste material." 104 U. S., 655 [XXVI., 881].

It often happens that for the development of a mine upon which several claims have been located, expenditures are required exceeding the value of a single claim, and yet without such expenditures the claim could not be successfully worked. In such cases it has always been the practice for the owners of different locations to combine and to work them as one general claim; and expenditures which may be necessary for the development of all the claims may then be made on one of them. The law does not apply to cases where several claims are held in common, and all the expenditures made are for the development of one of them without reference to the development of the others. In other words: the law permits a general system to be adopted for adjoining claims held in common, and in such case the expenditures required may be made, or the labor be performed upon any one of them.

The language as to the construction of a flume to carry off the *débris* or waste material at the conclusion of the citation above, has reference to such a structure as may be used to carry off the common *débris* of several claims, not to a flume used merely to remove the *débris* of one claim. Here no work was done for the general improvement of all the claims. The deposit of the *débris* from the Lomax gulch on the premises in controversy, so far from tending to develop them, imposed obstacles in the way of their development, by covering them up with refuse matter.

There having been no work done by either claimant, plaintiff or defendants, on the premises in controversy, the court properly instructed the jury to find against both.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 354.

GEORGE A. CUNNINGHAM, *Appt.*, [446]

v.

MACON AND BRUNSWICK RAILROAD COMPANY, EDWARD A. FLEWELLEN ET AL.

(See S. C., Reporter's ed., 446-468.)

Suit against State or the United States—jurisdiction of—classes of cases—State, when indispensable party.

1. Neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States, by virtue of the original jurisdiction conferred on this court by the Constitution.

2. Whenever it can be clearly seen that the State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction.

3. The classes of cases in which a State is not a necessary party, though some interest of it may be more or less affected by the decision, and of which the circuit court has jurisdiction, stated and distinguished.

4. In a foreclosure suit, a State which has the possession and legal title to the property involved is an indispensable party, and the Circuit Court of the United States has no jurisdiction, although the suit is nominally against the Governor and Treasurer of the State.

[No. 17.]

Argued Nov. 2, 5, 1883. Decided Dec. 3, 1883.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **A. G. Magrath,** *W. W. Montgomery* and *James Lowndes*, for appellant.

Messrs. **Joseph H. Choate** and **Clifford Anderson,** for appellees.

Mr. Justice **Miller** delivered the opinion of [447] the court:

This is an appeal from the decree of the Circuit Court for the Southern District of Georgia, dismissing the bill of complainant on demurrer.

The bill is filed by Cunningham, a citizen of the State of Virginia, against Alfred H. Colquitt, as Governor of the State of Georgia, J. W. Renfroe, as Treasurer of the State, the Macon and Brunswick Railroad Company, and A. Flewellen, W. A. Lofton and George S. Jones, styling themselves directors of said Railroad Company, John H. James, a citizen of Georgia, and the First National Bank of Macon.

The bill sets out, with reasonable fullness and with references to exhibits which make its statements clear, what we will try to state, as far as necessary, in shorter terms.

It alleges that on the 3d day of December, 1866, the Assembly of Georgia passed an Act authorizing the Governor to indorse the bonds of the Macon and Brunswick Railroad Company to the extent of $10,000 per mile, and that under this authority, the Governor indorsed bonds to the amount of $1,950,000, which were afterwards negotiated by said Company. The statute, under which this was done, made the indorsement of these bonds to operate as a prior mortgage upon all the property of the Company, which could be enforced by a sale by the Governor upon default in payment of the bonds so

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indorsed, or interest on them as it fell due. In addition to this the Company executed and delivered to the Governor, on the 22d of June, 1870, a written mortgage confirming the lien created by the statute, which was duly acknowledged and recorded.

October 27, 1870, the Legislature, by an Act amending the Act of December 3, 1866, authorized the Governor to indorse an additional $3,000 per mile of the bonds of the Company, which was done, and of this series of bonds the complainant became the holder and owner of nineteen for $1,000 each.

It is then alleged that on July 1, 1873, the [448] Company failed to pay its interest coupons upon both these sets of indorsed bonds, and that in a few days thereafter the Governor, under the power vested in him by the Act of 1866, took possession of the road and the property of the Company and placed them in the hands of Flewellen as receiver; and that on the first Tuesday in June, 1875, he sold said road to the State of Georgia for the sum of $1,000,000, and made a conveyance of it to the State accordingly, a copy of which is filed as an exhibit to the bill. It is also alleged that the State of Georgia has taken up since that time the entire issue of $1,950,000, giving her own bonds in place of the bonds which she had so indorsed.

The bill assails this transaction because the Governor, in advertising the sale, gave notice that he would accept in payment for bids bonds of the State at par, or bonds of the first series of $1,950,000 at their market value, or cash, and would not receive any of the second series of $600,000 in payment. Also because the sale was made improvidently, at a bad time, as the Governor was informed by his agent, Flewellen, and because the Governor was not authorized to bid for the property, and the State had no constitutional power to make the purchase.

And it is further alleged that if the sale is not absolutely void, it is voidable, because under the statutory and executed mortgages the State is trustee of the property mortgaged for the benefit of the bondholders, and her purchase can be set aside by the beneficiaries under the trust when they elect to do so. The bill insists that by the taking up and payment of the first series of indorsed bonds their lien on the property is extinguished, and that of the second series is now become paramount, and this suit is brought to foreclose that mortgage lien.

And if the court shall be of opinion that the sale was valid, then the bill insists that the holders of the second series were entitled to be paid *pro rata* under that sale, and that when the Legislature of Georgia appropriates any money to pay the bonds which it gave in exchange for $1,950,000 of the indorsed railroad bonds, the amount so appropriated should be divided *pro rata* between these bonds and the $600,000 of the second series of indorsed bonds.

The prayer of the bill is for the appointment [449] of a receiver, to whom all the property of the Company shall be delivered; that the mortgage be foreclosed and the proceeds applied to payment of the bonds of the second series so far as necessary for that purpose.

Or, if the court shall be of opinion that the sale was valid, that Renfroe be enjoined from paying the coupons of interest on the state bonds exchanged for the first series of bonds, and that the holders thereof be made parties to the suit, and be compelled to account to the holders of the $600,000 series of bonds for their *pro rata* share of said exchanged bonds; and the bill prays that Colquitt, the Governor, and Renfroe, the Treasurer, and the three directors of the Company be compelled by subpœna to appear and answer it and certain interrogatories in it, and produce certain papers; and that Renfroe be enjoined from paying the coupons on the state bonds exchanged for the indorsed bonds, and that the State of Georgia may come in and make herself a party defendant to this bill if she should wish to do so; and there is a prayer for general relief.

To this bill there was filed by Flewellen, Lofton and Jones, the directors, a demurrer and plea, as it is called. The plea is to the effect that they have no interest in the road otherwise than as agents of the State of Georgia, for which they hold and control the Macon and Brunswick Railroad and all its property and franchises of every description, and the plea and demurrer both rely on the proposition that the court has no jurisdiction of the case, because it cannot proceed without the State as a party, and that the court cannot compel the State to become a party to the suit.

Renfroe, the Treasurer, filed a similar plea, and Colquitt, the Governor, filed a demurrer and a plea separately.

The ground of demurrer stated by the Governor is that it is, apparent on the face of the bill, that the court cannot take cognizance of the matters and things set up in said bill as against the defendant, because it appears that he has no personal interest in the same, but that it is an attempt to make the State of Georgia a party to the suit through the defendant as Governor, so as to bind the State by the judgment and decision of the court in the case.

On this demurrer of Colquitt and the joint de- [450] murrer of the three trustees, the case was decided and the bill dismissed.

Mr. Justice Woods, in dismissing it, said: "The bill is to all intents and purposes a suit against the State. It is mainly her property, and not that of Alfred H. Colquitt or J. W. Renfroe that is to be affected by the decree of this court. It is the title of the State that is assailed. The attack is not made against the State directly, but through her officers. This indirect way of making the State a party is just as open to objection as if the State had been named as a defendant." 3 Woods, 426.

The failure of several of the States of the Union to pay the debts which they have contracted and to discharge other obligations of a contract character, when taken in connection with the acknowledged principle that no State can be sued in the ordinary courts as a defendant except by her own consent, has led, in recent times, to numerous efforts to compel the performance of their obligations by judicial proceedings to which the State is not a party.

These suits have generally been instituted in the Circuit Courts of the United States, or have been removed into them from the state courts.

The original jurisdiction of this court has also been invoked in the recent cases of *N. H.* v. *La.* and *N. Y.* v. *Same* [*ante*, 58]. These latter suits were based on the proposition that the constitutional provision that States might sue each

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other in this court would enable a State whose citizens were owners of obligations of another State to take a transfer of those obligations to herself and sue the defaulting State in the court. The doctrine was overruled in those cases at the last term by the unanimous opinion of the court.

In the suits which have been instituted in the circuit courts the effort has been, while acknowledging the incapacity of those courts to assume jurisdiction of a State as a party, to proceed in such a manner against the officers or agents of the State Government, or against property of the [451] State in their hands, that relief can be had without making the State a party.

The same principle of exemption from liability to suit as applied to the Government of the United States, has led to like efforts to enforce rights against the government in a similar manner. And it must be confessed that, in regard to both classes of cases, the questions raised have rarely been free from difficulty, and the judges of this court have not always been able to agree in regard to them. Nor is it an easy matter to reconcile all the decisions of the court in this class of cases.

While no attempt will be made here to do this, it may not be amiss to try to deduce from them some general principles, sufficient to decide the case before us.

It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on that court by the Constitution.

This principle is conceded in all the cases, and whenever it can be clearly seen that the State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. But in the desire to do that justice, which in many cases the courts can see will be defeated by an unwarranted extension of this principle, they have in some instances gone a long way in holding the State not to be a necessary party, though some interest of hers may be more or less affected by the decision. In many of these cases the action of the court has been based upon principles whose soundness cannot be disputed. A reference to a few of them may enlighten us in regard to the case now under consideration:

1. It has been held in a class of cases where property of the State, or property in which the State has an interest, comes before the court and under its control, in the regular course of judicial administration, without being forcibly taken from the possession of the government, the court will proceed to discharge its duty in [452] regard to that property. And the State, if it choose to come in as plaintiff, as in prize cases, or to intervene in other cases when she may have a lien or other claim on the property, will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the court. Of this class are the cases of *The Siren*, 7 Wall, 157 [74 U. S., XIX., 131]; *The Davis*, 10 Wall., 20 [77 U. S., XIX., 877]; and *Clark* v. *Barnard* [*ante*, 780], and others, at the last Term?

2. Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government.

In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him. See, *Mitchell* v. *Harmony*, 13 How., 115; *Bates* v. *Clark*, 95 U. S., 204 [XXIV., 473]; *Meigs* v. *McClung*, 9 Cranch, 11; *Wilcox* v. *Jackson*, 13 Pet., 498; *Brown* v. *Huger*, 21 How., 305 [62 U. S. XVI., 125]; *Grisar* v. *McDowell*, 6 Wall., 363 [73 U. S., XVIII., 863].

To this class belongs also the recent case of *U. S.* v. *Lee* [*ante*, 171], for the action of ejectment in that case is, in its essential character, an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment. And the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful and, therefore, insufficient as a defense. The judgment in that case did not conclude the United States, as the opinion carefully stated, but held the officers liable as unauthorized trespassers, and turned them out of their unlawful possession.

3. A third class, which has given rise to more controversy, is where the law has imposed upon an officer of the government a well defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process.

Of this class are writs of *mandamus* to pub [453] lic officers, as in *Marbury* v. *Madison*, 1 Cranch, 137; *Kendall* v. *Stokes*, 3 How., 87; *U. S.* v. *Schurz*, 102 U. S., 378 [XXVI., 167]; *U. S.* v. *Boutwell*, 17 Wall., 604 [84 U. S., XXI., 721].

But in all such cases, from the nature of the remedy by *mandamus*, the duty to be performed must be merely ministerial, and must involve no element of discretion to be exercised by the officer.

It has, however, been much insisted on that in this class of cases, where it shall be found necessary to enforce the rights of the individual, a court of chancery may, by a mandatory decree or by an injunction, compel the performance of the appropriate duty, or enjoin the officer from doing that which is inconsistent with that duty and with plaintiff's rights in the premises.

Perhaps the strongest assertion of this doctrine is found in the case of *Davis* v. *Gray*, 16 Wall., 203 [83 U. S., XXI., 447].

In that case, the State of Texas having made a grant of the alternate sections of land along which a railroad should thereafter be located, and the railroad company having surveyed the land at its own expense and located its road through it, the Commissioner of the State Land-Office and the Governor of the State were, in violation of the rights of the company, selling

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and delivering patents for the sections to which the company had an undoubted vested right. The circuit court enjoined them from doing this by its decree, which was affirmed in this court.

Judge Hunt did not sit in the case, and *Justice* Davis and *Chief Justice* Chase dissented, on the ground that it was, in effect, a suit against the State. Though there are some expressions in the opinion which are unfavorably criticised in the opinions of both the majority and minority of this court in the recent case of *U. S.* v. *Lee*, the action of the court has not been overruled.

But it is clear that in enjoining the Governor of the State in the performance of one of his executive functions, the case goes to the verge of sound doctrine, if not beyond it, and that the principle should be extended no further. Nor, was there in that case any affirmative relief granted by ordering the Governor and land commissioner to perform any act towards per- [454] fecting the title of the company.

The case of the *Board of Liquidation* v. *McComb* is to the same effect. The Board of Liquidation was charged by the Statute of Louisiana with certain duties in regard to issuing new bonds of the State in place of old ones which might be surrendered for exchange by the holders of the latter. The amount of new bonds to be issued was limited by a constitutional provision. McComb, the owner of some of the new bonds already issued, filed his bill to restrain the board from issuing that class of bonds in exchange for a class of indebtedness not included within the purview of the statute, on the ground that his own bonds would thereby be rendered less valuable. This court affirmed the decree of the circuit court enjoining the board from exceeding its power in taking up by the new issue a class of state indebtedness not within the provisions of the law on that subject. 92 U. S., 531 [XXIII., 623].

In the opinion in that case the language used by *Mr. Justice* Bradley well and tersely thus expresses the rule and its limitations:

"The objections to proceeding against state officers by *mandamus* or injunction are: first, that it is in effect proceeding against the State itself; and, second, that it interferes with the the official discretion vested in the officers. It is conceded that neither of these can be done. A State, without its consent, cannot be sued as an individual; and a court cannot substitute its own discretion for that of executive officers, in matters belonging to the proper jurisdiction of the latter. But it has been settled that where a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain a personal injury by such refusal, may have a *mandamus* to compel performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it."

It is believed that this is as far as this court has gone in granting relief in this class of cases.

The case of *Osborne* v. *Bank*, 9 Wheat., 738, [455] often referred to, was upon this principle, and goes no further; for, in that case, a preliminary injunction of the court forbidding the state officer from placing the money of the bank, which he had seized, in the Treasury of the State, having been disregarded, the final decree corrected this violation of the injunction, by requiring the restoration of the money thus removed. See, *Louisiana* v. *Jumel* [*ante*, 448].

On the other hand, in the cases of *Louisiana* v. *Jumel* and *Elliott* v. *Wiltz*, decided at the last Term, very ably argued and very fully considered, the court declined to go any further.

In the first of these cases the owners of the new bonds issued by the Board of Liquidation mentioned in *McComb's Case*, above cited brought their bill in equity, in the Circuit Court of the United States, to compel the Auditor of State and the Treasurer of the State to pay, out of the Treasury of the State, the over-due interest coupons on their bonds, and to enjoin them from paying any part of the taxes collected for that purpose for the ordinary expenses of the government. They at the same time applied to the state court for a writ of *mandamus* to the same officers, which suit was removed into the Circuit Court of the United States. In this they asked that these officers be commanded to pay, out of the moneys in the Treasury, the taxes which they maintained had been assessed for the purpose of paying the interest on their bonds, and to pay such sums as had already been diverted from that purpose to others by the officers of the government.

The circuit court refused the relief asked in each case, and this court affirmed the judgment of that court.

The short statement of the reason for this judgment is, that as the State could not be sued or made a party to such proceeding, there was no jurisdiction in the circuit court, either by *mandamus* at law, or by a decree in chancery, to take charge of the Treasury of the State, and seizing the hands of the Auditor and Treasurer, to make distribution of the funds found in the Treasury in the manner which the court might think just.

The *Chief Justice* said: "The Treasurer of the State is the keeper of the money collected [456] from this tax, just as he is the keeper of other public moneys. The taxes were collected by the tax collectors and paid over to him, that is to say, into the State Treasury, just as other taxes were when collected. He is no more a trustee of these moneys than he is of all other public moneys. He holds them only as agent of the State. If there is any trust the State is the trustee, and unless the State can be sued the trustee cannot be enjoined. The officers owe duty to the State alone, and have no contract relations with the bondholders. They can only act as the State directs them to act and hold as the State allows them to hold. It was never agreed that their relations with the bondholders should be other than as officers of the State or that they should have any control over this fund except to keep it like other funds in the Treasury, and pay it out according to law. They can be moved through the State, but not the State through them."

We think the foregoing cases mark, with reasonable precision, the limit of the power of the courts in cases affecting the rights of the State or Federal Governments in suits to which they are not voluntary parties.

In actions at law, of which *mandamus* is one,

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where an individual is sued, as for injuries to person or to property, real or personal or in regard to a duty which he is personally bound to perform, the government does not stand behind him to defend him. If he has the authority of law to sustain him in what he has done, like any other defendant he must show it to the court and abide the result. In either case the State is not bound by the judgment of the court, and generally its rights remain unaffected. It is no answer for the defendant to say: I am an officer of the government and acted under its authority; unless he shows the sufficiency of that authority.

Courts of equity proceed upon different principles in regard to parties. As was said in *Barney* v. *Baltimore*, 6 Wall., 280 [73 U. S., XVIII., 825], there are persons who are merely formal parties without real interest, and there are those who have an interest in the suit, but which will not be injured by the relief sought, and there are those whose interest in the subject-matter [457] of the suit renders them indispensable as parties to it. Of this latter class the court said, in *Shields* v. *Barrow*, 17 How., 130 [58 U. S., XV., 158]; "They are persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest or leaving the controversy in such a condition that its final disposition may be wholly inconsistent with equity and good conscience."

"In such cases," says the court in *Barney* v. *Baltimore*, "the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction."

In the case now under consideration the State of Georgia is an indispensable party. It is, in fact, the only proper defendant in the case. No one sued has any personal interest in the matter or any official authority to grant the relief asked.

No foreclosure suit can be sustained without the State, because she has the legal title to the property, and a purchaser under a foreclosure decree would get no title in the absence of the State. The State is in the actual possession of the property, and the court can deliver no possession to the purchaser. The entire interest, adverse to plaintiff, in this suit, is the interest of the State of Georgia in the property, of which she has both the title and possession.

On the hypothesis that the foreclosure by the Governor was valid, the trust asserted by plaintiff is vested in the State as trustee, and not in any of the officers sued.

No money decree can be rendered against the State, nor against its officers, nor any decree against the Treasurer, as settled in *Louisiana* v. *Jumel*.

If any branch of the State Government has power to give plaintiff relief it is the legislative. Why is it not sued as a body, or its members by *mandamus* to compel them to provide means to pay the State's indorsement?

The absurdity of this proposition shows the impossibility of compelling a State to pay its debts by judicial process.

The decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[458]

Mr. Justice **Harlan**, with whom concurred *Mr. Justice* **Field**, dissenting:

The bill in this suit was filed by Cunningham, a citizen of Virginia, in behalf of himself and all holders of the second series of the bonds of the Macon and Brunswick Railroad Company, indorsed by the State of Georgia, who may choose to be made parties to the suit and share the expenses thereof.

The defendants are: the Macon and Brunswick Railroad Company, a Corporation of Georgia; Edward A. Flewellyn, W. A. Lofton and George S. Jones, citizens of Georgia, and styling themselves "Directors of the Macon and Brunswick Railroad;" J. W. Renfroe, Treasurer, and Alfred H. Colquitt, Governor of the State of Georgia, both citizens of that State; the First National Bank of Macon, a corporation created under the laws of the United States and located at Macon, Georgia, and John H. James, a citizen of Georgia.

The suit relates to the Macon and Brunswick Railroad, of which Flewellyn, Lofton and Jones, as directors aforesaid, are in possession, and which they are managing and operating in entire disregard, as the bill alleges, of the rights of complainant and other holders of the beforementioned bonds.

But the suit has other features of which no notice is taken in the opinion of the court. The bill alleges that on or about July 2, 1873, the then Governor of Georgia not only seized the railroad and all other property of the Company, but certain other property embraced in a deed of trust to one Whittle, which was not covered by the statutory and executed mortgages, so far as the $1,950,000 series of indorsed bonds is concerned, because acquired by the Company after the last of that series had been indorsed, with funds other than the proceeds of the bonds, but which was covered by the mortgages so far as the $600,000 series is concerned, having been bought prior to the indorsement of the latter bonds. The property covered by the deed of trust to Whittle was, the bill alleges, transferred to the trustees therein named, with directions to dispose of the same and with the proceeds to redeem certain fare-bills of the Company; but said trust was never carried out by them, because those fare-bills were fully paid out of the earnings of the railroad.

The bill charges that the sale at which the [459] Governor of Georgia purchased the property for the State was void:

1. "Because neither the Legislature nor the Governor had the right to exclude the $600,000 series of indorsed bonds from being used as so much cash, in the purchase of said road, at their face value; certainly they were entitled to be so used, in the event of the exhaustion of the $1,950,000, which themselves should have been received as cash at par."

2. "Because the Governor was not authorized to bid on said property for the State, and the State had no constitutional power to make the purchase; or, if said sale is not void, it is certainly voidable, because, under the statutory and executed mortgages, the State is the trustee of the property mortgaged for the benefit of the bondholders, and had no right to buy at her own sale, as such trustee, without incurring the risk of having said sale set aside at the instance of any beneficiary under the trust, and your

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orator as such beneficiary, elects to set aside such sale."

The suit proceeds in part upon the general ground that the mortgages in question are mortgages to the Governor of Georgia, as trustee for the bondholders, to secure the payment of the bonds indorsed by the State, and not mortgages of indemnity to the State to save her harmless against the liability incurred by her indorsement. If, however, the court should be of opinion that the mortgages are for the indemnity of the State, and that the sale of the railroad and purchase by the State are valid, then the complainant insists that both series of indorsed bonds stand upon an equal footing, and that the sums paid by the Treasurer of the State, in taking up the coupons of the state bonds which have been exchanged for the $1,950,000 series of the Macon and Brunswick Railroad indorsed bonds, represent a portion of these proceeds, and should be paid *pro rata* upon both series of bonds; and that when the Legislature of Georgia appropriates any sum for the principal of the state bonds so exchanged, such sum should in like manner be divided *pro rata* among the holders of both series of indorsed bonds, and that the state bonds so exchanged should themselves be treated as the proceeds of the sale of the rail-
[460] road, and divided *pro rata* among all the holders of both series of state indorsed bonds.

The case went off in the court below on demurrers and pleas which questioned the right of complainant to relief solely upon the ground that the suit was against the State, which was not, and could not be made, a party to the suit.

It is true, as stated in the opinion of the court, that the property to which the suit relates is in the actual possession of some of the defendants, who assert no individual claim thereto, but are acting for and on behalf of the State. It is also true that the apparent legal title to the property embraced by the mortgages, other than such as was covered by the deed to Whittle, stands in the name of the State. But the suit, as is quite clear, proceeds upon the ground that Georgia, by her officers, is not rightfully in possession, and that no valid title passed to the State by virtue of the sale in question. The issue is distinctly made by the bill, that the Governor was not authorized to bid in the property, and that the State had no constitutional power to make the purchase. But the court declines or fails to consider or pass upon these questions. If the court had found that the sale under which the State claimed was valid, and that the Governor had legal authority to make the purchase in virtue of which the officers of the State claim to be rightfully in possession in her behalf; or had it been adjudged that the complainant and those united in interest with him had no lien or claim upon the property, I should not, perhaps, have expressed any dissent, however much I may have differed with my brethren upon such questions. In other words: if the State was ascertained to be the lawful owner of and entitled to the possession of the property in question, I should recognize the legal difficulties in the way of enforcing a lien thereon for any purpose in behalf of others; for the enforcement of such lien would, in the case supposed, necessarily disturb the rightful possession of the State, which could not be sued against her will, and without whose presence in the suit a final comprehensive decree could not be passed.

But such is not the case before us. The case to be determined is that made by the bill. Its averments are admitted by the demurrer and are [461] not controverted by the pleas. They show that the property, although held by officers of the State, as her absolute property, is not rightfully so held. It is this aspect of the present decision which constrains me to dissent from the opinion of the court. If the citizen asserts a claim or lien upon property in the possession of officers of a State, the doors of the courts of justice ought not to be closed against him, because those officers *assert* ownership in the State. The court should examine the case so far as to determine whether the State's title rests upon a legal foundation. If that title is found to be insufficient, and if the State, claiming its constitutional exemption from suit, refuse to appear in the suit as a party of record, the court ought to proceed to a final decree as between the complainant and those who are in possession of the property, leaving the State to assert her claim in any suit she might bring. This must be so, otherwise the citizen may be deprived of his property and denied his legal rights, simply because the officers of a State take possession of and hold it for the State.

Such was the ruling of this court in *United States* v. *Lee* [*ante*, 171]. That was an action to recover the possession of what was formerly known as the Arlington estate. The defendants held possession of the property in no other capacity than as officers and agents of the United States. The Attorney-General of the United States appeared, and in due form gave the court to understand that the property in controversy was then, and for more than ten years had been, held, occupied and possessed by the United States, through their officers and agents, as public property for public purposes, in the exercise of their sovereign and constitutional powers, namely: as a military station, and as a national cemetery established for the burial of deceased soldiers and sailors of the Union. Upon these grounds it was contended that no action could be maintained which would disturb the control of those who were in possession for the United States. The contention, in behalf of the government, was that the United States could not be sued without their consent, and that the maintenance of a suit against their officers and agents for the purpose of ousting them from the possession of the Arlington cemetery, would be an encroachment upon the powers intrusted by [462] the Constitution to the legislative and executive departments.

But to this argument the response of this court was: that under the American system of government the people, called elsewhere subjects, were sovereign; that their "rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch;" that "the citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered;" that, "when he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or ar-

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tificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right;" "that no man in this country is so high that he is above the law; no officer of the law may set that law at defiance with impunity; all the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." Upon examination of the doctrine that, except where Congress has provided, the United States cannot be sued, we held that it had no application to officers and agents of the United States, who, holding possession of property for public uses, are sued therefor by a person claiming to be the owner thereof or entitled thereto; but the lawfulness of that possession and the right or title of the United States to the property may, by a court of competent jurisdiction, be the subject-matter of the inquiry, and adjudged accordingly.

In the case just cited, we quoted, with approval, the language of *Chief Justice* Marshall, in *United States* v. *Peters*, 5 Cranch, 115, where, speaking for the court, he said that "It certainly can never be alleged that a mere suggestion of title in a State to property in possession of an individual must arrest the proceedings of the court, and prevent them looking into the suggestion and examining the validity of the title."

In *United States* v. *Lee*, we also referred with approval to the decision in *Osborne* v. *Bank of United States*, 9 Wheat., 738. That was a suit by the Bank of the United States against the Auditor, Treasurer and other agents of the State [463] of Ohio. The State, by its officers, levied a tax upon the bank, which it refused to pay. The state officer seized the money of the bank in payment of the tax, and delivered it to the Treasurer of the State. The latter held it when the suit was brought, and the right of the State to hold the money in discharge of its taxes was the fundamental question in the case. The State was not made a party, because by the Constitution the judicial power of the United States did not extend to a suit against one of the United States by citizens of another State. It was conceded that the State was the real party in interest. That of which the bank complained were the acts of the defendants in their official character, and done in obedience to the statutes of Ohio. The contention, therefore, was, that as the State could not be sued, the suit must be dismissed. But to this the court, speaking by *Chief Justice* Marshall, replied:

"If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit."

The relief asked was granted without the State becoming a party to the record.

In *United States* v. *Lee*, the language just quoted from *Osborne* v. *Bank of United States*, was distinctly approved, and the adjudged cases were held to show that the proposition, that when an individual is sued in regard to prop- [464] erty which he holds in his capacity as an officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it.

In my judgment it is impossible to reconcile the decision here with the ruling in the *Arlington Case*. As I concurred in the opinion and judgment in the latter case, I am constrained to withhold my assent to the present decision. In *United States* v. *Lee*, the judicial power was deemed ample to oust officers of the United States from the possession of property claimed by them, not as individuals, but as the representatives of their government. The possession of the government, by its officers, did not prevent the court from inquiring into the alleged title of the United States, and from awarding possession to those who claimed it as their property. But, in the case before us, the State of Georgia is allowed an exemption which the court did not feel at liberty to extend to the United States. The claim of complainant is, that he and others holding bonds indorsed by that State have a lien upon property in the possession of certain individuals. The latter assert a valid, complete title and the right of exclusive possession in the State. But the complainant contends that the alleged title of the State is not good in law; that the sale, in virtue of which the State asserts title and holds possession, was not a valid sale; that in any event the State, or her Governor, holds the title merely as a trustee for others.

In effect, my brethren say that they will not determine these matters, and that because it appears that the State is the substantial party in interest, and that the defendants are only her officers in possession in her behalf, the complainant and those united in interest with him must go out of court. It seems to me that the grounds upon which the court proceeds would have led to a different conclusion, not only in *United States* v. *Lee*, but in all the prior decisions therein referred to as authority for the judgment in that case.

The court say that the judgment in *United States* v. *Lee* did not conclude the United States. So it may be said here, that no decree rendered [465] would have concluded the State of Georgia, had she declined to appear in the suit. But as in the former case the court did not decline to give relief because of the mere assertion of title in the United States, so in this case the mere assertion of title in the State should not have prevented an adjudication as to complainant's claim. Had the court ascertained that the property in contest was in the rightful possession and control of the State, then, but not before, the question would have arisen whether the bill must not be dismissed, so long as the State refused to become a party to the suit.

The court in its opinion reviews numerous

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cases other than those I have referred to, and states the principles upon which, in its judgment, they were decided. I content myself with saying that the correctness of that review is not conceded.

Limitations and qualifications are now placed upon former decisions which their language, I submit, does not justify. A doubt is now expressed as to whether *Davis* v. *Gray*, 16 Wall., 215 [83 U. S., XXI., 447], did not go beyond the verge of sound doctrine; this, notwithstanding the decision in the *Arlington Case* was made to rest largely upon *Davis* v. *Gray*. In the *Arlington Case*, we quoted from *Davis* v. *Gray*, a suit in equity, the following statement of the doctrine applicable to suits in the determination of which a State is interested:

"Where the State is concerned, the State should be made a party if it can be done. That it cannot be done, is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record. In deciding who are parties to the suit, the court will not look beyond the record. Making a state officer a party does not make the State a party, *although her law may have prompted his action, and the State may stand behind him as a real party in interest.* A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case."

The only comment made, in the *Arlington Case* upon this language was "that though not prepared to say now that the court can proceed [466] against the officer in all respects, as if the State were a party, this may be taken as intimating in a general way the views of the court at that time."

But I especially dissent from the statement by the court of the question involved in *Louisiana* v. *Jumel* [*ante*, 448]. Had the court there denied the relief asked upon the sole ground that granting it would be "To take charge of the treasury of the State and, seizing the hands of the Auditor and Treasurer, to make distribution of the funds found in treasury in the manner which the court might think just," I should not, in that case, have expressed any dissent from the action of my brethren. I am unwilling by silence to accede to the suggestion that the substantial relief asked in *Louisiana* v. *Jumel*, could not have been granted without taking charge of the treasury of the State. There were in the hands of the Treasurer of Louisiana moneys raised by taxation under certain constitutional and statutory provisions. It was money which, by contract with creditors of the State, was set apart and appropriated to the payment of the interest due on designated bonds of the State. The records of the state Treasurer's office showed the exact amount obtained by taxation for that purpose. It was in the power of the officers of the State to have paid that money out in discharge of her contract obligations without the slightest confusion in the accounts of the state treasurer. The contrary was not claimed by those officers. But the Treasurer and other officers declined to apply the money in their hands for the purposes to which it had been dedicated. They rested their refusal upon an Ordinance passed by the State, which was conceded on all hands to be in palpable violation of the Constitution of the United States and, therefore, null and void. As a reason for not discharging a plain official duty imposed by law, those officers referred to a void provision in the Constitution of Louisiana, and it was held that there was no power in the courts of the Union to compel the performance of that duty. This court declined to give any relief against the state officers of Louisiana, partly upon the ground that the relief asked "Will require the officers, against whom the process is issued, to act contrary to the positive orders of the supreme political power of the State, whose creat- [467] ures they are, and to which they are ultimately responsible in law for what they do." "They must," proceeded this court, "use the public money in the treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation, when the same power has declared that it shall not be done." Thus the Constitution of the United States which is the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding, was, as I then thought and still think, subordinated to "the supreme political power" of the State of Louisiana.

My bretheren declare it to be impossible to compel a State to pay its debts by judicial process. As no decree was asked against the State on the bonds held by complainant, and since the State was not made a party to the record, it is difficult to perceive why it was deemed necessary to make this declaration. But if, by that declaration, it was meant that no State can be sued as a party to the record, and no judgment rendered against it as a party defendant, the proposition will not be disputed. I submit, however, that under our system of government the citizen may demand that the courts shall determine his claim to or his alleged lien upon property, by whatever individuals that property may be held, and that he cannot be denied an adjudication and enforcement of that claim merely because the individuals sued *assert* right of possession and title in the government they represent. The hardship and injustice of a different rule is well illustrated in the present case, especially as respects the property embraced by the deed of trust to Whittle. The bill alleges, and the demurrer admits, that that property was not covered by the statutory and executed mortgages upon which the State rests its claim. If these averments are true, the State of Georgia has no pretense of right, by its officers, to hold that property. But my brethren adjudge—if I do not misapprehend the opinion—that the assertion by defendants of title in the State is sufficient to preclude judicial inquiry into the rightfulness of their possession or the validity of the State's title.

My brethren say that "On the hypothesis that the foreclosure by the Governor was valid, the [468] trust asserted by plaintiff is vested in the State as trustee, and not in any of the officers sued." But, may not the court inquire whether that hypothesis be sound? Must it be assumed to be sound because the officers of the State so declare? Besides, if the alleged trust was vested in the State as trustee; if, as claimed by com-

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plainant, the State became the trustee of the property mortgaged for the benefit of the bondholders—may not the court proceed to a decree as between the parties to the record? If the trustee cannot be made a party, and refuses to appear, the court ought not, for that reason, to permit the interests of others to be sacrificed.

If the officers of the United States may be deprived of the possession of property held by them for the government, but the title to which is judicially ascertained, in an action against them only, not to be legally in the United States, I do not see why the courts may not, at the suit of the citizen, enforce his claims upon property as against officers of a State, who may be judicially ascertained, in a suit against them, not to be in rightful possession for such State. Such relief would not conclude the rights of the State, but would leave to her the privilege of asserting her claim in any court of competent jurisdiction.

I am authorized by *Mr. Justice* **Field** to say that he concurs in this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—114 U. S., 287.

JOSEPH P. LEROUX ET AL., *Appts.*,
v.
JOSEPH L. HUDSON, Assignee in Bankruptcy of SAMUEL SCHOTT ET AL.

(See S. C., Reporter's ed., 468-477.)

Injunction to state court—equity action for—bankruptcy proceedings.

*1. A Marshal of the United States, who, under a provisional warrant in bankruptcy, has, after receiving a bond of indemnity under General Order No. 13, in bankruptcy, seized goods as the property of the debtor, and been sued for damages for such seizure, in an action of trespass in a state court, by a third person, who claimed that the goods were his property at the time of the seizure, cannot maintain a suit in equity in a Circuit Court of the United States, for an injunction to restrain the further prosecution of the action of trespass, the parties to the suit in equity being citizens of the same State.

2. Such Marshal having delivered the goods seized to the assignee in bankruptcy appointed, after an adjudication of bankruptcy, in the proceeding in which the provisional warrant was issued, and the assignee having sold the goods, under the order of the court in bankruptcy, without giving to the plaintiff in the action of trespass any notice, under section 5063 of the Revised Statutes, of the application for the order of sale or of the sale, and such plaintiff not having brought any action against the assignee to recover the goods, or applied to the bankruptcy court for the proceeds of sale, and the assignee not being sued in the action of trespass, he cannot bring a suit in equity in a Circuit Court of the United States, joining the Marshal as plaintiff, against the plaintiff in the action of trespass, to have the title to the goods determined, on the allegation that they were transferred to such plaintiff in fraud of the Bankruptcy Act, and for an injunction restraining the prosecution of that action.

[No. 101.]

Argued Nov. 6, 7, 1883. Decided Dec. 10, 1883.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

The history and facts of the case fully appear in the opinion of the court. See, also, *Schott* v. *Hudson, post*, 1003.

Mr. **Don M. Dickinson,** for appellants:

If a Marshal under process against parties seizes property of a citizen of a State, not a party to that process and claiming the property adversely, the citizen's right to his common law action of trespass in the courts of the State, is absolute.

"If acting in his capacity as Marshal, he wrongs a citizen of a State, he is individually answerable and in her courts." 9 Pet., 600.

Sharpe v. *Doyle*, 102 U. S., 686 (XXVI., 277); *Lathrop* v. *Drake*, 91 U. S., 516 (XXIII., 414); *In Re Campbell*, 1 Bk. Reg., 166; *Re Burns*, 1 Bk. Reg., 174; *Sedgwick* v. *Menck*, 1 Bk. Reg., 425; *Re Marks*, 2 Bk. Reg., 575; *Re Evans*, 1 Low., 525; *Sampson* v. *Burton*, 4 Bk. Reg., 1; *Clarke* v. *Rist*, 3 McLean, 494; *Buck* v. *Colbath*, 3 Wall., 334 (70 U. S., XVIII., 257); *Marshall* v. *Knox*, 16 Wall., 551 (83 U. S., XXI., 481); *Peck* v. *Jenness*, 7 How., 612.

The State Court had jurisdiction of the action of trespass, and the appellant could have brought it in no other forum.

Marshall v. *Knox* (*supra*); *Smith* v. *Mason*, 14 Wall., 419 (81 U. S., XX., 748).

The jurisdiction could not be divested, and the plaintiffs could not be forced into another tribunal.

Ins. Co. v. *University of Chicago*, 6 Fed. Rep., 443; *Mallett* v. *Dexter*, 1 Curt. (C. C.), 178; *Wallace* v. *McConnell*, 13 Pet., 136; *Smith* v. *McIver*, 9 Wheat., 532; *Hagan* v. *Lucas*, 10 Pet., 400; *Taylor* v. *Carryl*, 20 How., 583 (61 U. S., XV., 1028); *Freeman* v. *Howe*, 24 How., 450 (65 U. S., XVI., 749); 1 Kent, Com., 405; 3 Story, Com., 521, 621; *Ableman* v. *Booth*, 21 How., 506 (62 U. S., XVI., 169); *Eyster* v. *Gaff*, 91 U. S., 521 (XXIII., 403); *Claflin* v. *Houseman*, 93 U. S., 131 (XXIII., 833); *Burbank* v. *Bigelow*, 92 U. S., 179 (XXIII., 481); *Jerome* v. *McCarter*, 94 U. S., 734 (XXIV., 136); *Davis* v. *Freidlander*, 104 U. S., 573 (XXVI., 818).

Messrs. **H. C. Wisner** and **William F. Cogswell,** for appellee:

That the circuit court has jurisdiction to entertain, hear and determine the case presented by the bill, as to the title of the assignees to the goods, is clearly settled.

R. S. U. S., secs. 630, 4979.

Allen v. *Massey*, 17 Wall., 351 (84 U. S., XXI., 542); *Ex parte Schwab*, 98 U. S., 240 (XXV., 105).

The circuit court having found the property in question to belong to and to be a part of the estate in bankruptcy of which complainant Hudson is assignee, has the power to stop all further litigation upon that question between appellant and the Marshal.

Sec. 4979, R. S.; *Ex parte Schwab* (*supra*); *Kellogg* v. *Russell*, 11 Bk. Reg., 121; *Main* v. *Glen*, 7 Biss., 86; *Main* v. *Bromley*, 6 Fed. Rep., 477; *Ex parte Christy*, 3 How., 308; *Pennington* v. *Sale*, 1 Bk. Reg., 572; *Jones* v. *Leach*, 1 Bk. Reg., 595; *In re Skoll*, 16 Bk. Reg., 175; *In re Duryea*, 17 Bk. Reg., 495; *In re Dumahaut*, 17 Bk. Reg., 517; *In re Rodger*, 18 Bk. Reg., 381.

Mr. Justice **Blatchford** delivered the opinion of the court:

*Head notes by *Mr. Justice* BLATCHFORD.

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The facts of this case, so far as they are material, are as follows: on the 14th of March, 1878, proceedings in involuntary bankruptcy were instituted in the District Court of the United States for the Eastern District of Michigan, against Samuel Schott and Philip Feibish, composing the firm of Schott & Feibish. On the same day a warrant was issued by the court to the Marshal, under section 5024 of the Revised Statutes, commanding him "to take possession provisionally of all the property and effects of the debtors." The petitioning creditors gave a bond of indemnity to the Marshal, [470] under Order No. 18 of the General Orders in Bankruptcy, and required him to seize, under the warrant, as the property of the debtors, certain goods in the hands of Joseph P. Leroux and Max Schott, composing the firm of Leroux & Co., then in the store of the latter at Bay City, Bay County, Michigan, which goods the creditors alleged had been transferred to J. Leroux & Co. by Samuel Schott and Feibish, in violation of the bankruptcy law. The seizure was made on the 29th of March by the Marshal, Salmon S. Matthews, assisted by his deputies, Myron Bunnell and Horace Becker. An adjudication of bankruptcy was made against Samuel Schott and Feibish on the 13th of April. On the 22d of April, J. Leroux & Co. commenced an action of trespass in the Circuit Court for Bay County, Michigan, against Matthews, Bunnell and Becker, to recover $25,000 damages for the acts of the defendants, on the 29th of March, in breaking and entering the store at Bay City and injuring the same, and taking therefrom and carrying away goods of the value of $25,000, the property of the plaintiffs, and converting the same to their own use, and preventing the plaintiffs, for three days, from carrying on their lawful business in the store. On the 6th of May, Joseph L. Hudson was appointed assignee in bankruptcy of Samuel Schott and Feibish, and became duly vested with that office. Thereupon the Marshal delivered the goods to the assignee, and the latter took possession of them as part of the estate of the bankrupts. The defendants in the trespass suit appeared therein by attorney and demanded a trial, and served a notice of defense, setting up the issuing of the provisional warrant, the seizure of the goods thereunder, the fact that they were the goods of Samuel Schott and Feibish, the adjudication in bankruptcy, the appointment of an assignee, and the fact that the goods had been turned over by the Marshal to the assignee and were held by him as a part of the estate of the bankrupts. At a Term of the State Circuit Court, in September following, on application of the defendants, the trial of the suit was postponed to the next Term, on affidavit of the illness and absence of an important witness.

In October, 1878, Hudson, the assignee, Matthews, the Marshal, and Bunnell and Becker filed a bill in equity, in the Circuit Court of the United States for the Eastern District of Michigan, against Leroux and Max Schott, setting forth the substance of the above facts, and alleging that the goods had been sold by the assignee under the order of the bankruptcy court; that he was holding the proceeds to be applied as a part of the estate of the bankrupts, if the [471] title should be found to be in the assignee, or he should be entitled to the said assets as assignee and to distribute the same as part of the estate; and that he had the proceeds in hand awaiting the determination of that question. The bill also alleged that the goods were transferred by the bankrupts, when insolvent, to Leroux and Max Schott, with a view to prevent them from coming to the assignee in bankruptcy, and a large part of them within three months before the filing of the petition in bankruptcy, and when Leroux and Max Schott knew that the transfer was made with a view to prevent the goods from going to the assignee, and to prevent them from being distributed under the Bankruptcy Act, to defeat its object and to injure and delay its operation and evade its provisions; that the transfers of the goods were, therefore, void and the title to them became vested in the assignee; that he claimed that by reason of the suit in the state court he was unable to proceed with the settlement of the estate of the bankrupts; that the funds so received by him for the goods must be kept until the question in reference to their title should be determined; and that the question in regard to the fraud on the Bankruptcy Act, so attempted, could not be litigated and determined in the state court. The bill then set forth various matters intended to show the existence of such fraud, and prayed that Leroux and Max Schott be enjoined from further prosecuting their suit, or any other suit in a state court, for damages in regard to the goods seized by the Marshal, and that if they should claim any interest therein they should proceed to establish their claim in the Circuit Court of the United States or in the District Court in Bankruptcy. It also prayed that any sale or transfer of the goods from the bankrupts to Leroux and Max Schott be set aside and decreed to be in violation of the Bankruptcy Act, and that the goods be decreed to be a part of the estate of the bankrupts, and that the title of the assignee to the goods or the funds arising therefrom be quieted and decreed to be perfected in him. In November following, on notice and after a hearing, the court granted a preliminary injunction in accordance with the prayer of the bill. Each of the defendants demurred separately to the bill for want of jurisdiction [472] and want of equity. The demurrers were overruled, on a hearing. Each of the defendants then answered separately. The answers maintained the right of the defendants to proceed with the suit in the state court, and averred that they owned the goods at the time of the seizure, and denied the equity of the bill. Proofs were taken in the cause on both sides. At the close of the plaintiffs' proofs, the defendants entered on the record a protest against the jurisdiction of the court, with a statement that, by bringing the suit in the state court, they had not sought in any manner to interfere with the goods seized, but had waived the question of interference with the goods. A decree was entered adjudging that the goods were, at the time of their seizure, a part of the estate of the bankrupts; that the title thereto vested in the assignee; that the sale or transfer of them to the defendants was in violation of the Bankruptcy Act, and be set aside; that the title of the assignee to the goods and their proceeds be quieted and declared to be perfect; and that the defendants be perpetually enjoined according to the prayer of the bill. From this decree the defendants have appealed.

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This suit divides itself into two branches: the case of the assignee, and that of the Marshal and his deputies. The assignee was not a party to the trespass suit. The plaintiffs in that suit, abandoning all pursuit of the goods and all action against the assignee, brought and continued their suit for damages against the Marshal and his deputies. They did not disturb the possession of the goods in the assignee, or claim [474] the proceeds of the goods. Although the bill states that the assignee, on applying to the bankruptcy court for an order to sell the goods, made known to it the facts as to the claim of Leroux and Max Schott thereto, it is not averred that any notice was given to them of the intention to sell or of the sale. It is provided as follows by section 5063 of the Revised Statutes: "Whenever it appears to the satisfaction of the bankruptcy court that the title to any portion of an estate, real or personal, which has come into the possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property, in any suit or controversy between the parties in any court. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale." The failure to give any notice to Leroux and Max Schott of the application for the order to sell the goods, although the facts as to their claim were laid before the bankruptcy court, and the fact that no suit was brought against the assignee to recover the possession of the goods from him, are evidence that the bankruptcy court and the assignee did not regard, and could not regard, the case as one where, under section 5063, the title to the goods was in dispute. It was not in dispute as between Leroux and Max Schott of the one part and the assignee of the other part. The former abandoned the goods and all claim to them or to their proceeds, and the assignee acted on that view in selling the goods without notice. They relied solely on their suit in trespass, and the defendants in that suit relied for protection, in case of adverse result, not on the goods or their proceeds, but on the bond of indemnity which the petitioning creditors had given to the Marshal. Under these circumstances, after pleading in the suit in the state court, and procuring a postponement of the trial, the defendants in [475] that suit and the assignee joined in bringing the bill in equity. Had the Circuit Court of the United States any cognizance of the suit? There was no common interest between the assignee and the other plaintiffs. The assignee was not sued in the state court. When the suit in equity was brought, the Marshal had no interest in the goods, and no right to rely on them or their proceeds for indemnity, and no right to look to the assignee for protection. The Marshal turned the goods over to the assignee, and did so voluntarily, so far as appears, relying on the bond of indemnity as his protection, and substituting that in place of a retention of the goods, when he might well have insisted on retaining them, if Leroux and Max Schott still claimed title to them, inasmuch as the suit in trespass was brought before the goods were turned over to the assignee.

An assignee in bankruptcy has, by section 5129, the right, in case of a transfer of property to a person not a creditor of the bankrupt, in violation of that section, to "recover the property or the value thereof, as assets of the bankrupt." Here the assignee had the property and there was no occasion for him to bring a suit to recover it.

By section 4979, a Circuit Court of the United States has jurisdiction of a suit "At law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee, touching any property or rights of the bankrupt transferable to or vested in the assignee." The jurisdiction invoked by the assignee in this case cannot be maintained under section 4979. It does not appear by the bill or the proofs that the defendants claim an interest in the proceeds of the goods adverse to the interest which the assignee claims in such proceeds. When the bill was filed the goods had been sold and were represented by their proceeds in the hands of the assignee. The only interest which the assignee then had touching the goods or in their proceeds was his claim to own those proceeds as assignee. No interest could be adverse to such interest of his unless it was another claim to own or receive those proceeds. The defendants made no such claim. The bill does not allege that they did, but it and the proofs show that from the time they brought the trespass suit they never disputed the right of the assignee to [476] deal with the goods and their proceeds as part of the assets of the estate. Nor is the bill filed to remove a cloud on the title to real estate or to set aside written instruments of title which might interpose obstacles to the rights of the assignee in the goods or their proceeds.

It is enacted by section 630 of the Revised Statutes "That the circuit court shall have jurisdiction in matters in bankruptcy, to be exercised within the limits and in the manner provided by law." This refers to the limitations in section 4979. As the bill avers that all the parties are citizens of Michigan, the jurisdiction of the circuit court in this case must be given by the bankruptcy statute or it does not exist. We are of opinion, upon full consideration, that it is not so given, notwithstanding what was said by this court in *Ex parte Schwab*, 98 U. S., 240 [XXV., 105].

It may, moreover, be said, that if there were jurisdiction by the citizenship of the parties a bill such as this, by the assignee in bankruptcy, to obtain such relief as he asked in respect to his own rights, would not lie, he being in possession, and his right to assert possession and ownership and to control and dispose of the property and its proceeds not being questioned or threatened.

As regards the Marshal and his deputies, apart from the assignee, there is nothing in the bankruptcy statute which authorizes them to invoke the action of the circuit court, for any relief by injunction in respect to the suit for trespass. As the assignee had no right conferred by that Statute to bring the suit in equity in respect to any claim of his own, he had no right as as-

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signee to bring it in respect to any claim of his co-plaintiffs, nor had all together any right conferred by that Statute to bring it. The relief sought by injunction depends wholly, as the bill is framed, on the right of the assignee, as such, to maintain the suit in respect to his own case.

If the case as to the Marshal and his deputies were one of jurisdiction by citizenship of the parties, it would fall within the principles laid down by this court in *Buck* v. *Colbath*, 3 Wall., 334 [70 U.S., XVIII., 257]. The provisional war- [477] rant being one merely commanding the Marshal to seize the property of the debtors, it was for the Marshal to determine for himself whether the goods seized were legally liable to seizure under the warrant, and the circuit court could afford him no protection against the consequences of an erroneous exercise of his judgment in that determination. He was liable to suit in any court of competent jurisdiction, for injuries growing out of his mistakes. The state court in which the suit for trespass was brought was such a court, and that suit was an appropriate suit. The parties bringing it were entitled to proceed with that suit in that forum. As was said in *Buck* v. *Colbath*, there was nothing in the mere fact that the provisional warrant issued from a Federal Court, "to prevent the Marshal from being sued in the state court, in trespass, for his own tort, in levying it upon the property of a man against whom the writ did not run, and on property which was not liable to it." This view was re-affirmed in *Sharpe* v. *Doyle*, 102 U. S., 686 [XXVI., 277], and was there applied to a seizure under a provisional warrant in bankruptcy like that in the present case.

We have limited our decision to the precise questions presented in this case, without attempting to define the cases in which an assignee in bankruptcy can maintain a suit under section 5129 or under section 4979, or to specify what relief by injunction can be granted to him under the bankruptcy Act, in a proper case. *The decree of the Circuit Court is reversed and the cause is remanded to that court, with direction to dismiss the bill.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MAX SCHOTT, *Appt.*,
v.
JOSEPH L. HUDSON, Assignee in Bankruptcy of SAMUEL SCHOTT ET AL.

(See S. C., Reporter's ed., 477, 478).

*The decision in Leroux v. Hudson, herewith made, confirmed and applied to this case.

[No. 100.]

Argued Nov. 6, 7, 1883. Decided Dec. 10, 1883.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

The history and facts of the case fully appear in the opinion of the court. See, also, the preceding case of *Leroux* v. *Hudson*, *ante*, 468.

Mr. **Don M. Dickinson**, for appellant.

Messrs. **H. C. Wisner** and **William F. Cogswell**, for appellee.

*Head note by *Mr. Justice* BLATCHFORD.

Mr. Justice **Blatchford** delivered the opinion of the court:

The facts in this case differ from those in *Leroux* v. *Hudson* [*ante*, 468], herewith decided, as set forth in the opinion in that case, only in the following immaterial respects: the goods seized were in the hands of Max Schott, in his store at East Saginaw, Saginaw County, Michigan, and had been transferred to him by the debtors. The Marshal, Matthews, assisted by John E. Wells, a deputy, seized them on March 29, 1878. Max Schott, on the 6th of April, commenced an action of trespass in the Circuit Court for Saginaw County, Michigan, against Matthews and Wells, to recover $25,000 damages for the acts of the defendants in breaking and entering [478] the store at East Saginaw, and taking therefrom and carrying away goods of the plaintiffs of the value of $20,000, and converting the same to their own use, and preventing the plaintiffs from carrying on their lawful business in the store. After the defendants in the trespass suit had appeared therein by attorney, and demanded a trial, and given the like notice of defense as was given in the suit for trespass brought by J. Leroux & Co., nothing further was done in the suit. In October, 1878, Hudson, the assignee, Matthews, the Marshal, and Wells filed a bill in equity, in the Circuit Court of the United States for the Eastern District of Michigan, against Max Schott, making the like allegations, *mutatis mutandis*, as to the goods taken from Max Schott, as were made in the bill filed by J. Leroux & Co. in regard to the goods taken from them, and containing a like prayer for relief and for an injunction. Like proceedings took place, except that a demurrer was embodied in the answer instead of being filed separately. The answer was of a like character, the proofs and protest were identical, and a like decree was entered, from which the defendant appealed.

The same questions are involved as in *Leroux* v. *Hudson*, the facts are substantially the same, and the same conclusions are reached. *The decree of the Circuit Court is reversed and the cause is remanded to that court, with direction to dismiss the bill.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

OAKEY RANDALL, *Plf. in Err.*,
v.
BALTIMORE AND OHIO RAILROAD COMPANY.

(See S. C., Reporter's ed., 478-485.)

Verdict, when may be directed—negligence of railroad company—injury by fellow-servant—ringing bell at highway crossing.

*1. When the evidence given at the trial, with all the inferences that the jury could justifiably draw

* Head notes by *Mr. Justice* GRAY.

NOTE.—*When a verdict may be directed by the court.* See, *note* to Grand Chute v. Winegar, 82 U. S., XXI., 174.

Who are co-employés or co-servants within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a co-servant. See *note* to Hough v. R. R. Co., 100 U. S., XXV., 612.

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from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court may direct a verdict for the defendant.

2. A ground switch, of a form in common use, was placed in a railroad yard, in a space six feet wide between two tracks; the lock of the switch was in the middle of the space; and the handle, when lying flat, extended to within a foot of the adjacent rail, and could be safely and effectively worked by standing in the middle opposite the lock, using reasonable care. The brakeman of a train on one of the tracks, while working at the switch, standing at the end of the handle, was struck by an engine on the other track. Held, that there was no such proof of fault on the part of the railroad corporation, in the construction and arrangement of the switch, as would support an action against it for the injury.

3. A brakeman, working a switch for his train on one track in a railroad yard, is a fellow-servant with the engineman of another train of the same corporation upon an adjacent track; and cannot maintain an action against the corporation for an injury caused by the negligence of the engineman in driving his engine too fast and not giving due notice of its approach, without proving negligence of the corporation in employing an unfit engineman.

4. A statute which provides that a bell or whistle shall be placed on every locomotive engine, and shall be rung or sounded by the engineman or fireman sixty rods from any highway crossing, and until the highway is reached, and that "the corporation owning the railroad shall be liable to any person injured for all damages sustained" by reason of neglect so to do, does not make the corporation liable for an injury, caused by negligence of the engineman or fireman in this respect, to a fellow-servant.

[No. 128.]

Argued Nov. 16, 1883. Decided Dec. 10, 1883.

IN ERROR to the Circuit Court of the United States for the District of West Virginia.

The history and facts of the case appear in the opinion of the court.

Mr. **B. D. Dovener**, for plaintiff in error.

Messrs. **John K. Cowen** and *C. Boggess*, for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

This is an action against a Railroad Corporation by a brakeman in its employ, for personal injuries received, while working a switch, by being struck by one of its locomotive engines.

The declaration, in seven different counts, alleged as grounds of action that the defendant negligently constructed and kept its tracks and switches in a defective and dangerous condition; that the defendant, by one of its agents and servants, who was at the time unskillful, negligent and unfit to perform the business and employment that he was engaged by the defendant to perform, and who was engaged in a service for the defendant other and different from the service in which the plaintiff was engaged, and whose negligence, unskillfulness and unfitness were known to the defendant, negligently propelled one of its locomotive engines against and over the plaintiff; that this was done without sounding any whistle or ringing any bell, as required by the laws of the State of West Virginia; and that the defendant neglected proper precautions in the selection and employment of its agents and servants.

[480] A statute of West Virginia provides that "A bell or steam whistle shall be placed on each locomotive engine, which shall be rung or whistled by the engineer or fireman at the distance of at least sixty rods from the place where the railroad crosses any public street or highway, and be kept ringing or whistling until such street or highway is reached," under a penalty of not exceeding one hundred dollars for each neglect; and that "the corporation owning the railroad shall be liable to any person injured for all damages sustained by reason of such neglect." Stat. of W. Va. of 1873, ch. 88, sec. 31.

As we understand the evidence introduced at the trial, it conclusively proved the following facts: the injury occurred at night at a place where, as the plaintiff himself testified, "there was one network of tracks," in the defendant's railroad yard, near the junction of a branch road with the main road, and about ten rods from a highway crossing. The plaintiff had previously been employed on another part of the road. On the night in question, in the performance of his duty as a brakeman on a freight train, he unlocked a switch which enabled his train to pass from one track to another; and he was stooping down, with his lantern on the ground beside him, to unlock the ball of a second switch to let the engine of his train pass to a third track, when he was struck and injured by the tender of another freight engine, in no way connected with his train, backing down on the second track. The tender projected ten inches beyond the rail. The distance between the adjacent rails of the second and third tracks was about six feet. The second switch was a ground switch of a kind in common use, the lock of which was in the center of the space between the two tracks; and the handle of which was about two feet long, and when lying flat extended towards either track, and when thrown one way opened the switch, and when thrown the other way closed it. The switch could be worked efficiently and safely by a man standing midway between the two tracks, using reasonable care. It could not be safely worked by standing at the end of the handle while an engine was coming on the track next that end. Upright switches could not be used at a place where the tracks were so near together, without seriously interfering with the moving and management of the trains. [481]

The plaintiff testified that he had never worked a ground switch before, and that the first switch was an upright switch. But he admitted on cross-examination that the two kinds of switches were unlocked in the same manner, and the other evidence established beyond doubt that the first switch was also a ground switch.

A single witness, who had been a brakeman, called for the plaintiff, in answer to a question, often repeated, of his counsel, whether that was a safe and proper switch to be used at that point, testified that he could not say it was a very safe place at that time there; that he thought that was not a proper kind of switch, and an upright switch would have been more convenient to handle; that he did not think it was a very safe ball there; that he thought it was not a safe ball there; and that it could not be unlocked without danger while an engine or train was coming upon the other track.

The engine which struck the plaintiff was being driven at a speed of about twelve miles an hour, by an engineman in the defendant's employ, and there was evidence tending to show that it had no light except the headlight, and no bell, and that its whistle was not sounded.

There was no evidence that the tracks were improperly constructed, or that the engineman

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was unfit for his duty. The other grounds of action relied on were: improper construction and arrangement of the switch; negligence of the defendant in running its engine, by an unskillful and negligent engineman, alleged to have been engaged in a different service for the defendant from that in which the plaintiff was engaged; and omission to comply with the requirements of the Statute of West Virginia.

At the close of the whole evidence (of which all that is material is above stated), the court directed the jury to return a verdict for the defendant, because the evidence was such that if a verdict should be returned for the plaintiff, the court would be compelled to set it aside. A verdict for the defendant was accordingly returned, and the plaintiff sued out this writ of error.

1. It is the settled law of this court, that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Pleasants* v. *Fant*, 22 Wall., 116 [89 U. S., XXII., 780]; *Herbert* v. *Butler*, 97 U. S., 319 [XXIV., 958]; *Bowditch* v. *Boston*, 101 U. S., 16 [XXV., 980]; *Griggs* v. *Houston*, 104 U. S., 553 [XXVI., 840]. And it has recently been decided by the House of Lords, upon careful consideration of the previous cases in England, that it is for the judge to say whether any facts have been established by sufficient evidence, from which negligence can be reasonably and legitimately inferred; and it is for the jury to say whether from those facts, when submitted to them, negligence ought to be inferred. *R. Co.* v. *Jackson*, 3 App. Cas., 193.

Tried by this test, there was no sufficient evidence of any negligence on the part of the Railroad Company in the construction and arrangement of the switch, to warrant a verdict for the plaintiff on that ground. The testimony of the plaintiff and of his witness was too slight. A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another, and anyone who enters the service of a railroad corporation, in any [483] work connected with the making up or moving of trains, assumes the risks of that condition of things. Although it was night, and the plaintiff had not been in this yard before, his lantern afforded the means of perceiving the arrangement of the switch and the position of the adjacent tracks. The switch was of a form in common use, and was, to say the least, quite as fit for its place and purpose as an upright switch would have been. It could have been safely and efficiently worked by standing opposite the lock, midway between the tracks, using reasonable care; and it was unnecessary, in order to work it, to stand, as the plaintiff did, at the end of the handle, next the adjacent track.

2. The general rule of law is now firmly established, that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of the employment. This court has not hitherto had occasion to decide who are fellow-servants, within the rule. In *Packet Co.* v. *McCue*, 17 Wall, 508 [84 U. S., XXI., 705] and in *R. R. Co.* v. *Fort*, 17 Wall., 553 [84 U. S., XXI., 739], the plaintiff maintained his action because at the time of the injury he was not acting under his contract of service with the defendant; in the one case, he had wholly ceased to be the defendant's servant; in the other, being a minor, he was performing, by direction of his superior, work outside of and disconnected with the contract which his father had made for him with the defendant. In *Hough* v. *R. Co.*, 100 U. S., 213 [XXV., 612], and in *R. Co.* v. *McDaniels* [*ante*, 474], the action was for the fault of the master; either in providing an unsafe engine, or in employing unfit servants.

Nor is it necessary, for the purposes of this case, to undertake to lay down a precise and exhaustive definition of the general rule in this respect, or to weigh the conflicting views which have prevailed in the courts of the several States; because persons standing in such a relation to one another as did this plaintiff and the engineman of the other train, are fellow-servants, according to the very great preponderance of judicial authority in this country, as well as the uniform course of decision in the House of Lords, and in the English and Irish courts, as is clearly shown by the cases cited in the margin.* [484] They are employed and paid by the same master. The duties of the two bring them to work at the same place at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object, the moving of the trains. Neither works under the orders or control of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in performing his service; and neither can maintain an action, for an injury caused by such negligence, against the corporation, their common master.

The only cases cited by the plaintiff, which have any tendency to support the opposite conclusion, are the decisions of the Supreme Court of Wisconsin in *Chamberlain* v. *R. R. Co.*, 11 Wis., 248, and of the Supreme Court of Tennessee in *Haynes* v. *R. R. Co.*, 3 Coldw., 222, each of which wholly rejects the doctrine of the master's exemption from liability to one servant for the negligence of another, and the first [485] of which has been overruled by the later cases in the same State.

This action cannot, therefore, be maintained for the negligence of the engine man in running his engine too fast, or in not giving due notice of its approach.

* Farwell v. R. R. Co., 4 Met., 49; Holden v. R. R. Co., 129 Mass., 268; Coon v. R. R. Co., 5 N. Y., 492; Wright v. R. R. Co., 25 N. Y., 562; Besel v. R. R. Co., 70 N. Y., 171; Slater v. Jewett, 85 N. Y., 61; McAndrews v. Burns, 10 Vroom, 117; Smith v. Iron Co., 13 Vroom, 467; Coal Co. v. Jones, 86 Pa. St., 432; Whaalan v. R. R. Co., 8 Ohio St., 249; R. Co. v. Devinney, 17 Ohio St., 197; Slattery v. R. Co., 23 Ind., 81; Smith v. Potter, 46 Mich., 258; Moseley v. Chamberlain, 18 Wis., 700; Cooper v. R. Co., 23 Wis., 668; Sullivan v. R. R. Co., 11 Iowa, 421; Peterson v. Coal Co., 50 Iowa, 673; Foster v. R. R. Co., 14 Minn., 360; Ponton v. R. R., Co., 6 Jones (N. C.), 245; R. R. Co. v. Robinson, 4 Bush, 507; R. Co. v. Smith, 59 Ala., 245; Hogan v. R. R. Co., 49 Cal., 128; Kielley v. Mining Co., 3 Sawy., 500; Hutchinson v. York, Newcastle & Berwick R. Co., 5 Exch., 343; Bartonshill Coal Co. v. Reid, 3 Macq., 266; Bartonshill Coal Co. v. McGuire, 3 Macq., 300; Wilson v. Merry, L. R. 1 H. L., 326; Morgan v. Vale of Neath R. Co., 5 B. & S., 570, 736; S. C., L. R., 1 Q. B., 149; Tunney v. Midland R. Co., L. R. 1 C. P., 291; Charles v. Taylor, 3 C. P. D., 492; Conway v. Belfast & N. C. R. Co. Ir. R. 9 C. L., 498, and Ir. R. 11 C. L., 345.

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3. The Statute of West Virginia, on which the plaintiff relies, has no application to this case. There is no evidence that the engine which struck the plaintiff was about to cross a highway; and the main, if not the sole, object of the Statute evidently was to protect travelers on the highway. *O'Donnell* v. *R. R. Co.*, 6 R. I., 211; *Harty* v. *R. R. Co.*, 42 N. Y., 468. It may perhaps include passengers on the trains, or strangers, not trespassers, on the line of the road. But it does not supersede the general rule of law which exempts the corporation from liability to its own servants for the fault of their fellow-servants.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—111 U. S., 170, 242, 319; 113 U. S., 320; 114 U. S., 619.

STEPHEN PERCY ELLIS, INEZ RUTH ELLIS, AND Her Husband, EDWARD PECKHAM ET AL., *Appts.*,

v.

JEFFERSON DAVIS.

(See S. C., Reporter's ed., 485-504.)

Bill in equity not sustained, if there is remedy at law—equity jurisdiction to annul will—state practice—Louisiana law.

1. A bill in equity cannot be sustained in the circuit court to recover possession of real estate, part of which was devised to defendant and part given to him by the testatrix, and to set aside the will and conveyance as obtained by undue influence and for an account of rents and profits, the title to which asserted by the plaintiff is not an equitable, but a legal title; the remedy at law is plain and adequate.

2. No jurisdiction belongs to the Circuit Courts of the United States, as courts of equity to decree the invalidity of a will and annul the probate thereof.

3. In a State, however, like New York, where, by its law, its own courts of general civil jurisdiction are authorized collaterally to try and determine the question, of the validity of a will and its probate, in a suit involving the title to real property, the Circuit Courts of the United States may have like jurisdiction of such a suit by reason of the citizenship of the parties.

4. By the law of Louisiana, an action of revendication is the proper one to be brought for the purpose of asserting the legal title and consequent right of possession of the heir at law to the succession, when another is in possession under claim of title by virtue of a will admitted to probate. It furnishes an adequate and complete remedy at law, and excludes a suit in equity for the purpose.

[No. 104.]

Argued Nov. 9, 12, 1883. Decided Dec. 10, 1883.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **Wm. Reed Mills** and *C. C. Leeds*, for appellants.

Messrs. **Jno. D. McPherson** and **Calderon Carlisle**, for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

The appellants, who were complainants below, are alleged in the bill of complaint to be, respectively, citizens of New York or Missouri, or British subjects and aliens, the defendant being a citizen of Mississippi.

It is set forth in the bill that Sarah Ann Dorsey died on July 4, 1879, seised in fee simple of certain real estate, consisting of two plantations [487] in Tensas Parish, in Louisiana, an estate called Beauvoir and other property in Harrison County, Mississippi, and real estate, not described, in Arkansas, besides a large amount of movable and personal property, rights and credits, also not described; that she died, leaving no heirs in the ascending or descending lines, the appellants being her next of kin and sole legal heirs in the collateral line, entitled to succeed, in case of intestacy, to the whole of her estate; that during her lifetime, on May 10, 1878, Mrs. Dorsey, by a notarial act of procuration, constituted the defendant her agent and attorney in fact, with full and special powers to take exclusive control, charge and management of all her property and estate, and all transactions and business in any manner connected therewith, including the power "for and in her name to sue and to be sued, to purchase, lease, alienate or incumber real estate situate anywhere, to borrow money, execute notes or other evidences of indebtedness.

That, in virtue of said agency, the defendant entered upon and assumed the exclusive management of said property and business, and took possession of all account books, title deeds, and papers thereto appertaining, and continued in the exclusive control, management and possession as said agent to the time said agency expired by the death of the principal, and since her said death has still continued in said exclusive possession, management and control. That though, on the expiration of said agency, it was incumbent on and the duty of said defendant to render to said heirs, all of whom, and their respective rights, were well known to him, a full, fair and correct account of his administration of said agency, and to surrender to them, all and singular, the said property, account books, title deeds, papers, etc., which had then come into his possession, and which your orators had well hoped he would have done, yet, on the expiration of his said agency, said defendant, notwithstanding amicable demand, refuses still so to do."

It is further alleged in the bill that the defendant claims that the said Sarah Ann Dorsey, by her last will and testament, bequeathed to [488] him all her property, for his own sole use and benefit, and thereby constituted him her sole heir and executor, and that, by virtue thereof, he is entitled in his own right to said estate; and the bill admits that on July 15, 1879, the defendant caused to be filed in the Second District Court for the Parish of Orleans an instrument written and signed by Sarah Ann Dorsey, of which the following is a copy:

"Beauvoir, Harrison Co., Miss., *Jan.* 4, 1878.

I, Sarah Ann Dorsey, of Tensas Parish, La., being aware of the uncertainty of life, and being now in sound health, in mind and body, do make this my last will and testament, which I write, sign and seal with my own hand, in the presence of three competent witnesses, as I possess property in the States of Louisiana, Mississippi and Arkansas. I owe no obligation of any sort whatever to any relation of my own. I have done all I could for them during my life; I, therefore, give and bequeath all my property,

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real, personal and mixed, wherever located and situated, wholly and entirely, without hindrance or qualification, to my most honored and esteemed friend, Jefferson Davis, ex-president of the Confederate States, for his own sole use and benefit, in fee simple, for ever; and I hereby constitute him my sole heir, executor and administrator. If Jefferson Davis should not survive me, I give all that I have bequeathed to him to his youngest daughter, Varina.

I do not intend to share the ingratitude of my country towards the man who is, in my eyes, the highest and noblest in existence.

In testimony whereof I sign this will, written with my own hand, in the presence of W. T. Watthall, F. S. Hewes and John C. Craig, subscribing witnesses, resident in Harrison County, Mississippi.

(Signed) Sarah Ann Dorsey.

At Mississippi City, on the fourth day of January, eighteen hundred and seventy-eight, the above named Sarah Ann Dorsey signed and sealed this instrument, and published and declared the same as and for her last will, and we, in her presence and at her request, and in the presence of each other, have hereunto subscribed our names as witnesses.

W. T. Watthall.
F. S. Hewes.
John C. Craig."

[489] But it is charged that the pretended will is not valid, but is void, because at the time of writing and signing the same Sarah Ann Dorsey was not of sound and disposing mind, because the same was written and signed by her when under the undue influence of the defendant, which undue influence excited and aggravated the causes depriving her of a sound and disposing mind, rendering her more susceptible to such undue influence, and because the motive and object inducing and controlling the testatrix to make the same were contrary to law.

The bill then proceeds to recite in detail a narrative of facts alleged in support of these charges affecting the testamentary capacity of Mrs. Dorsey and the integrity of the execution of the instrument as her testament; and alleges further that the defendant, "though in nowise ignorant of the premises hereinbefore set forth touching the nullity of said alleged will," nevertheless resorted to proceedings before the Second District Court for the Parish of Orleans for the probate thereof, "*ex parte* and without any previous notification thereof, judicial or extrajudicial." And it is thereupon further alleged:

"That, by said proceedings, it appears that on the 15th July, 1879, defendant, through his attorneys, filed his certain petition, in which he alleges that by the tenor of the last will and testament of Mrs. Sarah Ann Dorsey, dated 4th January, 1878, he is made the legatee and executor of the deceased; that said will had been on said day filed, and which he prays may be duly proved according to law; that thereupon an order was obtained that said will should be proved before the Judge of said court forthwith; that in accordance with said order, and on proof that said instrument was wholly written, dated, and signed in the handwriting of the testatrix (the only proof essential under the laws of Louisiana and the practice of its courts for an *ex parte* probate of an olographical will), and on the further (and unusual in such *ex parte* probate) sworn statement of two of the subscribing witnesses that "The testatrix, Mrs. Sarah Ann Dorsey, at the time of the execution of the aforesaid will, was of sound and disposing mind," a decree of probate, in usual form, was rendered, decreeing the probate and registry of the will and execution of its provisions, including the issuing of letters of executorship, on defendant's complying with the provisions of [490] law. That by said proceedings it further appears that without previously qualifying as executor or applying for an order of inventory, or in any manner showing to the court the amount of the indebtedness of the succession; without tendering any security to creditors or deferring his application for a reasonable time within which creditors might, should they desire, demand of him security, or heirs might contest the validity of the will, or any of its provisions, or the sufficiency of the testimony of its probate—proceedings not only usual, but, as to most of them, essential prerequisites to any demand by a testamentary heir or universal legatee to be put in possession of an estate; yet, notwithstanding this, said defendant, on the said 15th July, by representing to the court that the testatrix left no forced heirs and owed no considerable debts, that he was willing to accept and take the succession pure and simple, and that in his opinion 'there is no necessity of further administration,' obtained an order, 'That, as the sole and universal legatee of the late Sarah Ann Dorsey, petitioner, Jefferson Davis, be put in possession of all the property, real, personal and mixed, left by her and wherever situated.' That by said proceedings and decrees said second district court ceased to have jurisdiction over or regarding the administration of said succession and, owing to his citizenship and the limited jurisdiction of said court, defendant in the premises ceased to be in any manner further amenable or subject to its jurisdiction. That although said proceedings and decrees, as your orators are advised, are not *res judicata* against them, yet, nevertheless, in virtue thereof, said will and its order of probate are and will remain a muniment of title in defendant to all and singular the estate of said Sarah Ann Dorsey so long as said will and order of probate shall remain unannulled and unrevoked through judicial proceedings had contradictorily with said defendant."

And it is further alleged that this decree of probate was unadvisedly rendered and should be revoked, canceled, and recalled for the reasons rendering said will, of which it is the probate, null and void, and because the testimony given in support of the probate was false and erroneous, and because, even if uncontradicted, it would be insufficient.

It is further charged in the bill, that the de- [491] fendant also claims title to the estate in Mississippi called "Beauvoir," by virtue of a sale to him of said property and a conveyance thereof made by Sarah Ann Dorsey February 19, 1879, a copy of which is set out, which the appellants aver, however, to be null and void, for the same reasons on which they allege the will to be void, and because at the time the defendant occupied towards the said Sarah Ann Dorsey such a relation of trust and confidence, as

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that he had no right to purchase the property, and that his consent to the sale thereof to himself, without security for the payment of the price, which was below its value, was a violation of his trust, for which reasons, it is claimed, said sale should be canceled and annulled.

It is also alleged in the bill, "that owing to the complicated character of the said agency thus held by defendant, an account thereof, as herein demanded, cannot properly be taken except in a court of equity.

The prayer of the bill is as follows:

"And that it may be decreed that the said alleged will of the said Sarah Ann Dorsey, dated 'Beauvoir, Harrison County, Mississippi, January 4, 1878,' and filed in the second district court for the Parish of Orleans in the record of her succession under No. 41,376 of the docket, on the 15th July, 1879, be canceled and annulled as absolutely void and of no effect in law; and that the decree of probate of said alleged will, and the decree recognizing said defendant to be the sole and universal legatee of said Sarah Ann Dorsey, and as such ordered to be put in possession of all the property left by her, wherever situated, both rendered on said 15th July, 1879, and *in extenso* set forth in Exhibit B, be revoked, canceled and recalled as absolutely void and of no effect in law, and that the alleged sale and conveyance of property situate in Harrison County, Mississippi, by said Mrs. Dorsey to defendant, on the 19th February, 1879, and *in extenso* set forth in Exhibit C, be canceled and annulled as absolutely void and of no effect in law, in so far as either said will, decree or probate, decree of possession, or sale, in any manner to be pleaded by defendant as recognizing him as testamentary heir and universal legatee of said Sarah Ann Dorsey, or as a muniment of title or legal bar against your orators or their [492] co-heirs as her legal and sole heirs, and as such entitled to the ownership and possession of all and singular the property belonging to her estate, and which in any manner has come into the possession of said defendant, either as agent or trustee.

And that it be further decreed that said defendant come to a full and fair account of all and singular his acts and doings of his agency under the said act of procuration of May 10, 1878; and that it be decreed the defendant furnish to this honorable court a full and detailed statement of all properties, real and personal, of said Sarah Ann Dorsey, which came into his possession or under his control and management as her agent, or of which he has taken possession under and by virtue of said alleged will or said decrees of the second district court of July 15, 1879, or said alleged sale of February 19, 1879.

And that it be further decreed that said defendant at once surrender unto orators and, if so desired by them, jointly with their co-heirs, the possession of all said property, including all books, papers, evidences, title deeds, etc., which, belonging to said estate, at any time since May 10, 1878, has come into his possession.

And that defendant be perpetually enjoined and restrained by the decree of this court from setting up or pleading said alleged will, said decree of probate, said decree of possession and said act of sale, or any title, right or claim thereunder, against your orators as next of kin and legal heirs of said Mrs. Sarah Ann Dorsey.

And that it be further decreed that defendant make a full and true discovery and disclosure of and concerning all and singular, the transactions and matters appertaining to or connected with his said agency, as well during the lifetime as since the death of his principal. And that defendant may be decreed to come to an account with your orators, to be taken by and under the direction and decree of this honorable court, of all his dealings and transactions under the agency assumed by him under the act of procuration of May 10, 1878, or as trustee since Mrs. Dorsey's death, and to pay over to orators what shall be found due to them by defendant upon the taking of said account."

To this bill the defendant below filed a demurrer, which demurrer was sustained and a [493] decree rendered dismissing the bill without prejudice, to reverse which this appeal is prosecuted.

One of the main objects of this bill is to obtain from the defendant an account of the rents and profits received by him of the estate formerly belonging to Sarah Ann Dorsey and, in order thereto, a declaration that the legal title to that estate is vested in them as her heirs at law and next of kin, in a decree that the alleged will under which the defendant claims, and the probate thereof, are null and void. It is admitted that the defendant is in possession and that he holds adversely to the appellants; and there is a prayer in the bill for a recovery of the possession. In no respect does it differ from the frame of the bill in *Hipp* v. *Babin*, 19 How., 271 [60 U. S., XV., 633].

In that case the complainants sought by a bill in equity to recover possession of real estate to which they claimed title, as against a judicial sale, alleged to be void as against them, under which the defendants were in possession, and also for an account of rents and profits. The court refused to entertain the prayer for the recovery of the possession, on the ground that the remedy of the complainants at law was plain and adequate. It was urged that the bill would, nevertheless, lie for the account. To this *Mr. Justice* Campbell, delivering the opinion of the court, replied as follows:

"Nor can the court retain the bill under an impression that a court of chancery is better adapted for the adjustment of the account for rents, profits and improvements. The rule of the court is, that when a suit for the recovery of the possession can be properly brought in a court of equity, and a decree is given, that court will direct an account as an incident in the cause. But when a party has a right to a possession which he can enforce at law, his right to the rents and profits is also a legal right and must be enforced in the same jurisdiction. The instances where bills for an account of rents and profits have been maintained are those in which special grounds have been stated to show that courts of law could not give a plain, adequate and complete remedy. No instances exist where a person who had been successful at law has been allowed to file a bill for an account of rents and profits during the tortious possession held against him, or in which the complexity of the account has afforded a motive for the interposition of a court of chancery [494] to decide the title and to adjust the account."

This case was cited and its doctrine approved

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and applied in the recent case of *Root* v. *R. Co.*, 105 U. S., 189-212 [XXVI., 975-983].

In the present bill, no circumstances are alleged to except the case from the general rule. The defendant did not sustain towards the complainants at any time any relation of trust and confidence; he was not their agent; and any right which they can assert against him for the rents and profits of the estate is altogether dependent upon their title to that estate, and cannot arise until that has been established. The title which they assert to that is not an equitable, but a legal title, as heirs at law and next of kin of Sarah Ann Dorsey, and is to be established and enforced by a direct proceeding at law for the recovery of the possession which they allege the appellee illegally withholds. There is no ground, therefore, on which the bill can be supported for the account as prayed for.

It is contended, however, for the appellants that the bill ought to have been maintained, for the purpose of decreeing the invalidity of the will of Mrs. Dorsey and annulling the probate, so far at least as it gave effect to the will as a muniment of title.

It is well settled that no such jurisdiction belongs to the circuit courts of the United States, as courts of equity; for courts of equity, as such, by virtue of their general authority to enforce equitable rights and remedies, do not administer relief in such cases. The question in this aspect was thoroughly considered and finally settled by the decision of this court in the case of *Broderick's Will*, 21 Wall., 503 [88 U.S., XXII., 599]. It was elaborately considered and finally determined in England by the House of Lords in the case of *Allen* v. *McPherson*, 1 H. of L. Cas., 191. In that country, it was undoubtedly the practice of the courts of chancery to entertain bills to perpetuate the testimony of the witnesses to a will devising lands, at the suit of the devisee against the heir at law, it being alleged that the latter disputed its validity; and this, as Blackstone says, 3 Bl. Com., 450, "is what is usually meant by proving a will in [495] chancery." It is also true, that a bill in equity, in the nature of a bill of peace, or *quia timet*, would lie at the suit of a devisee against the heir at law, in which the validity of the will having been sustained by the verdict of a jury on the trial of an issue, *devisavit vel non*, a decree might be passed establishing the will and the title of the devisee under it, and perpetually enjoining the heir at law from setting up any claim of title against it. Story, Eq. Jur., section 1447. The heir at law, it was formerly held, was not entitled to file such a bill, for he could bring his action of ejectment and thus had his remedy at law; although such a bill would be entertained, if not objected to, or if there were any impediments to the proper trial of the merits on such an action. *Bootle* v. *Blundell*, 19 Ves., 494. The modern rule is "that the usual and generally more convenient practice is to enable the heir to proceed by ejectment, but that it is open to the court to direct an issue, if from any cause that course appears desirable." *Boyse* v. *Rossborough*, 6 H. of L. Cas., 1-42. The manifest ground on which courts of equity in England proceeded, in declining the jurisdiction in question was, that as to wills of personalty, the jurisdiction of courts of probate was exclusive, and that as to devises, the remedy at law was plain, adequate and complete. In this country, from a time anterior to the adoption of the Constitution, the same distinction of jurisdiction has existed, all probate and testamentary matters having been confided either to separate courts of probate, under different denominations, or a special jurisdiction over them having been vested in courts having jurisdiction also over other subjects. For reasons growing out of our policy, which subjected real estate equally with personalty to the payment of debts, and in other respects freed it from feudal fetters, the probate jurisdiction was extended, but with varying effect in different States, over wills of land, as well as of personal chattels, preserving, however, in some form, the rights and remedies of heirs at law to contest their validity. But it was almost universally recognized that no will could have effect, for any purpose, until admitted to probate and record by the local authority, although in some States, while the orignal probate was conclusive until set aside, for all purposes and as to all persons, in [496] others it was conclusive, while in force at all, only as to personalty and for the purposes of administration, and not as a muniment of title as to devises. In States where it is held to have a conclusive force, formal modes are prescribed of contesting the validity of the instrument as a will, and of the regularity and legality of the probate, by suits regularly instituted solely for that purpose, and *inter partes;* but such proceedings are generally regarded as the exercise of probate jurisdiction, even if administered in courts other than that of original probate, but the judgment, as in other cases *inter partes*, binds only parties and privies. In those States where the probate, although conclusive while in force as to personalty and for the purposes of administration merely, is only *prima facie* evidence where the will is relied on as a muniment of title to real estate, its validity may become a question to be tried whenever and wherever a litigation arises concerning real property, the title to which is affected by it, just as in England, in actions of ejectment between the heir and the devisee, or those claiming through them. In a State, of which New York is an example, where, by its law, its own courts of general civil jurisdiction are authorized thus incidentally and collaterally to try and determine the question of the validity of a will and its probate in a suit involving the title to real property, there can be no question but that the Circuit Courts of the United States might have jurisdiction of such a suit by reason of the citizenship of the parties, and in exercising it would be authorized and required to determine, as a court administering the law of that State the same questions. And where provision is made by the laws of a State, as is the case in many, for trying the question of the validity of a will already admitted to probate by a litigation between parties in which that is the sole question, with the effect, if the judgment shall be in the negative, of rendering the probate void for all purposes as between the parties and those in privity with them, it may be that the courts of the United States have jurisdiction, under existing provisions of law, to administer the remedy and establish the right in a case where the controversy is wholly between citizens of different States. The judicial power of the United

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[497] States extends, by the terms of the Constitution, "to controversies between citizens of different States;" and on the supposition, which is not admitted, that this embraces only such as arise in cases "in law and equity," it does not necessarily exclude those which may involve the exercise of jurisdiction in reference to the proof and validity of wills. The original probate, of course, is mere matter of state regulation, and depends entirely upon the local law; for it is that law which confers the power of making wills, and prescribes the conditions upon which alone they may take effect; and as, by the law in all the States, no instrument can be effective as a will until proved, no rights in relation to it, capable of being contested between parties, can arise until preliminary probate has been first made. Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte* and merely administrative, it is not conferred and it cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties. It has been often decided by this court that the terms "law" and "equity," as used in the Constitution, although intended to mark and fix the distinction between the two systems of jurisprudence as known and practiced at the time of its adoption, do not restrict the jurisdiction conferred by it to the very rights and remedies then recognized and employed, but embrace as well, not only rights newly created by Statutes of the States, as in cases of actions for the loss occasioned to survivors by the death of a person caused by the wrongful act, neglect, or default of another, *R. Co.* v. *Whitton*, 13 Wall., 287 [80 U. S., XX., 577]; *Dennick* v. *Railroad Co.*, 103 U. S., 16 [XXVI., 439], but new forms of remedies to be administered in the courts of the United States, according to the nature of the case, so as to save to suitors the right of trial by jury in cases in which they are entitled to it, according to the course and analogy of the common law. *Ex parte Boyd*, 105 U.S., 647 [XXVI., 1200]; *Boom Co.* v. *Patterson*, 98 U. S., 406 [XXV., 207].

In *Hyde* v. *Stone*, 20 How., 170-175 [61 U.S., XV., 874, 875], it was said by *Mr. Justice* Campbell, delivering its opinion, that "The court has [498] repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power."

In *Payne* v. *Hook*, 7 Wall., 425 [74 U.S., XIX., 260], it was decided that the jurisdiction of the Circuit Court of the United States, in a case for equitable relief, was not excluded because, by the laws of the State, the matter was within the exclusive jurisdiction of its probate courts; but, as in all other cases of conflict between jurisdictions of independent and concurrent authority, that which has first acquired possession of the *res*, which is the subject of the litigation, is entitled to administer it. *Williams* v. *Benedict*, 8 How., 107; *Bank* v. *Horn*, 17 How., 160 [58 U. S., XV., 71]; *Yonley* v. *Lavender*, 21 Wall., 276 [88 U. S., XXII., 536]; *Taylor* v. *Carryl*, 20 How., 583 [61 U. S., XV., 1028]; *Freeman* v. *Howe*, 24 How., 454 [65 U. S., XVI., 750]; *Hook* v. *Payne*, 14 Wall., 255 [81 U. S., XX., 889].

It was said by this court in *Gaines* v. *Fuentes*, 92 U. S., 10-18 [XXIII., 524-527], *Mr. Justice* Field delivering its opinion, that "The Constitution imposes no limitation upon the class of cases involving controversies between citizens of different States, to which the judicial power of the United States may be extended; and Congress may, therefore, lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the Federal Judiciary." And, referring to the nature of suits which, as in that case, sought to annul the probate of a will and adjudge it to be invalid, the court further said (p. 20): "And if by the law obtaining in the State, customary or statutory, they can be maintained in a state court, whatever designation that court may bear, we think they may be maintained by original process in a Federal Court, where the parties are, on the one side, citizens of Louisiana; and, on the other, citizens of other States."

As that was a case in which the sole question decided was the right of the defendant to remove the cause from the state court to the Circuit Court of the United States, under the Act of March 2, 1867, 14 Stat. at L., 558, it was assumed, and not decided, that the said suit brought in the state court was one which, under the laws of the State, its courts were authorized to entertain for the purpose of granting the relief prayed for. The point decided was, that if it were it might properly be transferred to a court of the United States. [499]

It remains, therefore, in the present case to inquire whether the complainants are entitled, under the laws of Louisiana, to draw in question, in this mode and with a view to the decree sought, the validity of the will of Sarah Ann Dorsey and the integrity of its probate.

An examination of the decisions of the Supreme Court of Louisiana on the subject will disclose that a distinction is made in reference to proceedings to annul a will and its probate, according to the objects to be accomplished by the judgment and the relation of the parties to the subject. If the administration of the succession is incomplete and *in fieri*, and the object is to alter or affect its course, the application must be made to the court of probates, which, in that case, has possession of the subject and exclusive jurisdiction over it. If, on the other hand, the succession has been closed, or has proceeded so far that the parties entitled under the will have been put in possession of their rights to the estate, then the resort of adverse claimants must be to an action of revendication in the courts of general jurisdiction, in which the legal title is asserted as against the will claimed to be invalid, making an issue involving that question.

In *O'Donogan* v. *Knox*, 11 La., 384, the Supreme Court of Louisiana said: "It appears then that the jurisdiction of the courts of probate is limited to claims against successions for money, and that all claims for real property appertain to the ordinary tribunals and are denied to courts of probate. The plaintiff in this case was therefore compelled, in suing for the property

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of the succession, to seek redress in the district court, and whether she attacked the will, or the defendant set it up as his title to the property, [500] the court having cognizance of the subject must of necessity examine into its legal effect. And although the will may have been admitted to probate and an order given for its execution, yet these are only preliminary proceedings necessary for the administration of the estate, and not a judgment binding on those who are not parties to them. When, therefore, in an action of revendication a testament with probate becomes a subject of controversy, it will surely not be contended that a court of ordinary jurisdiction, having cognizance of the principal matter, shall suspend its proceedings until another court of limited power shall pronounce upon the subject; for in that case the ordinary courts would submit to another tribunal the decision of the main question in the cause, without right of trial by jury, and would have little else to do than to comply with its decree."

In *Robert* v. *Allier*, 17 La., 4, the same court said: "On the question of jurisdiction arising from the state of the case, we understand the distinction repeatedly made by this court to be that whenever the validity or legality of a will is attacked and put at issue (as in the present case) at the time that an order for its execution is applied for, or after it has been regularly probated and ordered to be executed, but previous to the heirs or legatees coming into possession of the estate under it, courts of probate alone have jurisdiction to declare it void, or to say that it shall not be executed. This is the purport and extent of the decision in the case of *Lewis* v. *Executors*, 5 La. 387; C. of Pr., art. 924, section 1. But when an action of revendication is instituted by an heir at law against the testamentary heir or universal legatee who has been put in possession of the estate and who sets up the will as his title to the property, district courts are the proper tribunals in which such suits must be brought [*Massie* v. *Pierre*] 6 Mart. (N. S.), 268 [*Sharp* v. *Knox*] 2 La. 23; [*O'Donogan* v. *Knox*] 11 La. 388."

In *Rachal* v. *Rachal*, 1 Rob. (La.) 115, it is also said: "We cannot consider the question of jurisdiction as an open one. The doctrine is now well settled, that in a suit for property, whether the plaintiff attacks the will under which it is held or the defendant sets it up as his title to the property claimed, the courts of ordi- [501] nary jurisdiction before whom the principal matter, to wit: the action of revendication is brought, must of necessity pronounce on the validity of the will which is thus drawn in question. The proceedings had in the court of probate for the settlement of the estate, such as the probate of the will and the order given for its execution, cannot have the effect contended for by the appellant; they cannot be considered as a judgment binding on the plaintiffs, who were not parties to them."

In *Succession of Duplessis*, 10 *Rob.*, 193, it is said:

"This court has often held that the admission of a will to probate, and the order given for its execution, are only preliminary proceedings; necessary for the administration of the estate, and do not amount to a judgment binding on those who are not parties thereto." To the same effect are *Succession of Dupuy*, 4 La. Ann., 570; *Sophie* v. *Duplessis*, 2 La. Ann., 724; *Abeton* v. *Abeton*, 16 La. Ann., 137.

In *Sharp* v. *Knox* [*supra*] it was said: "The petitioner himself shows that the defendant holds the property claimed from him under a will and confirmatory act, which she seeks to set aside. This she cannot effect except in a court of ordinary jurisdiction, *i. e.*, in the district court."

In *Hoover's Succession* v. *York*, 30 La. Ann., 752, the suit was simply to annul a will, and the probate of a will, and to have certain persons plaintiff declared heirs and entitled to take as such. This, it was declared, was purely a probate proceeding and cognizable alone by the parish court in which the succession was opened. "It was a matter incidental to the opening and settlement of the succession."

And the same principle governed the decision in *Blasini* v. *Blasini's Succession*, 30 La. Ann., 1388. That was an application in the probate court on the part of forced heirs, demanding that their rights as such, known under the law of Louisiana as their *legitime*, of which their ancestor could not deprive them by his testament, should be recognized, so that they might receive their share of the succession. The ef- [502] fect of allowing it would be, not to annul or invalidate the will, but merely to displace it, in the administration of the succession, to the extent required by their indefeasible interest in it. It was objected to the jurisdiction of the court that the succession had been closed by a previous judgment sending the widow and testamentary heir into possession; but the exception was overruled on the ground that the suit was of probate jurisdiction.

In *Gibson* v. *Dooley*, 32 La. Ann., 959, an action to annul a will, it was held, might be brought in the parish court, although the succession had been closed by a delivery of the property to the instituted heir. The rule, as laid down in *Robert* v. *Allier*, 17 La., 15, was cited and approved, but was held not to apply. The reason was given in these words: "Here no action of revendication was instituted, but simply a suit for the nullity of the will. There is no prayer for ejectment or that plaintiffs may be put into or quieted in their possession of property claimed under the will."

By the law of Louisiana, C. of Pr., art. 4, a real action is given, which relates to claims made on immovable property, or to the immovable rights to which they are subjected, the object of which is the ownership or the possession of such property, and, when prosecuted by one having the title against the person in possession, is called the petitory action, and is the proper action for the recovery of an universality of things, such as an inheritance. C. of Pr. art. 12. It is an action of revendication, C. of Pr. art. 43, and is the proper one to be brought for the purpose of asserting the legal title and consequent right of possession of the heir at law to the succession, when another is in possession under claim of title by virtue of a will admitted to probate, as is abundantly shown by the citations already made from the decisions of the Supreme Court of Louisiana. We entertain no doubt that this action can be brought in a proper case as to parties in the Circuit Court of the United States.

The Louisiana Code of Practice, art. 556, *et seq.*, provides for an action of nullity, whereby [503]

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definitive judgments may be revised, set aside, or reversed, which may proceed either on the ground of vices of form or upon the merits, as that the judgment was obtained through fraud, and is a separate action, commenced by petition, the adverse parties being cited as in other suits. This action, with reference to the jurisdiction of the courts of the United States, was the subject of consideration in *Barrow* v. *Hunton*, 99 U. S., 80 [XXV., 407]; but the present is not an action of that description, for the relief prayed for is a recovery of the possession of the inheritance, which, we have seen, must be prosecuted in an action of revendication. Whether the probate of a will is a definitive judgment which can be the subject of an action of nullity under these provisions of the Code of Practice, is a question, therefore, which we are not called upon to discuss or decide. The case of *Gaines* v. *Fuentes*, 92 U. S., 10 [XXIII., 524], was such an action of nullity, but as before remarked, the point decided in that case was not that it would lie, according to the law of Louisiana, but that if it would lie in the state court it was removable to the Circuit Court of the United States, because it presented a controversy wholly between citizens of different States.

The present suit is not an action of nullity, because it prays for the recovery of possession of the inheritance, to which the appellants claim the legal title as heirs at law of Sarah Ann Dorsey. That claim, as has been shown, is properly the subject of an action of revendication, which furnishes a plain, adequate and complete remedy at law and, consequently, constitutes a bar to the prosecution of a bill in chancery.

There is nothing left, therefore, as a ground of support for the present bill, except so much of the case made by it as rests upon the prayer for the cancellation of the sale and conveyance of the Beauvoir estate by Mrs. Dorsey in her lifetime. That relief is claimed in part on the ground of a constructive fraud, growing out of the defendant's relation to her at the time as a confidential agent; but we see nothing in the circumstances as detailed to forbid such a transaction between the parties, and the charges of actual fraud and undue influence applicable to this sale, considered as detached from the rest of the case, are not of such character, even [504] when admitted by the demurrer, as in law would justify a rescission. And as the case for relief as to this sale is not made independently, but only as part of the whole case intended to be presented by the bill, we conclude that it must fail with the rest.

The demurrer was rightly sustained and the bill properly dismissed.

The decree is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—113 U. S., 78, 405.

ELIZABETH M. TOWNSEND, *Appt.*, *v.* JAMES T. LITTLE ET AL.

(See S. C., Reporter's ed., 504-512.)

Constructive notice by possession—requisites of—purchaser for value—territorial law.

1. A polygamous wife occupying premises with her so-called husband, the apparent owner, does not have such possession of the property as to give constructive notice to a *bona fide* purchaser, of any claim she may have thereto by virtue of a secret agreement with the owner.

2. Where possession is relied on as giving constructive notice, it must be open and unambiguous, and not liable to be misunderstood or misconstrued; and must be sufficiently distinct and unequivocal to put the purchaser on his guard.

3. A purchaser for a valuable consideration, without notice of a prior equitable right, obtaining the legal estate at the time of his purchase, is entitled to priority in equity as well as at law.

4. The Act of the territorial Legislature of Utah, providing for the conveyance to occupants, by the mayor, of lands included in the town site, did not require witnesses to his deed. This class of deeds is not controlled by the law of the Territory requiring deeds generally to be executed with two witnesses.

[No. 132.]

Submitted Nov. 26, 1883. Decided Dec. 10, 1883.

APPEAL from the Supreme Court of the Territory of Utah.

The history and facts appear in the

Statement of the case by *Mr. Justice* **Woods:**

By an Act of Congress passed March 3, 1867, entitled "An Act for the Relief of the Inhabitants of Cities and Towns upon the Public [505] Lands," 14 Stat. at L., 541, it was provided that whenever any portion of the public lands of the United States had been, or should thereafter be, settled upon and occupied as a town site, it should be lawful for the corporate authorities of the town to enter at the proper land-office, at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their several interests, and that the execution of said trust, as to the disposal of the lots of said town, etc., should be conducted under such rules and regulations as might be prescribed by the Legislature of the State or Territory in which the same might be situated.

In pursuance of the authority thus granted, the Legislature of the Territory of Utah, by an Act passed February 17, 1869, Compiled Laws of Utah, 1876, page 379, provided that whenever the corporate authorities of any town should enter any public land occupied as a town site, such corporate authorities should give notice thereof, by publication in a newspaper for three months; whereupon, any person claiming to be the rightful occupant, or entitled to the occupancy or possession of any lot or part thereof, should, within six months after the first publication of the notice, file in the probate court of the county a statement in writing, containing an accurate description of the particular parcel of land in which he might claim to have an interest, and the specific right, interest or estate therein which he claimed to be entitled to receive; and that the filing of a statement should be considered notice to all persons claiming any interest in the lands described therein of the claim of the party filing the same; and that all persons failing to file such statement within the time limited by the Act, should be forever barred the right of claiming or receiving such land, or any interest or estate therein, or in any part, parcel or share thereof, in any court of law or equity. The Act further provided that if there were no adverse claimants to a particular lot or parcel of land, the Probate Court should give notice to the person filing the statement claiming the same to pro-

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duce his proofs in support of his statement, and the court, if satisfied from the proofs of the validity of such claim, should cause judgment [506] to be entered of record, and certify the fact to the mayor of the town, who should make to the party claimant a deed for the tract or parcel of land so adjudged to him.

The appellant, Elizabeth M. Townsend, brought this suit in the District Court for the Third Judicial District of the Territory of Utah, by which she claimed title under the provisions of the Act of Congress and the Act of the Legislature of the Territory of Utah, to the undivided half of a certain lot in the City of Salt Lake, which was particularly described in her bill of complaint.

She alleged that in the year 1867 she and the defendant, James Townsend, went into the actual possession of said premises; that from the date just mentioned until March 1, 1878, they jointly occupied and improved said property and kept a hotel thereon, known as the Townsend House; that they occupied said premises as two persons for their mutual and equal benefit, mutually acknowledging each other's interest; that said premises formed part of a tract of land in Salt Lake City, in the Territory of Utah, subject to entry, which, on November 21, 1871, was in fact entered at the United States land-office in Salt Lake City by Daniel H. Mills, mayor of said city, in trust for the occupants thereof, under the Act of Congress aforesaid; that at the date of said entry the appellant was, as to a half interest in said premises, one of the persons for whose relief said Act of Congress was passed, and she and said Townsend were conclusively entitled to a conveyance of said premises from the mayor on complying with said rules and regulations; that on May 1, 1873, Townsend obtained a deed from the mayor conveying the entirety of said premises to himself in fee, without the knowledge of appellant, and she was not informed thereof until a subsequent year; that when it came to her knowledge she requested Townsend to convey to her one half of said premises, which he promised to do, admitting her right to the same, and that upon the obtaining of such deed from the mayor by Townsend a trust resulted in her favor, binding Townsend to convey to her the one undivided half of said premises, which he has never done. The bill further alleged that the defendants Hooper, Jennings and Roberts [507] claimed some interest in the premises, adverse to appellant, as purchasers, incumbrancers or otherwise, but that their rights were only such as they had questionably derived from Townsend, with notice of appellant's possession and occupancy of said premises, and her consequent rights, and subject thereto. The bill prayed that the purchase of said premises by Townsend might be declared as to one half thereof, as a purchase in trust by him for appellant, and that Townsend, Hooper and Jennings might be required to convey the same to her.

The defendant, Townsend, filed no answer. Roberts answered disclaiming any interest in the premises. Defendants, Hooper and Jennings, filed a joint answer, in which they denied all the averments of the petition, except that the premises in controversy were situate within the town site of Salt Lake City and were subject to entry by the mayor under the Act of Congress, and that Townsend had obtained a deed from the mayor for the whole of said premises. They averred that they were purchasers of said premises for a valuable consideration, without notice of the claim of appellant, and that they had no notice thereof until the bringing of this suit, and that appellant and Townsend had conspired to bring and maintain this suit for the purpose of defrauding them, well knowing that the claim of appellant was false.

The district court made a finding, from which the following facts appeared:

In March, 1865, the defendant, James Townsend, took possession of the premises in question, having purchased the possessory right thereto of one Clawson, who conveyed the same to him for the price of $6,000. Afterwards, in the years 1872 and 1873, he purchased the rights of other claimants for $3,000. All the purchase money for these claims was paid by Townsend out of his own means. In the fall of the year 1866 he went on the premises to reside, taking with him his lawful wife, whom he had married in 1828, and the appellant as a plural or polygamous wife. He kept a hotel on the premises from that date until February, 1878, which was known as the Townsend House and was carried on in his name solely, and he was represented to the public by every advertising agency as the sole proprietor. During all this time he and the [508] appellant lived together on the premises as husband and polygamous wife, the appellant taking an active part in conducting the business of the hotel. The lawful wife of Townsend also lived with him as such on the same premises until her death in 1870.

In the fall of the year 1867 Townsend and appellant entered into a verbal agreement with each other, whereby Townsend stipulated, that if appellant would continue to live at the Townsend House and assist in carrying on the business of the hotel as she had theretofore done, he would convey to her one half interest in the real and personal property of the hotel.

During the fall of the same year, Townsend took another polygamous wife, but ostensibly continued his cohabitation with the appellant as his polygamous wife, the motive of both being to conceal from the public any change in their relations to each other.

On November 21, 1871, the Mayor of Salt Lake City entered in the land-office and paid for the lands embraced in the town site of Salt Lake City in trust for the occupants thereof, and received a patent therefor on June 1, 1872. The mayor gave for the period of three months the public notice required by law of such entry, the first publication being on November 24, 1871. Within the time allowed by law for occupants to assert their claims to the lands embraced in said town site, Townsend applied for a conveyance to himself of the premises in controversy, and in due course of proceedings in the probate court was adjudged to be the rightful occupant thereof and entitled to a deed therefor. Whereupon the mayor, on May 1, 1873, executed and delivered to him a deed, under his corporate seal of the city, purporting to convey to him the whole of said premises in fee in execution of said trust, but said deed was without witnesses.

The appellant did not, within six months after the first publication of notice of entry of said town site by the mayor, or at any time, make

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or deliver to the clerk of the probate court of said county, any description of said premises, or of any right, interest or estate claimed by him therein, or make any claim as an occupant or otherwise to a conveyance of any interest [509] therein under the town site laws.

After his purchase of the possessory right to said premises, and before the fall of 1868, Townsend expended in the erection of buildings thereon the sum of $16,000. On October 1, 1868, he borrowed of defendant, Hooper, the sum of $5,000, and on December 8, 1868, a further sum of $5,000. For these sums he executed his several notes and deeds of trust on the premises to secure the same.

On September 24, 1873, the indebtedness of Townsend to Hooper on these notes amounted to $12,500, and on that day he renewed the same by giving Hooper his three notes, two for $5,000 each and one for $2,500, due in one year, and at the same time executed a deed of trust to trustees to secure the same.

On October 10, 1876, Townsend gave his note to defendant Roberts for $5,000, payable in one year, and secured it by a deed of trust upon the same premises. This note afterwards by assignment became the property of defendants Hooper and Jennings.

Afterwards, Townsend contracted other debts, which either by deed of trust or judgment, became liens on said premises, and by various assignments the defendants, Hooper and Jennings, became the owners and holders of all the debts secured by lien on said premises. On April 10, 1878, the sum of $16,425 was due on the notes executed by Townsend to Hooper on September 24, 1873, and the trustees named in the deed of trust to secure the same, in pursuance of the power thereby conferred, sold said premises to defendant, Jennings, for $22,500, which sum he paid and it was applied to the discharge of the several liens on the property in the order of their priority. Jennings afterwards conveyed an undivided half of the premises to his co-defendant, Hooper.

During all their transactions with Townsend the defendants Hooper, Jennings and Roberts dealt with him, prior to the proceedings in the probate court under the town site law, as the sole owner of said premises, as against every one save the United States, and subsequently thereto as absolute sole owner, without any actual or constructive notice of any claim of the [510] appellant, and neither the trustees in said trust-deed, nor the defendants Hooper, Jennings and Roberts, nor any of them, had any notice of the claim of the appellant to any interest in or right to said premises until after the bringing of this suit.

Upon this finding of facts, the district court dismissed the bill of complaint. Its decree was carried to the Supreme Court of the Territory by appeal, where it was affirmed. The decree of the latter court affirming the decree of the district court is brought under review by the present appeal.

Messrs. **J. G. Sutherland, James H. Mandeville,** *J. R. McBride,* and *Arthur Brown,* for appellant.

Messrs. **P. L. Williams** and *Legrand Young,* for appellees.

Mr. Justice **Woods** delivered the opinion of the court:

The facts found by the court leave no ground for the appellant's case to rest on. Whatever rights, if any, she might have as against Townsend, had he continued the owner of the premises in controversy, she certainly has none against innocent *bona fide* incumbrancers and purchasers, without notice of her claim. The arrangement between Townsend and the appellant was a secret agreement known only to themselves and, as found by the court, they, after the agreement, continued to live together, as they had previously done, in order that the public might not know that any change had taken place in their relations to each other. A secret agreement, as between herself and Townsend, which they purposely kept concealed, cannot be set up against *bona fide* purchasers without notice. The finding of the court that neither Hooper, Jennings nor Roberts had notice, either actual or constructive, of appellant's alleged rights, cuts up by the roots all claim on her part as against them to the premises in controversy.

Appellant contends, however, that her joint physical occupancy with Townsend, of the premises, as found by the court, was constructive notice to the defendants, Hooper and Jennings, of her alleged rights, and that they, therefore, purchased in subservience thereto. When [511] Townsend, in 1866, entered into possession of the premises which he had previously bought with his own money, he took with him his lawful wife and the appellant, his polygamous wife. At that time it is not disputed that he was the sole occupant under the Act of Congress. The appellant was no more a joint possessor at that time than any servant or guest of the hotel. A secret agreement subsequently entered into between Townsend and the appellant, and purposely kept concealed from the public by them, cannot be held to change the nature of Townsend's occupancy, so as to affect with constructive notice persons who had no actual notice.

Constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted. *Plumb* v. *Bluitt*, 2 Anst., 438; *Kennedy* v. *Green*, 3 My. & K., 719. Where possession is relied on as giving constructive notice, it must be open and unambiguous, and not liable to be misunderstood or misconstrued. *Ely* v. *Wilcox*, 20 Wis., 523; *Patten* v. *Moore*, 32 N. H., 384; *Billington* v. *Walsh*, 5 Binn., 132. It must be sufficiently distinct and unequivocal so as to put the purchaser on his guard. *Butler* v. *Stevens*, 26 Me., 484; *Wright* v. *Wood*, 23 Pa., 120; *Bogue* v. *Williams*, 48 Ill., 371. As said by Strong, *J.*, in *Meehan* v. *Williams*, 48 Pa., 238, what makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell. See, also, *Holmes* v. *Stout*, 3 Green, Ch., 492; *McMechan* v. *Griffing*, 3 Pick., 149; [*Hanrick* v. *Thompson*], 9 Ala., 409.

Tested by these rules, it is plain that the physical occupancy of the premises in question by appellant, as found by the district court, was not such possession as to put a purchaser on inquiry and charge him with constructive notice. On the contrary, viewed in connection with the other facts found, it was such as to mislead him.

The case of appellant is, therefore, an attempt to set up a secret trust as against *bona fide* pur-

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chasers for value without notice. But nothing is clearer than that a purchaser for a valuable consideration, without notice of a prior equi-
[512] table right, obtaining the legal estate at the time of his purchase, is entitled to priority in equity as well as at law, according to the well known maxim, that when equities are equal the law shall prevail. *Williams* v. *Jackson* [*ante*, 529]; *Willoughby* v. *Willoughby*, 1 T. R., 763; *Charlton* v. *Low*, 3 P. Wms., 328; *Ex parte Knott*, 11 Ves., 609; *Tildesley* v. *Lodge*, 3 Sm. & Giff., 543; *Stine* v. *Gough*, 1 Ball & B., 436; *Bowen* v. *Evans*, 1 Jones & La T., 264; *Vattier* v. *Hinde*, 7 Pet., 252. This is the case of defendants Hooper and Jennings.

The appellant contends, however, that, as the deed, executed by the Mayor of Salt Lake City to Townsend, was without witnesses as required by the general law of the territory, it did not convey the legal title. But the Act of the Territorial Legislature, providing for the conveyance to occupants, by the mayor, of lands included in the town site, did not require witnesses to his deed. It merely directed that "deeds of conveyance for the same shall be executed by the mayor of the city or town under the seal of the corporation." According to the well settled rule, that general and specific provisions, in apparent contradiction, whether in the same or different statutes and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general, this provision for the execution of a particular class of deeds is not controlled by the law of the territory requiring deeds generally to be executed with two witnesses. *Pease* v. *Whitney*, 5 Mass., 380, *Nichols* v. *Bertram*, 3 Pick., 342; *State* v. *Perrysburg*, 14 Ohio St., 472; *London, etc., Railway* v. *Wandsworth Board of Works*, L. R. 8 C. P., 185; Bishop on the Written Laws, sec. 112 *a*. The deed of the mayor to Townsend having been executed in conformity with the special Act, was, therefore, valid and effectual to convey the legal title.

The result of these views is that the appellant has failed to show herself entitled to the relief prayed in her bill. *The decree of the Supreme Court of the Territory of Utah, affirming the decree of the District Court by which her bill was dismissed, must be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[513] UNITED STATES, *Plff. in Err.*,

v.

FRANK L. JONES, Admr. of GEORGE J. PUMPELLY, Deceased, ET AL.

(See S. C., Reporter's ed., 513-521.)

Right of eminent domain—constitutional provision—right of General Government—compensation.

1. The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and requires no constitutional recognition.

2. The provision found in the Fifth Amendment to the Federal Constitution, and in the Constitutions of the several States, for just compensation for the property taken, is merely a limitation upon the use of the power.

3. The right of eminent domain vested in the General Government cannot be transferred to a State, any more than its other sovereign attributes; but the proceeding to ascertain the compensation for private property taken may be prosecuted as the legislative power may designate, by a tribunal created directly by an Act of Congress, or one already established by the State.

4. The provisions of an Act of Congress, that the compensation for private property taken for public use shall be ascertained in the mode prescribed by the laws of a State, is a consent to such proceedings as the state laws authorize for the condemnation of the property.

[No. 88.]

Submitted Oct. 11, 1883. Decided Dec. 10, 1883.

IN ERROR to the Supreme Court of the State of Wisconsin.

The history and facts of the case fully appear in the opinion of the court.

Mr. S. F. Phillips, Solicitor-Gen., for plaintiff in error.

Messrs. **Norman S. Gilson, Geo. E. Southerland,** for defendants in error.

Messrs. B. J. Stevens and *E. Mariner, Attys. of the Canal Co.*, filed a brief for defendants in error.

Mr. Justice **Field** delivered the opinion of the court:

By an Act of Congress passed on the 8th of August, 1846 [9 Stat. at L., 83], certain lands were ceded to Wisconsin, to aid in improving the navigation of Fox and Wisconsin Rivers, in that State, and in constructing a canal to unite the rivers, and thus form a connection between the waters of Green Bay, in Lake Michigan, and the waters of the Mississippi. Statutes of 1846, ch. 170.

The State accepted the cession of the lands, and in August, 1848, created a Board of Public Works, under whose superintendence it placed the construction of the improvement contemplated. The work, however, was not done under that board; the means furnished proved inadequate. Various other attempts, therefore, were made by different companies created by the State to carry out the improvement, and in furtherance of it Congress ceded additional lands; but none of these attempts proved successful. The improvement was only partially made. [514]

In 1866, by various transfers, which it is unnecessary to detail, the lands ceded by Congress, and the works of improvement, including the locks, dams, canals and other structures connected with it, became the property of a corporation known as the Green Bay and Mississippi Canal Company.

In July, 1870, Congress passed an Act "For the improvement of water communication between the Mississippi River and Lake Michigan by the Wisconsin and Fox Rivers;" by which, among other things, the Secretary of War was authorized to ascertain the sum which ought to be paid to the Green Bay and Mississippi Canal Company for the transfer of its property and rights of property in the line of water communication between Wisconsin River and the mouth of Fox River, including its locks, dams,

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NOTE.—*Eminent domain; the right to payment for private property taken for public use, generally recognized; Fifth Amendment to Constitution applies only to Federal Government, and not to States.* See *note* to Withers v. Buckley, 61 U. S., XV., 516.

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canals and franchises, or so much thereof as, in his judgment, should be needed; and for that purpose to join with the company in the appointment of a board of arbitrators. In making their award, the arbitrators were required to take into consideration the amount of money obtained from the sale of lands ceded by Congress to aid in the construction of the water communication, which was to be deducted from the valuation found by them. 16 Stat. at L., 189, ch. 210.

Under this Act arbitrators were appointed, the value of the works ascertained and an award made, the amount of which having been paid, the entire property was, in 1872, conveyed to the United States. Since then the United States have been the owners and in possession of the works, and Congress has made various appropriations to carry on and complete the improvement.

The arbitrators, in making their award, proceeded upon the principle that the United States should pay for the works what their construction had cost the State, and the companies succeeding to its interests, after making a reasonable abatement for wear and decay, and deducting the amount obtained from the sale of the ceded lands. Some of the dams constructed had caused the lands of several parties to be overflowed, and in the estimate of the amount to be paid by the United States no account was [515] taken of the liability of the company for such damages. The question, therefore, soon arose whether the payment of these damages devolved upon the United States; and this question was submitted by the Committee on Commerce of the House of Representatives to the Secretary of War, and by him was referred to the Assistant Judge Advocate-General. That officer held that liability for the damages incurred from the flowage of water on the lands of others, caused by the works constructed, followed the property transferred and devolved on the United States. Upon this opinion a bill was prepared for the assumption, by them, of the company's liability for such damages, which was passed by Congress and approved on the 3d of March, 1875 [18 Stat. at L., 506]. This Act provided that whenever, in the prosecution and maintenance of the improvement mentioned, it should become necessary or proper, in the judgment of the Secretary of War, to take possession of any lands, or the right of way over any lands, for canals or cut-offs, or to use any earth, quarries or other material adjacent to the line of improvement and needful for its prosecution or maintenance, the officers in charge of the works might, in the name of the United States, take possession of and use the same, after having first paid or secured to be paid, the value thereof, "which may have been ascertained in the mode provided by the laws of the State" wherein the property lay.

The Act also provided, that in case any lands or other property were then or should be overflowed or injured, by means of any part of the works of the improvement theretofore or thereafter constructed, for which compensation was then, or should become legally owing, and in the opinion of the officers in charge it should not be prudent to lower the dam or dams, the amount of such compensation might be "ascertained in like manner;" that the Department of Justice should represent the interest of the United States in legal proceedings under the Act and for "flowage damages" previously occasioned, and that a portion of the appropriation made for the prosecution of the improvement, not exceeding in amount $25,000, might be applied in payment for property and rights thus taken and used.

In the previous year, 1874, the Legislature of [516] Wisconsin had passed a law providing for ascertaining the compensation to be made for damages caused to lands, by their being overflowed or otherwise injured or taken by the United States in the construction of any public works. It declared, among other things, that in case the lands of any person had been overflowed or injured or taken, or if it should be found necessary or proper thereafter to overflow, injure or take the lands of any person for or by reason of the construction of any dam, bridge, lock or pier, or the repair or enlargement thereof, or the construction, repair or enlargement of any canal or other works of the United States Government in the improvement of any harbor, river or stream of water in the State, the compensation for damages sustained by the owner or owners of the lands overflowed, injured, or taken might be ascertained, determined and paid in the manner prescribed in chapter 119 of the Laws of 1872, entitled "An Act in Relation to Railroads and the Organization of Railroad Companies," for acquiring title to lands of railroad companies, and that all the provisions of such Act properly applicable thereto should apply in the case of the overflow, injury or taking of lands by the United States Government for the purposes mentioned.

Chapter 119 of the Laws of 1872, referred to in this Act of 1874, prescribes the mode in which land may be condemned for railroad purposes. The company is to file a petition, for the appointment of commissioners of appraisal, with the clerk of the circuit court of the county in which the property is situated, containing, among other things, a description of the land desired and the names of parties interested in it. Notice is then to be given, by publication for three successive weeks in a newspaper of the county or adjoining county, of the filing of the petition, of the time and place of its presentation and of the application for the appointment of commissioners. On the presentation of the petition the parties whose interest may be affected by the proceeding are at liberty to show cause against its prayer. If no sufficient cause be shown, the court or judge may grant the petition and appoint three disinterested and competent freeholders, resident in the county or adjoining county, to ascertain and appraise the [517] compensation to be made to the owner or owners of the property. Either party to the proceeding, if dissatisfied with the award rendered, may appeal from it to the circuit court, where a trial is to be had by a jury and the compensation fixed by them. The proceeding, so far as the ascertainment of compensation is concerned, there takes the form of a regular action at law, in which the petitioner becomes the plaintiff and the contestants the defendants. The chapter also provides that the party interested in the land may institute and conduct the proceedings to a conclusion if the company delay or omit to prosecute the same.

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Under the legislation referred to, the present proceeding was instituted by the defendants in error, to recover the value of certain lands which had been overflowed by a dam constructed by the canal company in the prosecution of the improvement mentioned. In their petition they ask for the appointment of commissioners for the appraisal of certain lands, which are described, and of the damage caused to them by a dam constructed by the canal company, but owned by the United States, they having succeeded to the title and possession of the company. They also set forth the ownership of the lands, the injury to them from the dam causing the waters of Lake Winnebago to set back and overflow them, and that the dam cannot be maintained without a continuance of such injuries. All the allegations required by the statute were set forth. Commissioners were accordingly appointed, before whom the parties interested appeared, the United States being represented by counsel retained by the Department of Justice. They awarded the petitioners the sum of $8,000. From this award both parties appealed to the circuit court, where the case was tried before a jury. Previously, however, to its being impaneled the defendants objected to the action of the court on three grounds: first, that it had no jurisdiction of them; second, that it had no jurisdiction to try a cause in which the United States were a party; and third, that the Act of Congress of March 3, 1875, was unconstitutional in that it assumed to confer upon the state court authority to try a cause in which the United States were a party. These objections were overruled, and the trial resulted in [518] a verdict for the plaintiffs for $10,000. The judgment entered thereon was affirmed by the Supreme Court of the State, and from that court the case is brought here on writ of error.

Various exceptions were taken to the rulings of the court on the trial, but as they do not involve any question of federal law, they are not open for consideration here. The only point presented upon which we can pass relates to the jurisdiction of the court below; if that can be sustained its judgment must be affirmed.

The position of the counsel of the United States in the court below, as we understand it, was substantially this: that the power vested in the Federal Government to take private property for the public uses of the United States is, in its nature, exclusive, and its exercise by any State is, therefore, prohibited as completely as though the prohibition were expressed in terms; that the power cannot, therefore, be delegated to the State of Wisconsin; that the ascertainment of the compensation is involved in the exercise of the power as a necessary part of it, inasmuch as there can be no lawful taking until compensation is made; and that the Act of Congress transferring to the state board and state court the function of ascertaining the value of the property taken, and the amount of compensation to be made, is, therefore, invalid.

There is, in this position, an assumption that the ascertainment of the amount of compensation to be made is an essential element of the power of appropriation; but such is not the case. The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty and, as said in *Boom Co.* v. *Patterson*, requires no constitutional recognition. 98 U. S., 406 [XXV., 203]. The provision found in the 5th Amendment to the Federal Constitution, and in the Constitutions of the several States, for just compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. It is undoubtedly true that the power of appropriating private property to public uses vested in the General Government—its right of eminent domain, which Vattel de- [519] fines to be the right of disposing, in case of necessity and for the public safety, of all the wealth of the country—cannot be transferred to a State any more than its other sovereign attributes; and that, when the use to which the property taken is applied is public, the propriety or expediency of the appropriation cannot be called in question by any other authority. But there is no reason why the compensation to be made may not be ascertained by any appropriate tribunal capable of estimating the value of the property. There is nothing in the nature of the matter to be determined which calls for the establishment of any special tribunal by the appropriating power.

The proceeding for the ascertainment of the value of the property and consequent compensation to be made, is merely an inquisition to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon. Whether the tribunal shall be created directly by an Act of Congress, or one already established by the States shall be adopted for the occasion, is a mere matter of legislative discretion. Undoubtedly, it was the purpose of the Constitution to establish a General Government independent of and in some respects superior to that of the state governments—one which could enforce its own laws through its own officers and tribunals; and this purpose was accomplished. That Government can create all the officers and tribunals required for the execution of its powers. Upon this point there can be no question. *Kohl* v. *U. S.*, 91 U. S., 367 [XXIII., 449]. Yet from the time of its establishment that Government has been in the habit of using, with the consent of the States, their officers, tribunals and institutions as its agents. Their use has not been deemed violative of any principle or as in any manner derogating from the sovereign authority of the Federal Government; but as a matter of convenience and as tending to a great saving [520] of expense.

The use of the courts of the States in applying the rules of naturalization prescribed by Congress, the exercise at one time by state justices of the peace of the power of committing magistrates for violations of federal law, and the use of state penitentiaries for the confinement of convicts under such laws, are instances of the employment of state tribunals and state institutions in the execution of powers of the

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General Government. At different times, various duties have been imposed by Acts of Congress on state tribunals; they have been invested with jurisdiction in civil suits and over complaints and prosecutions for fines, penalties and forfeitures arising under laws of the United States. 1 Kent, 400. And though the jurisdiction thus conferred could not be enforced against the consent of the States; yet, when its exercise was not incompatible with state duties, and the States made no objection to it, the decisions rendered by the state tribunals were upheld. Whatever question might arise as to such delegation of authority, we can see none where the inquiry relates to an incidental fact, not involving in its ascertainment the exercise of any sovereign attribute. Almost, if not quite from the first year of its existence, it has been the practice of the General Government, when necessary to take private property for public uses, to resort to state boards and tribunals to ascertain the value of the property and hence the compensation to be made. *Burt* v. *Ins. Co.*, 106 Mass., 362. In recent statutes such resort is expressly prescribed. For example, on the 3d of March, 1879, an Act was passed for improving a part of Tennessee River, which provided that, whenever it became necessary to take private property, "The price to be paid shall be determined and the title and jurisdiction procured, in the manner prescribed by the laws of the State of Alabama." And, on the 14th of June, 1880, an Act was passed making an appropriation for constructing reservoirs on the head waters of the Mississippi, with a provision that "Injuries occasioned to individuals by the overflow of their lands shall be ascertained and determined by agreement, or in accordance with the laws of Minnesota." These are but examples of many instances of legislation where resort is had to local boards or tribunals to ascertain particular facts by which the General Government may be guided in its action. Whatever assent may be necessary to the validity of the proceedings against the United States, owing to their general immunity from process, is given by such legislation.

[521]

The provisions of the Act of 1875, with reference to the property overflowed by dams constructed in the improvement of the navigation of Fox and Wisconsin Rivers, that the compensation to be made shall be ascertained in the mode and manner prescribed by the laws of the State, and that in any proceedings to ascertain such compensation, the interests of the United States shall be represented by the Department of Justice, constitutes a sufficient waiver of the immunity. The legislation amounts to a consent to such proceedings as the state laws authorize for the condemnation of property in which the United States are interested. In the present case, the overflow of the property for which compensation was asked was caused whilst the property was held by the canal company, before its acquisition, in 1872, by the United States; and the legislation is, in legal effect, little more than a declaration that the United States will pay the compensation which may be awarded by officers of the State in proceedings taken in accordance with its laws. In any aspect in which the legislation can be viewed, we see no objection to it arising out of the independent or sovereign character of the Government of the United States.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—114 U. S., 582.

JOSEPH T. THOMAS, Trustee, *Appt.*, [522]

v.

BROWNVILLE, FORT KEARNEY AND PACIFIC RAILROAD COMPANY, WILLIAM DENNISON, Trustee, ET AL.

(See S. C., Reporter's ed., 522-527.)

Fraudulent contract by railroad construction company—mortgage given for—value of work, when recoverable.

1. A contract made by directors of a railroad company with a construction company, in which some of the directors were interested and upon a substantial consideration to the other directors, is fraudulent and void; the construction company can maintain no suit on it, and the bonds given in pursuance of it cannot be enforced unless they are negotiable instruments in the hands of innocent holders for value.

2. On a suit to foreclose a mortgage given in pursuance of a contract for the construction of a railroad, if the contract and mortgage are void for fraud, relief may be had as on a *quantum meruit* for the work actually done and accepted, without regard to the prices fixed by the contract.

3. Those who seek by suit to set aside such a mortgage, as they seek equity, must do equity; and the mortgage, though excessive by reason of the fraud in the contract, should stand for the reasonable value of what the company actually received in the way of construction.

[No. 62.]

Submitted Oct. 19, 1883. Decided Dec. 10, 1883.

APPEAL from the Circuit Court of the United States for the District of Nebraska.

The history and facts of the case appear in the opinion of the court.

Messrs. **Wm. M. Ramsey**, *J. R. Webster*, *J. M. Woolworth* and *Marquett*, for appellant.

Mr. **J. H. Broady**, for appellees.

Mr. Justice **Miller** delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court for the District of Nebraska, dismissing appellant's bill for a foreclosure of a railroad mortgage.

The mortgage was made by the Brownville, Fort Kearney and Pacific Railroad Company, to secure the payment of bonds issued by said Company to certain persons who had contracted to build its road, and to whom 610 of said bonds of $1,000 each had been delivered. There was a default in the payment of these bonds. After they were executed and delivered, the Brownville and Fort Kearney R. R. Co. became consolidated under the laws of Nebraska with the Midland Pacific R. R. Co., under the new name of the Nebraska Railway Company. In the bill of foreclosure, both these Companies, that is, the Brownville Company and the Nebraska Company, are made defendants, and an answer confessing plaintiff's right to relief being filed. [523]

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the court rendered a decree of foreclosure and, apparently, a sale was had.

But, at this stage of the proceeding certain parties interested as stockholders of the original Brownville and Fort Kearney Company were permitted to make themselves defendants, and the first decree was vacated.

These parties set up by way of answer and cross-bill that the contract for the construction of the road on account of which the bonds were issued, was fraudulent and void, and so were the bonds issued under it, and they resisted the foreclosure of the mortgage on that account.

The fraud charged in this answer and cross-bill is founded on two allegations:

1. It is alleged that two of the Board of the Directors who took part in making the construction contract were interested with the other parties in the contract.

2. That the other contractors besides these two made an agreement at the same time that the construction contract was made, with twelve of the shareholders of the Railroad Company, that they would relieve them, as subscribers to the stock of said Company, from the payment of any further assessments upon the stock which they had subscribed for, by paying out said stock and having same assigned to them; in all not to exceed $16,500 of the $41,000 of individual subscriptions to said Company.

The names of the persons thus relieved by the construction company, included all the di- [524] rectors of the Railroad Company at the time the contract for construction was made. As the stock was worthless, and these parties were liable to be called on to pay up this $16,500, the effect upon the directors in making a construction contract with the men who relieved them of their liability, two of them being also parties in the construction contract is readily seen.

These allegations are proved beyond question, and the circuit court held the contract void and the bonds issued in fulfillment of it also void, and dismissed the bill.

We concur with the Circuit Judge that no such contract as this can be enforced in a court of equity, where it is resisted and its immorality is brought to light.

But as this court said in the case of the *Twin Lick Co.* v. *Marbury*, 91 U. S., 587 [XXIII., 328], such contracts are not absolutely void, but are voidable at the election of the parties affected by the fraud. It may often occur that, notwithstanding the vice of the transaction, namely: the directors or trustees, or a majority of them, being interested in opposition to the interest of those whom they represent, and in reality parties to both sides of the contract, that it may be one which those whose confidence is abused may prefer to ratify or submit to. It is, therefore, at the option of these latter to avoid it; and until some act of theirs indicates such a purpose, it is not a nullity.

In the present case the stockholders of the Corporation, whose officers accepted those benefits at the hands of the parties, with whom they were, in the name of the Corporation, making a contract for over a million of dollars, do denounce and repudiate that contract. The conduct of these directors is utterly indefensible. The case of *Wardell* v. *R. R. Co.*, 103 U. S., 651 [XXVI., 509], is in precise analogy to this. See, also, same case in 4 Dill., 330.

The original contract being such that the contractors can maintain no suit on it, the bonds which they received are affected with the same vice, and cannot be enforced unless they are negotiable instruments in the hands of innocent holders for value.

This principle is set up and relied on to reverse the decree, on the ground that the bonds [525] are in the hands of the Burlington and Missouri River Railroad Company. This company is no party to the suit, but it appears in evidence that, while it has possession of these bonds, it did not receive them by any purchase in the ordinary course of business. They came into their possession as part of a transaction in which they purchased the consolidated Nebraska Company's railroad, and these bonds were probably taken as security against their being used to injure the title. It is also shown that, as further security in the same direction, the Burlington and Missouri Railroad Company yet retains $400,000 of the price of the road, which they agreed to pay. Under these circumstances we do not see that that company is in condition to avail itself of the doctrine of *bona fide* holders for value.

But we are asked to reverse the decree so far as to permit the trustee in this case to recover such a sum as the construction company actually earned in building the road. The matter was referred to a master, who, on this hypothesis, reported that the contractors had done work for the Railroad Company, which it had accepted, to the value of $205,947.66 beyond what they had received payment for, except as it was paid by these bonds. He also reported that this work was of that much advantage to the Company, and its value or cost is estimated as on a *quantum meruit*, without regard to the prices fixed by the contract.

We are of opinion that appellant's view of this part of the transaction is sound.

The bonds and mortgage in the hands of the trustee were issued in payment for this work. To the extent of $205,947.66 the consideration is good, and no sound principle is seen on which they cannot to that extent be enforced. To this extent they do not rest on the original contract, but on work, labor and material actually furnished to the Company and received by it. These services and materials are not estimated by the prices named in the contract, but by their real value to the Company.

In the analogous case of *Wardell* v. *R. R. Co.*, 4 Dill., 339, the circuit court, after rejecting the fraudulent contract on the same grounds [526] that we reject this one, said:

"By what rule shall we measure Mr. Wardell's rights? He has spent time and labor and money, in discovering the mines and in placing them in condition to be profitably worked. * * * Apart from the contract, and if it had never existed, he is entitled to a fair and reasonable compensation for his labor and time and skill. The fraud gives the railroad company no right to these without just compensation."

This ruling was affirmed in this court on appeal in the same case. 103 U. S., 659 [XXVI., 512]; see, also, *Gardner* v. *Butler*, 30 N. J. Eq., 702.

There is another principle of equity jurisprudence which leads to the same conclusion.

The stockholders who have resisted complainant's claim were not parties to the original suit

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for foreclosure, nor were they either necessary or proper parties as the case then stood. The decree and sale were made in a suit where all the usual parties to such a suit were agreed.

These stockholders had no legal right to interfere. It was only by permission of the court that they were allowed to come in and contest the validity of the mortgage. In doing this, they became actors. They filed their cross-bill.

In this condition of the case they are amenable to the rule that they who seek equity must do equity. It is just that they should pay a fair price for what they have received; that this mortgage, given for the construction of the road, though excessive by reason of the fraud in the contract, should stand for the reasonable value of what the company actually received in the way of construction. To permit these interveners to defeat the mortgage on any other terms would be unjust and would make the court the instrument of this injustice.

The decree of the Circuit Court must, therefore, be reversed and the case remanded to that court, with directions for a decree in favor of the plaintiff for the sum of $205,947.66, with interest. If a sale becomes necessary, this sum must be paid out [527] pro rata *on the bonds secured by the mortgage, on their being produced and canceled, or surrendered for cancellation, provided the road sells for so much.*

Mr. Justice **Field** and *Mr. Justice* **Matthews** took no part in the hearing or decision of this case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CANADA SOUTHERN RAILROAD COMPANY, *Plff. in Err.*,

v.

WILLIAM H. GEBHARD AND AUGUST LIMBERT, Exrs. of FREDERICK C. GEBHARD, Deceased.

SAME,

v.

WILLIAM H. GEBHARD.

SAME *v.* SAME.

SAME,

v.

WILLIAM H. GEBHARD AND AUGUST LIMBERT, Exrs.

(See S. C., Reporter's ed., 527-549.)

Canada Act—effect of, in United States—laws of foreign government, extraterritorial effect of.

1. The Canada Southern Arrangement Act, 1878, which authorized and approved a scheme of arrangement of the affairs of an embarrassed railroad corporation, and a compromise and settlement of the same, is valid in Canada, and had the effect of binding non-assenting bondholders within the Dominion, by the terms of the scheme.

2. The courts of the United States should give such Act the same effect as against citizens of the United States whose rights accrued before its passage, as it has in Canada.

3. Every person who deals with a foreign corporation, impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes; therefore, anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere.

[Nos. 72, 73, 74, 619.]

Argued Oct. 24, 1883. Decided Dec. 10, 1883.

ERROR to the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the opinion of the court.

Messrs. **Joseph H. Choate,** *Wm. M. Evarts* and *C. F. Southmayd*, for plaintiff in error:

First. The legislative Act relied upon as a defense in this case is not a novel or isolated piece of legislation, but is in substantial conformity with the established system provided by English and Canadian law for the reorganization of embarrassed and disabled railways and other public works.

Under that system of law, the foreclosure of railway mortgages is unknown. The legal method open to the holders of defaulted bonds is by a resort to a court of equity for the appointment of a receiver.

In view of the evils inseparable from that remedy, the plan of the reorganization by Act of Parliament has long been adopted.

In Re Cambria Ry. Co's Scheme, L. R., 3 Ch. App., 294; *In Re East & West Ry. Co.*, L. R., 8 Eq., 87; *In Re Potteries, etc., Ry. Co.*, L. R., 5 Ch., 67: *S. C.* on appeal, 6 Ch. App., 621; *Lond. Asso.* v. *Railway Co.*, L. R., 18 Eq., 566.

The exact justice to all, of such a scheme of re-arrangement, cannot be called in question. Its practical effect upon the interests of all is substantially equivalent to that of a reorganization by means of a foreclosure under our own law. There, the old company is stripped of its property, and practically extinct. The technical personal liability under which it rests for its various obligations, is of no possible value, and is practically never resorted to. The bondholders and shareholders, according to their varying degrees, receive as a substitute for their original securities, either their money value, as shown by an actual sale, or, in nine cases out of ten, a new and substituted security in the name of a new company that succeeds upon the reorganization. A new lien is given them upon the same property, according to the actual value of their interest in it; and at the same time, new capital is provided for carrying on the undertaking. The rule of justice displayed by either system, in its practical operation, is nowhere better stated than by this court in the case of *Shaw* v. *R. R. Co.*, 100 U. S., 605 (XXV., 757), and it is exactly the rule of right which the plaintiff in error claims in the present action.

Second. It is entirely within the power of the court to recognize the binding effect of the Canadian statute.

Story, Confl. L., 8 ed., sec. 24.

Third. The authority of the Canadian Parliament to deal with the Corporation, which was an artificial creature of its own, was, like that

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of the English Parliament in the United Kingdom, absolute and unlimited.

Dwar. Stat., p. 44.

Fourth. The ordinary rules applicable to the contracts of individuals made in one country, to be performed in another have, as we think, made no application to the present case.

In this case we have the distinctive features of a Corporation created by a government of absolutely unlimited powers for a public object, and dealt with by that government, in the public interest in the re-adjustment of securities which were accepted by the holders upon the obvious understanding, that in the emergency which has arisen, the power should be exercised as it has been.

Mr. **John M. Bowers,** for defendant in error:

1. This Act of the Parliament of Canada has no extraterritorial force. It has no strength in this country *proprio vigore.*

McMillan v. *McNeill*, 4 Wheat., 209; *Hoyt* v. *Thompson*, 19 N. Y., 225; *Kelly* v. *Crapo*, 45 N. Y., 86; *Bank* v. *Earle*, 13 Pet., 589; *LeRoy* v. *Crowninshield*, 2 Mason, 161; *Commonwealth* v. *Aves*, 18 Pick., 217; Whart. Confl. L., sec. 427, 2 Kent, 406, 407, 457; Story, Confl. L., sec. 349; Burge, Col. L., V. 1, p. 5; West. Int. L., 1880, sec. 20; *Forbes* v. *Cochrane*, 2 Barn. & C., 471.

"When a foreign rule is repugnant to the fundamental principles of the *lex fori*, or when it is contrary to religion or sound morality, the doctrine of comity ought not to be followed."

Fenton v. *Livingston*, 3 Macq., 497; *Brook* v. *Brook*, 9 H. L. Cas., 193, 203.

If the contract of marriage is such in essentials as to be contrary to the law of the country of domicil, it is to be regarded as void in the country of domicil, though not contrary to the law of the country where it was celebrated.

Warrender v. *Warrender* (infidel marriage), 2 Clark & F., 532; *Hyde* v. *Hyde*, 35 L. J., Prob. & Matrimonial, 57 (Mormon marriage); *Armitage* v. *Armitage*, 3 L. R., Eq., 343 (New Zealand marriage).

2. The Act in question is repugnant to the laws and policy of the United States, because it endeavors to impair the obligation of a contract.

This principle is a fundamental part of our jurisprudence and has never been questioned.

The States are prohibited by the Constitution from passing laws impairing the obligation of a contract; the Federal Government by the decision of its courts.

Sinking Fund Cases, 99 U. S., 710 (XXV., 496).

But, if the Act in question is valid, as an insolvent or bankrupt law in the Dominion of Canada, yet the principle remains:

That a discharge, under the Bankrupt Laws of one country, cannot affect contracts made or to be executed in another country.

Sturges v. *Crowninshield*, 4 Wheat., 122; *Ogden* v. *Saunders*, 12 Wheat., 213; *Donnelly* v. *Corbett*, 7 N. Y., 500.

3. The bonds in suit are to be governed by the law of the place of payment, New York.

Cook v. *Moffat*, 5 How., 307; *Scudder* v. *Bank*, 91 U. S., 406 (XXIII., 245); *Pritchard* v. *Norton* (*ante*, 104); *Bank* v. *Daniel*, 12 Pet., 53; *Bell* v. *Bruen*, 1 How., 182; *Bowen* v. *Newell*, 13 N. Y., 290; 2 Kent, 459–462; *Lee* v. *Selleck*, 33 N. Y., 615.

4. A citizen of this country, who takes property here from a foreign corporation, is not bound to look beyond the charter of the company to inquire if any general law of the country prevents such transfer.

Hoyt v. *Sheldon*, 3 Bosw., 267; affirmed, 19 N. Y., 225.

Mr. Chief Justice **Waite** delivered the opinion of the court:

What is now known as the Canada Southern Railway Company was originally incorporated on the 28th of February, 1868, by the Legislature of the Province of Ontario, Canada, to build and operate a railroad in that Province between the Detroit and Niagara Rivers, and was given power to borrow money in the Province or elsewhere, and issue negotiable coupon bonds therefor, secured by a mortgage on its property, "for completing, maintaining and working the railway." Under this authority the Company, on the 2d of January, 1871, at Fort Erie, Canada, made and issued a series of negotiable bonds, falling due in the year 1906, amounting in all to $8,703,000, with coupons for semi-annual interest attached, payable, principal and interest, at the Union Trust Company, in the City of New York. To secure the payment of both principal and interest as they matured, a trust mortgage was executed by the Company, covering "the railway of said Company, its lands, tolls, revenues present and future, property and effects, franchises and appurtenances." Every bond showed on its face that it was of this kind and thus secured. [529]

Before the 31st of December, 1873, the Company became satisfied that it would be unable to meet the interest on these bonds maturing in the coming January, and so it requested the holders to fund their coupons falling due January 1, 1874, July 1, 1874, and January 1, 1875, by converting them into new bonds payable on the first of January, 1877, and by so doing only, in legal effect, extend the time for the payment of the interest, without destroying the lien of the coupons under the mortgage, or otherwise affecting the obligation of the old bonds. Some of the bondholders funded their coupons, in accordance with this proposition, and accepted the extension bonds, but, under the arrangement, their coupons were not to be canceled until the new bonds were paid.

In this condition of affairs the Parliament of Canada, on the 26th of May, 1874, enacted that the Canada Southern Railway, which was the railway built by the Canada Southern Railway Company under its provincial Act of incorporation, "be declared to be a work for the general advantage of Canada," and a "body corporate and politic within the jurisdiction of Canada," For all the purposes mentioned in, and with all the franchises conferred by, the several incorporating Acts of the Legislature of the Province. This, under the provisions of the British North America Act, 1867, passed by the Parliament of Great Britain "For the Union of Canada, Nova Scotia and New Brunswick, and the government thereof," made the Corporation a Dominion Corporation and subjected it to the legislative authority of the Parliament of Canada.

On the 15th of March, 1875, another series of bonds, amounting in the aggregate to $2,044,000,

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or thereabouts, was issued and secured by a second mortgage to trustees. After the issue of all the bonds the Company found itself unable to pay its interest and otherwise financially embarrassed, and a joint committee, composed of three directors and three bondholders, after full consideration of all the circumstances, submitted to [530] the Company and to the bondholders "a scheme of arrangement of the affairs of the Company," which was approved at a meeting of the directors on the 28th of September, 1877. This scheme contemplated the issue of $14,000,000 of thirty-year bonds, bearing three per cent interest for three years and five per cent thereafter, guaranteed, as to interest for twenty years, by the New York Central and Hudson River Railroad Company, the first coupons being payable January 1, 1878. These new bonds were to be secured by a first mortgage on the property of the Company, and exchanged for old bonds at certain specified rates. The old bonds of 1871 were to be exchanged for new at the rate of one dollar of principal of the old for one dollar of the new, nothing being given either for the past due coupons or the extension bonds executed under the arrangement in December, 1873. The proposed issue of bonds was large enough to take up all the old indebtedness at the rates proposed, whether bonded or otherwise, and leave a surplus, to be used for acquiring further equipment, and for such other purposes of the Company as the directors might find necessary. This scheme was formally assented to by the holders of 108,132 shares of the capital stock out of 150,000; by the holders of the bonds of 1871 to the amount of $7,832,000 out of $8,703,000; and by the holders of $1,590,000 of the second series of bonds out of $2,029,000 then outstanding. Upon the representation of these facts to the Parliament of Canada the "Canada Southern Arrangement Act, 1878," was passed and assented to in the Queen's name on the 16th of April, 1878.

This statute, after reciting the scheme of arrangement with the causes that led to it, and that it had been assented to by the holders of more than two thirds of the shares of the capital stock of the Company, and by the holders of more than three fourths of the two classes of bonds, enacted that the scheme be authorized and approved; that the new bonds be a first charge "over all the undertaking, railway works, rolling stock and other plant" of the Company, and that the new bonds be used for the purposes contemplated by the arrangement, including the payment of the floating debt. Section 4 is as follows:

[531] "4. The scheme, subject to the conditions and provisos in this Act contained, shall be deemed to have been assented to by all the holders of the original first mortgage bonds of the Company secured by the said recited indenture of the fifteenth day of December, one thousand eight hundred and seventy, and of all coupons and bonds for interest thereon, and also by all the holders of the second mortgage bonds of the Company secured by the said recited indenture of the fifteenth day of March, one thousand eight hundred and seventy-five, and of all coupons thereon, and also by all the shareholders of the Canada Southern Railway Company, and the hereinbefore recited arrangement shall be binding upon all the said holders of the first and second mortgage bonds and coupons, and bonds for interest thereon respectively, and upon all the shareholders of the Company."

Under the arrangement thus authorized the New York Central and Hudson River Railroad Company executed the proposed guaranty, and the scheme was otherwise carried into effect.

The several defendants in error are and always have been citizens of the State of New York, and were, at the time the scheme of arrangement was entered into and confirmed by the Parliament of Canada, the holders and owners of certain of the bonds of 1871, and of certain extension bonds, these last having been delivered to them respectively at the Union Trust Company in the City of New York, where the exchanges were made, in December, 1878. Neither of the defendants in error assented in fact to the scheme of arrangement, and they did not take part in the appointment of the joint committee. Their extension bonds have never been paid, neither have the coupons on their bonds of 1871, which fell due on the 1st of July, 1875, and since, though demanded. The Company has been at all times ready and willing to issue and deliver to them the full number of new bonds, with the guaranty of the New York Central and Hudson River Railroad Company attached, that they would be entitled to receive under the scheme of arrangement.

These suits were brought on the extension bonds and past due coupons. The Company pleaded the scheme of arrangement as a defense, and at the trial tendered the new bonds in exchange for the old. The circuit court decided that the arrangement was not a bar to the actions, [532] and gave judgments in each of them against the Company for the full amount of extension bonds and coupons sued for. To reverse these judgments the present writs of error were brought.

Two questions are presented for our consideration:

1. Whether the "Arrangement Act" is valid in Canada, and had the effect of binding non-assenting bondholders within the Dominion by the terms of the scheme; and,

2. Whether, if it did have that effect in Canada, the courts of the United States should give it the same effect as against citizens of the United States whose rights accrued before its passage.

1. There is no constitutional prohibition in Canada against the passage of laws impairing the obligation of contracts, and the Parliament of the Dominion had, in 1878, exclusive legislative authority over the Corporation and the general subjects of bankruptcy and insolvency in that jurisdiction. As to all matters within its authority, the Dominion Parliament has "plenary legislative powers as large and of the same nature as those of the Imperial Parliament." *Fredericton* v. *Queen*, 3 Can. Sup. Ct., 259.

On the 20th of August, 1867, the Parliament of Great Britain passed the "Railway Companies Act, 1867." 2 Stat., 1332; 30, 31 Vict., ch., 127. This Act provides, among other things, for the preparation of "Schemes of Arrangement" between railway companies unable to meet their engagements and their creditors, which can be filed in the court of chancery, accompanied by a declaration in writing, under the seal of the company, and verified by the oaths of the directors, to the effect that

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the company is unable to meet its engagements with its creditors. Notice of the filing of such [533] a scheme must be published in the Gazette, and the scheme is to be deemed assented to by the holders of mortgages, bonds, debenture stock, rent charges, and preference shares, when assented to in writing by the holders of three fourths in value of each class of security, and by the ordinary shareholders when assented to at an extraordinary general meeting, specially called for that purpose. Provision is then made for an application to the court by the company for a confirmation of the scheme. Notice of this application must be published in the Gazette and, after hearing, the court, if satisfied that no sufficient objection to the scheme has been established, may confirm it. Sec. 18 is as follows:

"The scheme when confirmed shall be enrolled in the court, and thencoforth the same shall be binding and effectual to all intents, and the provisions thereof shall, against and in favor of the company and all parties assenting thereto or bound thereby, have the like effect as if they had been enacted by Parliament."

This Act, it is apparent, was not passed to provide, for the first time, a way in which insolvent and embarrassed railway companies might settle and adjust their affairs, but to authorize the court of chancery, to do what had before been done by Parliament. *Lord* Cairns, *L. J.*, said of it in *Cambrian Railways Company's Scheme*, L. R., 8 Ch. App., 294: "Hitherto such companies, if they desired to raise further capital to meet their engagements, have been forced to go to Parliament for a special Act, enabling them to offer such advantages by way of preference or priority to persons furnishing new capital as would lead to its being obtained. And Parliament, in dealing with such applications, has been in the habit of considering how far the arrangements proposed as to such new capital were assented to or dissented from by those who might be considered as the proprietors of the existing capital of the company, either as shareholders or bondholders. The object of the present Act * * * appears to be to dispense with a special application to Parliament of the kind I have described, and to give a parliamentary sanction to a scheme filed in the court of chancery, and confirmed by the court, and assented to by certain majorities of shareholders and of holders of debentures and securities *ejusdem gen-* [534] *eris.*" And even now in England special Acts are passed whenever the provisions of the general Act are not such as are needed to meet the wants of a particular company. A special Act of this kind was considered in *London Financial Association* v. *Wrexham, Mold and Connah's Quay R. W. Co.* L. R., 18 Eq., 566.

In Canada no general statute like that in England has been enacted, but the old English practice of passing a special Act in each particular case prevails and Osler, *J.*, said in *Jones* v. *Canada Central R. W. Co.*, 46 U. C., Q. B., 261, "our statute-books are full" of legislation of the kind. The particular question in that case was whether, after the establishment of the Dominion Government the Provincial Parliaments had authority to pass laws with reference to provincial corporations which would operate upon debentures payable in England, and held by persons residing there, but it was not suggested, either by the court or counsel, that a statute of the kind, passed by the Dominion Parliament in reference to a Dominion corporation, would not be valid as a law. So far as we are advised, the parliamentary authority for such legislation has never been doubted either in England or Canada. Many cases are reported in which such statutes were under consideration, but in no one of them has it been intimated that the power was even questionable.

In *Gilfillan* v. *Canal Co.* [*ante*, 977], at the present Term, it was said that holders of bonds and other obligations issued by large corporations for sale in the market and secured by mortgages to trustees, or otherwise, have, by fair implication, certain contract relations with each other. In England, we infer, from what was said by *Lord* Cairns in *Cambrian Railways Company's Scheme*, *supra*, they are considered as in a sense part proprietors of the existing capital of the company, and dealt with by Parliament and the courts accordingly. They are not there, any more than here, corporators, and thus necessarily, in the absence of fraud or undue influence, bound by the will of the majority as to matters within the scope of the corporate powers, but they are interested in the administration of a trust which has been created for their common benefit. Ordinarily their ultimate security depends in a large degree on the success of the work in which the corporation is engaged, [535] and it is not uncommon for differences of opinion to exist as to what ought to be done for the promotion of their mutual interests. In the absence of statutory authority or some provision in the instrument which establishes the trust, nothing can be done by a majority, however large, which will bind a minority without their consent. Hence it seems to be eminently proper that where the legislative power exists, some statutory provision should be made for binding the minority in a reasonable way by the will of the majority; and unless, as is the case in the States of the United States, the passage of laws impairing the obligation of contracts is forbidden, we see no good reason why such provision may not be made in respect to existing as well as prospective obligations. The nature of securities of this class is such that the right of legislative supervision for the good of all, unless restrained by some constitutional prohibition, seems almost necessarily to form one of their ingredients, and when insolvency is threatened, and the interests of the public, as well as creditors, are imperiled by the financial embarrassments of the corporation, a reasonable "scheme of arrangement" may, in our opinion, as well be legalized as an ordinary "composition in bankruptcy." In fact such "arrangement Acts" are a species of bankrupt Acts. Their object is to enable corporations created for the good of the public to relieve themselves from financial embarrassments by appropriating their property to the settlement and adjustment of their affairs, so that they may accomplish the purposes for which they were incorporated. The necessity for such legislation is clearly shown in the preamble to the Grand Trunk Arrangement Act, 1862, passed by the Parliament of the Province of Canada on the 9th of June, 1862, before the establishment of the Dominion Government, and which is in these words:

"Whereas the interest on all the bonds of the

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Grand Trunk Railway Company of Canada is in arrear, as well as the rent of the railways leased to it, and the company has also become indebted, both in Canada and in England, on simple contract, to various persons and corporations, and several of the creditors have obtained judgment against it, and much litigation is now pending; and whereas, the keeping open of the railway traffic, which is of the utmost importance to the interests of the Province, is thereby imperiled, and the terms of a compromise have been provisionally settled between the different classes of creditors and the company, but in order to facilitate and give effect to such compromise the interference of the Legislature of the Province is necessary."

[536]

The confirmation and legalization of "a scheme of arrangement" under such circumstances, is no more than is done in bankruptcy when a "composition" agreement with the bankrupt debtor, if assented to by the required majority of creditors, is made binding on the non-assenting minority. In no just sense do such governmental regulations deprive a person of his property without due process of law. They simply require each individual to so conduct himself for the general good as not unnecessarily to injure another. Bankrupt laws have been in force in England for more than three centuries, and they had their origin in the Roman law. The Constitution expressly empowers the Congress of the United States to establish such laws. Every member of a political community must necessarily part with some of the rights which, as an individual, not affected by his relation to others, he might have retained. Such concessions make up the consideration he gives for the obligation of the body politic to protect him in life, liberty and property. Bankrupt laws, whatever may be the form they assume, are of that character.

2. That the laws of a country have no extraterritorial force is an axiom of international jurisprudence, but things done in one country under the authority of law may be of binding effect in another country. The obligor of the bonds and coupons here sued on was a Corporation created for a public purpose, that is to say, to build, maintain and work a railway in Canada. It had its corporate home in Canada, and was subject to the exclusive legislative authority of the Dominion Parliament. It had no power to borrow money or incur debts except for completing, maintaining and working its railway. The bonds taken by the defendants in error showed on their face that they were part of a series amounting in the aggregate to a very large sum of money, and that they were secured by a trust mortgage on the railway of the Company, its lands, tolls, revenues, etc. In this way the defendants in error, when they bought their bonds, were, in legal effect, informed that they were entering into contract relations not only with a foreign corporation created for a public purpose, and carrying on its business within a foreign jurisdiction, but with the holders of other bonds of the same series, who were relying equally with themselves for their ultimate security on a mortgage of property devoted to a public use, situated entirely within the territory of a foreign government.

[537]

A corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty," *Bank* v. *Earle*, 13 Pet., 588, though it may do business in all places where its charter allows and the local laws do not forbid. *R. R. Co.* v. *Koontz*, 104 U. S., 12 [XXVI., 645]. But wherever it goes for business it carries its charter, as that is the law of its existence, *Relf* v. *Rundel*, 103 U. S., 226 [XXVI., 339]; and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country, *Paul* v. *Virginia*, 8 Wall., 168 [75 U. S., XIX., 357], but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy, which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere.

[538]

No better illustration of the propriety of this rule can be found than in the facts of the present case. This Corporation was created in Canada to build and work a railway in that Dominion. Its principal business was to be done in Canada, and the bulk of its corporate property was permanently fixed there. All its powers to contract were derived from the Canadian Government, and all the contracts it could make were such as related directly or indirectly to its business in Canada. That business affected the public interests, and the keeping of the railway open for traffic was of the utmost importance to the people of the Dominion. The Corporation had become financially embarrassed, and was and had been for a long time unable to meet its engagements in the ordinary way as they matured. There was an urgent necessity that something be done for the settlement of its affairs. In this the public, the creditors and the shareholders were all interested. A large majority of the creditors and shareholders had agreed on a plan of adjustment which would enable the Company to go on with its business, and thus accommodate the public, and to protect

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the creditors to the full extent of the available value of its corporate property. The Dominion Parliament had the legislative power to legalize the plan of adjustment as it had been agreed on by the majority of those interested, and to bind the resident minority creditors by its terms. This power was known and recognized through-
[539] out the Dominion when the Corporation was created, and when all its bonds were executed and put on the market and sold. It is in accordance with and part of the policy of the English and Canadian Governments in dealing with embarrassed and insolvent railway companies and in providing for their reorganization in the interest of all concerned. It takes the place in England and Canada of foreclosure sales in the United States, which in general accomplish substantially the same result, with more expense and greater delay, for it rarely happens in the United States that foreclosures of railway mortgages are anything else than the machinery by which arrangements between the creditors and other parties in interest are carried into effect and a reorganization of the affairs of the corporation under a new name brought about. It is in entire harmony with the spirit of bankrupt laws, the binding force of which upon those who are subject to the jurisdiction, is recognized by all civilized nations. It is not in conflict with the Constitution of the United States, which, although prohibiting States from passing laws impairing the obligation of contracts, allows Congress "to establish * * * uniform laws on the subject of bankruptcy throughout the United States." Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized, the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries. The fact that the bonds made in Canada were payable in New York is unimportant, except in determining by what law the parties intended their contract should be governed, and every citizen of a country, other than that in which the corporation is located, may protect himself against all unjust legislation of the foreign government by refusing to deal with its corporations.

On the whole we are satisfied that the scheme of arrangement bound the defendants in error, and that these actions cannot be maintained. The same result was reached by the Court of Queen's Bench in the Province of Ontario when
[540] passing on a similar statute in *Jones* v. *The Canada Central R. W. Co., supra.*

The judgments are reversed and the causes remanded, with instructions to enter judgment on the facts found in favor of the Railway Company in each of the cases.

Mr. Justice **Field,** not being present at the argument of this case, took no part in the decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Harlan,** dissenting:

The Canada Southern Railway Company is a Corporation created and organized under the laws of the Dominion of Canada. It was given, by its charter, power to borrow in Canada "or elsewhere," at a rate of interest not exceeding eight per cent per annum, such sums of money as might be necessary to complete, maintain or work its railway; to issue bonds therefor, payable either in currency or in sterling, at such place, within Canada "or without," as might be deemed advisable; to sell the same at such prices or discount as might be deemed expedient or necessary; and to hypothecate, mortgage or pledge the lands, tolls, revenues and other property of the Company for the payment of the said sums and the interest thereon.

In pursuance of the authority thus conferred, the Company, in 1871, issued its bonds in the customary form of negotiable securities, and made them payable in the year 1906, at the office of the Union Trust Company in the City of New York, with interest at the rate of seven per cent per annum, coupons being given for such interest. These bonds, with their interest, were secured by a deed of trust to Wm. L. Scott and Kenyon Cox, citizens of the United States, conveying to them and their successors in the trust, the railway of the Company, its lands, tolls, revenues, present and future, property, effects, franchises and appurtenances. That deed declared that the bonds, and also the rights and benefits arising therefrom, should pass by delivery.

In 1873 the Company issued certain bonds, of the denomination of $105 each, for the purpose of funding unpaid coupons. They were made payable, principal and interest in gold, at the office of the Union Trust Company in the City of New York. In order to effect this arrangement for funding, the latter company was made a trustee to deliver the bonds of $105 each to the parties surrendering the unpaid coupons. [541]
Of some of these bonds defendants in error, who are citizens of New York, became the holders. They were delivered to them at the City of New York. Upon their non-payment at maturity, the present suits at law were brought in one of the courts of that State, and judgment asked for the amount of the bonds. The Railway Company appeared, and upon its petition the suits were removed into the Circuit Court of the United States for the Southern District of New York. In the latter court an answer was filed, to which the plaintiff demurred. The demurrer being sustained and the Company declining to answer further, judgment was rendered for the amount due on the bonds in suit.

What is the defense which my brethren have declared to be sufficient to deprive the plaintiffs of their right to judgment? That the Company had paid the bonds in suit, in whole or in part? No. That, by the terms of the contract, it was discharged from liability to pay them? By no means. Its defense is placed wholly upon an Act of the Parliament of Canada ratifying a certain scheme or arrangement, which is inconsistent with the contract between the parties, and to which a large minority of the bondholders and stockholders have never given their assent. That scheme provided for the surrender of the old bonds, bearing seven per cent interest, and the substitution of other bonds, maturing at a later date, and bearing a less rate of interest—three per cent for the first three years, and five per cent thereafter, the interest on the new bonds being guaranteed by the New York and Hudson River Railroad Company.

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To this scheme the circuit court finds as a fact that the plaintiffs never assented. They stood, as they had a right to do, upon their contract with the Company. But the Parliament of Canada declares that this scheme "*shall* be *deemed* to have been assented to by *all* the holders of the original first mortgage bonds of the Company," and that this arrangement "*shall* be *binding* upon *all* the holders of the first and second mortgage bonds and coupons and bonds for interest thereon respectively, and upon all the shareholders of the Company."

[542] This defense, asserting the power of a foreign government, by its legislation, to destroy the contract rights of citizens of the United States, was well characterized, as it seems to me, by the learned Circuit Judge who tried this case, as a most extraordinary one to be made in a country where the obligation of contracts against impairment by legislative enactment, as well as the rights of persons and property, are carefully guarded by constitutional provisions. In this country, no State can pass any law impairing the obligation of contracts; the Constitution of the United States forbids such legislation. And the principle is founded in justice, independently of this constitutional provision. The Statute of Canada here relied on disregards this principle, and openly and in terms impairs the obligation of the contract which each holder of these bonds has with this foreign Railway Company. It assumes, without a hearing and without the consent of those who hold its bonds, to discharge the Railway Company from all liability thereon. If any State in this Union should assume to pass a law with reference to a railway corporation she had created, requiring the holders of its bonds, for which they had paid value, to surrender them and take in their place others of less value, and payable at a different time, our courts, federal and state, would be constrained, by their obligation to support the Constitution of the United States, to declare such legislation to be in conflict with that instrument. More than that, a citizen of Canada, or even a railway corporation of that Dominion, could have the benefit, in our courts, of the constitutional inhibition upon state laws impairing the obligation of contracts.

In the *Sinking Fund Cases*, 99 U. S., 718, 719, [XXV., 501], we said that while the United States are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, yet "Equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise [543] than according to the laws of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State, or a municipality, or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation."

But the laws of Canada, by the judgment now rendered, are given effect here, to the injury of our own citizens, notwithstanding those laws arbitrarily deprive them of their contract rights. This Railroad Company, under express authority conferred by its charter, executed bonds payable, as we have seen, in New York, and secured them by mortgage executed to citizens of the United States. It sent them to this country for sale and our people invested their money in them. Intrenched behind the arbitrary edict of a foreign government, it now says to American holders of its bonds, that it will not comply with its contract; that if they do not surrender those securities and take others of less value, they shall not receive anything.

It is claimed by my brethren that the Canada Statute provides a scheme which, in its practical effect, resembles a composition in bankruptcy. It seems to me that there are several answers to this suggestion: 1. It does not purport to be a scheme of bankruptcy in the sense of the word bankruptcy as used either in England or America. 2. It is unlike a composition in bankruptcy in this: that whereas a composition is never had except upon notice, so that creditors may have their day in court, with opportunity to show that the proposed composition should not be made, here, no such opportunity was given to the holders of this Company's bonds, in any court or other tribunal, to show that the arrangement which the Canadian Parliament sanctioned ought not, in justice, to be made; but the arrangement was, by legislative enactment, made absolutely binding upon every bondholder and stockholder, even those who are citizens of other countries.

It is said that the Canadian scheme is practically nothing more than might be accomplished [544] in foreclosure proceedings instituted in one of our own courts by or at the instance of the assenting bondholders. My answer is that all bondholders and stockholders have their day in court in such proceedings; and, when, upon the judicial sale of a railway and its appurtenances, they fail to realize the full amount of their claims, they are not deprived of their property without due process of law.

Reference is made by the court to the Act of the English Parliament which authorizes such arrangements to be effected through courts of chancery. But, in such proceedings, all interested have their day in court, with opportunity to show that the proposed scheme should not receive judicial sanction.

In my judgment, the discharge in Canada, by statute, of this foreign Railway Company from all obligation to pay these bonds according to their terms—whatever may be the binding force of such legislation upon persons resident in that country, or upon those who may assert their rights under the original contract in the courts of Canada—can have no extraterritorial effect; certainly none as to persons who reside in a different State or country, where the contract is to be performed, and in the courts of which it becomes the subject of litigation.

In *Baldwin* v. *Hale*, 1 Wall., 223 [68 U. S., XVII., 531], it was held that a discharge obtained under the insolvent law of one State of the Union is not a bar to an action on a note

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even when given in and payable in the same State, the party to whom the note was given having been and being of a different State. Story, in his Conflict of Laws, says that should a State provide that the discharge of an insolvent debtor under her own laws was a discharge of all his contracts, even of those made in a foreign country, such a discharge, although binding upon the courts of that State, would or might be mere nullities in other countries. Sec. 348. *Chancellor* Kent, referring to state insolvent laws, in operation when there is no national bankrupt statute, says: "The discharge under a state law is no bar to a suit on a contract existing when the law was passed, nor to an action by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained. The discharge under a state law will not [545] discharge a debt due to a citizen of another State who does not make himself a party to a proceeding under the law. It will only operate upon contracts made within the State between its own citizens or suitors, subject to state power. The doctrine of the Supreme Court of the United States in *Ogden* v. *Saunders* [12 Wheat., 213] is, that a discharge under the bankrupt law of one country does not affect contracts made or to be executed in another." 2 Kent, pp. 392-3.

Such is the unvarying current of authority in this country. If a discharge by an insolvent law of one of the United States does not affect the contract rights of citizens of another State, how much stronger is the case where, by the terms of the contract, it is to be performed in a state or country other than that in which the discharge is granted. My brethren suggest, if I do not misapprehend their opinion, that the parties here suing must be understood to have purchased these bonds with reference to the power which the Canadian Government has over corporations of its own creation. But this view, it seems to me, overlooks the principle, founded, says Story, in natural justice—and applicable here even if the bonds in suit had been purchased and delivered in Canada—that "Where the contract is, either expressly or tacitly, to be performed in another place than where made, the rule is, in conformity with the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance." Story, Conflict of Laws, sec. 280; *Andrews* v. *Pond*, 13 Pet., 65; *Cook* v. *Moffatt*, 5 How., 307. Why should it not be presumed that the parties to these contracts made them with reference as well to that principle as to another principle, which is thus forcibly stated by Kent: "The laws of other governments have no force beyond their territorial limits; and if permitted to operate in other States, it is upon a principle of comity, and only when neither the State nor its citizens would suffer any inconvenience from the application of the foreign law." 2 Kent, 406. Story announces the same doctrine in the following [546] language: "And even in relation to a discharge according to the laws of the place where the contract is made, there are (as we have seen) some necessary limitations and exceptions ingrafted upon the general doctrine which every country will enforce, whenever those laws are manifestly unjust, or are injurious to the fair rights of its own citizens. It has been said by a learned Judge with great force: 'As the laws of foreign countries are not admitted *ex proprio vigore*, but merely *ex comitate*, the judicial power will exercise a discretion with respect to the laws, which they may be called upon to sanction; for should they be manifestly unjust, or calculated to injure their own citizens, they ought to be rejected. Thus, if any State should enact that its citizens should be discharged from all debts due to creditors living without the State, such a provision would be so contrary to the common principles of justice that the most liberal spirit of comity would not require its adoption in any other State.'" In Burge's Commentaries on Colonial and Foreign Laws, Vol. 1, p. 5, the author says: "It is established as a principle of international jurisprudence that effect should be given to the laws of another State whenever the rights of a litigant before its tribunals are derived from, or are dependent on, those laws, and when such recognition is not prejudicial to its own interests or the rights of its own subjects." The same view is thus expressed by another American author: "It (the State) must consult sound morals and the interests and public policy of its own people, and if to enforce the laws of another State or country would lead to their infringement, it would be treacherous to its own duties to lend aid to their execution." 1 Daniel, Neg. Inst., sec. 366.

In *Smith* v. *Buchanan*, 1 East, 6, 11, the question was whether a discharge of an English contract under an insolvent Act of the State of Maryland, where the debtor resided, was a bar to a suit upon that contract in the courts of England. The point was there made that the discharge under the laws of Maryland was analogous and equivalent to a certificate of bankruptcy in England; and having been issued by [547] a competent jurisdiction in the case of subjects of Maryland residing there at the time, though it had not the binding force of law in England, yet the courts there should give effect to it "by adoption and the courtesy of nations." But to that argument the court, speaking by *Lord* Kenyon, said: "This is the case of a contract lawfully made by a subject in this country, which he resorts to a court of justice to enforce; and the only answer is that a law has been made in a foreign country to discharge these defendants from their debts on condition of their having relinquished all their property to their creditors." "But how," said he, "is that an answer to a subject of this country, suing on a lawful contract made here? How can it be pretended he is bound by a condition to which he has given no assent either express or implied?" "In America," adds Story, referring to that case, "the same doctrine has obtained the fullest sanction." Story, Conflict of Laws, sec. 342. So, also, in *Bartley* v. *Hodges*, 1 Best & Smith, 375, where the defendant pleaded, in a court of England, an insolvent discharge under the laws of Victoria, a British Colony. The court said: "No case has been cited to show that a discharge under the insolvent laws of Victoria is an answer to an action here, brought by an English subject on a bill of exchange drawn and payable in England. * * * It is true that the Colony of Victoria is not a foreign country in

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one sense of the word, yet its laws are the laws of that colony only. * * * It might as well be said that the laws of the State of Maryland would apply here." So, also, in *Phillips* v. *Allan*, 8 B. & C., 477, it was held that an insolvent discharge under the laws of Scotland was no bar to an action brought by an English subject in a court in England on a debt contracted in England, although it appeared that the English creditor had appeared in the Scottish proceedings for the purpose only of opposing the discharge.

The case, then, before us is one in which a foreign Railway Corporation pleads in discharge of its liability to pay its negotiable securities, held by citizens of the United States, and which [548] were delivered and are payable in this country, not that it had paid such securities; not that there had been a composition in bankruptcy embracing these claims; not that any court had given its sanction to the scheme in question; but that a statute of a foreign country, without the consent of those who did not approve such scheme and without giving an opportunity before any authorized tribunal to show that such scheme ought not to be ratified, had absolved it from liability to meet its contract engagements.

This defense my brethren feel obliged, upon grounds of international comity, to sustain. Thus an American court denies to American holders of foreign railway securities what an English court would not deny to English holders of American railway securities. An English court would not permit the rights of Englishmen, growing out of a contract between them and a foreign corporation, which is to be performed in England, to be injuriously affected by foreign laws in violation of the terms of that contract. I fully concur in what the Circuit Judge said: "If any of our own States had passed such an Act as the one under consideration, it would have been the duty of the courts of that State to treat it as an unlawful exercise of power; and certainly it cannot be expected that this court will tolerate legislation by a foreign State which it would not sanction if passed here, and which, if allowed to operate, would seriously prejudice the rights of a citizen of this State. Comity can ask no recognition of such unjust foreign legislation, and the case falls under the qualifications of a general rule, which prescribes that when the foreign law is repugnant to the fundamental principle of the *lex fori*, it will be ignored."

The principles for which I contend are not affected, in their application to this case, by the circumstance that the legislation of Canada relates to the contracts of a *quasi* public corporation and not to contracts wholly between individuals. For, in determining whether a statute impairs the obligation of a contract, within the meaning of our Constitution, it must be conceded that that instrument protects such obligation against legislative impairment as well in [549] cases of contracts with railway corporations as of contracts between individuals. It is equally clear that debts held against such corporations are property of which the citizen may not be deprived without due process of law. We said in *Pritchard* v. *Norton* [*ante*, 104], that "A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the Legislature to take it away." Railway corporations are, undoubtedly, public instrumentalities employed by government to accomplish public purposes. But in this country the legislative department may not, under the guise of regulating such corporations, arbitrarily deprive creditors of the benefit of their claims against them, nor impair the obligation of contracts which individuals have with them. This, perhaps, would not be disputed were this a contest between American citizens, or even citizens of Canada, and an American Railway Corporation.

As I do not think that a foreign railway corporation is entitled, upon principles of international comity, to have the benefit, in our courts —to the prejudice of our own people and in violation of their contract and property rights—of a foreign statute which could not be sustained had it been enacted by Congress or by any one of the United States, with reference to the negotiable securities of an American railway corporation; and as I do not agree that an American court should accord to a foreign railway corporation the privilege of repudiating its contract obligations to American citizens, when it must deny any such privilege, under like circumstances, to our own railway corporations, I dissent from the opinion and judgment of the court.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 160.

J. L. SULLIVAN ET AL., *Plffs. in Err.*, [550]
v.
IRON SILVER MINING COMPANY.

(See S. C., Reporter's ed., 550-555.)

Demurrer, admission by—Colorado Code—action for mining claim.

*1. A demurrer admits all facts well pleaded.
2. Under the Colorado Code of Civil Procedure, as at common law, facts may be pleaded according to their legal effect, without setting out the particulars that lead to it; and necessary circumstances implied by law need not be expressed in the plea.
3. In an action by the patentee of a placer claim, to recover possession of a vein or lode within its boundaries, an answer alleging that the vein or lode was known to the patentee to exist at the time of applying for the patent, and was not included in his application, well pleads the fact which, under section 2333 of the Revised Statutes, precludes him from having any right of possession of the vein or lode.

[No. 1006.]
Submitted Nov. 6, 1883. Decided Dec. 17, 1883.

IN ERROR to the Circuit Court of the United States for the District of Colorado.

The history and facts of the case appear in the opinion of the court.

Messrs. **T. M. Patterson** and *F. P. Cuppy* for plaintiffs in error.

Messrs. **G. G. Symes** and **Ashley Pond**, for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

*Head notes by *Mr. Justice* GRAY.

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This action was brought by the Iron Silver Mining Company, owning a tract of land or mining claim, known as the Wells and Moyer placer claim, described by metes and bounds in the complaint, against Sullivan and others, to recover possession of part of the tract, likewise described, from which it had been ousted by the defendants. The answer originally filed was demurred to and the demurrer sustained.

The defendants thereupon, by leave of the court, filed an amended answer, alleging that, on the 11th of March, 1879, the United States issued to Wells and Moyer, the grantors of the plaintiff, for the premises described in the complaint, and known as No. 281, upon the application for and entry of the premises as the Wells and Moyer placer claim, a placer patent, or patent of and for a placer mining claim, containing the following restrictions and exceptions:

[551] "First. That the grant hereby made is restricted in its exterior limits to the boundaries of the said lot No. 281 as hereinbefore described, and to any veins or lodes of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, which may hereafter be discovered within said limits, and situate and not claimed or known to exist at the date hereof.

Second. That should any vein or lode of quartz, or other rock in place, bearing gold, silver. cinnabar, lead, tin, copper or other valuable deposits, be claimed or known to exist within the above described premises at the date hereof, the same is expressly excepted and excluded from these presents."

The amended answer also alleged "That, at the time of the location of said placer claim, and the survey thereof, and at the time of the application for said patent, and at the time of the entry of said land thereunder, and at the time and date of the issuing and granting of said patent, a lode, vein or deposit of mineral ore in rock in place, carrying carbonates of lead and silver, and of great value, was known to exist, and was claimed to exist, within the boundaries and underneath the surface of said Wells and Moyer placer claim No. 281; and that the fact that said vein was claimed to exist, and did exist as aforesaid within said premises, was known to the patentees of said claim at all the times hereinbefore mentioned;" and "that the said application for said patent by said patentees and grantors of said plaintiff did not include any application whatever for a patent of or to said lode or vein within its boundaries aforesaid. Wherefore these defendants aver that the said failure to include said vein or lode in said application amounted to a conclusive declaration by said patentees that they made no claim whatever to said lode or vein or any part thereof, and that the same was expressly excepted and excluded from, and did not pass with the grant of said premises in and by said patent for said premises."

The amended answer further alleged that on the first of January, 1883, the defendants, then and now being citizens of the United States, went upon the premises last described in the complaint, and sunk a shaft thereon, which uncovered and exposed said lode, vein or deposit; [552] and thereupon proceeded to and did locate the same as a lode claim, by erecting a notice containing the name of the lode, the date of the location, and their own names as locators, and marked the surface boundaries by posts; and afterwards caused to be filed a location certificate containing the name of the lode, the names of the locators, the date of the location, the number of feet in length claimed on each side of the center of the discovery shaft, and the general course and direction of said claim as near as might be. "Wherefore the defendants claim the right to occupy and possess the said premises in full accordance with, and by virtue of a full compliance with, the requirements of the laws of the United States, and of the State of Colorado, the said vein, lode or deposit being a part and parcel of the unappropriated public mineral domain of the United States; and that the acts and doings of the defendants as hereinbefore set forth constitute the said supposed trespass complained of by the plaintiff."

The plaintiff demurred to the amended answer, because neither of its allegations set forth any defense; because it showed that neither the defendants nor their grantors had duly discovered, located or recorded any lode or vein such as is described in section 2320 of the Revised Statutes, at or before the time of the application for the placer patent, but that the defendants located their lode claim within the boundaries of the patented ground after the issuing of the placer patent; and because the applicants for the placer patent were not required to apply for the vein or lode claim, unless it had been duly discovered, located and recorded, and was owned by the applicants for the placer patent at the time of applying for the patent.

The circuit court sustained the demurrer to the amended answer, and gave judgment for the plaintiff, and the defendants sued out this writ of error.

The question in this case arises under section 2333 of the Revised Statutes, the different provisions of which will be more clearly distinguished from each other, without affecting the meaning of either, by separating them by periods, as follows:

"Sec. 2333. Where the same person, association or corporation is in possession of a placer [553] claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of $5 per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of $2.50 per acre, together with all costs of proceedings. And where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim. But where the existence of the vein or lode in a placer claim is not known.

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a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

The section referred to in the third subdivision of this section is as follows:

"Sec. 2320. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other."

The counsel of both parties in their arguments [554] have discussed the question whether a vein or lode included within the boundaries of a placer claim, the application for which does not include an application for the vein or lode claim, is excepted out of the patent for the placer claim, if at the time of the application it is known to the applicant to exist, but no claim to the vein or lode has been located.

In accordance with the view expressed by the circuit court in the opinion delivered on sustaining the demurrer to the original answer, and reported in 16 Fed. Rep., 829, the defendants in error maintain that by virtue of section 2333, taken in connection with section 2320 therein referred to, a vein or lode within the boundaries of a placer claim is not excepted from a patent for the placer claim, unless a claim for the vein or lode had previously been located according to section 2320.

The plaintiffs in error contend that if the existence of the vein or lode is known to the applicant for a placer claim, he must include in his application for the placer claim an application for the vein or lode claim, and pay for the latter at the higher rate, in order to obtain any title to it.

The circuit court treated the question of the construction of this statute as one of much difficulty and of some doubt, and as affecting numerous cases. This court should not express an opinion upon it, unless its determination is necessarily involved in the adjudication of the case at bar.

We are of opinion that the question is not presented for adjudication upon the record before us. The amended answer alleges that at the times of the location and survey of, entry upon, and application and patent for, the placer claim, the lode or vein was known to exist, and was claimed to exist, within the boundaries and underneath the surface of the placer claim, and the fact that the vein was claimed to exist and did exist within the premises was known to the patentees of that claim. The phrase "claimed to exist," as used in the amended answer, apparently intending to follow the form of patent therein set forth, is not indeed a statement that a claim for the vein or lode had been in due form made and located, but only that it was contended that the vein or lode existed. But the further allegation in the answer, that the vein [555] was known by the patentees to exist at the times mentioned, is an allegation, in the very words of the statute itself, of the fact which the statute declares shall be conclusive against any right of possession of the vein or lode claim in a claimant of the placer claim only.

Whether the words "known to exist," as used in the statute, are satisfied by actual knowledge of the applicant, or imply also a located claim for the vein or lode, the same meaning must be attributed to them in the amended answer; and the fact signified by the statute is well pleaded; for, by the elementary rules of pleading, facts may be pleaded according to their legal effect, without setting forth the particulars that lead to it; and necessary circumstances implied by law need not be expressed in the plea. Bac. Abr. Pleas & Pleading, I, 7; Co. Lit., 303 *b*. The fact that the vein or lode was known to exist as contemplated by the statute being well pleaded, although in general terms, is admitted by the demurrer. *Eaton* v. *Southby*, Willes, 131; *Postmaster-General* v. *Ustick*, 4 Wash. (C. C.), 347; *Christmas* v. *Russell*, 5 Wall., 290 [72 U. S., XVIII., 475]. In order to present the issue discussed in argument, the plaintiff should either have traversed the allegation, or have replied that no claim for the vein or lode had been located at the time in question.

We find nothing in the statutes of Colorado which changes the rules of the common law in this respect. See, Colorado Code of Civil Procedure of 1877, secs. 48, 49, 52, 61.

The judgment must, therefore, be reversed and the case remanded to the Circuit Court, with liberty to either party to move in that court to amend the pleadings. Judgment reversed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Ex Parte:

In the Matter of KANG-GI-SHUN-CA, Oth- [556] erwise Known as CROW DOG, *Petitioner*.

(See S. C., Reporter's ed., 556-572).

Jurisdiction of territorial court over Indian country—interpretation of statutes—what is Indian country—murder in—exception—crime committed by one Indian on another—implied repeal of statute—when effected—Dakota court.

1. The District Court of a Territory, within the geographical boundaries of whose district an Indian reservation lies, may exercise jurisdiction under the laws of the United States over offenses made punishable by them, committed within its limits.

2. In the interpretation of statutes, clauses which have been repealed may still be considered in construing the provisions that remain in force.

3. All the country described by the Act of 1834 as Indian country, remains Indian country so long as the Indians retain their original title to the soil, and

NOTE.—*Repeal of statute by implication.* See note to U. S. v. Henderson, 78 U. S., XX., 235.

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ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by Act of Congress.

4. If section 2145 R. S., extends the Act of Congress, sec. 5339, punishing murder, to the Indian country, sec. 2146 expressly excepts from its operation crimes committed by one Indian against the person or property of another Indian.

5. The exception contained in section 2146, R. S., is not repealed by the operation and legal effect of the Treaty with the Sioux Indians of April 29, 1868, 15 Stat. at L., 635; and an Act of Congress approved February 28, 1877, to ratify an agreement with Sioux Indians, etc., 19 Stat. at L., 254.

6. Legislation which makes punishable, when committed within the Indian country by one Indian against the person or property of another Indian, offenses defined by the general laws of the United States, may be constitutionally extended to embrace Indians in the Indian country, by the mere force of a treaty, without the aid of any legislative provision.

7. Implied repeals of Statutes are not favored; the implication must be necessary. To constitute a repeal there must be a positive repugnancy between the provisions of the new laws and those of the old.

8. A general Act is not to be construed to repeal a previous particular Act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two Acts standing together.

9. The First District Court of Dakota is without jurisdiction to find or try an indictment for murder committed by one Indian upon another in the Indian country, and a conviction and sentence upon such indictment are void, and imprisonment thereon is illegal.

[No. 8, Orig.]

Argued Nov. 26, 1883. Decided Dec. 17, 1883.

PETITION for writs of *habeas corpus* and *certiorari*.

The history and facts of the case appear in the opinion of the court.

Messrs. **Walter H. Smith** and **Adoniram J. Plowman**, for petitioner.

Mr. **S. F. Phillips**, *Solicitor-Gen., contra.*

Mr. Justice **Matthews** delivered the opinion of the court:

The petitioner is in the custody of the Marshal of the United States for the Territory of Dakota, imprisoned in the jail of Lawrence County, in the First Judicial District of that Territory, under sentence of death, adjudged against him by the district court for that district, to be carried into execution January 14, 1884. That judgment was rendered upon a conviction for the murder of an Indian of the Brule Sioux Band of the Sioux Nation of Indians by the name of Sin-ta-ge-le-Scka, or in English, Spotted Tail, the prisoner also being an Indian, of the same band and nation, and the homicide having occurred, as alleged in the indictment, in the Indian country, within a place and district of country under the exclusive jurisdiction of the United States and within the said judicial district. The judgment was affirmed, on a writ of error, by the Supreme Court of the Territory. It is claimed on behalf of the prisoner that the crime charged against him, and of which he stands convicted, is not an offense under the laws of the United States; that the district court had no jurisdiction to try him, and that its judgment and sentence are void. It, therefore, prays for a writ of *habeas corpus*, that he may be delivered from an imprisonment which he asserts to be illegal.

The indictment is framed upon section 5339 of the Revised Statutes. That section is found in title LXX., on the subject of crimes against the United States, and in chapter three, which treats of crimes arising within the maritime and territorial jurisdiction of the United States. [558] It provides that "Every person who commits murder, * * * within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States, * * * shall suffer death."

Title XXVIII. of the Revised Statutes relates to Indians, and the sub-title of chapter 4 is, Government of Indian Country. It embraces many provisions regulating the subject of intercourse and trade with the Indians in the Indian country, and imposes penalties and punishments for various violations of them. Section 2142 provides for the punishment of assaults with deadly weapons and intent, by Indians upon white persons, and by white persons upon Indians; section 2143, for the case of arson, in like cases; and section 2144 provides that "The general laws of the United States defining and prescribing punishments for forgery and depredations upon the mails shall extend to the Indian country."

The next two sections are as follows:

"Sec. 2145. Except as to crimes, the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

Sec. 2146. The preceding section shall not be construed to extend to [crimes committed by one Indian against the person or property of another Indian, nor to] any Indian committing any offense in the Indian country who has been punished by the local law of the Tribe, or to any case where by treaty stipulations the exclusive jurisdiction over such offenses is or may be secured to the Indian Tribes respectively."

That part of section 2146 placed within brackets was in the Act of 27th March, 1854, ch. 26, sec. 3, 10 Stat. at L., 270, was omitted by the revisers in the original revision, and restored by the Act of 18th February, 1875, ch. 80, 18 Stat. at L., 318, and now appears in the second edition of the Revised Statutes. It is assumed for the purposes of this opinion, that the omission in the original revision was inadvertent, and [559] that the restoration evinces no other intent on the part of Congress than that the provision should be considered as in force, without interruption, and not a new enactment of it for any other purpose than to correct the error of the revision.

The District Courts of the Territory of Dakota are invested with the same jurisdiction in all cases arising under the laws of the United States as is vested in the Circuit and District Courts of the United States. R. S., secs. 1907-1910. The reservation of the Sioux Indians, lying within the exterior boundaries of the Territory of Dakota, was defined by article II., of the Treaty concluded April 29, 1868, 15 Stat. at L., 635, and by section 1839 Rev. Stats., it is excepted out of and constitutes no part of that Territory. The object of this exception is stated to be to exclude the jurisdiction of any state or territorial government over Indians, within its exterior lines, without their consent, where their rights have been reserved and remain unextinguished by treaty. But the district courts of the Territory having by law, the

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jurisdiction of District and Circuit Courts of the United States, may, in that character, take cognizance of offenses against the laws of the United States, although committed within an Indian reservation, when the latter is situate within the space which is constituted by the authority of the territorial government the judicial district of such court. If the land reserved for the exclusive occupancy of Indians lies outside the exterior boundaries of any organized territorial government, it would require an Act of Congress to attach it to a judicial district, of which there are many instances, the latest being the Act of January 6, 1883, by which a part of the Indian Territory was attached to the District of Kansas and a part to the Northern District of Texas. 22 Stat. at L., 400. In the present case, the Sioux reservation is within the geographical limits of the Territory of Dakota, and being excepted out of it only in respect to the territorial government, the District Court of that Territory, within the geographical boundaries of whose district it lies, may exercise jurisdiction under the laws of the United States over offenses made punishable by them committed within its limits. *U. S.* v. *Dawson*, 15 How., [560] 467; *U. S.* v. *Jackalow*, 1 Black, 484 [66 U. S., XVII., 225]; *U. S.* v. *Rogers*, 4 How., 567; *U. S.* v. *Alberty*, Hemp., 444, opinion by *Mr. Justice* Daniel; *U. S.* v. *Starr*. Hemp., 469; *U. S.* v. *Ta-wanga-ca or Town Maker*, an Osage Indian, Hemp., 304.

The district court has two distinct jurisdictions. As a territorial court it administers the local law of the territorial government; as invested by Act of Congress with jurisdiction to administer the laws of the United States, it has all the authority of circuit and district courts; so that, in the former character, it may try a prisoner for murder committed in the territory proper, under the local law, which requires the jury to determine whether the punishment shall be death or imprisonment for life (Laws of Dakota, 1883, ch. 9); and, in the other character, try another for a murder committed within the Indian reservation, under a law of the United States, which imposes, in case of conviction, the penalty of death.

Section 2145 of the Revised Statutes extends the general laws of the United States as to the punishment of crimes committed in any place within their sole and exclusive jurisdiction, except the District of Columbia, to the Indian country, and it becomes necessary, therefore, to inquire whether the locality of the homicide, for which the prisoner was convicted of murder, is within that description.

The 1st section of the Indian Intercourse Act of June 30, 1834 [4 Stat. at L., 729], defines the Indian country as follows:

"That all that part of the United States west of the Mississippi and not within the States of Missouri and Louisiana or the Territory of Arkansas, and also that part of the United States east of the Mississippi River, not within any State to which the Indian title has not been extinguished, for the purposes of this Act, be taken and be deemed to be the Indian country."

Since the passage of that Act great changes have taken place, by the acquisition of new territory, by the creation of new States and by the organization of territorial governments; and the Revised Statutes, while retaining the substance of many important provisions of the Act of 1834, with amendments and additions since made reg- [561] ulating intercourse with the Indian Tribes, has, nevertheless, omitted all definition of what now must be taken to be "the Indian country." Nevertheless, although the section of the Act of 1834 containing the definition of that date has been repealed, it is not to be regarded as if it had never been adopted, but may be referred to in connection with the provisions of its original context which remain in force, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes. It is an admitted rule in the interpretation of statutes that clauses which have been repealed may still be considered in construing the provisions that remain in force. *Bramwell, L. J.*, in *Atty-Gen* v. *Lamplough*, L. R., 3 Ex. D., 223-227; Hardcastle, Stat. Law, 217; *Bank* v. *Collector*, 3 Wall., 495-513 [70 U. S., XVIII., 207-211]; *Commonwealth* v. *Bailey*, 13 Allen, 541. This rule was applied in reference to the very question now under consideration in *Bates* v. *Clark*, 95 U. S., 204 [XXIV., 471], decided at the October Term, 1877. It was said in that case by *Mr. Justice* Miller, delivering the opinion of the court, that "It follows from this that all the country described by the Act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by Act of Congress." In our opinion that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the Act of 1834, and notwithstanding the formal definition in that Act has been dropped from the statutes, excluding, however, any territory embraced within the exterior geographical limits of a State not excepted from its jurisdiction by treaty or by statute, at the time of its admission into the Union, but saving even in respect to territory not thus accepted and actually in the exclusive occupancy of Indians, the authority of Congress over it, under the con- [562] stitutional power to regulate commerce with the Indian Tribes, and under any treaty made in pursuance of it. *U. S. McBratney*, 104 U. S., 621 [XXVI., 869].

This definition, though not now expressed in the Revised Statutes, is implied in all those provisions, most of which were originally connected with it when first enacted, and which still refer to it. It would be otherwise impossible to explain these references, or give effect to many of the most important provisions of existing legislation for the government of the Indian country.

It follows that the *locus in quo* of the alleged offense is within Indian country, over which, territorially, the District Court of the First Judicial District of Dakota, sitting with the authority of a Circuit Court of the United States had jurisdiction.

But if section 2145, R. S., extends the Act of Congress, section 5339, punishing murder, to

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the locality of the prisoner's offense, section 2146 expressly excepts from its operation "crimes committed by one Indian against the person or property of another Indian;" an exception which includes the case of the prisoner, and which, if it is effective and in force, makes his conviction illegal and void. This brings us at once to the main question of jurisdiction, deemed by Congress to be of such importance, to the prisoner and the public, as to justify a special appropriation for the payment of the expenses incurred on his behalf, in presenting it for decision in this proceeding to this court. 22 Stat. at L., 624, ch. 143, March 3, 1883.

The argument in support of the jurisdiction and conviction is, that the exception contained in section 2146, Rev. Stats., is repealed by the operation and legal effect of the Treaty with the different Tribes of the Sioux Indians of April 29, 1868, 15 Stat. at L., 635; and an Act of Congress, approved February 28, 1877, to ratify an agreement with certain bands of the Sioux Indians, etc. 19 Stat. at L., 254.

The following provisions of the Treaty of 1868 are relied on:

"Article 1. From this time forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and its honor is hereby pledged [563] to keep it. The Indians desire peace, and they now pledge their honor to maintain it.

If bad men among the whites or among other people subject to the authority of the United States shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of anyone, white, black or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States to be tried and punished according to its laws. And in case they willfully refuse so to do, the person injured shall be re-imbursed for his loss from the annuities or other moneys due or to become due to them under this or other Treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no one sustaining loss while violating the provisions of this Treaty or the laws of the United States shall be re-imbursed therefor."

The second article defines the reservation which, it is stipulated, "Is set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly Tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents and *employés* of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this ar- [564] ticle."

"Article V. The United States agrees that the agent for said Indians shall in future make his home at the agency building; that he shall reside among them and keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under their treaty stipulations, as also for the faithful discharge of other duties enjoined upon him by law. In all cases of depredation on person or property he shall cause evidence to be taken in writing and forwarded, together with his findings, to the Commissioner of Indian Affairs, whose decision, subject to the revision of the Secretary of the Interior, shall be binding on the parties to this Treaty."

Other provisions of this Treaty are intended to encourage the settlement of individuals and families upon separate agricultural reservations, and the education of children in schools to be established. The condition of the Tribe in point of civilization is illustrated by stipulations on the part of the Indians, that they will not interfere with the construction of railroads on the plains or over their reservation, nor attack persons at home or traveling, nor disturb wagon trains, mules or cattle belonging to the people of the United States, nor capture nor carry off white women or children from the settlements, nor kill nor scalp white men, nor attempt to do them harm.

By the Indian Appropriation Act of August 15, 1876, Congress appropriated $1,000,000 for the subsistence of the Sioux Indians, in accordance with the Treaty of 1868, and "for purposes of their civilization," 19 Stat. at L., 192; but coupled with certain conditions relative to a cession of a portion of the reservation, and with the proviso, "That no further appropriation for said Sioux Indians for subsistence shall hereafter be made until some stipulation, agreement or arrangement shall have been entered into by said Indians with the President of the United States, which is calculated and designed to enable said Indians to become self supporting."

In pursuance of that provision the agreement was made, which was ratified in part by the Act of Congress of February 28, 1877. The enact- [565] ment of this agreement by statute, instead of its ratification as a treaty, was in pursuance of the policy which had been declared for the first time in a proviso to the Indian Appropriation Act of March 3, 1871, 16 Stat. at L., 566, ch. 120, and permanently adopted in section 2079 of the Revised Statutes, that thereafter "No Indian Nation or Tribe within the territory of the United States, shall be acknowledged or recognized as an independent Nation, Tribe or power with whom the United States may contract by treaty," but without invalidating or impairing the obligation of subsisting treaties.

The instrument in which the agreement was embodied was signed by the commissioners, on the part of the United States, and by the representative chiefs and head men of the various

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Sioux Tribes, but with certain exceptions on the part of some of the latter, and consisted of eleven articles.

The first defines the boundaries of the reservation; the second provides for wagon roads through it to the country lying west of it, and for the free navigation of the Mississippi River; the third for the places where annuities shall be received.

Article 4 was as follows:

"The Government of the United States and the said Indians being mutually desirous that the latter shall be located in a country where they may eventually become self-supporting and acquire the arts of civilized life, it is, therefore, agreed that the said Indians shall select a delegation of five or more chiefs and principal men from each band, who shall, without delay, visit the Indian Territory, under the guidance and protection of suitable persons, to be appointed for that purpose by the Department of the Interior, with a view to selecting therein a permanent home for the said Indians. If such delegation shall make a selection which shall be satisfactory to themselves, the people whom they represent and to the United States, then the said Indians agree that they will remove to the country so selected within one year from this date. And the said Indians do further agree in all things to submit themselves to such beneficent plans as the government may provide for them in the selection of a country suitable for [566] a permanent home where they may live like white men."

The 5th article recites that, in consideration of the foregoing cession of territory and rights, the United States agrees "To provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools, and instruction in mechanical and agricultural arts, as provided for by the Treaty of 1868;" to provide subsistence, etc.

Article 8 is as follows:

"The provisions of the said Treaty of 1868, except as herein modified, shall continue in full force, and with the provisions of this agreement, shall apply to any country which may hereafter be occupied by the said Indians as a home; and Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person and life.

Article 9. The Indians, parties to this agreement, do hereby solemnly pledge themselves, individually and collectively, to observe each and all of the stipulations herein contained; to select allotments of land as soon as possible after their removal to their permanent home, and to use their best efforts to learn to cultivate the same. And they do solemnly pledge themselves that they will, at all times, maintain peace with the citizens and Government of the United States; that they will observe the laws thereof, and loyally endeavor to fulfill all the obligations assumed by them under the Treaty of 1868 and the present agreement, and to this end will, whenever requested by the President of the United States, select so many suitable men from each band to co-operate with him in maintaining order and peace on the reservation as the President may deem necessary, who shall receive such compensation for their services as Congress may provide."

By the 11th and last article it was provided that the term "reservation," as therein used, should be held to apply to any country which should be selected under the authority of the United States as their future home.

The 4th article and part of the 6th article of the agreement, which referred to the removal [567] of the Indians to the Indian Territory, were omitted from its ratification, not having been agreed to by the Indians.

If this legislation has the effect contended for, to support the conviction in the present case, it also makes punishable, when committed within the Indian country by one Indian against the person or property of another Indian, the following offenses, defined by the general laws of the United States as to crimes committed in places within their exclusive jurisdiction, *viz.*: manslaughter, sec. 5341; attempt to commit murder or manslaughter, sec. 5342; rape, sec. 5345; mayhem, sec. 5348; bigamy, sec. 5352; larceny, sec. 5356; and receiving stolen goods, sec. 5357.

That this legislation could constitutionally be extended to embrace Indians in the Indian country, by the mere force of a treaty, whenever it operates of itself, without the aid of any legislative provision, was decided by this court in the case of *U. S.* v. *43 Gallons of Whisky*, 93 U. S., 188 [XXIII., 846]. See, *Holden* v. *Joy*, 17 Wall., 211 [84 U. S., XXI., 523]; *The Cherokee Tobacco*, 11 Wall., 616 [78 U. S., XX., 227]. It becomes necessary, therefore, to examine the particular provisions that are supposed to work this result.

The first of these is contained in the 1st article of the Treaty of 1868 [15 Stat. at L., 635], that "If bad men among the Indians shall commit a wrong or depredation of the person or property of anyone, white, black or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws."

But it is quite clear from the context that this does not cover the present case of an alleged wrong committed by one Indian upon the person of another of the same Tribe. The provision must be construed with its counterpart, just preceding it, which provides for the punishment by the United States of any bad men among the whites or among other people subject to their authority, who shall commit any wrong upon the person or property of the Indians. Here are two parties, among whom, respectively, there [568] may be individuals guilty of a wrong against one of the other—one is the party of whites and their allies, the other is the Tribe of Indians with whom the Treaty is made. In each case the guilty party is to be tried and punished by the United States, and in case the offender is one of the Indians who are parties to the Treaty, the agreement is that he shall be delivered up. In case of refusal, deduction is to be made from the annuities payable to the Tribe, for compensation to the injured person, a provision which points quite distinctly to the conclusion that the injured person cannot himself be one of the

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same Tribe. Similar provisions for the extradition of criminals are to be found in most of the treaties with Indian Tribes, as far back, at least, as that concluded at Hopewell with the Cherokees, November 28, 1785. 7 Stat. at L., 18.

The second of these provisions, that are supposed to justify the jurisdiction asserted in the present case, is the 8th article of the agreement, embodied in the Act of 1877 [19 Stat. at L., 254], in which it is declared: "And Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person and life."

It is equally clear, in our opinion, that these words can have no such effect as that claimed for them. The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all, that of self-government; the regulation by themselves of their own domestic affairs; the maintenance of order and peace among their own members by the administration of their own laws and customs. They were, nevertheless, to be subject to the laws of the United States, not in the sense [569] of citizens, but, as they had always been, as wards subject to a guardian; not as individuals, constituted members of the political community of the United States, with a voice in the selection of representatives and the framing of the laws, but as a dependent community who were in a state of pupilage, advancing from the condition of a savage Tribe to that of a people who, through the discipline of labor and by education, it was hoped might become a self-supporting and self-governed society. The laws to which they were declared to be subject were the laws then existing, and which applied to them as Indians and, of course, included the very statute under consideration, which excepted from the operation of the general laws of the United States, otherwise applicable, the very case of the prisoner. Declaring them subject to the laws made them so, if it effected any change in their situation, only in respect to laws in force and as existing, and did not effect any change in the laws themselves. The phrase cannot, we think, have any more extensive meaning than an acknowledgment of their allegiance as Indians to the laws of the United States, made or to be made in the exercise of legislative authority over them as such. The corresponding obligation of protection on the part of the government is immediately connected with it, in the declaration that each individual shall be protected in his rights of property, person and life, and that obligation was to be fulfilled by the enforcement of the laws then existing appropriate to those objects, and by that future appropriate legislation which was promised to secure to them an orderly government. The expressions contained in these clauses must be taken in connection with the entire scheme of the agreement as framed, including those parts not finally adopted, as throwing light on the meaning of the remainder; and looking at the purpose, so clearly disclosed in that, of the removal of the whole body of the Sioux Nation to the Indian Territory proper, which was not consented to, it is manifest that the provisions had reference to their establishment as a people upon a defined reservation as a permanent home, who were to be urged, as far as it could successfully be done, into the practice of agriculture, and whose chil- [570] dren were to be taught the arts and industry of civilized life, and that it was no part of the design to treat the individuals as separately responsible and amenable, in all their personal and domestic relations with each other, to the general laws of the United States, outside of those which were enacted expressly with reference to them as members of an Indian Tribe.

It must be remembered that the question before us is whether the express letter of section 2146 of the Revised Statutes, which excludes from the jurisdiction of the United States the case of a crime committed in the Indian country by one Indian against the person or property of another Indian, has been repealed. If not, it is in force and applies to the present case. The Treaty of 1868 and the agreement and Act of Congress of 1877, it is admitted, do not repeal it by any express words. What we have said is sufficient at least to show that they do not work a repeal by necessary implication. A meaning can be given to the legislation in question, which the words will bear, which is not unreasonable, which is not inconsistent with its scope and apparent purposes, whereby the whole may be made to stand. Implied repeals are not favored. The implication must be necessary. There must be a positive repugnancy between the provisions of the new laws and those of the old. *Wood* v. *U. S.*, 16 Pet., 342; *Davies* v. *Fairbairn*, 3 How., 636; *U. S.* v. *Tynen*, 11 Wall., 88 [78 U. S., XX., 153]; *State* v. *Stoll*, 17 Wall., 425 [84 U. S., XXI., 650].

The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is, *Generalia specialibus non derogant.* "The general principle to be applied," said Bovill, *C. J.*, in *Thorpe* v. *Adams*, L.R., 6 C. P., 135, "To the construction of Acts of Parliament is that a general Act is not to be construed to repeal a previous particular Act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two Acts standing together." "And the reason is," said Wood, *V. C.*, in *Fitzgerald* v. *Champneys*, 30 L. J. Ch., 782, 2 Johns. & H., 31-54, "that the Legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and [571] provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do."

The nature and circumstances of this case strongly re-inforce this rule of interpretation in its present application. It is a case involving the judgment of a court of special and limited jurisdiction, not to be assumed without clear warrant of law. It is a case of life and death. It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a

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community, separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others and not for them; which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality. It is a case, too, of first impression, so far as we are advised, for, if the question has been mooted heretofore in any courts of the United States, the jurisdiction has never before been practically asserted as in the present instance. The provisions now contained in sections 2145 and 2146 of the Revised Statutes were first enacted in section 25 of the Indian Intercourse Act of 1834. 4 Stat. at L., 733. Prior to that, by the Act of 1796, 1 Stat. at L., 469, and the Act of 1802, 2 Stat. at L., 139, offenses committed by Indians against white persons and by white persons against Indians, were specifically enumerated and defined, and those by Indians against each other were left to be dealt [572] with by each Tribe for itself, according to its local customs. The policy of the government in that respect has been uniform. As was said by *Mr. Justice* Miller, delivering the opinion of the court in *U. S.* v. *Joseph*, 94 U. S., 614, 617 [XXIV., 295, 297], "The Tribes for whom the Act of 1854 was made were those semi-independent Tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized State or Territory and, in regard to their domestic government, left to their own rules and traditions, in whom we have recognized the capacity to make treaties, and with whom the governments, state and national, deal, with a few exceptions only, in their national or tribal character and not as individuals."

To give to the clauses in the Treaty of 1868 and the agreement of 1877 effect, so as to uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the government towards the Indians, as declared in many statutes and treaties, and recognized in many decisions of this court, from the beginning to the present time. To justify such a departure, in such a case, requires a clear expression of the intention of Congress, and that we have not been able to find.

It results that the First District Court of Dakota was without jurisdiction to find or try the indictment against the prisoner, that the conviction and sentence are void, and that his imprisonment is illegal.

The writs of habeas corpus *and* certiorari *prayed for will, accordingly, be issued.*

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 100, 550.

VIRGINIA YOUNG, *Appt.*, [573]

v.

ANDREW B. DUVALL ET AL.

(See S. C., Reporter's ed., 573-577.)

Action to set aside deed of trust—effect of acknowledgment.

* In a suit to set aside a deed of trust, executed to secure the payment of a note, signed by husband and wife, and the acknowledgment of which was certified as required by law, it was in proof that the wife signed the note and the deed, having an opportunity to read both before signing them; she was before an officer competent to take her acknowledgment, and he came into her presence, at the request of the husband, to take it; and she knew or could have ascertained, while in the presence of the officer, as well to what property the deed referred as the object of its execution; held, That the certificate must stand against a mere conflict of evidence as to whether she willingly signed, sealed and delivered the deed, or had its contents explained to her by the officer, or was examined privily and apart from her husband; and that even if it be only *prima facie* evidence of the facts therein stated, it cannot be impeached, in respect to those facts, except upon proof which clearly and fully shows it to be false or fraudulent.

[No. 129.]

Argued Nov. 16, 19, 1883. Decided Dec. 17, 1883.

APPEAL from the Supreme Court of the District of Columbia.

The bill in this case was filed in the court below, by the appellant, to vacate and have declared null and void, as fraudulent of her rights, a deed of trust, securing a note for $8,000, alleged to have been obtained through a conspiracy of the officer pretending to have taken her acknowledgment to the same with other persons, including her husband, and for an injunction to prevent the sale of the premises under the said deed of trust.

Upon the hearing of the case at the Special Term of the court below, a decree was entered dismissing the bill.

This decree having been affirmed, on appeal, at the General Term of said court, the complainant appealed to this court.

The facts of the case are stated by the court.

Messrs. **Enoch Totten** and *Fred W. Jones*, for appellant:

It is essential to the efficacy of a conveyence by a married woman of her real estate, that it be executed and acknowledged in the manner prescribed by the statutes.

Mott v. *Smith*, 16 Cal., 533; *Rumfelt* v. *Clemens*, 46 Pa., 455; *Colburn* v. *Kelley*, 61 Pa. St., 314; *Clark* v. *Thompson*, 12 Pa., 274.

To be valid, the examination and acknowledgment must be taken out of the presence of her husband; "this is indispensable."

Rhea v. *Rhenner*, 1 Pet., 105; *McCandless* v. *Engle* 51 Pa., 309; *Loudon* v. *Blythe*, 27 Pa. St., 22; *Miltenberger* v. *Croyle*, 27 Pa., 170; *Michener* v. *Cavender*, 38 Pa., 334; *Bank* v. *Copeland*, 18 Md., 305; *Barnet* v. *Barnet*, 15 Serg. & R., 72.

A deed obtained from a married woman by coercion of any kind is void as to her.

Richardson v. *Hittle*, 31 Ind., 119; *Wiley* v. *Prince*, 21 Tex., 639; *Schrader* v. *Decker*, 9 Pa. St.,

*Head note by *Mr. Justice* HARLAN.

NOTE.—*Acknowledgment of deed by married woman; parol evidence to contradict; interested officer* See *note* to Drury v. Foster, 69 U. S., XVII., 780.

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14; *Louden* v. *Blythe*, 16 Pa. St., 532; *O'Neal* v. *Robinson*, 45 Ala., 538; *Wilson* v. *Bull*, 10 Ohio, 250; *Drury* v. *Foster*, 2 Wall., 24 (69 U.S., XVII., 780).

Subsequent parol declarations of the wife will not cure defective execution or acknowledgment.

Watson v. *Bailey*, 1 Binn., 470; *Jourdan* v. *Jourdan*, 9 Serg. & R., 268.

The acts of a married woman are not voidable only, like those of infants, etc., but are in general absolutely void.

Elliott v. *Peirsol*, 1 Pet., 338.

Messrs. **Jos. H. Bradley** and *A. B. Duvall*, for appellees.

Mr. Justice **Harlan** delivered the opinion of the court:

It is provided by the Revised Statutes of the United States, relating to the District of Columbia, that "When any married woman shall be a party executing a deed for the conveyance of real estate or interest therein, and shall only be relinquishing her right of dower, or when she shall be a party with her husband to any deed, it shall be the duty of the officer authorized to take acknowledgments, before whom she may appear, to examine her privily and apart from her husband, and to explain to her [575] the deed fully;" further, "if upon such privy examination and explanation, she shall acknowledge the deed to be her act and deed, and shall declare that she had willingly signed, sealed and delivered the same, and that she wished not to retract it, the officer shall certify such examination, acknowledgment and declaration, by a certificate annexed to the deed and under his hand and seal," to the effect indicated in the form prescribed by the statute. R. S. Dist. Col., sec. 450.

It is also provided that "When a privy examination, acknowledgment and declaration of a married woman is taken and certified and delivered to the recorder of deeds for record, in accordance with the provisions of this (the 14th) chapter, the deed shall be as effectual in law as if she had been an unmarried woman; but no covenant contained in this deed shall in any manner operate upon her or her heirs, further than to convey effectually her right of dower or other interest in the real estate which she may have at the date of the deed." *Ib.*, sec. 452.

These statutory provisions being in force, there was placed upon record in the proper office in the District of Columbia, on the 17th day of November, 1875, a deed of trust purporting to have been executed by Mark Young and Virginia Young, his wife, and to have been, on the same day, acknowledged before B. W. Ferguson, a justice of the peace in and for the District of Columbia. The certificate of that officer, under his hand and seal, shows that the grantors were personally known to him to be the persons who executed the deed; that they personally appeared before him, in this District, "and acknowledged the same to be their act and deed, and the said Virginia Young, wife of said Mark Young, being by me (him) examined privily and apart from her husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it."

This deed of trust conveyed certain real estate, in the City of Washington, the property of Mrs. Young, to the appellees, Duvall and Holtzman, in trust to secure the payment of a note executed by the grantors, whereby they promised to pay to the order of John Little, two years after date, at the National Metropolitan Bank, [576] the sum of $8,000, with interest at the rate of ten per cent until paid. Neither Little, nor the present holder of the note, had any knowledge of the circumstances attending the execution of the deed. Default having occurred in the payment of the debt so secured, the trustees advertised the property for sale at public auction. Thereupon, Mrs. Young instituted this suit for the purpose of preventing such sale and to obtain a decree declaring the deed of trust fraudulent and void, and requiring it to be surrendered for cancellation.

The bill sets forth several grounds upon which relief to that extent is asked, but those only deserve serious consideration which are embraced by averments to the following effect: that the contents of the deed were never explained to her; that she signed it because she was required, ordered and commanded to do so by her husband and a person who was with him; that its contents were never known or explained to her by the officer; that so far from her having been examined, in reference to the deed, privily and apart from her husband, the latter remained in the presence of herself and the officer on the occasion when it is claimed she signed, acknowledged and delivered it.

It was in proof that Mrs. Young signed the note and the deed, having an opportunity to read papers before signing them; she was before an officer competent under the law to take her acknowledgment, and he came into her presence for the purpose of receiving it; he so came at the request of the husband, who expected, by means of the executed deed of trust, to secure a loan from John Little of the amount specified in the note; and she knew or could readily have ascertained, while in the presence of the officer, as well to what property the deed referred as the object of its execution. There is, however, a conflict in the evidence as to whether she willingly signed, sealed and delivered the deed, or had its contents fully or at all explained to her by the officer, or was examined privily and apart from her husband.

It is not necessary to enter upon a review of the adjudged cases bearing upon the general question of the effect to be given to the certificate of an officer taking an acknowledgment of a married woman to a conveyance of real estate; for, if it be assumed, for the purposes of this [577] case, that it is only *prima facie* evidence of the facts stated in it, we are of opinion that the integrity of the certificate before us has not been successfully impeached. The certificate of the officer states every fact essential, under the statute, to make the deed, upon its being delivered for record, as effectual in law as if Mrs. Young was an unmarried woman. The duties of that officer were plainly defined by statute. It was incumbent upon him to explain the deed fully to the wife, and to ascertain from her whether she willingly signed, sealed and delivered the same, and wished not to retract it. The responsibility was upon him to guard her against coercion or undue influence upon the part of the

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husband, in respect of the execution and delivery of the deed. To that end he was required to examine her privily and apart from the husband. These facts were to be manifested by a certificate under his hand and seal. Of necessity, arising out of considerations of public policy, his certificate must, under the circumstances disclosed in this case, be regarded as an ascertainment, in the mode prescribed by law, of the facts essential to his authority to make it; and if, under such circumstances, it can be contradicted, to the injury of those who in good faith have acted upon it—upon which question we express no opinion—the proof to that end must be of such a character as will clearly and fully show the certificate to be false or fraudulent. *Ins. Co.* v. *Nelson*, 103 U. S., 544, 547 [XXVI., 486]. The mischiefs that would ensue from a different rule could not well be overstated. The cases of hardship upon married women that might occur under the operation of such a rule are of less consequence than the general insecurity in the titles to real estate which would inevitably follow from one less rigorous.

It is sufficient for the disposition of this case to say that, even upon the assumption that the certificate is only *prima facie* evidence of the facts stated in it, the proof is not of that clear, complete and satisfactory character which must be required to impeach the official statements of the officer who certified Mrs. Young's acknowledgment of the deed in question.

The decree must, therefore, be affirmed. It is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[578] PROVIDENCE AND NEW YORK STEAMSHIP COMPANY, *Plff. in Err.*,

v.

HILL MANUFACTURING COMPANY.

(See S. C., Reporter's ed., 578-607.)

Limited liability proceedings—award of injunction—rules regulating proceedings—loss by fire—superseding actions.

*1. Proceedings in the District Court of U.S., under the Act of 1851, 9 Stat. at L., 635, to limit the liability of ship-owners for loss or damage to goods, supersede all other actions and suits for the same loss or damage in the State or Federal Courts, upon the matter being properly pleaded therein.

2. The effect of such proceedings, in superseding other actions and suits, does not depend upon the award of an injunction by the district court, but upon the object and intrinsic character of the proceedings themselves, and the express language of the Act of Congress.

3. The power of Congress to pass the Act of 1851, and of this court to prescribe the Rules adopted in December Term, 1871, for regulating proceedings under the Act, re-affirmed.

4. Loss and damage by fire on board of a ship are within the relief of the 3d, as well as the 1st, section of the Act.

5. Goods transported by steamer from Providence to New York were injured by fire on board the vessel at her dock in the latter place, and suits for damage were commenced against the owners of the steamer in New York and Boston; thereupon proceedings were instituted by such owners in the U. S. District Court for New York, under the Act of 1851, to limit their liability; held, that said proceedings, properly pleaded and verified, superseded the actions in other courts, and that it was error to proceed further therein.

[No. 82.]

Argued Apr. 2, 3, 1883. Decided Dec. 17, 1883.

IN ERROR to the Supreme Judicial Court of the Commonwealth of Massachusetts.

This action was brought in the court below, by the defendant in error, to recover for the loss of certain goods, shipped for New York, by the plaintiff's agents at Providence, May 22, 1868, on the defendant's vessel, The Oceanus, which are alleged to have been damaged and destroyed by fire through the negligence of the defendant.

The defendant set up, as one of its defenses, certain proceedings which had been instituted in the District Court of the United States for the Southern District of New York, under the Act of March 3, 1851, limiting the liability of ship-owners.

At the first trial the case was reserved for the consideration of the full court, which subsequently ordered a trial. *Mfg. Co.* v. *P. & N. Y. S. S. Co.*, 118 Mass., 495.

The trial resulted in a verdict and judgment in favor of the plaintiff for $8,104.34, with costs amounting to $3,060.15; *Hill Mfg. Co.* v. *P. & N. Y. S. S. Co.*, 125 Mass., 292. Whereupon, the defendant sued out this writ of error.

A fuller statement of the history and facts of the case appears in the opinion of the court.

Messrs **Joseph H. Choate**, *Moorfield Storey* and *J. D. Ball*, for plaintiff in error:

The court below erred in proceeding in defiance of the injunction of the district court, and after its own jurisdiction had ceased.

The substantial effect of the Act of 1851 and the rules, taken together, is to make adequate provision that all claims of a maritime character, growing out of a single disaster contemplated by the Act, be presented and tried in one proceeding, and to restrict the remedy in such a case to a proceeding *in rem* against the vessel and freight, withholding all remedy *in personam*, or limiting the latter to the value of the vessel and freight.

The Genesee Chief v. *Fitzhugh*, 12 How., 443; *The Scotland*, 105 U. S., 24 (XXVI., 1001); *In Re L. I. Trans. Co.*, 5 Fed. Rep., 599; *In the Matter of the Prov. & N. Y. Steamship Co.*, 6 Ben., 124; *Norwich Co.* v. *Wright*, 13 Wall., 104 (80 U. S., XX., 585).

The question of limitation or no limitation under the Act of 1851 is, in its nature, an admiralty question, which, when raised by the proper procedure *in rem*, none but an admiralty court can determine; and, as soon as its jurisdiction has attached, that of the state court is necessarily terminated or suspended until its decision, which, on that admiralty question, is *res judicata*.

Nocion v. *Hallett*, 16 Johns., 337; *LeCaux* v. *Eden*, Doug., 594; *Slocum* v. *Mayberry*, 2 Wheat., 1; *Gelston* v. *Hoyt*, 3 Wheat., 246; *Steam Nav. Co.* v. *Merch. Bk.*, 6 How., 344.

There was no evidence before the jury, tending to show that the fire was caused by the defendant's neglect, within the meaning of the statute.

Kendall v. *Boston*, 118 Mass., 234; *Joy* v.

*Head notes by *Mr. Justice* BRADLEY.

NOTE.—*Liability of carrier by water for loss or damage of goods.* See *note* to Moore v. Trans. Co., 65 U. S., XVI., 674.

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Winnisimmet Co., 114 Mass., 63; *Merch. Bk.* v. *State Bk.*, 10 Wall., 665 (77 U. S., XIX., 1024); *Ryder* v. *Wombwell*, L. R., 4 Exch., 39; *Giblin* v. *McMullen*, L. R., 2 P. C., 335; *Stubley* v. *L. & N. W. R. R. Co.*, L. R., 1 Exch., 13; *Crafter* v. *Met. R. R. Co.*, L. R., 1 C. P., 300; *Toomey* v. *London, etc., Ry. Co.*, 3 C. B. (N. S.), 146; *Cornman* v. *Eastern Counties R. R. Co.*, 4 H. & N., 781.

Messrs. **Josiah G. Abbott** and *Samuel A. B. Abbott*, for defendant in error:

The only purpose of the Act of 1851 is to exempt owners of ships from the burdensome liability to which they were held by the common law as common carriers for the acts or negligence of their agents or servants, without their knowledge or assent, not to lessen their responsibility for their own willful or negligent acts.

Moore v. *Trans. Co.*, 24 How., 1 (65 U. S., XVI., 674); *Walker* v. *Trans. Co.*, 3 Wall., 150 (70 U. S., XVIII., 172).

By the Judiciary Act of 1789, 1 Stat. at L., 76, the common law remedy is expressly reserved to state courts, where the common law can give a remedy.

This gives the state courts concurrent jurisdiction.

The common law affords a complete remedy, if the loss by fire occurred with the privity or knowledge of the owners, and the liability can be enforced at common law in the simplest and most efficient manner.

Sutton v. *Mitchell*, 1 T. R., 18; *Wilson* v. *Dickson*, 2 B. & Ald., 2; *Walker* v. *Ins. Co.*, 14 Gray, 288.

Jurisdiction having once attached in the state court, by bringing this action, it cannot be defeated by subsequent proceedings in the Federal Courts.

Smith v. *McIver*, 9 Wheat., 532; *Wallace* v. *McConnell*, 13 Pet., 136; *Taylor* v. *Carryl*, 20 How., 583 (61 U. S., XV., 1028); *Mallett* v. *Dexter*, 1 Curt. (C. C.), 178; *Johnson* v. *Bishop*, 1 Wool., 324.

The district court has no power to enjoin against the prosecution of a suit in a state court. This was expressly provided by the Act of Congress of 1793, 1 Stat. at L., 346, which has never been repealed, either expressly or by implication. Such have been the decisions of this court even in cases of bankruptcy.

Peck v. *Jenness*, 7 How., 625; *Taylor* v. *Carryl* (*supra*); *McKim* v. *Voorhies*, 7 Cranch, 279; *Diggs* v. *Wolcott*, 4 Cranch, 179; *Watson* v. *Jones*, 13 Wall., 679 (80 U. S., XX., 666); *Campbell's Case*, 1 Abb. (U. S.), 185; *Dial* v. *Reynolds*, 96 U. S., 340 (XXIV., 644).

Mr. Justice **Bradley** delivered the opinion of the court:

The writ of error in this case brings up for consideration a judgment of the Supreme Judicial Court of Massachusetts rendered in an action brought by the Hill Manufacturing Company against the Providence and New York Steamship Company as common carriers, to recover damages for the loss of certain goods delivered by the plaintiffs to the defendants at Providence, Rhode Island, to be transported to the City of New York; which goods, it is alleged, were, by the negligence of the defendants, burned and injured by fire. The loss is stated to have occurred in May, 1868; the action was commenced in September, 1870. The defendants first put in an answer denying the allegations of the declaration; but averring that if the goods were delivered to them for the purpose stated, they were delivered to and received by them to be transported to the City of New York over Long Island Sound, not being river or inland navigation, and were safely transported to New York in their steamship Oceanus, and that the damage, if any, was caused by fire happening to said steamship at her dock in New York, and said [580] fire was not caused by the neglect or design of the defendant, who was the owner of said steamship, but occurred without their privity or knowledge; and they pleaded the 1st and 3d sections of the Act of Congress, approved March 3, 1851 [9 Stat. at L., 635], entitled: "An Act to Limit the Liability of Ship-Owners, and for Other Purposes;" the 1st section of which provided as follows, to wit:

"That no owner or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons any loss or damage which may happen to any goods or merchandise whatsoever, which shall be shipped, taken in or put on board any such ship or vessel, by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners."

And the 3d section of said Act provided as follows, to wit:

"That the liability of the owner or owners of any ship or vessel for any embezzlement, loss or destruction by the master, officers, mariners, passengers or any other person or persons, of any property, goods or merchandise shipped or put on board such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively in such ship or vessel and her freight then pending."

The defendants subsequently amended their answer by adding a particular statement of the manner in which the loss occurred, namely: by a fire at New York, which commenced in a building on the wharf or pier at which the steamship lay after her arrival, and was rapidly communicated to the vessel, which was burnt to the water's edge, together with most of her cargo, including not only the goods of the plaintiffs, but a large quantity of goods of other persons, greatly exceeding in amount the value of the defendants' interest in the vessel and her freight then pending. The amended answer further stated, that the defendants having been sued in the present case and in other cases in [581] New York City and elsewhere, for injuries to said cargo by said fire, and desiring as well to contest their liability and the liability of the steamer, for the loss and damage occasioned by the fire, as also to claim the benefit of the limitation of liability provided for in the 3d and 4th sections of said Act of Congress, on May 14, 1872, filed in the proper District Court of the United States having jurisdiction thereof, to wit: the District Court for the Southern District of New York, pursuant to said Act and the rules of the Supreme Court of the United States

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in that behalf, their libel and petition, setting forth the facts and circumstances on and by reason of which such exemption from and limitation of liability were claimed, and offering to pay into said district court the amount of the defendants' interest in said vessel and freight, or to give a stipulation with sureties for the payment thereof into said court whenever the same should be ordered, praying relief in that behalf and further praying that said district court would cause due appraisement to be had of the amount or value of the interest of said defendants in said steamer and her freight for said voyage, and would either order the same to be paid into said district court, or a stipulation to be given by the defendants with sureties for the payment thereof into said district court whenever ordered; and that said district court would issue a monition against all persons claiming damages for the loss, destruction, damage and injury occasioned by said fire on board of said vessel, citing them to appear before said district court and make due proof of their respective claims at a time to be therein named; and also praying that said district court would designate a commissioner, before whom such claims should be presented in pursuance of said monition; and that if, upon the coming in of the report of said commissioner and confirmation thereof, it should appear that said defendants were not liable for such loss, damage, destruction and injury, it might be so finally decreed by said district court; otherwise, that the moneys paid or secured to be paid into said district court as aforesaid, after payment of the costs and expenses, should and might be divided *pro rata* amongst the several claimants in proportion to the amount of their respective claims; and praying that, in the meantime and until the final judgment should be rendered, said district court would make an order restraining the further prosecution of all and any suit or suits against said defendants in respect to any such claim or claims; that upon said libel said district court caused due appraisement to be had and made of the amount or value of the interest of said defendants in said steamer and her freight for said voyage, and duly made an order for the giving by the defendants of a stipulation with sureties for payment thereof into court whenever the same should be ordered.

[582]

The answer further stated that the defendants; pursuant to the order of said district court, entered into a stipulation, with two sureties, to pay the value of said interest and freight as so appraised into said district court whenever ordered, which stipulation was approved, and said order having been complied with, a monition was thereupon issued by said district court against all persons claiming damages for the loss, destruction, damage and injury occasioned by said fire on board said steamer, citing them to appear before said district court and made due proof of their respective claims at or before a certain time named in said monition, to wit: at or before the 15th day of October, A. D. 1872, which time was at least three months from the issuing of said monition; and designating George F. Betts, Esq., a commissioner of said district court, as the commissioner before whom such claims should be presented, in pursuance of said monition, and ordering public and other notice of said monition as therein set forth, and that said notice had been served on the said Hill Manufacturing Company, as well as on all other claimants, pursuant to said monition; and said district court duly made an order restraining the further prosecution of all and any suit or suits against the defendants in respect of any such claim or claims.

The answer then referred to a certified copy of the libel and the proceedings thereon, annexed to and made part of the answer, and also made profert of said libel and proceedings, and concluded as follows:

"And these defendants further say that said fire, and the injury thereby caused or occasioned, was without the privity or knowledge of these defendants. And these defendants, further answering, say that if the plaintiffs have any claim by reason of any injury to said cotton cloth, it cannot be enforced in this action, but can only be enforced in said suit in said district court, and then and there only under and pursuant to said Act of Congress. And these defendants, further answering, say that said steamer Oceanus was not a canal-boat, barge or lighter, and was not used in rivers or inland navigation, and that said voyage from Providence to said City of New York was not in rivers or inland navigation; and that an injunction has been issued by said district court against said Hill Manufacturing Company, restraining and enjoining them from the further prosecution of this suit, and that said injunction has been duly served on said Hill Manufacturing Company; and further, that said Hill Manufacturing Company sued in this court the Boston & Lowell Railroad Company for the alleged loss and injury complained of in the declaration in this cause to the cotton cloth therein mentioned, and recovered therein a judgment against said Boston & Lowell Railroad Company for said alleged loss and injury, which judgment was settled, paid and satisfied."

[583]

Upon the filing of this answer the case was opened to a jury, but before any verdict was taken the case was reserved, upon the report of the Judge who presided at the trial, for the consideration of the full court. In September Term, 1875, it was ordered by the Supreme Judicial Court that the case do stand for trial. Whereupon, the defendants filed the following objections, *viz:*

"And now, with the view of having this action taken to the Supreme Court of the United States upon a writ of error, if the final judgment therein in this honorable court shall be against the defendants, and for the purpose of saving the rights of the defendants, and so that their going to trial shall not be construed a waiver of their rights or of the objections herein, said defendants come and object to and protest against the ruling and decision of this honorable court ordering and directing said action to stand for trial, and also the ruling of this honorable court that if the loss complained of by the plaintiff was occasioned by the neglect of defendants it must have been with their privity or knowledge and was not within the Act of Congress limiting the liability of ship-owners; also the rulings that the proceedings in the District Court of the United States did not affect the jurisdiction of this honorable court."

[584]

In April Term, 1876, the cause came on for trial, and the defendants, by leave of the court,

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further amended their answer by setting forth, amongst other things, the final decree of the District Court of the United States for the Southern District of New York, made on the 16th of October, 1872, by which it was adjudged and decreed that the Hill Manufacturing Company, the plaintiffs in the present suit, among other parties, be forever debarred from prosecuting any claims for damages for any loss, damage or injury occasioned by the fire on board the steamer Oceanus on the 24th of May, 1868.

Thereupon the trial proceeded, and the evidence showed that the plaintiffs' goods were delivered to the defendants at Providence to be transported to New York, and were thus transported in the steamer Oceanus upon Long Island Sound, and that the vessel safely arrived at New York with the goods on board, and was moored in a slip or dock on the North River side on a Sunday morning; and whilst lying there on that day, ready to be discharged, the fire occurred which caused the loss in question, commencing in a building on the wharf or pier, which was used by the defendants in their transportation business. The plaintiffs adduced evidence tending to show that this building was not properly constructed and managed to avoid the risk of fire, and that the defendants were guilty of negligence in that behalf; and they contended that if the jury believed that the defendants were guilty of such negligence, they could not claim the benefit of the Act of Congress, but were liable to respond for the loss of the goods. The defendants adduced counter proofs, tending to show that they were not guilty of any negligence; and also put in evidence the record of proceedings upon their libel and petition in the District Court of the United States for the Southern District of New York, corresponding to the statements of their answer; and it was [585] admitted that process and the restraining order issued in said suit had been duly served upon the plaintiffs. The record of proceedings in said suit is set forth in the transcript, but it is unnecessary to describe them in detail. They appear to be in conformity to the Act of 1851, and to the orders made by this court relating to proceedings under said Act for securing the benefit of limited liability provided for therein. They were instituted in the proper court, namely: the District Court of the United States for the Southern District of New York, in which district the steamer was found, or so much as remained of her after the fire. The libel and petition set forth the proper facts and made the proper allegations as well to show that neither the libelants nor the steamer were liable for the injury caused by the fire, as to show that, if there was any liability, the libelants were only liable to the extent of their interest in the vessel and freight; and upon this libel and petition, the proper proceedings were had, and the proper monition and process were issued, published and served, to ascertain the amount of the libelants' interest in the steamer and freight, and to bring all parties before the court who had any claims arising from the injury caused by the fire; and the said district court, on the 13th day of May, 1872, made an order restraining the further prosecution of the suits which had been commenced against the libelants in New York, which was duly served upon the respective parties concerned; and after the amount of the libelants' interest in the vessel and freight had been duly appraised on the 8th of July, 1872, a further order was made that a monition issue against all persons claiming damages for the loss and injury occasioned by the fire on board of said steamer, citing them to appear before said district court and make due proof of their respective claims at or before the 15th day of October, 1872; and that the monition be published and personally served on the attorneys, proctors or solicitors of the plaintiffs or libelants in each of the suits brought and pending in any court in the United States against the libelants, or against the said steamer Oceanus, to recover for any such damages. A monition was duly issued in pursuance of this order, and was served on the attorney of the plaintiffs in this [586] suit on the 30th day of July, 1872. On the 2d day of September, 1872, the district court made a further order against the different plaintiffs and libelants by name who had brought suits for damages, etc., and, amongst others, against the plaintiffs in this case, ordering them to refrain from the further prosecution of their respective suits, or any suit whatever, against the libelants, the defendants in this suit, to recover for any loss of cargo by the aforesaid fire on the steamship Oceanus; and that any further prosecution of such suits be and the same was by said order restrained. A certified copy of this order was served on the plaintiffs' attorney in this suit at Boston on the 7th day of October, 1872, and upon their treasurer at the same place, on the 9th of the same month. On the 16th of October, 1872, default was taken against the plaintiffs in this case, and divers other persons, for failing to appear and present their claims before the district court according to the monition in that behalf, and a decree was made forever debarring them from presenting, filing or prosecuting any claims for damages for any loss or injury occasioned by said fire.

After the evidence was closed, the defendants asked the court to rule that upon the whole evidence in the case the plaintiffs could not maintain their action, and that the jury must find for the defendants; but the court refused so to rule. The defendants then asked the court to instruct the jury, amongst other things, as follows:

"1. That, under the proper construction of the Act of Congress entitled 'An Act to Limit the Liability of Ship-Owners and for Other Purposes,' Stat., 1851, ch. 43, the libel and petition of the defendant filed in the District Court of the United States for the Southern District of New York, and the proceedings had thereon, the record of which has been put in evidence, are a bar to the plaintiff's action.

2. That, under the proper construction of said Act of Congress, the plaintiffs are precluded from maintaining their action by said proceedings in said district court.

3. That by the decree of said district court, made upon said libel and petition and the subsequent proceedings thereon, it has been ad- [587] judged as between the parties to the present suit that the fire which caused the damage, for which the plaintiffs seek to recover, was not caused by the design or neglect of the defendants within the meaning of said Act of Congress."

The court refused to give these instructions;

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but left it to the jury to find for the plaintiffs if they were satisfied from the evidence that the fire was caused by the negligence of the defendants, either in respect to the construction and equipment of the vessel, or in respect to the construction and management of the pier or buildings thereon.

To all the rulings of the court the defendant excepted; and the jury having found a verdict for the plaintiffs, the exceptions were argued before the Supreme Judicial Court and were overruled, and judgment was entered for the plaintiffs. To that judgment this writ of error is brought. The case, as decided by the Supreme Judicial Court of Massachusetts, is reported in 118 Mass., 495, and 125 Mass., 292.

The principal question in this case is, whether the institution of proceedings in the District Court of the United States, under the Act of 1851, for procuring a decree of limited liability of the owners of The Oceanus, the defendants in the present action, for the losses and injuries to goods on board of the vessel, superseded the prosecution of claims for the same losses and injuries in other courts. It seems to us that this must be the necessary effect of such proceedings, and that this results as well from the language of the law, as from its object and purpose.

The 1st section of the Act exempts ship-owners from liability for losses on board of their ship by fire, "unless such fire is caused by the design or neglect of such owner or owners."

The 2d section relates to the shipping of precious metals and other valuables without giving notice of their character and value, and exempts the master and owners of the vessel, in such case, from liability as carriers.

The 3d section declares that the liability of ship-owners for embezzlement, loss or destruction of goods on board of their ship by the master, crew, passengers or others, or for loss or damage by collision, or for any act, matter or [588] thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively in such ship or vessel and her freight then pending.

The 4th section of the law declares: "That if any such embezzlement, loss or destruction shall be suffered by several freighters or owners of goods, wares or merchandise, or any property whatever on the same voyage, and the whole value of the ship or vessel and her freight for the voyage shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel or any of them, may take the appropriate proceedings in any court for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this Act on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer all claims and proceedings against the owner or owners shall cease." 9 Stat. at L., 635, 636.

By the last section of the Act, it is declared that it shall not apply to the owner or owners of any canal-boat, barge or lighter, or to any vessel of any description whatever, used in rivers or inland navigation.

In these provisions of the statute we have sketched, in outline, a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, [589] with the view of giving to ship-owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations, as before stated, will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship-owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions.

As the present case raises a question of great importance to the practical and successful working of the law, the decision of which, indeed, will determine whether it is to be of any real value, it will be proper to examine a little the grounds on which, as well the law itself as the proceedings, adopted for carrying it into execution, rest for their support.

We have no doubt that Congress had power to pass the law. It is not only a maritime regulation in its character, but it is clearly within the scope of the power given to Congress "to regulate commerce." In the case of *The Lottawanna*, 21 Wall., 558 [88 U. S., XXII., 654] speaking of the power to make changes in the maritime law of the country, we said: "Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law and that of commercial regulation are not coterminous, it is true; but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrollment, license and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of ship-owners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime. * * * On this subject, the remarks of *Mr. Justice* Nelson, in delivering the opinion of the court in *Bank v. Smith*, 7 Wall., 655 [74 U. S., XIX., 213], (which established the validity and effect of the Act respecting the recording of mortgages on vessels in the custom-house) are pertinent. [590] He says, 'Ships or vessels of the United States are creatures of the legislation of Congress. None can be denominated such, or be entitled

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to the benefits or privileges thereof, except those registered or enrolled according to the Act of September 1, 1789 [1 Stat. at L., 55]; and those which, after the last day of March, 1793, shall be registered or enrolled in pursuance of the Act of 31st December, 1792 [1 Stat. at L., 287], and must be wholly owned by a citizen or citizens of the United States, and to be commanded by a citizen of the same. * * * Congress having created, as it were, this species of property and conferred upon it its chief value, under the power given in the Constitution to regulate commerce, we perceive no reason for entertaining any serious doubt but that this power may be extended to the securing and protection of the rights and titles of all persons dealing therein.'"

It need not be added that if Congress had power to pass the Act of 1851 [9 Stat. at L., 635], it is binding on all courts and jurisdictions throughout the United States.

We have said that, by the provisions of the Act, the scheme was sketched in outline. A reference to its provisions shows that it was only in outline; and that the regulation of details as to the form and modes of proceeding was left to be prescribed by judicial authority. The law was evidently drawn in view of similar laws adopted and in operation in England and in some of the States. It laid down a few general principles and propositions and left it to the courts to enforce them and carry them into practical effect.

Although the Act was passed in 1851, it stood on the statute-book for twenty years before a careful scrutiny of its provisions was demanded of this court. In the case of *Norwich Co.* v. *Wright*, decided in December Term, 1871, and reported in 13 Wall., 104 [80 U. S., XX., 585], we were called upon to interpret the Act, and to adopt some general rules for the better carrying of it into effect. On that occasion, a history of similar Acts, both in England and this country, an examination of the general maritime law on the same subject, and the circumstances under which the Act of 1851 was passed, were reviewed and the general effect and construction of the Act were examined and [591] discussed. The consideration given to the whole subject in the opinion delivered in that case, and in subsequent opinions of this court when the matter has been brought up for examination, notably in the cases of *The Benefactor*, 103 U. S., 239 [XXVI., 351], and *The North Star* [*ante*, 91], supersedes the necessity of any minute examination of the law at this time. We will make one extract from the opinion in the case first referred to. It is there said: "The proper course of proceeding for obtaining the benefit of the Act would seem to be this: when a libel for damages is filed, either against the ship *in rem* or the owners *in personam*, the latter, whether with or without an answer to the merits, should file a proper petition for an apportionment of the damages according to the statute, and should pay into court, if the vessel or its proceeds is not already there, or give due stipulation for such sum as the court may, by proper inquiry, find to be the amount of the limited liability, or else surrender the ship and freight by assigning them to a trustee in the manner pointed out in the 4th section. Having done this, the ship-owner will be entitled to a monition against all persons to appear and intervene *pro interesse suo*, and to an order restraining the prosecution of other suits. If an action should be brought in a state court, the ship-owners should file a libel in admiralty, with a like surrender or deposit of the fund, and either plead the fact in bar in the state court, or procure an order from the district court to restrain the further prosecution of the suit. The court having jurisdiction of the case, under and by virtue of the Act of Congress, would have the right to enforce its jurisdiction and to ascertain and determine the rights of the parties. For aiding parties in this behalf, and facilitating proceedings in the district courts, we have prepared some rules which will be announced at an early day." These rules were announced at a subsequent day of the same Term, and will be found at the commencement of 13 Wall., pp. xii., xiii [XX., 921].

The substance of these rules, so far as relates to the purpose in hand, was as follows: that ship-owners, desiring to claim the benefit of limitation of liability provided for in the 3d and 4th sections of the Act, may file a libel or petition in the proper District Court of the United [592] States, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying relief in that behalf; and thereupon the court, having caused due appraisement to be had of the amount or value of the interest of said owners respectively in the ship or vessel, and her freight for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation with sureties for payment thereof into court whenever the same shall be ordered; or, if the owners shall so elect, the court shall, without such appraisement, make an order for the transfer by them of their interest in such vessel and freight, to a trustee to be appointed by the court under the 4th section of the Act, and upon compliance with such order, the court shall issue a monition against all persons claiming damages for loss or injury to goods, respecting which the limited liability is sought, citing them to appear before the court and make due proof of their respective claims, at or before a certain time not less than three months from issuing the same; and public notice of the monition shall be given as in other cases, and such further notice served, through the postoffice or otherwise, as the court, in its discretion, may direct; and the court shall also, on the application of the owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owners in respect of any such claims.

Provision is then made for proof of all claims before a commissioner to be appointed by the court; for a report thereon; and for a *pro rata* distribution of the money paid into court or the proceeds of the ship and freight, amongst the several claimants.

The rules further provide that the ship-owners, making suitable allegations for the purpose, shall be at liberty to contest their liability, or the liability of the vessel, to pay any damages, as well as to show that if liable they are entitled to a limitation of liability under the Act; and that any parties claiming damages may contest the right of the ship-owners to exemption from liability or to the benefit of a limited liability.

Finally; the rules provide that the libel or pe-

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[593] tition shall be filed and the said proceedings had in any District Court of the United States in which the ship or vessel may be libeled to answer for any such loss or damage; or, if the vessel be not libeled, then in the district court of any district in which the owners may be sued; and if the ship have already been libeled and sold, the proceeds shall represent it.

The court had no doubt then, and has no doubt now, of its power to make these rules under the Acts of Congress which authorized it to prescribe the forms of proceeding in equity and admiralty causes. The Process Acts of 1792 and 1828 had declared that the forms of writs, and other process, and the forms and modes of proceeding in suits in equity and in those of admiralty and maritime jurisdiction, should be according to the principles, rules and usages which belong to courts of equity and admiralty respectively, as contradistinguished from courts of common law, except as modified by the Judiciary Act of 1789; but subject to such alterations and additions as the respective courts should in their discretion deem expedient, or to such regulations as the Supreme Court of the United States should think proper from time to time by rule to prescribe to any circuit or district court concerning the same. 1 Stat. at L., 276; 4 Stat. at L., 280. And the Process Act of 1842 gave the Supreme Court full power and authority to prescribe and regulate the forms of process in the district and circuit courts, and the forms and modes of framing and filing libels, bills, answers and other proceedings and pleadings, in suits at law, in admiralty or in equity in said courts, and the forms and modes of taking evidence, and generally the forms and modes of proceeding to obtain relief, and of drawing up and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice of said courts. 5 Stat. at L., 518.

We are clearly of opinion that the authority thus vested in this court was adequate and sufficient to enable it to make the rules before referred to. The subject is one pre-eminently of admiralty jurisdiction. The rule of limited liability prescribed by the Act of 1851 is nothing more than the old maritime rule administered in courts of admiralty in all countries except England from time immemorial; and if this were not so, the subject-matter itself is one that be- [594] longs to the department of maritime law. The adoption of forms and modes of proceeding requisite and proper for giving due effect to the maritime rule thus adopted by Congress, and for securing to ship-owners its benefits, was, therefore, strictly within the powers conferred upon this court; and, where the general regulations adopted by this court do not cover the entire ground, it is undoubtedly within the power of the district and circuit courts, as courts of admiralty, to supplement them by additional rules of their own.

We have deemed it proper to examine thus fully the foundation on which the rules adopted in December Term, 1871, were based, because, if those rules are valid and binding, as we deem them to be, it is hardly possible to read them in connection with the Act of 1851 without perceiving that after proceedings have been commenced in the proper district court in pursuance thereof, the prosecution *pari passu* of distinct suits, in different courts or even in the same court, by separate claimants, against the ship-owners is, and must necessarily be, utterly repugnant to such proceedings and subversive of their object and purpose.

In promulgating the Rules referred to, this court expressed its deliberate judgment as to the proper mode of proceeding on the part of ship-owners for the purpose of having their rights under the Act declared and settled by the definitive decree of a competent court, which should be binding on all parties interested, and protect the ship-owners from being harassed by litigation in other tribunals. Unless some proceeding of this kind were adopted which should bring all the parties interested into one litigation, and all the claimants into concourse for a *pro rata* distribution of the common fund, it is manifest that in most cases the benefits of the Act could never be realized. Cases might occur, it is true, in which the ship-owners could avail themselves of those benefits, by way of defense alone, as where both ship and freight are totally lost, so that the owners are relieved from all liability whatever. But even in that case, in the absence of a remedy by which they could obtain a decree of exemption as to all claimants, they would be liable to a diversity of suits, brought, perhaps, in different States, after long [595] periods of time, when the witnesses have been dispersed, and issuing in contrary results before different tribunals; whilst in the ordinary cases, where a limited liability to some extent exists, but to an amount less than the aggregate claims for damages, so as to require a concourse of claimants and a *pro rata* distribution, the prosecution of separate suits, if allowed to proceed, would result in a subversion of the whole object and scheme of the statute. The questions to be settled by the statutory proceedings being, first, whether the ship or its owners are liable at all, if that point is contested and has not been decided; and, secondly, if liable, whether the owners are entitled to a limitation of liability, must necessarily be decided by the district court having jurisdiction of the case; and to render its decision conclusive, it must have entire control of the subject to the exclusion of other courts and jurisdictions. If another court may investigate the same questions at the same time, it may come to a conclusion contrary to that of the district court; and if it does, as happened in this case, the proceedings in the district court will be thwarted and rendered ineffective to secure to the ship-owners the benefit of the statute.

The case is very different from that of two concurrent actions for a debt or other demand, proceeding at the same time in different courts; though even that, in the English law, was matter for plea in abatement in the action last instituted. Still, as both actions in such case are prosecuted for the same end, the satisfaction of the debt, and as only one satisfaction can be had, no essential conflict arises between the two. But the very object of proceedings for limited liability is to inquire and determine whether the parties ought to be sued at all in any other tribunal after giving up, or submitting to pay the value of, all their interest in the ship and freight. Besides, it is obvious on the face of the thing, that proceedings for limited liability cannot be participated in by two jurisdictions, without interference and conflict between them, and can-

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not have any useful effect if a different court may inquire into and decide the same question, and execute a separate judgment independent of and perhaps contrary to that of the court [596] to which the inquiry properly belongs. Such a state of things would utterly defeat the purpose of the law. The judgment in one court would annul or render nugatory that of the other.

The inconveniences that may arise from preventing or arresting the prosecution of separate suits by the claimants are no greater in this case than in the case where proceedings at law are arrested for the purpose of having an investigation in the court of equity, or where distinct and separate suits are restrained for the purpose of settling a common controversy in a single proceeding; as in the case of bills for preventing a multiplicity of suits, and in cases of bankruptcy. By the Bankrupt Act of 1867 [14 Stat at L., 517], it was enacted that no creditor whose debt was provable under the Act should be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge should have been determined; although, if the amount due the creditor was in dispute, the suit, by leave of the court in bankruptcy, might proceed to judgment for the purpose of ascertaining the amount, but execution should be stayed. See, *Hill* v. *Harding* [*ante*, 494]. None of the cases here referred to more imperatively require a cessation of proceedings in other suits for the same cause than that of the proceeding for a limitation of liability under the statute in question.

Nor is the inconvenience any greater than that which occurs when a case is removed from the State to a Federal Court. In that case, on the presentation of a petition for removal, duly verified and showing the proper grounds for removal, and accompanied with the bond required by the statute on that subject, the law declares "It shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit." In the case before us, as well as in the cases of bankruptcy and of removal, the parties have a right to have their causes heard and determined by a court of the United States invested with appropriate jurisdiction, and capable of affording a proper mode of relief.

In England, where the forms and modes of proceeding in the courts of admiralty are or formerly were greatly hampered and restricted, [597] ship-owners seeking a decree of limited liability under the law of that country, were forced to resort to the court of chancery for redress, and to call before that court the various parties interested. Here they were subjected to some onerous conditions before the court would exercise jurisdiction in their behalf, one of which was, that they must confess liability for the damages which they sought to have limited in accordance with the Act of Parliament. But when this was done and the amount of the confessed liability was paid into court, they were entitled to an injunction against all other suits and proceedings wherever instituted or pending; and the cause then proceeded, in due course, by reference to a master to take the proof of claims and make a report of the facts, and by a final decrée of distribution.

Under recent English statutes, the High Court of Admiralty, as well as the court of chancery, is empowered to administer the law, when it has possession of the ship or its proceeds. In the 11th edition of Abbott on Shipping, published in 1867, it is stated as follows: "In cases where several claims are made or apportioned against an owner for loss of life, personal injury, or loss or damage to ships, boats or goods, the Court of Chancery and the High Court of Admiralty, whenever any ship or proceeds thereof are under its arrest, in England and Ireland, and the Court of Session in Scotland and any competent court in a British possession, are empowered to entertain proceedings at the suit of such owner for the purpose of determining the amount of his liability, and for the distribution ratably of such amount, and to stop all actions and suits pending in any other court in relation to the same subject-matter."*

It is believed that in all other countries except England, the courts of admiralty or tribunals of commerce having cognizance of maritime causes, exclusively exercise this jurisdiction; and no other courts can really exercise it so conveniently and satisfactorily as those courts can. And the general course of proceeding, in whatever courts it is exercised, shows the ne- [598] cessity, everywhere acknowledged, that the court exercising the jurisdiction in any case should have exclusive control of the case.

In view of these considerations and having no doubt of the jurisdiction of the district courts over the matter, as courts of admiralty, in the Rules adopted in December Term, 1871, the district court of the district in which the vessel is libeled or found or in which the owners are sued, was designated as the proper court in which to institute the proceedings for obtaining a decree of limited liability. When cases arise in which the vessel and freight have been totally lost, and no district court has or can have possession of any fund to distribute, resort may probably be had with propriety to the district court of the district in which the owners reside, or where the vessel perished. It will be time enough, however, to consider what is proper in such exceptional cases when they arise. In *Ex parte Slayton*, 105 U.S., 451 [XXVI., 1066], we held that jurisdiction accrued to the district court of the district comprising the port to which the vessel was bound, although she had been sunk in the lake and only a few fragments were washed ashore, the proceeds of which, however, amounting to a trifling sum, were deposited in court. On this branch of the subject the following remarks were made in the opinion pronounced in the case of *Norwich Trans. Co.* v. *Wright*, already cited: "The Act does not state what court shall be resorted to nor what proceedings shall be taken, but that the parties, or any of them, may take '*the appropriate proceedings in any court*, for the purpose of apportioning the sum for which, etc.' Now, no court is better adapted than a court of admiralty to administer precisely such relief. It happens every day, that the proceeds of a vessel or other fund is brought into that court to be distributed amongst those whom it may

* Referring to 24 Vict., ch. 10, s. 13. For the previous practice see, The Saracen, 2 W. Rob., 451; S. C. on appeal, 11 Jurist, 255; 6 Moore (P. C.), 56; The Clara, Swabey, 6.

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concern. Claimants are called in by monition to present and substantiate their respective claims; and the fund is divided and distributed according to the respective liens and rights of all the parties. Congress might have invested the Circuit Courts of the United States with jurisdiction of such cases by bill in equity, but it did not. It is also evident that the state courts have not the requisite jurisdiction. Unless, therefore, the district courts themselves can [599] administer the law, we are reduced to the dilemma of inferring that the Legislature has framed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the district courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter; and this court undoubtedly has the power to make all needful rules and regulations for facilitating the course of proceeding." 13 Wall., 128 [80 U. S., XX., 591].

We see no reason to modify these views and, in our judgment, the proper district court, designated by the rules, or otherwise indicated by circumstances, has full jurisdiction and plenary power, as a court of admiralty, to entertain and carry on all proper proceedings for the due execution of the law, in all its parts; and its decrees, in cases subject to its jurisdiction, are valid and binding in all courts and places. In the present case, the proper court undoubtedly was the District Court of the United States for the Southern District of New York, where the remains of the vessel were situated and where suits were brought against the owners. Proceedings under the Act having been duly instituted in this court, it acquired full jurisdiction of the subject-matter; and having taken such jurisdiction, and procured control of the vessel and freight or their value, constituting the fund to be distributed, and issued its monition to all parties to appear and present their claims, it became the duty of all courts before which any of such claims were prosecuted, upon being properly certified of the proceedings, to suspend further action upon said claims.

But the power of the district courts to issue an injunction to stay proceedings in a state court is questioned, since, by the Judiciary Act of 1793, 1 Stat. at L., 335, it was declared that no writ of injunction shall be granted by the United States Courts to stay proceedings in any court of a State. But the Act of 1851 was a subsequent statute and, by the 4th section of this Act, after providing for proceedings to be had under it for the benefit of ship-owners, and after declaring that it shall be deemed a sufficient compliance with its requirements on their part if they shall transfer their interest in ship and freight for the benefit of the claimants to a [600] trustee to be appointed by the court, it is expressly declared, that "from and after (such) transfer, all claims and proceedings against the owners shall cease." Surely this injunction applies as well to claims and proceedings in state courts as to those in the Federal Courts; and whilst the district court having jurisdiction of the case, for the purpose of enforcing the Act of Congress and the rules adopted by this court in pursuance thereof, can only direct an injunction against the parties and not against the courts in which such claims and proceedings are prosecuted; yet any further proceedings on the part of said courts, after being judicially informed by plea or suggestion duly made in the cause, of the action and proceedings in the district court, would be against the express words of the Act, and clearly erroneous. The operation of the Act, in this behalf, cannot be regarded as confined to cases of actual transfer, which is merely allowed as a sufficient compliance with the law, but must be regarded, when we consider its reason and equity and the whole scope of its provisions, as extending to cases in which what is required and done is tantamount to such transfer; as where the value of the owner's interest is paid into court, or secured by stipulation and placed under its control, for the benefit of the parties interested.

This view of the statutory injunction, and of its effect upon separate actions and proceedings, render it unnecessary to determine the question as to the legality of the writ of injunction issued by the district court. Although we have little doubt of its legality, the question can only be properly raised on an application for an attachment for disobeying it. As the writ was issued prior to the adoption of the Revised Statutes, the power to issue it was not affected by any supposed change of the law introduced into the revision, by the 720th section of which the prohibition of the Act of 1793 in regard to injunctions against proceedings in state courts has this exception appended to it: "Except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Under the rule of "*Expressio unius*," this express exception may be urged as having the effect of excluding any other exception; though it is observable that [601] the injunction clause in the Act of 1851 is preserved without change in section 4285 of the Revised Statutes, and will probably be construed as having its original effect, due to its chronological relation to the Act of 1793.

But, as before indicated, the legality of the writ of injunction is not involved in this case. In our opinion the state court in overruling the plea of the defendants, which set up the proceedings pending in the district court, and in ordering the cause to stand for trial; and again, on the trial, in overruling as a defense the proceedings and decree of the district court as set up in the amended answer, disregarded the due effect, as well as the express provisions, of the Act of 1851, and therein committed error. It was the duty of the court, as well when the proceedings pending in the district court were pleaded and verified by profert of the record, as when the decree of said court was pleaded and proved, to have obeyed the injunction of the Act of Congress, which declared that "all claims and proceedings shall cease." When the plea only showed that proceedings for limited liability were pending and undetermined in the district court, probably a stay of proceedings was all that the defendants could require; but when they set up and produced the final decree of that court, forever debarring the plaintiffs from prosecuting any claim for damages, they were entitled either to a verdict and judgment in their favor, or to a dismissal of the proceedings.

We have assumed in the foregoing discussion that the case of loss and damage by fire on board of a ship is within the provisions of the

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3d and 4th sections of the Act of 1851. This, however, is disputed, and it is necessary to examine the question. The language of the 3d section, which governs also the 4th, is certainly broad enough to embrace cases of loss by fire. It declares that the liability of the owner or owners of any ship or vessel "For any act, matter or thing, loss, damage or forfeiture, occasioned or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively in such ship or vessel and her freight then pending." Why should liability for loss by fire be [602] excepted from the relief here prescribed? It is just as much within the reason of the law as any other liability, and it is within its terms. If it is excepted, it must be by virtue of some implication arising from other parts of the law. Such an implication is sought in the 1st section, which declares that no owner or owners of a ship or vessel shall be liable to answer for any loss or damage which may happen to any goods on board of such ship or vessel by reason or means of any fire happening to or on board of such ship or vessel, unless such fire is caused by the design or neglect of such owner or owners It is contended that this section covers the whole ground, so far as liability for losses by fire is concerned; and, therefore, such liability must be impliedly excepted from the relief provided by section 3. But we fail to see why this should necessarily follow. Fire, except when produced by lightning, not being regarded in the commercial law as the act of God, ship-owners, as common carriers, were held liable for any loss or damage caused thereby. The 1st section of the Act of 1851 was no doubt intended to change this rule. It was copied, all except the last clause, from the 2d section of 26 George III., ch. 86, passed in 1786. The last clause of the section, excepting from its operation cases in which the fire is caused by the design or neglect of the owners, was probably implied in the English statute without being expressed, as in ours. In all cases of loss by fire, not falling within the exception, the exemption from liability is total. But there is no inconsistency or repugnancy in allowing a partial exemption in cases falling within the 3d section; that is, cases of loss by fire happening without the *privity or knowledge* of the owners. They may not be able under the 1st section, to show that it happened without any neglect on their part, or what a jury may hold to be neglect; whilst they may be very confident of showing, under the 3d section, that it happened without their privity or knowledge. The conditions of proof, in order to avoid a total or a partial liability under the respective sections, are very different.

It is true the owners of a ship may desire to [603] contest all liability whatever, as well as to establish a limited liability if they fail in the first defense; and this they may do, as well in cases of loss by fire as in other cases, in one and the same proceeding. And we see no repugnancy between the two defenses. One is a more perfect defense than the other, and requires a different class or degree of proofs. That is all. In our judgment, the case of loss or damage by fire is comprised within the terms and relief of the 3d and 4th sections of the Act.

The judgment of the Supreme Judicial Court of Massachusetts is reversed and the cause remanded, with directions to take such further proceedings as may be in accordance with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Field,** dissenting:

I am not able to agree with the court in its disposition of this case. As I construe the Act of 1851 to limit the liability of ship-owners, the liability of the Steamship Company for the loss by fire of the goods of the plaintiff below, the Hill Manufacturing Company, rests upon the 1st section. In my judgment that section is not qualified nor in any respect affected by the rest of the Act; nor is an action to recover for losses by fire, caused by the design or neglect of the owner of the vessels, controlled by proceedings taken by him to limit his liability for losses from other causes. The opinion of the court proceeds on the assumption that cases of loss and damage by fire are within the provisions of the 3d section of the Act; it so states expressly. Yet this assumption necessarily involves the conclusion that a fire, caused by the design or neglect of the owner, may occur without his privity or knowledge; which appears to me to be nothing less than saying that contradictory and inconsistent terms may be appropriately applied to the same transaction.

The object of the Act was to change the rule of the common law as to the liability of the owners of vessels for losses and injuries, to which they did not contribute, either designedly or by their neglect, but which were attributable entirely to the acts or omissions of their officers or *employés*. The common law placed a burdensome responsibility upon the owners of [604] the acts or omissions of their agents or servants without their knowledge or assent; and to lighten this responsibility the statute in question was passed. It was not its purpose to limit the responsibility of the owners for the consequences of their own wrongful acts or omissions.

The 1st section exempts them from all liability for loss or damage by fire of goods shipped on board their vessels, unless such fire is caused by their design or neglect. When the fire is thus caused, the common law rule of liability remains as before; and that extends to the whole value of the property if entirely lost, or to the extent to which it may be damaged, if only partially destroyed. The concluding provision of the section is equivalent to a declaration that the exemption provided in the preceding part shall not exist when the fire originated from the wrongful acts or omissions of the owners.

The 3d section prescribes a limited liability of the owners for losses from a great variety of acts. It does not exempt them from all liability, but restricts it in the cases mentioned to the value of their interest in the vessels and the freight then pending. It is as follows:

"That the liability of the owner or owners of any ship or vessel for any embezzlement, loss or destruction by the master, officers, mariners, passengers or any other person or persons, of any property, goods or merchandise shipped or put on board such ship or vessel; or for any loss, damage or injury by collision; or for any

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act, matter or thing, loss, damage or forfeiture done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively in such ship or vessel and her freight then pending."

The 4th section refers to the acts mentioned in the 3d, and declares that if any such embezzlement, loss or destruction shall be suffered by several freighters or owners of goods on the same voyage, and the whole value of the ship and freight shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner in proportion to [605] their respective losses; and for that purpose the freighters and owners of the property and the owner of the ship or any of them may take proceedings in any court for the purpose of apportioning the sum for which he may be liable among the parties thereto; and the owner may transfer his interest in the ship and freight, for the benefit of the claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such for the persons entitled thereto, after which transfer all claims and proceedings against him shall cease.

It seems clear that the various cases of damages and losses enumerated in section 3 are not intended to embrace losses by fire. This section first speaks of the liability of the owner for embezzlement, loss or destruction, by the master, officers, mariners, passengers or other persons, of property shipped on board the vessel. It then speaks of his liability for any loss, damage or injury by collision; and lastly, for any loss by any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred without his privity or knowledge. It is conceded that the language of the first and second parts of the section does not include losses by fire, and the language of the concluding clause does not necessarily include them. It may be applied to other cases; and as losses by fire are specifically embraced by the 1st section, it must receive such application as will give to each section full force. This is a settled rule of construction. Besides, it cannot be contended that an act done by the design of the owner could have been done without his privity or knowledge. It must necessarily have been done with both; and if the fire was caused by the neglect of the owner, it must be presumed to have been caused with his knowledge. Where one is bound to do a thing or to see that certain things are done, he is presumed to know the direct consequence of his carelessness and neglect in those respects. Especially is this so where his doing the thing or seeing that it is done is necessary to the safety of life or property. He cannot shield himself from responsibility by saying that he did not know what would be the consequence of his carelessness and neglect. The law presumes that he does know it and intends it. The Act speaks of neglect by the owner, not by any [606] subordinate officer or agent. It is, therefore, personal neglect which is meant; and it would be unreasonable to hold that the owner was ignorant of that which necessarily followed from his own personal conduct.

Not only would this be unreasonable, but there is an inconsistency in holding that the 1st section exempts the owner from all liability in cases of fire happening without his design or neglect, if by the 3d section a liability is fastened upon him to the extent of the value of the ship and freight in case of a fire occurring without his privity or knowledge. And yet, according to the position of the court, the owner is exempted by the 1st section from all liability if a fire occur without his knowledge and privity, and by the 3d section is subjected to liability to the extent of the value of the ship.

As stated by counsel of the plaintiff below, there can be no public policy in absolving common carriers by water from their full liability to others for property which has been intrusted to their care, and has been lost by their design or neglect. It certainly would require language, as he observes, so clear and plain that no subtlety of criticism can escape from the conclusion, before such a purpose can be ascribed to Congress. It would be establishing a limitation of liability against public policy, common right, and the universal feeling of justice. It would make the law one to protect wrong-doers, and to punish the innocent who had been injured by them while thus protected.

If, then, the 1st section is not affected by the other sections of the Act, the liability of the owner of a vessel in case of fire caused by his design or neglect, exists, as it always has existed, at the common law; and that liability may be enforced in any court, state or federal, having jurisdiction of the parties. The other provisions by which the owner may seek to relieve himself from liability by surrendering his vessel and the freight earned, have no application to such a case. It follows that the defense of a liability limited, as asserted by the district court, goes to the ground.

There is also another consideration which leads to the same conclusion. By section 9 of the Judiciary Act of 1789, re-enacted in section 563, clause 8, of the Revised Statutes, a common law remedy is expressly reserved to suitors in [607] all cases where the admiralty has jurisdiction, provided the common law also gives a remedy; and that the common law gives a remedy in cases of losses by fire where goods are intrusted to common carriers by water, there can be no doubt. Of such common law remedy, the state courts have exclusive jurisdiction, when the parties are citizens of the same State, and concurrent jurisdiction with the Federal Courts when the parties are citizens of different States. The state court, therefore, had jurisdiction of this case. It is a suit *in personam*, and even if a Federal Court might also take jurisdiction, that of the state court, having first attached, could not be subsequently defeated. *Wallace* v. *McConnell*, 13 Pet., 136; *Taylor* v. *Carryl*, 20 How., 583 [61 U. S., XV., 1028]; *Mallett* v. *Dexter*, 1 Curt., 178. The Federal Court could not issue an injunction against the parties which would affect the jurisdiction of the state court. The Act of Congress of 1793 forbids any injunction from a Federal Court to restrain the prosecution of a suit in a state court; and this Act has never been repealed, either expressly or by implication, except as to proceedings in bankruptcy. R. S., sec. 720; *Peck* v. *Jenness*, 7 How., 625; *Taylor* v. *Carryl* [*supra*]; *McKim* v. *Voorhies*, 7 Cranch, 279; *Diggs* v. *Wolcott*, 7 Cranch, 179; *Watson* v. *Jones*, 13 Wall., 679 [80 U. S., XX., 666]; *Haines* v. *Carpenter*, 91 U.S., 254 [XXIII.,

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345]; *Dial* v. *Reynolds*, 96 U. S., 340 [XXIV., 644].

For these reasons, I am of opinion that the judgment of the state court should be affirmed and I am authorized to say that *Mr. Justice* **Gray** concurs with me in this conclusion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[608] STANHOPE ROBERTSON, JOHN T. ROBERTSON, Jr., AND EDWARD A. R. WYATT, A Minor, by His Guardian, EDWIN R. WYATT, *Plffs. in Err.*,

v.

ESAU PICKRELL ET AL.

(See S. C., Reporter's ed., 608-617.)

State judicial records as evidence—law of place as to real property—probate of will—proof of devise—admission of title—estoppel.

1. The Act of Congress, declaring the effect to be given in any court within the United States to the records and judicial proceedings of the several States, does not require that they shall have any greater force and efficacy in other courts than in the courts of the States from which they are taken, but only such faith and credit as by law or usage they have there.
2. The law of the place governs as to the formalities necessary to the transfer of real property, whether testamentary or *inter vivos*.
3. The probate of a will of real property in one State is of no force in establishing the validity of the will as to real property in another State. That must be determinined by the laws of the State where the property is situated.
4. In ejectment, proof of a devise of land in Maryland—and the same law obtains in the District of Columbia—must be made by the production of the will in court, and evidence of its execution by the subscribing witnesses; or, if the will be lost or cannot be produced, proof must be made, by secondary evidence, of its execution and contents.
5. Where both parties assert title from a common grantor and no other source, neither can deny that such grantor had a valid title when he executed his conveyance.
6. The doctrine of estoppel *in pais* cannot be applied to preclude a grantee whether of a fee or life estate, in an absolute conveyance, without recital or covenant, from denying his grantor's title and acquiring a superior one.

[No. 139.]

Argued Dec. 5, 1883. *Decided Dec. 17, 1883.*

IN ERROR to the Supreme Court of the District of Columbia.

This was an action of ejectment, brought in the court below, by the plaintiff in error, to recover certain premises situated in the City of Washington.

The trial resulted in a verdict, by direction of the court, and judgment for the defendants. This judgment having been affirmed by the court below in General Term, the plaintiff sued out this writ of error.

The facts of the case are sufficiently stated by the court.

Mr. **J. G. Bigelow**, for plaintiff in error.

Messrs. **Samuel B. Paul** and *Fred. W. Jones*, for defendants in error:

The judgment of the Virginia court and the record of the proceedings of said court were entitled to full faith and credit before the Supreme Court of the District, to the extent to which the Virginia court had jurisdiction, and to that extent only.

D'Arcy v. *Ketchum*, 11 How., 165; *Harris* v. *Hardeman*, 14 How., 334.

In ejectment, the only mode of proving a devise of realty is to produce the will itself and its subscribing witnesses; if the witnesses are not living, then to prove their handwriting.

Tillinghast's Adams, Eject., 289; 1 Greenl. Ev., secs. 528, 278; 2 Greenl. Ev., secs. 693, 694; *Darby* v. *Mayer*, 10 Wheat., 465; Adams, Eject., 253.

The *lex loci rei sitæ* governs in ejectment.

2 Kent, Com., secs. 428-9; Story, Confl. L., secs. 424-28, 465-74; *U. S.* v. *Crosby*, 7 Cranch., 115; Jarm. Wills, ed. 1845, ch. 1., secs. 1-10; *Kerr* v. *Moon*, 9 Wheat., 565.

By the law of Maryland and the District of Columbia, even the domestic probate of a will of real estate, is not evidence of the will.

Md. Act of Assembly, 1798, ch. 101; *McCormick* v. *Sullivant*, 10 Wheat., 192; *Darby* v. *Mayer*, 10 Wheat., 465; *Kerr* v. *Moon*, 9 Wheat., 565.

Still less is a probate in another State.

Budd v. *Brooke*, 3 Gill, 198; *Smith* v. *Steele*, 1 Har. & McH., 419.

Mr. Justice **Field** delivered the opinion of the court:

This was an an action of ejectment for a parcel of land in the City of Washington, District of Columbia. On the trial, the plaintiffs gave [609] in evidence a conveyance of the premises from the United States to one Robert Moore, executed in June, 1800; and then endeavored to trace title from the grantee through a devise in his last will and testament, bearing date in July, 1803. For this purpose they produced and offered a transcript of proceedings in the Hustings Court of Petersburg, in the State of Virginia, containing a copy of the will and of its probate in that court in December, 1804.

By the law of Virginia then in force, that court was authorized to take the probate of wills, as well of real as of personal estate; and when a will was exhibited to be proved, it could proceed immediately to receive proofs, and to grant a certificate of its probate. Within seven years afterwards, its validity was open to contestation in chancery by any person interested; but, if not contested within that period, the probate was to be deemed conclusive, except as to parties laboring at the time under certain disabilities, who were to have a like period to contest its validity after the removal of their disabilities.

The transcript was offered not merely as an exemplified copy of the record of the last will and testament of Robert Moore, and of its probate in the hustings court, but also as conclusive proof of the validity of the will, and of all matters involved in its probate. Upon objection of the defendants' counsel, it was excluded and an exception was taken to the exclusion. This ruling of the court constitutes the principal error assigned for a reversal of the judgment.

We think the ruling was correct. Looking at the transcript presented, we find that it shows only that a paper purporting to be the last will and testament of the deceased was admitted to

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NOTE.—Lex loci rei sitæ *governs title to lands by deed or devise.* See *note* to Clark v. Graham, 19 U. S. (6 Wheat.), 577; and *note* to Darby v. Mayer, 23 U. S. (10 Wheat.), 465.

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record upon proof that the instrument and the signature to it were in his handwriting. No witnesses to its execution were called; no proof was offered of the genuineness of the signatures of the parties whose names are attached to it as witnesses, and no notice was given, to parties interested, of the proceedings in the hustings court. As a record it furnishes no proof of an instrument executed as a last will and testament in a form to pass real estate in the District of Columbia. The execution of such a will must be attested by at least three witnesses. [610] It matters not how effective the instrument may be to pass real property in Virginia, it must be executed in the manner prescribed by the law in force in the District to pass real property situated there, and its validity must be established in the manner required by that law. It is familiar doctrine that the law of the place governs as to the formalities necessary to the transfer of real property, whether testamentary or *inter vivos*. In most of the States of the Union a will of real property must be admitted to probate in some one of their courts before it can be received elsewhere as a conveyance of such property. But, by the law of Maryland, which governs in the District of Columbia, wills, so far as real property is concerned, are not admitted to such probate. The common law rule prevails on that subject. The orphans' court there may, it is true, take the probate of wills, though they affect lands, provided they affect chattels also; but the probate is evidence of the validity of the will only so far as the personal property is concerned. As an instrument conveying real property, the probate is not evidence of its execution. That must be shown by a production of the instrument itself and proof by the subscribing witnesses; or, if they be not living, by proof of their handwriting.

So it matters not that the same effect is to be given in the courts of this District to the record of the hustings court, which, by the law of Virginia, can be given to it there; that is, that it is to be received as sufficient to pass the title to real property situated in that State. The question still remains: is the instrument sufficient to pass title to real property in the District of Columbia? If so, it should have been produced and proved in the manner mentioned. If, as stated by counsel, it is on file in the hustings court, and by the law of Virginia cannot be removed, then it should have been proved under a commission, as other instruments out of the State are proved, when it is impossible to compel their production in court.

The Act of Congress declaring the effect to be given in any court within the United States to the records and judicial proceedings of the several States, does not require that they shall have any greater force and efficacy in other [611] courts than in the courts of the States from which they are taken, but only such faith and credit as by law or usage they have there. Any other rule would be repugnant to all principle and, as we said on a former occasion, would contravene the policy of the provisions of the Constitution and laws of the United States on that subject. *Board of Public Works* v. *Columbia Coll.*, 17 Wall., 529 [84 U. S., XXI., 691].

It does not appear that the validity of the will of Moore, as probated in 1804 in the Hustings Court of Petersburg, was ever afterwards contested in a court of chancery in Virginia. Its probate must, therefore, be deemed conclusive, so far as that State is concerned, and the will held sufficient to pass all property which can be there transferred by a valid instrument of that kind. But no greater effect can be given out of Virginia to the proceedings in the hustings court. The probate establishes nothing beyond the validity of the will there. It does not take the place of provisions necessary to its validity as a will of real property in other States, if they are wanting. Its validity as such will, in other States, depends on its execution in conformity with their laws; and if probate there be also required, such probate must be had before it can be received as evidence.

Authority for these views is found in the cases of *McCormick* v. *Sullivant* and of *Darby* v. *Mayer*, both reported in 10 Wheaton. In the first of them it appeared that, by the law of Ohio, before a will devising real property can be considered as valid, it must be presented to the court of common pleas of the county where the land lies for probate, and be proved by at least two of the subscribing witnesses, unless it has been proved and recorded in another State according to its laws; in which case an authenticated copy may be offered for probate without proof by the witnesses. A will devising real property in that State was admitted to probate in the State of Pennsylvania, and this court held that such probate gave no validity to the will in respect to the real property in Ohio, as to which the deceased was to be considered as having died intestate. 10 Wheat., 202, 208. In the second case, which was an action of ejectment for land in Tennessee, the defendant en- [612] deavored to trace title to the premises through the will of one Kitts. For that purpose, a copy and probate of the will devising the property were produced in evidence, certified from the Orphans' Court of Baltimore County, Maryland, and admitted against the objection of the plaintiff. This court held the record inadmissible, and in its opinion explained the common law doctrine as to what was legal evidence in an action of ejectment to establish a devise of real property. It stated that the ordinary's probate was no evidence of the execution of the will in ejectment; that where the will itself was in existence and could be produced, it was necessary to produce it; and that when the will was lost or could not be produced, secondary evidence was necessarily resorted to; but that, whatever the proof, it was required to be made before the court which tried the cause, the proof before the ordinary being *ex parte*, the heir at law having no opportunity to cross-examine the witnesses, and the same solemnities not being required to admit the will to probate, which are indispensable to give it validity as a devise of real property. And the court added that the law of Maryland, with regard to the evidence of a devise in ejectment, was the common law of England, and had been so recognized in decisions of the courts of that State. 10 Wheat., 468, 469.

The first of these cases shows that the probate of a will of real property in one State is of no force in establishing the validity of the will in another State. That must be determined by the laws of the State where the property is situated. The second case shows that the proof of a devise of land in ejectment in Maryland,

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and its law obtains in this District, must be made by the production of the will in court, and evidence of its execution by the subscribing witnesses; or, if the will be lost or cannot be produced, the proof must be made by secondary evidence of its execution and contents.

The plaintiffs contend that they can use the record of the Hustings Court in Virginia as proof of the genuineness of the instrument, and then supplement that proof by parol evidence that the original was executed by three witnesses, and thus establish it as a will sufficient to pass [613] real estate in the District of Columbia. But in this contention they overlook a material circumstance. It is not sufficient to give effect to an instrument as a will of real property that its genuineness merely be established. Its genuineness must be shown by the witnesses, if they are living, who attested its execution and heard the declaration of the testator as to its character; and if dead, their handwriting must be proved, as already stated. No other proof will answer; certainly not the probate of the will on *ex parte* testimony by a tribunal of another State or country.

When the record of the will and probate were excluded, the plaintiffs offered parol evidence to show that the copy of the will in the record was a true copy of the original now on file in the hustings court. Upon objection the evidence was excluded, and we think properly so. The proof of such copy would not have established the validity of the original instrument as a will to pass real property in the District of Columbia. The law of Maryland of 1785, upon which the plaintiff relies, assuming that it is still in force, which may be doubted, was not designed to change the formalities required by the local law for the validity of wills of real property executed in other States; but to give to authenticated copies of such instruments, when recorded or filed with the register there, the same force and efficacy which would attend the originals if produced.

Failing to secure the introduction of the record of the hustings court and the parol evidence mentioned, the plaintiffs insisted that the defendants were estopped from asserting an adverse title against them. To support their position they introduced a deed by one Robertson and his wife, Maria, executed in 1839 to one Samuel Redfern, conveying the premises for the life of the said Maria, and then showed conveyances in fee of the property from Redfern to one Fraser, and from Fraser to one John Pickrell, then a devise of the property by him to Anna Pickrell, and by her to the defendants; and that the plaintiffs are heirs of Robertson and wife, who are dead, Maria having died in 1873; and they contended that the conveyance by Robertson and wife of a life estate to the grantor of parties through whom the defendants trace their interest, precluded them from as- [614] serting any title against the right of the plaintiffs to the reversion as heirs of Robertson and wife. This position was assumed upon the notion that a party who receives a deed of a life estate, and all persons taking a subsequent conveyance in fee from him or his grantees, or deriving title by devise from such grantees, are estopped to deny that the reversion upon the termination of the life estate is vested in the grantor or his heirs.

There was here, of course, no estoppel *by deed* against Redfern, the grantee of the life estate, for he did not join in the execution of the instrument, nor is his seal annexed to it. If any estoppel was created against his acquisition of the reversion from other parties than his grantors or persons claiming under them it was one *in pais;* and that can arise as between grantor and grantee only where from the relation of the parties there is implied in the acceptance of possession under the deed an obligation to restore the possession on the happening of certain events, or to hold the property for the grantor's benefit or persons designated by him, such as exists from the relation of landlord and tenant, of mortgagor and mortgagee or the creator of a trust and trustee. *Gardner* v. *Greene*, 5 R. I., 104.

The doctrine that a lessee entering into possession under a lease is estopped, whilst retaining possession, to deny his landlord's title, is familiar. That arises from the nature of the contract of lease, which is for the possession and use, for a prescribed period, of the lessor's property upon considerations to him by way of rent or otherwise. It implies an obligation to surrender the premises to the lessor on the termination of the lease; that is, at the expiration of the time during which the owner has stipulated that the lessee may have the use and possession of his property. As said by this court in *Blight* v. *Rochester*, "The title of the lessee is, in fact, the title of the lessor. He comes in by virtue of it, holds by virtue of it and rests upon it to maintain and justify his position. He professes to have no independent right in himself, and it is a part of the very essence of the contract under which he claims that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that possession shall be surrendered at its expira- [615] tion. He cannot be allowed to controvert the title of the lessor without disparaging his own and he cannot set up the title of another without violating that contract by which he obtained and holds possession, and breaking that faith which he has pledged, and the obligation of which is still continuing and in full operation." And in speaking in the same case of the relation between vendee and vendor, the court added: "The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title, unless he should be called upon in consequence of some covenant or warranty in his deed. The property having become, by the sale, the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this, nor is either the letter or the spirit of the contract violated by it." 7 Wheat., 547, 548; see, also, *Willison* v. *Watkins*, 3 Pet., 43; *Watkins* v. *Holman*, 16 Pet., 54, and Taylor, Land. & T., sec. 14.

To this general statement of the law, there is this qualification:—that a grantee cannot dispute his grantor's title at the time of conveyance so as to avoid payment of the purchase price of the property; nor can the grantee in a contest with

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another, whilst relying solely upon the title conveyed to him, question its validity when set up by the latter. In other words, he cannot assert that the title, obtained from his grantor or through him, is sufficient for his protection and not available to his contestant. Where both parties assert title from a common grantor and no other source, neither can deny that such grantor had a valid title when he executed his conveyance. *Ives* v. *Sawyer*, 4 Dev. & Bat., 51, and *Gilliam* v. *Bird*, 8 Ired., 280. The case of *Board* v. *Board*, to which counsel refer, was decided upon similar grounds; there the defendant in ejectment, claiming as grantee under the [616] devisee of a life estate under a will, was held to be estopped from denying the validity of the will in an action by the grantees of the remainder man. L. R., 9 Q. B., 48.

With exceptions or limitations of this character, it will be found on examination of the authorities, particularly those of a modern date, that the doctrine of estoppel *in pais*, however it may have been applied formerly, cannot now be asserted to preclude the grantee from denying his grantor's title and acquiring a superior one, unless there exists such a relation of the parties to each other as would render the proceeding a breach of good faith and common honesty. No such relation exists between grantor and grantee in an absolute conveyance without recital or covenant, whether it be of the fee or of an estate for life. The grantee does not recognize, by the acceptance of such a conveyance of an estate for the life of another, the possession of any greater estate in the grantor, or any obligation to hold the premises for him after the termination of the estate. So far as he is informed by such a conveyance, he takes the entire interest of the grantor in the property. He does him, therefore, no wrong by purchasing any adverse claims which may strengthen his own title, or which may give him a title after the termination of the life estate. Covenants in the instrument intended for him, such as to restore and surrender the premises on the termination of the life estate, or recitals declaring the reversion to be in the grantor or others, would, of course, change the relations of the parties. Obligations from such covenants or recitals might arise which would control the action of the grantee. *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y., 35. Here, as already stated, there is nothing of the kind. The conveyance is for the life of Maria and no longer, and without covenants or recitals as to any further interests of the grantors or of others. By taking a deed poll of this character no obligation to the grantors could arise and, consequently, no estoppel precluding the grantee, and those claiming under him, from accepting conveyances from other sources to strengthen their existing interests or to acquire the reversion, and thus securing to themselves the absolute fee. In *Osterhout* v. *Shoemaker*, 3 Hill, 512, the Supreme Court of New York held a similar doctrine as to the relation between grantor and grantee in fee. [617] Speaking by *Judge* Bronson it said: "There is no estoppel where the occupant is not under an obligation, express or implied, that he will at some time or in some event surrender the possession. The grantee in fee is under no such obligation. He does not receive the possession under any contract, express or implied, that he will ever give it up. He takes the land to hold for himself, and to dispose of it at pleasure. He owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an utter stranger to the title." This language was subsequently cited with approval by the court of appeals of the State in the case of *Sparrow* v. *Kingman*, 1 N. Y., 242, and there is no reason why it should not apply with equal force to a grantee of an estate for life as to a grantee in fee. There is nothing in the nature of the estate which necessarily implies that the grantor is the owner of the reversion. The absence in the deed here of any reference to a reversionary interest would rather seem to negative such ownership. Be that as it may, there was no implied obligation from any relation of the parties to each other which could estop the grantee of the life estate or persons claiming under him from denying the title of his grantors to any greater estate than the one conveyed, or from acquiring title to the reversion from other sources.

We have considered in this opinion that Redfern took possession of the premises in controversy under the deed to him of the life estate, because on the argument that fact was assumed as established; but there is no direct evidence on the point in the record.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

MARY R. STEEVER, *Appt.*,

v.

JAMES N. RICKMAN.

Question of fact. Decree affirmed without discussion of the evidence.

[No. 67.]

Argued Dec. 4, 5, 1883. Decided Dec. 17, 1883.

APPEAL from the Circuit Court of the United States for the District of Kentucky.

Messrs. **William Stone Abert**, *West Steever* and *Sterling B. Toney*, for appellant.

Mr. **W. O. Dodd**, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

If all that is charged in this bill were true, there could be no doubt of the right of the appellant to the relief she asks, as well on account of the actual as constructive fraud of the appellee. But the answer, which is under oath, is as emphatic and direct in its denials as the bill is in its charges. There is no disputed question of law. The only controversy is as to the facts. The testimony is voluminous, and it would serve no useful purpose to discuss it in an opinion. *It is sufficient to say that we are entirely satisfied with the conclusion reached by the Circuit Court.*

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[618] ARTHUR W. SWEENEY, *Appt.*,

v.

UNITED STATES.

(See S. C., Reporter's ed., 618-620.)

Condition precedent in contract.

Where a contract with the United States requires a certificate by an officer or agent of the Government that the work agreed to be done is done in all respects as contracted for, such certificate is a condition precedent to a recovery, unless it is shown to have been refused through fraud, such gross mistake as would imply bad faith, or failure to exercise an honest judgment.

[No. 109.]

Submitted Nov. 13, 1883. Decided Dec. 17, 1883.

APPEAL from the Court of Claims.

The claimant contracted to construct a brick wall, at the National Military Cemetery at Fort Harrison, Va., for the defendant, according to plans and specifications. It was agreed that, from time to time and when completed, the wall should be inspected by an officer of the army, or by a civil engineer, or other agent to be designated by the United States, and that it should be received and become the property of the United States after such officer or civil engineer or other agent should certify that it was in all respects as contracted for.

The Government agreed, in consideration of the faithful performance of that and other stipulations, to pay the claimant a fixed price per linear foot for the wall. It was also agreed that, upon inspection and report of materials furnished and work done during the performance of the contract, payments in part might be made, not to exceed 80 per cent of the estimated value of the material and work actually furnished.

Not long after the contract was concluded the claimant invited the defendant to inspect a kiln of bricks made to be used in the wall. The defendant sent a civil engineer to inspect it, and the bricks were rejected. From time to time the invitations to inspect material were repeated, both with reference to bricks and with reference to gate posts intended for the wall. The inspector condemned all the bricks offered, and also the proposed gate posts.

The claimant, with full knowledge of these decisions, constructed the wall, using the condemned bricks and the condemned gate posts. The civil engineer refused to certify that the work was such as was required by the contract, but certified to the contrary. The defendant thereupon took down the wall and gate posts which had been put up by the claimant and constructed a new wall of other materials in its place.

The claimant then filed his petition in the court below to recover $4,273.44 and interest, alleged to be due him on account of the work done in execution of his contract.

The court below having found for the defendant, the claimant appealed to this court.

Messrs. **T. W. Bartley** and *M. I. Southard*, for appellant.

Mr. **Wm. A. Maury**, *Asst. Atty-Gen.*, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This judgment is affirmed on the authority of *Kihlberg* v. *U. S.*, 97 U. S., 398 [XXIV., 1106]. It was provided in the contract that payment for the wall was not to be made until some officer of the army, civil engineer, or other agent, to be designated by the United States, had certified, after inspection, that it was in all respects as contracted for. The officer of the army, designated under this authority, expressly refused to give the necessary certificate, on the ground that neither the material nor the workmanship were such as the contract required. The court below found that there was neither fraud, nor such gross mistake as would necessarily imply bad faith, nor any failure to exercise an honest judgment on the part of the officer in making his inspections. The appellant was notified of the defective character of the material and that it would not be accepted, before he put it into the wall; and after he had completed his work, the wall which he constructed was taken down by order of the Quartermaster-General, and a new one made of other material built in its place.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—114 U. S., 550.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CHEROKEE, STATE OF KANSAS, *Plff. in Err.*, [621]

v.

WILLIAM C. WILSON.

(See S. C., Reporter's ed., 621-627.)

Levy of taxes in Kansas—question in error.

1. Under the statutes of Kansas, it is the duty of boards of county commissioners, when there is no trustee of the township or when he fails to act, to levy all taxes required to meet the liabilities of the township not otherwise provided for by law.

2. Where a board of county commissioners in Kansas alone bring writ of error on a *mandamus* requiring them, with the clerk and treasurer of the county, to levy, collect and pay over a tax, they cannot complain for the clerk and treasurer, because the board must levy the tax before the other officers, whose duties are purely ministerial, can act.

[No. 918.]

Submitted Dec. 5, 1883. Decided Dec. 17, 1883.

IN ERROR to the Circuit Court of the United States for the District of Kansas.

The history and facts of the case appear in the opinion of the court.

Messrs. **Wallace Pratt** and *Charles W. Blair*, for plaintiffs in error.

Messrs. **James S. Botsford**, *Marcus T. C. Williams* and *Joseph Shippen*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

On the 11th of June, 1881, William C. Wilson, the defendant in error, recovered a judgment in the Circuit Court of the United States for the District of Kansas, against the Township

NOTE.—Mandamus *to compel city, town or county to levy tax to pay bonds or interest on bonds.* See note to The Mayor v. U. S., 76 U. S., XIX., 704.

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of Salamanca, Cherokee County, for $48,920.31. At that time the office of trustee of the township was vacant and it has not been filled since. On the 24th of July, 1882, Wilson sued out of the same court an alternative writ of *mandamus*, returnable on the 9th of October, 1882, requiring the Board of County Commissioners of the County "To forthwith levy upon the taxable [622] property * * * in said township * * * a tax sufficient in amount for the payment of the judgment * * * and cause the same to be certified to the county clerk of said county;" and requiring the clerk of the county "To extend said tax forthwith on the tax books of said county and deliver the same with said tax so levied and extended thereon to the county Treasurer of said county," and the county Treasurer forthwith, after the tax books shall have been delivered to him by the clerk, "To proceed to collect said taxes and pay the same, when so collected, to said William C. Wilson in payment of said judgment, interest and costs," or show cause why they had not so done. This writ was served on the individual members of the Board of County Commissioners, and on the clerk and Treasurer of the county, on the 26th of July. On the 27th of November, 1882, the respondents filed a motion to quash the writ, and on this motion, raised two questions, to wit:

1. Whether the writ was not sued out prematurely; and

2. Whether, under the statutes of Kansas, the County Commissioners could legally do that which the writ sought to coerce them into doing.

Before this motion was disposed of, the individual members of the Board of County Commissioners filed an answer and, after the testimony was closed, Wilson moved for a peremptory writ. Upon the hearing of this motion and the motion to quash, the Judges holding the court were divided in opinion on the following questions:

1. Whether said motions respectively should be sustained or overruled.

2. Whether it is the legal duty of the Board of County Commissioners of Cherokee, under the statutes of the State of Kansas, to levy the tax as commanded by the alternative writ of *mandamus* herein, for the payment of the judgment of the relator against Salamanca Township, in said county, based upon interest coupons detached from bonds issued by said township to pay shares of capital stock in a railroad company, which bonds were voted under the Act of the General Assembly of the State of Kansas, entitled: "An Act to Enable Municipal Townships to Subscribe for Stock in Any Rail- [623] road and to Provide Payment of the Same," approved February 25, 1870, and issued September 1, 1872, under the Act of said General Assembly, entitled "An Act to Authorize Counties, Incorporated Cities and Municipal Townships to Issue Bonds for the Purpose of Building Bridges, Aiding in the Construction of Railroads, Water-Powers or Other Works of Internal Improvement, and Providing for the Registration of Such Bonds, and the Repeal of All Laws in Conflict Therewith," approved March 2, 1872.

The Circuit Judge was of opinion that the motion to quash should be overruled, and that for the peremptory writ granted. A judgment awarding the writ was thereupon entered, and the questions, as to which the difference of opinion arose, were duly certified. The case is now here on a writ of error for an answer to these questions.

The Act of February 25, 1870, authorized the township to subscribe to the capital stock of the Memphis, Carthage and Northwestern Railroad Company, and to issue bonds to pay the subscription. That was settled by the judgment against the township on account of which the *mandamus* is asked.

Every township in Kansas is a body corporate and politic. Sec. 1, 5965, Dassler, Comp. L., 977. The trustee is the principal officer of the township, and his duty is, among other things, sec. 22 (5988) *Id.*, 980, to superintend all the pecuniary concerns of his township, and at the July session of the Board of County Commissioners, annually, with the advice and consent of the Board, to levy a tax on the property of the citizens of the township, for township, road and other purposes, and report the same to the county clerk for entry on the tax roll; "But, in a failure of such trustee and commissioners to concur, then the Board of County Commissioners shall levy such township, road and other taxes." The Board of County Commissioners are required by law to meet in regular session on the first Monday in July of each year. Sec. 13 (1897), Dassler Comp. L., 274. They must also meet on the first Monday in August in each year to estimate and determine the amount of money to be raised by tax for all county purposes, and all other taxes which they shall be required by law to levy. Sec. 83 (5886), Dassler, Comp. L., 956. The county clerk must make up the tax list immediately after the first [624] Monday in August, and deliver it to the treasurer for collection on or before the first Monday in November. Sec. 84, *Id.*

Section 6 of the Act of February 25, 1870, under which the bonds involved in this proceeding were issued, is as follows:

"Sec. 6. Whenever any bonds shall be issued in pursuance of the foregoing provision, it shall be the duty of the Board of County Commissioners, annually, to proceed to levy and collect a tax on all the taxable property in such township sufficient to pay the interest on such bonds as the same becomes due, and to create a sinking fund sufficient to pay said bonds at maturity; and such tax shall be collected in cash or the coupons of such bonds which may be due; and such tax shall be collected as county and township taxes are collected, and paid out by the Treasurer on presentation of the coupon or bonds, when due; and the county clerk, Treasurer and other officers who may be required to do any act under the foregoing provisions, shall be entitled to the same fees as are allowed by law for similar services, and liable to the same fines and penalties for non-compliance."

The Act of March 2, 1872, referred to in the second question certified, was repealed, so far as it affects this case, by the Act of March 9, 1874, Sess. L. of 1874, p. 41, sections 7 and 13 of which are as follows:

"Sec. 7. It shall be the duty of the proper officers of any county, city or township, in which bonds have been heretofore voted for any of the purposes mentioned in the Act to which this Act is amendatory, annually, at the time when other

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taxes are levied, to levy and cause to be collected a sufficient tax to pay the interest on all such bonds as the same shall become due, and also for the purpose of creating a sinking fund for the final redemption of such bonds."

"Sec. 13. It will be the duty of the Board of County Commissioners of any county in which railroad bonds shall be issued under the provisions of this Act, annually, at the time when other taxes are levied, to levy and cause to be collected, as other taxes are levied and collected, a sufficient tax to pay the interest on all bonds issued for railroad purposes by such county, or any [625] township therein, as the same falls due, and also for the purpose of creating a sinking fund for the final redemption of such bonds."

These statutes were in force when the alternative writ of *mandamus* was sued out in this case. The judgment against the township was rendered on the 11th of June, 1881. It, therefore, became the duty of the proper officers to levy the tax at the time fixed by law for that purpose in the year 1881. No such levy was made and, consequently, all officers whose duty it was to make the levy were in default when the alternative writ was sued out in 1882. It follows that the writ was not prematurely issued if it was the duty of the Board of County Commissioners to make the levy when there was no trustee of the township. The fact that the Board may not have had actual notice of the rendition of the judgment until November, 1881, does not affect their legal obligation to make the levy. It may be accepted as an excuse for not performing that duty, but it does not relieve them from the consequences of their legal default.

The township trustee is, in law, the principal officer of the township. It is his duty to superintend all the pecuniary concerns of the township and, with the advice and concurrence of the Board of County Commissioners, to levy all taxes required to meet the liabilities of the township not otherwise provided for by law; but, if he fails in this duty, the Board must, as we think, make the necessary levies for him. To that extent, the Board is charged with the duty of caring for the interests of the township. Such is the fair meaning of section 22 (5088). Under that section the township trustee is required to attend the meeting of the Board in July of each year and lay before them his recommendations for taxes to be levied. As his levy can only be made with the concurrence of the Board, there must necessarily be an inquiry by the Board into the pecuniary concerns of the township, so as to determine whether what is recommended by the trustee is enough or more than enough to meet its liabilities for the current year. If the trustee has omitted a tax for any purpose, which the law requires to be levied, it is the clear duty of the Board to make the levy themselves if the trustee will not. The trustee and [626] the Commissioners are made in law a tribunal to meet in July in each year to estimate and determine what taxes are required in the township for the year. If both the trustee and Commissioners are present at the meeting and agree as to what should be done, the trustee reports the tax to the county clerk, but if the trustee is not present, or being present does not agree with the Commissioners, the opinion of the Commissioners prevails, and they may proceed without him. This is the evident purpose of the provision that, in failure of such trustee and Commissioners to concur, the Board shall make the levy. The tax to pay the judgment in this case was one of the taxes to be levied on the property of the township to pay a township debt. It is true that this section of the law was enacted in substance years before the bonds involved in this suit were issued, but unless it has been in some way superseded by reason of the special Acts connected with the particular obligation of these bonds, it governs this case. So far as we are advised, if the tribunal, consisting of the trustee and County Commissioners, are relieved from their general supervision of the needs of the township in the way of taxation for these bonds, it is only to put that duty on the Board alone. If on the Board, it was clearly their duty to levy the tax without the trustee at the meeting in August, 1881, because the legal liability of the township had then been judicially established. If, however, it was a matter in respect to which the trustee should act conjointly with them, both they and the trustee were in default in July, 1881. In any view of the case, the obligation to levy the tax had been imposed on the County Commissioners when the alternative writ was sued out, and they have shown no good cause why the levy was not made.

The Board of County Commissioners have alone brought this writ of error. So far as appears the clerk and Treasurer are satisfied with what has been done in reference to them. The Board are in no condition to complain for the other officers, because, under the law, they must levy the tax before the others can act and, if the levy is made, the duties of the clerk and Treasurer are purely ministerial. The whole proceeding depends on the duty of the Board to levy the tax.

We conclude, therefore, that the motion to [627] quash should have been overruled, and the motion for judgment sustained. The first question is answered accordingly. The second question is answered in the affirmative.

As the judgment was in accordance with these answers, it is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 222, 225.

SALAMANCA TOWNSHIP, CHEROKEE COUNTY, STATE OF KANSAS, *Plff. in Err.*,
v.
WILLIAM C. WILSON.

(See S. C., Reporter's ed., 627-629.)

Township treasurer, effect of removal.

Where the Constitution or laws of a State do not require a township treasurer to be a resident of the township, the removal of a treasurer from a township into an adjoining township does not of itself vacate his office, so as to invalidate the service of a summons upon him as such officer.

[No. 919.]

Submitted Dec. 5, 1883. Decided Dec. 17, 1883.

IN ERROR (certificate of division) to the Circuit Court of the United States for the District of Kansas.

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This action was brought in the court below, by the defendant in error, to recover the amount alleged to be due him on certain interest coupons detached from bonds issued by the defendant.

The Judges holding the court below, certified a difference of opinion as to the sufficiency of the service of process upon the defendant.

The Circuit Judge being of opinion that the service was sufficient, a motion to set aside was overruled. Upon the defendant failing to answer, the court rendered judgment for the plaintiff for $5,448.56, with costs. Whereupon, the defendant suid out this writ of error.

The facts of the case are sufficiently stated by the court.

Messrs. **Wallace Pratt** and *Charles W. Blair*, for plaintiff in error.

Messrs. **James S. Botsford, Joseph Shippen** and *Marcus T. C. Williams*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

In this case the Judges holding the circuit court have certified a difference of opinion between them upon the hearing of a motion to set aside the service of summons on the plaintiff in error, being the defendant below. The return of service is in these words:

"Received the within writ, September the 12th, 1882. I served the within summons on said Township of Salamanca, Cherokee County, State of Knnsas, by delivering a true and certified copy thereof to Joseph A. Jones, the last elected and qualified Treasurer of said Salamanca Township, in the County of Cherokee, State and District of Kansas; and I made diligent search and inquiry for, but could not find, [628] in the Township of Salamanca, or County of Cherokee, State and Dist. of Kansas, the last elected and qualified trustee or clerk of said within defendant, Township of Salamanca.

All done this 18th day of September, A. D. 1882.

B. F. Simpson,
U. S. M., Dist. of Kansas.
By J. H. Smith, *Deputy.*"

The controlling question certified is as follows:

"2. Whether service of said summons upon Joseph A. Jones, the last elected and qualified Treasurer of said Township, after said Jones had removed out of said Township and across the line into the adjoining Township of Crawford, in said County of Cherokee, was good and sufficient service of said summons."

It is not denied that the service was good if Jones was, in law, the Treasurer of the Township when served. By the Constitution of Kansas, article 9, section 4, township officers, except justices of the peace, hold their offices one year from the Monday next succeeding their election, and until their successors are qualified. Jones was, therefore, presumptively in office when served, unless his removal across the line into Crawford Township of itself created a vacancy. *Borton* v. *Buck*, 8 Kan., 302; *Rheinhart* v. *State*, 14 Kan., 318; *Hubbard* v. *Crawford*, 19 Kan., 507.

There is nothing in the Constitution or laws of Kansas which requires a township treasurer to be a resident of or voter in the township when elected or qualified; neither is there anything which vacates the office if the officer removes from the township during the term for which he was elected. Justices of the peace are township officers, and as to them it is expressly provided that they shall reside and hold their office in the township for which they shall have been elected. Section 4, 5970, Dassler, Comp. Laws, 1879, 978. As no similar provision is made in respect to any other township officer, the implication necessarily is that actual residence in the township is not required of them. *Expressio unius est exclusio alterius.* That residence, as a qualification for office, was in the minds of the framers of the Constitution and of the Legislature, is apparent, for article 3, section 11, of [629] the Constitution, provides that all judicial officers shall reside in their respective townships, counties and districts during their respective terms of office; article 2, section 4, that "No person shall be a member of the Legislature who is not at the time of his election a qualified voter of and resident in the county or district for which he is elected;" and section 218 (1643) of the general statutes, Dassler, Comp. Laws, 311, that ceasing to be an inhabitant of the county for which he was elected or appointed vacates the office of a county officer.

Undoubtedly, the removal of a township treasurer from a township may, under some circumstances, vacate his office and authorize the County Commissioners to fill the place, section 12 (1978), Dassler, Comp. Laws, 978, but we think it does not necessarily vacate the office under all circumstances. In the present case the question is, whether moving across the line into an adjoining township, of itself, has that effect. *In our opinion*, it does not and, consequently, *we answer the second question certified in the affirmative. The motion to set aside the service was, therefore, properly overruled, and the judgment is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

In the Matter of the Petition of JULIUS A. BOYER AND DAVID E. CORNEAU, For a Writ of Prohibition.

(See S. C., Reporter's ed., "*Ex Parte Boyer*," 629-632.)

Admiralty jurisdiction of collision between canal-boats.

* The District Court of the United States for the Northern District of Illinois, as a Court of Admiralty, has jurisdiction of a suit *in rem* against a steam canal-boat, to recover damages caused by a collision between her and another canal-boat, while the two boats were navigating the Illinois and Lake Michigan Canal, at a point about four miles from its Chicago end, and within the body of Cook County, Illinois, although the libelant's boat was bound from one place in Illinois to another place in Illinois.

[No. 13, Orig.]

Submitted Nov. 17, 1883. Decided Jan. 7, 1884.

The history and facts of the case fully appear in the opinion of the court.

*Head note by *Mr. Justice* BLATCHFORD.

NOTE.—*To what places the jurisdiction of admiralty is confined.* See *note to* Allen v. Newberry, 62 U. S., XVI., 110.

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Mr. **Robert Rae,** for petitioner.
Mr. **C. E. Kremer,** *contra.*

Mr. Justice **Blatchford** delivered the opinion of the court:

The owners of the canal-boat Brilliant and her cargo filed a libel in admiralty, in the District Court of the United States for the Northern District of Illinois, against the steam canal-boat B and C, in a case of collision. The libel alleges that The Brilliant is a vessel of more than twenty tons burden, and was employed, at the time of the collision, in the business of commerce and navigation between ports and places in different States and Territories of the United States, upon the lakes and navigable waters connecting said lakes; that The B and C is a vessel of more than twenty tons burden, and was, at the time of the collision, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between ports and places in different States and Territories of the United States, upon the lakes and navigable waters of the United States; that, in August, 1882, The Brilliant, while bound from Morris, Illinois, to Chicago, Illinois, towed, with other canal-boats, by a steam canal-boat, and carrying the proper lights and moving up the Illinois and Lake Michigan Canal about four miles south of the Chicago end of the canal, was, through the negligence of The B and C, struck and sunk, with her cargo, by The B and C, which was moving in the opposite direction, to the damage of the libelants $1,500. The owners and claimants of The B and C answered the libel, giving their version of the collision and alleging that it was wholly due to the faulty navigation of The Brilliant, and that it occurred on the Illinois and Michigan Canal, at a place within the body of Cook County, in the State of Illinois. In November, 1883, the District Court made an interlocutory decree, finding that both parties were in fault, and decreeing that they should [631] each pay one half of the damages occasioned by the collision, to be thereafter ascertained and assessed by the court.

The owners of The B and C have now presented to this court a petition, praying that a writ of prohibition may issue to the Judge of the said District Court, prohibiting him from proceeding further in said suit. The ground alleged for the writ is the want of jurisdiction of the District Court, as a Court of Admiralty, over the waters where the collision occurred.

The Illinois and Michigan Canal is an artificial navigable water way, connecting Lake Michigan and the Chicago River with the Illinois River and the Mississippi River. By the Act of Congress of March 30, 1822, ch. 14, 3 Stat. at L., 659, the use of certain public lands of the United States was vested in the State of Illinois forever, for a canal to connect the Illinois River with the southern bend of Lake Michigan. The Act declared "That the said canal, when completed, shall be and forever remain a public highway, for the use of the Government of the United States, free from any toll or other charge whatever for any property of the United States, or persons in their service, passing through the same." This declaration was repeated in the Act of March 2, 1827, ch. 51, 4 Stat. at L., 234, granting more land to the State of Illinois to aid it in opening the canal. We take judicial notice of the historical fact that the canal, ninety-six miles long, was completed in 1848, and is sixty feet wide and six feet deep and is capable of being navigated by vessels which a canal of such size will accommodate, and which can thus pass from the Mississippi River to Lake Michigan and carry on interstate commerce, although the canal is wholly within the territorial bounds of the State of Illinois. By the Act of 1822, if the land granted thereby shall cease to be used for a canal suitable for navigation, the grant is to be void. It may properly be assumed that the District Court found to be true the allegations of the libel, before cited, as to the character and employment of the two vessels, those allegations being put in issue by the answer.

Within the principles laid down by this court in the cases of *The Daniel Ball*, 10 Wall., 557 [77 U. S., XIX., 999], and *The Montello*, 20 Wall., 430 [87 U. S., XXII., 391], which ex- [632] tended the salutary views of admiralty jurisdiction applied in *The Genesee Chief*, 12 How., 443, *The Hine* v. *Trevor*, 4 Wall., 555 [71 U. S., XVIII., 451], and *The Eagle*, 8 Wall., 15 [75 U. S., XIX., 365], we have no doubt of the jurisdiction of the District Court in this case. Navigable water situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different States, carried on by vessels such as those in question here, is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States, even though the canal is wholly artificial, and is wholly within the body of a State, and subject to its ownership and control; and it makes no difference as to the jurisdiction of the District Court that one or the other of the vessels, was at the time of the collision on a voyage from one place in the State of Illinois to another place in that State. *The Belfast*, 7 Wall., 624 [74 U.S., XIX., 266]. Many of the embarrassments connected with the question of the extent of the jurisdiction of the admiralty disappeared when this court held, in the case of *The Eagle*, *ubi supra*, that all of the provisions of section 9 of the Judiciary Act of September 24, 1789, ch. 20, 1 Stat. at L., 77, which conferred admiralty and maritime jurisdiction upon the district courts were inoperative, except the simple clause giving to them exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction. That decision is carried out by the enactment in section 563 of the Revised Statutes, subdivision 8, that the district courts shall have jurisdiction of all civil causes of admiralty and maritime jurisdiction, thus leaving out the inoperative provisions.

This case does not raise the question whether the admiralty jurisdiction of the District Court extends to waters wholly within the body of a State and from which vessels cannot so pass as to carry on commerce between places in such State and places in another State or in a foreign country; and no opinion is intended to be intimated as to jurisdiction in such a case.

The prayer of the petition is denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[633] JACOB ESTEY ET AL., *Appts.*,
v.
RILEY BURDETT.

(See S. C., Reporter's ed., 633-640.)

Patent for improvement in organs—construction of.

*1. Claim 1 of letters patent No. 87241, granted February 23, 1869, to Riley Burdett, as inventor, for 17 years from August 24, 1868, for an improvement in reed organs, namely: "The arrangement, in a reed musical instrument, of the reed board A, having the diapason set *a* and its octave set *b* and the additional set L, extending from about at tenor F upward through the scale, substantially as and to the effect set forth," defined and construed.

2. A reed board with two sets of reeds and a third partial set was made and put into an organ by one Dayton, prior to the invention of Burdett and, such organ being put in evidence, it was held that the alleged infringing organs contained nothing which, so far as said claim 1 was concerned, was not found in such prior organ.

3. As to claim 2, namely: "The reed board A, and foundation board G, constructed with the contracted valve openings D F F, and the reeds arranged in relation thereto, all in the manner described," it was held that, in view of the state of the art, there was no invention in making the length and size of the valve opening greater or less in a reed board of a given width, or where the reed board was made wider or narrower, or had more or less sets of reeds in it, either full or partial; and that the vibrating ends of the lowest and longest reeds in such prior organ were as near together as they were in the reed boards of the alleged infringing organs.

4. On these views, a decree was entered in favor of the defendants.

[No. 85.]

Argued Nov. 21, 22, 23, 1883. Decided Jan. 7, 1884.

APPEAL from the Circuit Court of the United States for the District of Vermont.

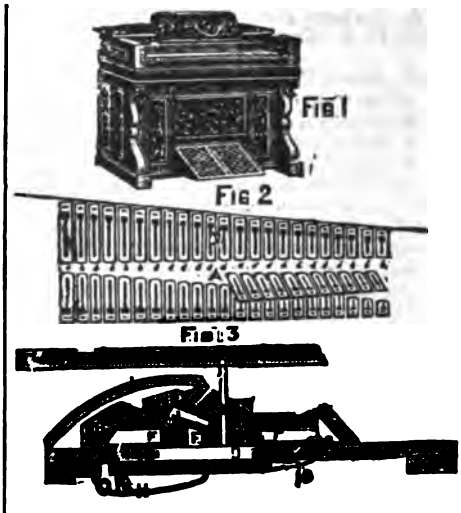
The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **Edward N. Dickerson** and **Wm. M. Evarts**, for appellants.

Messrs. **George Harding, E. J. Phelps** and *Kittredge Haskins*, for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity brought for the infringement of letters patent No. 87241, granted February 23, 1869, to Riley Burdett, the plaintiff, for 17 years from August 24, 1868, for an improvement in reed organs. The specification of the patent is in these words: "Figure 1 is a [634] perspective view of one of my reed celeste organs. Figure 2 is a diagram plan, showing the relative arrangement of the reeds. Figure 3 is a vertical transverse section of my reed board, etc. This invention consists: first, in the arrangement of the reed board; second, in a method of tuning, by which a peculiar quality of tone is produced and by which the power of the instrument is greatly increased without an increased resistance in the action and without an increase of power being necessary to operate the bellows. The advantages gained by my peculiar arrangement are, a greatly increased power and variety of tone. This is effected by the use of an additional set of reeds commencing at tenor F, or thereabouts, and running upward through the scale of the instrument, and tuning the same in the peculiar manner hereinafter described. No other reed musical [635] instrument containing the same number of



reeds, so far as I knew, has ever possessed so great a variety or pleasing quality of tone, while simplicity of construction, compactness of form and ease of operation are other excellencies of this arrangement not found in others. I will now describe particularly the construction of that part of my instrument which forms the subject of this patent. The case, bellows, pedals, etc., may be, in general construction and arrangement, like those in common use and, therefore, no special description is required. The foundation of the reed board is also constructed in the usual manner, but the reed board proper, in itself, differs from the ordinary reed board in the following particulars, *viz.*: the main board A contains two sets of reeds running through the entire scale, the back set of which is marked *a* and is tuned as a unison or diapason, while the front or octave set, marked *b*, is turned an octave above the diapason. In the arrangement of these reeds, it will be seen that the lowest and longest reeds in the diapason and the octave sets are placed with their vibrating ends as near together as they can be, with room only for the tracker pin which communicates the motion of the key to the valve beneath the reeds. But, as the reeds continually shorten as they advance upward in the scale, there is necessarily a vacant space left between the diapason set *a* and the octave set *b*, which constantly enlarges itself and has heretofore been regarded as useless. Within this space, commencing on tenor F and running upward through the scale, I have introduced a third set of reeds, L, which forms the distinguishing feature of this instrument. These are placed in the reed board over the octave set *b*, and run obliquely to the foundation board G, as shown in Figure 3, the vibrating ends resting on the same base as the other sets of reeds, *a* and *b*. These reeds are of the same size as the corresponding ones in the diapason *a*, and are tuned either a trifle above or below the diapason, but only sufficiently so to produce a slightly waving and undulating quality or effect, without producing any discord. A few trials will enable any tuner of reed instruments to tune these reeds so as to realize the best effect. This method of tuning will, when

* Head notes by *Mr. Justice* BLATCHFORD.

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this set of reeds, which I have named the Harmonic Celeste, is drawn and used in connection with the diapason, produce a most wonderfully pleasing and captivating effect, while the power and beauty of both sets of reeds are greatly augmented and enriched, in a manner which [636] cannot be realized without being heard. Figure 2 shows a top view of the reed board proper, wherein the location of the reeds is shown with reference to the divergence of the reeds of the diapason set *a* and the octave set *b*, and also the space afforded for the introduction of the third set, L. Figure 3 exhibits a transverse section of my reed and foundation board, showing the arrangement of my reeds and the valve connections. In this figure, A is the reed board, G is the foundation board, D is the valve opening, E is the valve, and F F are the throats over which the reeds are located and placed. The valve E is retained in its proper place by the pins *e e* and spring H, and is operated by the tracker pin I, which rests upon its upper surface, and passes upwards through the reed board to the under surface of the key N. The swell boards J and K and stop dampers B and M are raised, whenever desired, by the knee stop C, Fig. 1, or by a hand draw stop, or by some other convenient device. Another important advantage arising from the introduction of the harmonic celeste is, that a greater power and variety are attained than can be by the use of any of the octave coupling arrangements now in use. These, while they augment the power, by drawing down octaves to the keys actually played, are objectionable, inasmuch as they offer more than double the resistance to the key, and are thus often exceedingly undesirable. In my instrument, no such objection can ever arise, as the pressure upon the keys is always the same, whether one or all the sets of reeds are used. This is of prime importance to the performer, as the required exertion becomes involuntary and not a matter of calculation, and thus the mind is not distracted from the proper feeling and expression of the music performed." The claims of the patent are as follows: "1. The arrangement, in a reed musical instrument, of the reed board A, having the diapason set *a* and its octave set *b* and the additional set L, extending from about at tenor F upward through the scale, substantially as and to the effect set forth. 2. The reed board A and foundation board G, constructed with the contracted valve openings DFF, and the reeds arranged in relation thereto, all in the manner described. 3. The diapason *a* and its octave or principal, *b*, arranged over the same valve opening, as described, so that the octave unison may be produced, when desired, without the use of coupler, and without any additional pressure upon the keys. 4. In connection with the reed board A, having the [637] sets *a*, *b* and L, as described, the independent dampers B and M, as set forth."

The circuit court made an interlocutory decree declaring the patent to be valid so far as claims 1 and 2 are concerned; that those two claims had been infringed; that the plaintiff was not the original and first inventor of what is set forth in claim 4 and did not, before the commencement of this suit, file a disclaimer of what is claimed in claim 4 and had not unreasonably neglected to file such disclaimer, and had presented evidence of his having filed such disclaimer; that no evidence had been offered to show any infringement of claim 3 and that the plaintiff was entitled to recover profits and damages because of such infringement. A reference to a master to ascertain the same was ordered, and a perpetual injunction was awarded as to claims 1 and 2. On the report of the master a final decree was made for the plaintiff, for $161,011.79, without costs to either party. The decisions of the circuit court in the case are reported in 15 Blatchf. (C. C.), 349, 16 *Id.*, 105, and 19 *Id.*, 1. The defendants have appealed.

An examination of the text of the specification shows that the inventor purposed to cover by his patent two things: 1, a new arrangement of the reed board; 2, a new method of tuning. In the application for the patent, claim 1 read as it does now, while claims 2, 3 and 4 had specific reference to the method of tuning described. The Patent-Office rejected all the claims. The plaintiff then amended two of the claims relative to tuning, still retaining the tuning feature in them, and added the claims which are now claims 2, 3 and 4. The office then rejected all seven of the claims. On appeal to the examiners in chief, the decision rejecting the three tuning claims was affirmed, and that rejecting the other four claims was reversed, and the patent was issued accordingly. There is nothing in claims 1 and 2, as granted, which has any reference to any new method of tuning, unless it is to be intended, in accordance with the description, that the partial set is to be capable of being tuned a trifle above or below the diapason set. Except, perhaps, to that extent, all there is in the descriptive part of the specification in [638] relation to a new method of tuning may be dismissed from consideration, as it was introduced to lay a foundation for the original claims 2, 3 and 4, in reference to such new method of tuning. Claims 1 and 2, as they stand, relate only to the arrangement of the reed board and the sets of reeds, in conjunction with the foundation board and the valve openings and the valves.

The specification shows that the inventor takes a reed board having two sets of reeds running through the entire scale, a diapason set and an octave or principal set, and makes no change in the foundation board, or in the case; bellows, pedal, etc. The reed board with the two sets was old. In its structure, as shown in Figure 2 of the drawings and as described in the specification, the lowest and longest reeds in the two sets are placed so near together as to leave between them room only for the tracker pin which communicates motion from the key to the valve; but, as the reeds shorten continually as the scale proceeds upward, there is a vacant space between the ends of the reeds in the two sets, which space continually grows wider. Within that space the inventor introduces a third set of reeds, commencing at or about tenor F and running upward through the scale. He places this third set over the octave set, and the reeds run downwardly in a direction oblique to the foundation board, and their vibrating ends, which are their lower ends, rest on the same base as that of the other two sets of reeds. They are of the same size as the corresponding reeds in the diapason set. The point of advantage in bringing down the vibrating ends of the reeds in the third set, so that they shall rest on the same base with the vibrating ends of the reeds

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in the other two sets, is shown by the evidence to be the same point of advantage which is set forth in the specification of the prior patent granted to the plaintiff on the 9th of January, 1866. In that the invention is stated to be to so make the reed board that the three or four sets of reeds in it shall be acted upon instantly and simultaneously by the rush of air upon the opening of the valve; and it is set forth that that result is effected by placing two sets of reeds on the same horizontal plane, and placing the other sets on an inclined plane, each with its base on the same level as the first and second [639] sets, thus making the head of each reed equidistant from the valve and making each produce instantaneous concerted sound.

There was introduced in evidence a reed organ, known as Exhibit No. 21, containing a reed board with two sets of reeds, and a third partial set, alleged to have been made by one Dayton in 1866, prior to the plaintiff's invention. There was much testimony on the question as to whether the reed board and reeds in this organ were made prior to the plaintiff's invention, in the shape in which they appeared when put in evidence. The circuit court decided that question in the affirmative, but, nevertheless, it held that the arrangement of reed board and reeds found in No. 21 did not embrace the entire arrangement specified and claimed in claim 1 of the patent, because, although it had a reed board no wider than was necessary for two full sets of reeds, and had an additional partial set of reeds put in on an incline, and although the reeds in that set may have been tuned flat in relation to the diapason set, yet such reeds did not rest on the same base as that of the other two sets of reeds. We concur with the circuit court in its conclusion as to the genuineness and the date of No. 21, but are of opinion that there is nothing found in the alleged infringing organs which, so far as claim 1 of the plaintiff's patent is concerned, is not found in No. 21. The vibrating reeds in the partial set in the alleged infringing organs do not rest on the same base as that of the other two sets of reeds and occupy a position in that respect no different, in reference to any requirement of the plaintiff's patent, from that occupied by the vibrating ends of the partial set in No. 21. In all other respects in which the alleged infringing reed board and reeds embrace what is covered by claim 1 of the plaintiff's patent, what they contain is found in No. 21.

The material point in claim 2 is the contraction of the valve openings. The idea is that the valve openings and passages for the two complete sets of reeds and the intermediate partial set are contracted or condensed within the same space which was usually occupied by the valve openings and passages for only two complete sets of reeds in an instrument of the usual prior construction; and that, therefore, no more force [640] is required to be applied to the keys to open the valves than where only two full sets of reeds are used. The circuit court was of opinion that the valve openings in No. 21 were not the contracted valve openings of the plaintiff's patent, because they were as large as the valve openings in a reed board having three full sets of reeds; and that the lowest and longest reeds in No. 21 did not, as in the plaintiff's arrangement, have their vibrating ends as near together as they could be, with room between them only for the tracker pin. Our conclusion is that the absolute length and size of the valve opening was a matter of judgment, in view of the state of the art shown, and that there was no invention in making its length and size greater or less in a reed board of a given width, or where the reed board was made wider or narrower, or had more or less sets of reeds in it, either full or partial. The dimensions of the valve opening and of the valve are regulated by the judgment of the manufacturer as to the quantity of air necessary, and the resistance to be overcome in working the valve, and the inconvenience of the leakage of air. We are also satisfied that the vibrating ends of the lowest and longest reeds in No. 21 were as near together as they are in the reed boards of alleged infringing organs.

It results from these considerations that the decree of the Circuit Court must be reversed and the case be remanded to that court, with direction to dismiss the bill.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—114 U. S., 12.

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[641]

WILLIAM E. CLEMENTS, *Appt.*,

v.

ODORLESS EXCAVATING APPARATUS COMPANY.

(See S. C., Reporter's ed., 641-650.)

Letters patent—construction of.

*1. Claims 1 and 3 of re-issued letters patent No. 6962, granted to Lewis R. Keizer, February 29, 1876, for an improvement in apparatus for cleaning privies, the original patent, No. 115565, having been granted, June 6, 1871, to Henry C. Bull and Joseph M. Lowenstein, on the invention of said Bull, and the application for the re-issue having been filed January 11, 1876, namely: "1. A privy-vault cleaning apparatus, consisting of an air pump, a deodorizer, and suitable tubular connections, in combination with an independently movable receiving cask, having an induction passage or opening, and also an air opening for connection with the air pump, and provided with screw necks at each opening for receiving sealing caps or covers, substantially as described, whereby the movable cask may be located in any desired position with relation to the vault and privy, and the pump and deodorizer located in any desired position with relation to the vault, privy, and cask, and also whereby the casks, when filled, may be handled as is usual with filled casks, as set forth;" "3. The combination, with a portable night soil cask, of a float valve located at the air passage, substantially as described, whereby the fluid matter is prevented from entering the air passage and clogging the suction air pipe and pump, as set forth;" are invalid, because they are for inventions not indicated in the original patent as inventions, being for sub-combinations in combinations claimed in the original, and were made for the purpose of covering features described in patents issued to others during the interval between the granting of the original and the application for the re-issue.

2. Those features are contained in the defendant's apparatus, and that apparatus does not infringe any claim in the original patent.

[No. 136.]

Argued Dec. 5, 1883. Decided Jan. 7, 1884.

APPEAL from the Circuit Court of the United States for the District of Maryland.

The bill in this case was filed in the court below by the appellee, to recover damages, alleged

*Head notes by *Mr. Justice* BLATCHFORD.

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to haveresulted from the infringement of certain re-issued letters patent, and for an injunction.

The court below entered an interlocutory decree, delaring the validity of the re-issue and its infringement, and awarding a perpetual injunction and an accounting. The final decree awarded $1,406.50 as damages; whereupon, the defendant appealed to this court.

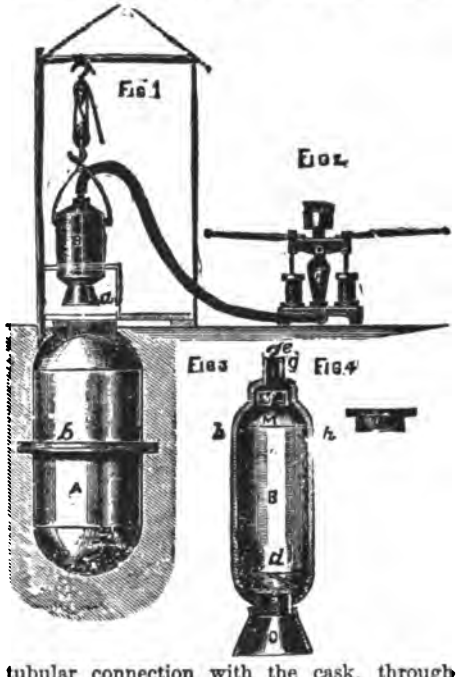
The facts of the case are stated by the court.

Messrs. **Hector S. Fenton** and *F. P. Cuppy*, for appellant.

Mr. **Benjamin F. Price**, for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity, brought for the infringement of re-issued letters patent No. 6962, granted to Lewis R. Keizer, February 29, 1876, for an improvement in apparatus for cleaning privies, the original patent, No. 115565, having been granted, June 6, 1871, to Henry C. Bull [642] and Joseph M. Lowenstein, on the invention of said Bull, and the application for the re-issue having been filed January 11, 1876. The specification says: "My invention consists, mainly, in a sink cleaning apparatus, consisting of an air pump, a deodorizer and suitable tubular connections, in combination with an independent or movable receiving cask, having an induction passage or opening, and also an air passage for connecting with the air pump, and provided with stench and water tight covers for both passages, whereby the movable cask may be located in any desired position with relation to the vault, and the air pump and the deodorizer properly located with reference to the vault and cask, and also whereby the cask, when filled, may be trundled on its bilge or end, after the usual manner of handling casks or barrels. My invention consists, further, in the combination, with the cask, of a flanged opening, a detachable suction pump or funnel connected with the flange of the opening, and a check valve located within the cask for retaining the offensive matter after passing through the valve. My invention still further consists in the combination, with the air passage of a night soil cask, of a float valve, whereby, when the cask is filled with fluid matters, the valve will be floated and closed, thereby indicating that the cask is filled, and preventing the fluid matter from entering the conducting pipe and passing through the air passage to the air pump, which would otherwise be liable to have its valves clogged thereby and rendered inoperative. To more particularly describe my invention, I will refer to the accompanying drawings, in which Figure 1 represents, in side view, a cask embodying several features of my invention, located within a privy. Figure 2 represents, in side view, an air pump connected with the cask by a flexible tube or suction hose, and provided with a deodorizer. Figure 3 represents a privy vault. Figure 4 represents, on an enlarged scale and in detail, in vertical central section, the cask shown in Figure 1. A vault is indicated at A. It is provided with the usual entrance or opening, as at *a*. B denotes one of several casks or receptacles which are employed in connection with an air pump, as at C, for removing the offensive matter from the vault. The cask B has at one end a screw neck, *i*, and the check valve *d*, which opens inwardly. Said cask also has another screw neck, as at M, to which is attached the suction hose which communicates [643] with the air pump. Attached to this neck is also a float valve, as at *f*, which guards the entrance to the suction tube or hose. The spindle of the valve *f* is provided, in a well known manner, with guiding devices. The lower portion of the float valve is provided with cork or other light material, whereby, when the cask is filled with fluid matter, the valve will be floated and effectually close the entrance to the suction air pipe, preventing the latter, as well as the pump, from being clogged by said matter. The cask is shown to be provided with shoulders *h h*, whereby the hoisting clamps L [644] may readily be made to engage with the cask. The induction pipe O is secured to the proper screw neck on the cask, and it constitutes a



tubular connection with the cask, through which the offensive matter is conducted from the vault into the cask. In operation I proceed as follows: after removing the seat or floor of a privy, uncovering the entrance to the vault, the cask B is suspended by a block and tackle over the vault, connected by the suction pipe to the air pump, and then lowered until the funnel pipe connection O, which is temporarily screwed to the neck *i* of the cask, is at its lower end immersed in the contents to be removed. The air is then exhausted from the cask by means of the pump, and deodorized by the furnace on the pump. The vacuum thus induced causes the matter to be sucked through the funnel pipe into the cask until the float valve is lifted and the air passage closed. The pump is then stopped, and the valve *d* closes. The cask, being wholly free from exterior contact with filth, is then lifted, the funnel and suction pipe removed, and the screw caps V applied to the necks *i* and M, after which the cask is handled like any filled cask, and rolled on its

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bilge or end." The re-issue has 8 claims, as follows: "1. A privy vault cleaning apparatus, consisting of an air pump, a deodorizer and suitable tubular connections, in combination with an independently movable receiving cask, having an induction passage or opening, and also an air opening for connection with the air pump, and provided with screw necks at each opening, for receiving sealing caps or covers, substantially as described, whereby the movable cask may be located in any desired position with relation to the vault and privy, and the pump and deodorizer located in any desired position with relation to the vault, privy and cask; and also whereby the casks, when filled, may be handled as is usual with filled casks, as set forth. 2. The combination, with a portable cask, having an induction aperture at one end, of a check valve, a screw neck surrounding the aperture, a funnel shaped pipe connected with the neck, and an air eduction passage provided with a screw neck, substantially as described. 3. The combination, with a portable night soil cask, of a float valve located at the air passage, substantially as described, whereby the fluid matter is prevented from entering the air passage and clogging the suction air pipe and pump, as set forth."

[645] The specification of the original patent was in these words, the drawings attached to the original and the re-issue being alike: "Figure 1 is a view in perspective of the cask or package, showing the method of suspending and operating the same. Figure 2 is a side elevation of the suction pump and furnace. Figure 3 is a plan view of the vault. Figure 4 is a vertical transverse section of the cask or receptacle shown in Figure 1. My invention relates to an improvement in devices for cleaning or emptying privy vaults, whereby the night soil therein contained may be removed and utilized and the disagreeable odors arising therefrom prevented. It consists of the vault A, receptacles or casks B, and the suction pump with furnace C, constructed and operated as shown and described. A, a cylindrical privy vault, constructed of metal or other suitable water tight material, and provided with the neck *a* and the flange *b*, which latter is designed as an auxiliary for holding it in a vertical position, as also for strengthening the same. B represents one of several casks or receptacles, which are employed as adjuncts of the suction pump C, for removing the fecal matter from the vault. It has located at its lower extremity the funnel O, which fits air tight upon the neck *i*, and the valve *d*, which opens upwardly; and at its apex the float valve *f* is provided, which screws upon or is otherwise caused to fit air tight upon the neck M. The float valve *f* consists of the rod *e* located vertically in the tube *g*, the said rod being guided by orifices provided in transverse bars in the upper and lower ends thereof. The lower part of the float valve is made of cork or other light material, in order that, when the cask or receptacle becomes filled by the action of the suction pump, it may press against the orifice of the tube and thereby prevent the contents of the vault A from overflowing or extending beyond the cask B. *h h* are shoulders rigidly attached to the cask B, and are designed for clutching with the clamps L. V represents one of a series of caps which are screwed upon the neck or necks of casks B, when filled by the action of the suction pump. The method of operating my device is as follows: after removing the seat or floor, the receptacle B is suspended from a block and tackle over the opening, and the cask or receptacle B is then lowered into the vault until the funnel O enters the fecal matter about ten inches; whereupon, by operating the suction [646] pump, the receptacle or cask becomes filled with the feces until it reaches the float valve *f*, which presses against and closes the orifice of the tube leading to the pump. The valve *d* then falls and prevents the escape of the contents of the cask. In the meantime, the air that is pumped out of the receptacle B is forced into a furnace located over the suction pump, whereby the odor arising therefrom is destroyed. When one receptacle is thus filled, the valve *f* is removed and the cap V screwed thereon, whereupon the operation is repeated by the employment of another cask until the vault is emptied of its contents." The claims of the original patent are 2 in number, as follows: "1. The combination and arrangement of the funnel O, neck *i* and valve *d*, with cask B, neck M and float valve *f*, substantially as shown and described. 2. The combination and arrangement of the vault A, cask B and suction pump C, substantially in the manner and for the purpose described."

Infringement of only claims 1 and 3 of the re-issue is insisted on. It is set up as a defense, in the answer, that the re-issue is not for the same invention as that described in the original patent. The apparatus used by the defendant is constructed in accordance with the description contained in two letters patent: one, No. 158743, granted to Samuel R. Scharf, January 12, 1875, for an improvement in machines for cleaning privy vaults; the other, No. 179993, granted to Jerome Bradley and Samuel R. Scharf, July 18, 1876, for a machine for cleaning privy vaults and like places. In that apparatus there is an independently movable cask, having two necks in its upper head, as it stands. The suction pipe from the vault is screwed to one neck; and the air pipe, which leads to the pump, is screwed to the other neck. There is an air pump, by means of which a vacuum can be formed and maintained in the cask, and a deodorizer, through which the air drawn into the pump is expelled by the working of the pump. The suction pipe and the air pipe are both of them tubular, flexible connections. There are caps for closing the necks after the barrel is filled. There is inside of the cask no check valve, but there is a float valve, so arranged with reference to the opening of the air pipe that the fecal matter lifts the valve and closes the passage [647] when the barrel is sufficiently full.

It is quite apparent that the defendant's apparatus did not infringe either one of the two claims of the original patent. Claim 1 made the valve *d* in the bottom of the cask, opening to admit the entrance of material, and shutting when the orifice to the pump was closed by the float valve, a necessary element in the combination covered by that claim. Without the valve *d*, the peculiarly constructed cask of the patent could not be operated. So, as to claim 2, there could be no operative combination of vault, cask and pump, unless the cask should have the valve *d*, and that valve was a part of the combination covered by claim 2. The valve *d* is not found in the defend-

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ant's apparatus, nor is there any substitute or equivalent for it. The material is taken into the barrel through its head as it stands on its bottom, and hence there is no need of a check valve.

There is not in the specification of the original patent any suggestion or indication of any invention other than the two combinations severally claimed in the two claims. In the re-issue there are material enlargements of the scope of the invention described and claimed in the original patent and, apparently, with a studied view to include and cover, by descriptive words and by broader claims, an apparatus like that used by the defendant. If claim 1 of the re-issue be construed so as to exclude the check valve from the combination covered by that claim, no warrant is found in the original specification for such a construction. It is apparent that the inventor contemplated the use of no other description of cask than one having such a check valve as the original specification describes. If claim 1 of the re-issue be construed so as to include only such a cask as is described, that is, one with a check valve, there is no infringement of that claim.

Claim 3 of the re-issue is for the combination of a float valve with a cask of same kind. Whether it be a cask with a check valve, or one without a check valve, the claim is an expansion of the invention beyond anything indicated in the original specification as the invention. In claim 1 of the original patent four other elements are made necessary, with the cask and [648] the float valve, to constitute the combination claimed. In claim 2 of the original, the cask and the pump cannot be combined, so as to practically co-operate in working, unless the float valve is used. The original specification states that, unless the float valve is used, the contents of the vault will overflow or extend beyond the cask. The specification of the re-issue states that, in the absence of the float valve, the fluid matter will enter the air pipe, and pass through it to the air pump, and tend to clog the air pipe and the valves of the pump and render the latter inoperative. It is, moreover, as true of claim 3 of the re-issue, as it is of claim 1, that if the cask of claim 3 be construed to be a cask without a check valve, there is no ground in the original patent for such a construction; and that if claim 3 includes no cask except one with a check valve, it is not infringed.

The original specification indicates nothing but a cask having the entrance opening in its bottom, furnished with a check valve to open and shut such entrance automatically, the cask suspended vertically over the vault and lowered into it until the funnel at the bottom is sufficiently immersed, the filling of the cask in that position, and the raising it and emptying it. The cask in the defendant's apparatus has the entrance opening in its top, has no check valve, is not suspended over or lowered into the vault, is placed at a distance from the vault and is connected with the vault by a flexible pipe. The patent to Scharf, No. 158743, granted January 12, 1875, a year before re-issue No. 6962 was applied for, shows an apparatus substantially the same as that used by the defendant. There is a barrel or tank, in the head of which, as it stands on its bottom, there are two short metallic pipes. A flexible pipe extends from one into the vault, and another flexible pipe extends from the other to an air pump. There is a deodorizer connected with the air pump by a third flexible pipe. The cask is filled by the action of the air pump in creating a vacuum in it. The foul air passes through the cask and the pump into the deodorizer. The barrel and the air pump are described as independently movable about the vault, by reason of the flexibility of the pipes. The attempted expansion of the original Bull patent, to cover what is shown in the Scharf patent, is manifest. The [649] funnel O of the original patent is called in the re-issue, "an induction passage or opening." It is said in the re-issue, that "The movable cask may be located in any desired position with relation to the vault;" and that the operation may be performed within or near the privy. In claim 1 of the re-issue it is stated that "The movable cask may be located in any desired position with relation to the vault and privy." The effort was to obtain a re-issue which should cover an apparatus having the cask located at a distance from the vault, with a flexible pipe from it to the vault, and a receiving opening in the top of the cask and no check valve; all of them features not indicated in the original patent but all of them features existing in the Scharf patent granted after the original Bull patent and before the application for its re-issue. The same observations apply to the patent to Frazier, No, 168473, granted October 5, 1875, more than three months before re-issue No. 6962 was applied for. That patent shows a portable receiving cask connected from its top, by a flexible pipe, with the vault; and by another flexible pipe with an air pump, which has secured to it a deodorizing vessel. The air is exhausted from the cask and passes through the air pump into the deodorizer, and the contents of the vault rise into the cask. The cask has no check valve and is described as placed suitably near the vault.

The foregoing state of facts brings this case within the principles laid down in *Miller* v. *Brass Co.*, 104 U. S., 350 [XXVI., 788], and *James* v. *Campbell*, Id., 356 [XXVI., 787]. The suggested mistake in the original patent, that its two claims were not as broad as they might have been made, and that the combinations claimed were too narrow and contained too many elements, and that sub-combinations such as are found in claims 1 and 3 of the re-issue might have been claimed in the original patent, in view of the state of the art and of the description and drawings of that patent, was, if a mistake at all, one apparent on the first inspection of that patent. The expansions in claims 1 and 3 of the re-issue were afterthoughts, developed by the subsequent course of improvement in the Scharf and Frazier patents, and intended to cover matters appearing in those patents and [650] not claimed in the original patent, No. 115565. No excuse is given for the delay in applying for the re-issue, nor is any actual inadvertence, accident or mistake shown. The omission to claim sub-combinations in the combinations claimed, the existence of such sub-combinations being apparent on the face of the original patent, was, in law, on the facts in this case, such a dedication of them, if new, to the public, that a re-issue, to cover such sub-combinations, in revocation of such dedication, cannot be availed of to the prejudice of rights acquired by the

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public to what is shown in the Scharf and Frazier patents, issued before the re-issue was applied for. The re-issued patent must, for these reasons, be held to be invalid, as to claims 1 and 3.

The circuit court made an interlocutory decree declaring the validity of the re-issue and its infringement and awarding a perpetual injunction and an account of profits and damages. By a final decree, a sum of money was awarded as damages. From that decree the defendant has appealed. *The result of our consideration is, that the decree must be reversed and the case be remanded to the Circuit Court, with direction to dismiss the bill.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 669.

JOHN JOSEPH ALBRIGHT, WILLIAM E. BARKER AND ANDREW LANGDON, Partners, as LANGDON, ALBRIGHT & CO., *Appts.*,

v.

SAMUEL EMERY, Sr.

(See S. C., Reporter's ed., 650, 651).

*A decree of the Supreme Court of the District of Columbia, in General Term, affirmed, on the facts.

[No. 159.]

Argued Dec. 12, 13, 1883. Decided Jan. 7, 1884.

APPEAL from the Supreme Court of the District of Columbia.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **A. S. Worthington,** and *Nath'l Wilson*, for appellants.

Messrs. **John W. Ross** and **S. S. Henkle,** for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

In a suit in equity brought in the Supreme Court of the District of Columbia, by the firm of Langdon, Albright & Company, against Samuel Emery, Senior, and five other persons, that [651] Court, in Special Term, made a decree setting aside an assignment made to two of the defendants, directing the manner in which receivers in the suit should distribute a fund in their hands, directing the clerk to pay to the plaintiffs the whole of a fund in the registry of the court, directing the defendant Emery to pay to the plaintiffs $1,232.37, with interest from July 14, 1879, adjudging Emery to be indebted to the plaintiffs in the further sum of $14,818.98, with interest from July 20, 1877, and the defendant Sailer to be liable to them for the same amount, and awarding execution as at law therefor, against them or either of them. From that decree, Emery appealed to that court in General Term, in his own behalf, Sailer declining, in open court, to appeal. The court in General Term made a decree reversing the decree in Special Term so far as it charged Emery, and dismissing the bill as to him. From that decree the plaintiffs have appealed to this court.

*Head note by *Mr. Justice* BLATCHFORD.

It is not necessary to consider the question whether the bill, if demurred to, or if the facts alleged in it were sustained by the proofs, would lie, as setting forth a case for the cognizance of a court in equity, because we are of opinion that the proofs do not establish the allegations of the bill, so far as they affect Emery, in respect to any relief prayed against him in the bill, or any relief granted against him by the court in Special Term, and that no part of the relief contended for in the assignments of error made by the appellants is warranted by the proofs. *The decree of the court in General Term is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WINCHESTER & PARTRIDGE MANUFACTURING COMPANY, *Appt.*,

v.

WILLIAM W. FUNGE.

(See S. C., Reporter's ed., 651-654.)

Contract, construction of.

*For the purpose of settling a debt, the debtor gave to the creditor orders for twenty-five wagons, and the creditor gave to the debtor a written receipt, which he accepted, stating that the wagons were to be received in payment of the claim, provided they were delivered to the creditor in good condition and merchantable order, and that it was understood and agreed that if the wagons were so delivered in good condition they were to be sold for the highest prices that could be obtained for them, and the surplus, after paying the debt and cost of selling, should be refunded to the debtor; twenty-one of the wagons were delivered, but none of them were in good condition and merchantable order; the creditor sold nineteen of them and made ineffectual efforts to sell the other two, and, after crediting the net proceeds of sale, sued the debtor to recover the balance of the debt; held, that the receiving the twenty-one wagons and proceeding to sell them was an acceptance of them *pro tanto* in payment of the claim; that the contract for the payment in wagons was unfulfilled as to the four wagons not delivered; and that the price for which the nineteen wagons were sold, and the selling value of the two not sold, had no bearing on the case, unless there was a surplus of the proceeds of sale to be refunded to the debtor, under the contract.

[No. 1024.]

Submitted Dec. 6, 1883. Decided Jan. 7, 1884.

APPEAL from the Supreme Court of Utah Territory.

The history and facts of the case appear in the opinion of the court.

Messrs. **F. S. Richards** and *R. K. Williams*, for appellant.

Messrs. **Enos D. Hoge,** *James N. Kimball, Abbot R. Heywood* and *O. W. Bennett*, for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an appeal from the Supreme Court of Utah Territory, in a suit brought in the First Judicial District Court of that Territory, in March, 1882, by the appellant, a Wisconsin Corporation, against the appellee, to recover the sum of $1,444.90 and interest from the filing of the complaint. The complaint contains two counts. The first sets forth that the appellee

*Head note by *Mr. Justice* BLATCHFORD.

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owed the appellant $2,832.40, for a balance of an account; that, for the purpose of settling such indebtedness, the appellee gave to the appellant's agents, on the 28th of October, 1880, six orders on six different parties in Utah Territory, for the delivery to such agents of wagons, twenty-five in number, the orders being severally for one, three, two, five, nine and five wagons; that, at the same time, said agents executed and delivered to the appellee a receipt, which he accepted, as follows: "Received from W. W. Funge orders on the respective parties named in the annexed list, for wagons therein mentioned, which wagons are to be received in payment of the claim of Winchester & Partridge Manufacturing Company against said Funge for $2,832.40; provided the said wagons are delivered to said Winchester & Partridge Manufacturing Company, or their agents, W. W. Burton & Co., in good condition and merchantable order, at the respective places named in said orders, on presentation thereof; and it is understood and agreed that if said wagons are [653] so delivered in good condition and promptly, as aforesaid, they are to be sold to the best advantage and for the highest prices that can be obtained for them, and any surplus of the proceeds thereof that may remain after paying said debt of $2,832.40, and the actual and necessary cost of selling the same, is to be refunded to said Funge, unless prior to that time he shall have been paid two hundred dollars ($200), which he agrees, at their option, to take in lieu of said surplus, and in full settlement of his account with said Company;" that four of the wagons covered by the order for nine wagons were not delivered; that twenty-one of the wagons were delivered, but were none of them in good condition and merchantable order; and that the appellant had sold nineteen of them, for $1,807.43 net, and had made ineffectual efforts to sell the other two. The second count sets forth an indebtedness of the appellee to the appellant of $2,832.40, for a balance of an account, in August, 1880, and a credit thereon of the net proceeds of certain wagons, leaving due $1,444.90, with interest from the filing of the complaint.

The appellee filed a demurrer, and alleged therein, as a ground of demurrer to the complaint and to each count separately, that it did not state facts sufficient to constitute a cause of action. The district court sustained the demurrer and, the appellant electing to stand by its complaint, judgment was entered in favor of the appellee. The Supreme Court affirmed the judgment, and the case is here for review.

We are of opinion that, on the terms of the receipt, which expressed the contract between the parties, the appellant or its agents were required to determine, on receiving the wagons, whether they were in good condition and merchantable order, and were at liberty to reject them if not meeting those conditions; that the receiving the twenty-one and proceeding to sell [654] them was an acceptance of the twenty-one in payment *pro tanto* of the claim; that the contract for the payment in wagons was unfulfilled as to the four wagons not delivered; and that the price for which the nineteen wagons were sold, and the selling value of the two not sold, have no bearing on the case under the first count, unless there be a surplus of the proceeds of sale, to be refunded to the appellee, under the contract.

As to the second count, it sets forth a good cause of action. That count does not involve on its face any question as to the contract, evidenced by the receipt embodied in the first count.

The judgment of the Supreme Court is reversed, with direction to it to reverse the judgment of the District Court, and to take or direct such further proceedings in the suit as may be according to law and in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JAMES BENDEY AND WIFE, *Appts.*, [665]

v.

AMOS TOWNSEND ET AL.

(See S. C., Reporter's ed., 665-668.)

Assignee of mortgage, when may foreclose—unlawful stipulation in mortgage.

*1. The maker of a promissory note executed, to one who for his accommodation signed his name on the back of the note before its delivery to the payee, a mortgage of real estate to indemnify him against all costs and charges arising from his contract, with a power of sale in case of the mortgagor's default in paying the note. The mortgagor failing to pay the note at maturity, the mortgagee paid the amount thereof to the payee, and entered it upon his books in general account against the mortgagor, and the payee indorsed the amount as a full payment on the note, and delivered up the note to the mortgagee. The mortgagee afterwards assigned to a third person the mortgage and the obligation therein mentioned; held, that the assignee might maintain a bill in equity against the mortgagor for foreclosure and sale of the land under the mortgage, and for payment by the mortgagor personally of so much of the amount of the note as the proceeds of the sale under the foreclosure were insufficient to satisfy.

2. A stipulation, in a mortgage of real estate, that in case of foreclosure the mortgagor shall pay an attorney's or solicitor's fee of $100, is unlawful and void by the law of Michigan, as declared by the Supreme Court of the State; and, therefore, cannot be enforced in the Circuit Court of the United States upon a bill in equity to foreclose a mortgage, made and payable in that State, of land therein.

[No. 118.]

Argued Nov. 13, 1883. Decided Jan. 7, 1884.

APPEAL from the Circuit Court of the United States for the Western District of Michigan.

The history and facts of the case appear in the opinion of the court.

Mr. **C. J. Walker,** for appellants.

Messrs. **W. H. Smith,** *A. T. Britton* and *J. H. McGowan,* for appellees.

Mr. Justice **Gray** delivered the opinion of the court:

This is an appeal by James Bendey and wife from a decree for the foreclosure of a mortgage of land in Michigan, executed by them at

*Head notes by *Mr. Justice* GRAY.

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Houghton in that State, on April 30, 1873, to Samuel S. Smith and William Harris; expressed to be made in consideration of the indorsement by Smith and Harris of several promissory [666] notes of Bendey, therein described, payable to the order of Thomas W. Edwards, at the First National Bank of Houghton; conditioned that if Bendey should pay the notes at maturity and should save and keep harmless the mortgagees of and from all costs and charges arising from or on account of said indorsements; and empowering the mortgagees, in case of default by Bendey, in the payment of the notes or either of them, to sell the land by public auction and convey it to the purchasers, rendering the surplus money, if any, arising from the sale, to the mortgagors, after deducting the costs and charges of the sale, "And also $100 as an attorney fee, should any proceedings be taken to foreclose this indenture under the statute, and the same sum as a solicitor's fee, should any proceedings be taken to foreclose the same in chancery."

The other facts appearing by the record are as follows: Smith and Harris, who were partners, signed their partnership name upon the back of the notes before their delivery to Edwards. One of these notes, for $5,000, became payable on May 4, 1876 and, not being paid by Bendey, was protested for non-payment, and an action was brought thereon by Edwards against Smith and Harris, who, before judgment in that action, paid the amount of the note, with interest. Edwards indorsed the amount as a full payment on the note, and delivered up the note to Smith and Harris; and they entered the amount paid by them upon their books in their general account against Bendey and, afterwards, on September 5, 1877, assigned the mortgage, and the land therein described, together with the note or obligation therein also mentioned, to William Brigham and Amos Townsend, trustees. This assignment was in fact made in part payment of debts due from Smith and Harris to firms of which Townsend and Brigham were respectively members.

Townsend and Brigham, who were citizens of Ohio, filed a bill in equity against Bendey and wife, who were citizens of Michigan, in a court of this State, alleging the facts aforesaid, and praying for an account, for the foreclosure of the mortgage by sale of the land, for the payment by Bendey of any balance remaining due to the plaintiff of the principal and interest of [667] the note and mortgage, and for general relief. After the filing of answers and replication, the case was removed, on petition of the defendants, into the Circuit Court of the United States for the Western District of Michigan, and a hearing there had, upon which the facts above stated were proved and a decree entered that the defendants pay to the plaintiffs the sum of $7,996.59 with interest, together with a solicitor's fee of $100, and that in default of such payment the land be sold by public auction and conveyed under the direction of a master in chancery, and the proceeds of the sale applied to the payment of these sums, and that, if the proceeds of the sale should be insufficient for such payment, the amount of the deficiency, with interest, should be paid by Bendey to the plaintiff. From this decree the defendants appealed to this court.

The contract into which Smith and Harris entered, by signing their names on the back of the note before its delivery to the payee, though styled in the mortgage an indorsement, was rather, as towards the payee or a subsequent indorsee of the note, that of joint makers with Bendey. *Good* v. *Martin*, 95 U. S., 90 [XXIV., 341]; *Rothschild* v. *Grix*, 31 Mich., 150. But, whether their liability in that aspect should be treated as that of promisors or of guarantors or of indorsers, it is clear that, having signed their names to the note for the accommodation of Bendey, their relation towards him was that of sureties, and they had the right, upon being obliged to pay the amount of the note on his failure to pay it at maturity, to recover from him the sum so paid. The mortgage, containing a condition to indemnify them against all costs and charges arising from their contract, was security to them for the payment by the mortgagors to them of that sum. The entry, in the regular course of their book-keeping, of the amount so paid in general account against Bendey, did not merge nor extinguish the mortgage or the personal liability of Bendey to them. The assignment by them to Townsend and Brigham, of the mortgage, together with the obligation therein mentioned, was a valid assignment, in equity at least, of the mortgage, as well as of their claim against Bendey for the repayment of the sum paid by them on the note. The assignees were, therefore, rightly held to be entitled [668] to a decree for the foreclosure of the mortgage, and also under the Ninety-Second Rule in equity, to a decree against Bendey himself for so much of the sum paid by Smith and Harris, with interest, as the money obtained by the sale of the land under the foreclosure should be insufficient to satisfy.

The decree below is, therefore, right in all respects except in allowing a solicitor's fee of $100. The land is in Michigan, the notes and mortgage were made and payable in Michigan; and by the law of Michigan, as settled by repeated and uniform decisions of the Supreme Court of that State, a stipulation in a mortgage to pay an attorney's or solicitor's fee of a fixed sum is unlawful and void, and cannot be enforced in a foreclosure, either under the statutes of the State, or by bill in equity. *Bullock* v. *Taylor*, 39 Mich., 137; *Myer* v. *Hart*, 40 Mich., 517; *Vosburgh* v. *Lay*, 45 Mich., 455; *Van Marter* v. *McMillan*, 39 Mich., 304; *Botsford* v. *Botsford*, 49 Mich., 29. Upon such a question, affecting the validity and effect of a contract made and to be performed in Michigan, concerning land in Michigan, the law of the State must govern in proceedings to enforce the contract in a Federal Court held within the State. *Brine* v. *Ins. Co.*, 96 U. S., 627 [XXIV., 858]; *Ins. Co.* v. *Cushman* [*ante*, 648]; *Equator Co.* v. *Hall* [*ante*, 114].

The result is, that the decree must be reversed, without costs to either party in this court, and the case remanded to the Circuit Court with directions to enter a decree for the plaintiffs, with costs, modified by striking out the allowance of the solicitor's fee. Decree accordingly.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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HERMAN S. BACHMAN ET AL., *Plfs. in Err.*,

v.

JAMES LAWSON ET AL.

(See S. C., Reporter's ed., 659-664.)

Compensation of attorney—share of claim—lien for.

*1. An agreement, made a fortnight before the Treaty of Washington of 1871, and by which the owners of a ship and cargo taken by the armed rebel cruiser, The Florida, employed a person, whether an attorney at law or not, to use his best efforts to collect their claim arising out of the capture, and authorised him to employ such attorneys as he might think fit to prosecute it, and promised to pay him a compensation equal to twenty-five per cent of whatever sum shall be collected on the said claim, applies to a sum awarded to them by the Court of Commissioners of Alabama Claims, established by the Act of June 23, 1874, ch. 459; and is not affected by section 18 of that Act, providing that that court should allow, out of the amount awarded on any claim, reasonable compensation to the counselor and attorney for the claimant, and issue a warrant therefor; and that all other liens or assignments, either absolute or conditional, for past or future services about any claim, made or to be made before judgment in that court, should be void.

[No. 160.]

Argued Dec. 14, 1883. Decided Jan. 7, 1884.

IN ERROR to the Superior Court of the City of New York.

The history and facts of the case appear in the opinion of the court.

Messrs. **Edward Jordan** and *E. M. Crittenden*, for plaintiffs in error.

Mr. **Frederic B. Jennings**, for defendants in error.

Mr. Justice **Gray** delivered the opinion of the court:

This action was brought in the Superior Court of the City of New York, by the members of the firm of Lawson & Walker against the members of the firm of Bachman Brothers, to recover compensation for services performed under a written agreement between them, dated April 25, 1871, which recited that the defendants had employed, and by power of attorney of the same date had authorized, the plaintiffs to collect their claim arising out of the capture of the ship Commonwealth and her cargo by the armed rebel cruiser, The Florida; and by which the plaintiffs agreed to use their best efforts, at their own expense, to collect the said claim in the shortest practicable time; and the defendants, in consideration of the premises, agreed to allow and pay to the plaintiffs a compensation equal to twenty-five per cent of whatever sum shall be collected on the said claim.

By the power of attorney, referred to in this agreement, the defendants appointed the plaintiffs their attorneys to prosecute and collect the [661] claim by such lawful proceedings and means as to them might appear expedient but at their own cost and charge, and authorized them to receive on the defendants' account whatever sums of money might be awarded on the claim, and to give in their name proper acquittances therefor; to execute all papers necessary to secure the transfer of the claim to any party, department or government which might assume the payment thereof; and to employ for the prosecution of the claim such attorneys as they might think fit.

The plaintiffs, who were average adjusters, filed an abstract of the claim in the department of state, and in accordance with the instructions issued by that department, and from papers and information furnished by the defendants, prepared a memorial giving a full history of the circumstances relating to the claim; and afterwards went to Washington several times about this and other like claims; and after the passage of the Act of Congress of June 23, 1874, ch. 459, establishing the Court of Commissioners of Alabama Claims, prepared and sent to the defendants for signature a petition to be presented to that court which, although repeatedly asked for, was never returned; and the defendants, after endeavoring to induce the plaintiffs to release them from the agreement, employed an attorney at law to prosecute their claim before that court, which he did, and recovered thereon the sum of $3,034.16.

The plaintiffs brought this action to recover twenty-five per cent of this sum, less $125, the estimated expense which they would have incurred had they proceeded and recovered the money. The defendants, besides other defenses presenting no federal question, contended that the agreement sued on had been annulled and rescinded by the Act of 1874 [18 Stat. at L., 245]. The Judge presiding at the trial overruled the objection, and the jury returned a verdict for the plaintiffs, on which judgment was rendered. The defendants appealed to the General Term of the Superior Court, at which the judgment was reversed and a new trial ordered. The plaintiffs appealed to the Court of Appeals, which reversed the judgment of the General Term, and remitted the case to the Superior Court for further proceedings. See, 81 N. Y., 616. The Superior Court thereupon entered judgment in accordance with the verdict, and the defendants sued out this writ of error. [662]

In support of the writ of error it was contended that the agreement sued on had relation solely to the claim which existed at its date; that that claim was extinguished by the operation of the Treaty of Washington, the Geneva Award, and the payment by Great Britain to the United States of the sum awarded; and that the claim successfully prosecuted under the Act of Congress and before the court of commissioners was a new claim, created by that Act, and after the making of the agreement; or, if it could be treated in any respect as the same claim, was so changed in its character and circumstances that the agreement had no application to it.

But, as was said by *Mr. Justice* Story, delivering the judgment of this court, in a similar case: "The right to indemnity for an unjus capture, whether against the captors or the Sovereign, whether remediable in his own courts, or by his own extraordinary interposition and grants upon private petition, or upon public negotiation, is a right attached to the ownership of the property itself." "The very ground of

*Head note by *Mr. Justice* GRAY.

NOTE.—*Attorney's compensation contingent on success or from proceeds of suit; a fixed sum or a percentage; purchase of interest in the suit or subject of litigation by attorney.* See *note* to McMicken v. Perin, 59 U. S., XV., 504.

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the Treaty is, that the municipal remedy is inadequate; and that the party has a right to compensation for illegal captures, by an appeal to the justice of the government." "The right to compensation, in the eye of the Treaty, was just as perfect, though the remedy was merely by petition, as the right to compensation for an illegal conversion of property, in a municipal court of justice." "It recognized an existing right to compensation, in the aggrieved parties, and did not, in the most remote degree, turn upon the notion of a donation or gratuity. It was demanded by our government as matter of right, and as such it was granted by Spain." *Comegys* v. *Vasse*, 1 Pet., 193, 215-217.

The claim established before the Court of Commissioners of Alabama Claims was manifestly the very claim contemplated by the agreement in suit. It is described in that agreement as a claim arising out of the capture of the ship Commonwealth and her cargo, by the armed rebel cruiser, The Florida. The agreement bears date only a fortnight before the Treaty of Wash-
[663] ington was made and concluded, by which it was agreed between the United States and Great Britain that all claims growing out of acts committed by The Alabama and other vessels should be referred to a tribunal of arbitration. The Florida was one of the vessels which were determined by the Geneva Award to have put out from British ports through neglect of international duty on the part of Great Britain, and compensation for the wrongs done by which to these defendants and others was included in the sum awarded in favor of the United States. The claim of the defendants was one for which compensation was justly due to them from Great Britain; was demanded by the United States from Great Britain as a matter of right; as such was awarded to be paid and was paid by Great Britain to the United States in accordance with the provisions of the Treaty between the two Nations, and with the determination of the tribunal of arbitration created by that Treaty; and was paid by the United States to the defendants, out of the money received from Great Britain, pursuant to the directions of the Act of Congress, and to the decision of the court of commissioners established by that Act. The defendants were the original owners of the claim, and the money was granted and paid by the United States to them as such The money so demanded and received by the United States from Great Britain, and paid by the United States to the defendants, was money collected on the claim described in the agreement. *Comegys* v. *Vasse*, above cited; *Phelps* v. *McDonald*, 99 U. S., 298 [XXV., 473]; *Leonard* v. *Nye*, 125 Mass., 455.

The other points relied on in support of the writ of error, so far as they present any federal question, are based upon the following provisions of the Act of 1874:

"Sec. 18. In case any judgment is rendered by said court for indemnity for any loss or claim herein before mentioned against the United States; at the time of the giving of the judgment the court shall, upon motion of the attorney or counsel for the claimant, allow out of the amount thereby awarded, such reasonable counsel and attorney fees, to the counsel and attorney employed by the claimant or claimants respectively, as the court shall determine is just and reasonable, as compensation for the services [664] rendered the claimant in prosecuting such claims, which allowance shall be entered as part of the judgment in such case, and shall be made specifically payable as a part of said judgment for indemnification to the attorney or counsel, or both, to whom the same shall be adjudged; and a warrant shall issue from the Treasury, in favor of the person to whom such allowance shall be made respectively, which shall be in full compensation to the counsel or attorney for prosecuting such claim; and all other liens upon, or assignments, sales, transfers, either absolute or conditional, for services rendered or to be rendered about any claim or part or parcel thereof provided for in this bill, heretofore or hereafter made or done before such judgment is awarded and the warrant issued therefor, shall be absolutely null and void and of none effect." 18 Stat. at L., 249.

It was argued that the Act, by prescribing a mode of proceeding for collecting the claim which required the services of attorneys at law, rendered the agreement in question inoperative, because the plaintiffs, not being such attorneys, were incapable of performing it. But the power of attorney executed at the same time as the agreement, and referred to therein, authorized the plaintiffs to use all such lawful means and proceedings, and to employ such attorneys, as they might think fit, for the prosecution of the claim.

It was further contended that the section above quoted rendered illegal and void all agreements, made before judgment, to pay compensation for services about any such claim. But the prohibition is clearly limited to liens, sales or assignments which create a right of property in the claim itself, and does not extend to a mere personal agreement to pay as compensation for such services a sum of money equal to a certain proportion of the amount which may be recovered.

The other points made in argument present no federal question and, therefore, afford no ground upon which this court can revise the judgment of the state court. *Murdock* v. *Memphis*, 20 Wall., 590 [87 U. S., XXII., 429].

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

A. U. WYMAN, Treasurer of the UNITED STATES, *Plff. in Err.*,

v.

UNITED STATES, *ex rel.* EMINEL P. HALSTEAD, Admr., etc.

(See S. C., Reporter's ed., 654-659).

Assets, what are—debts due from United States—mandamus to U. S. Treasurer.

*1. For the purpose of founding administration, a simple contract debt is assets where the debtor resides, even if a bill of exchange or promissory note has been given for it, and without regard to the place where the bill or note is found or payable.

2. Debts due from the United States are not local assets at the seat of Government only.

3. The Treasurer of the United States cannot be

Head notes by *Mr. Justice* GRAY.

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compelled by writ of *mandamus* to pay to an administrator appointed in the District of Columbia, of an inhabitant of one of the States of the Union, the amount of a draft payable to the intestate at the Treasury, out of an appropriation made by Congress, and held by such administrator.

[No. 892.]

Argued Dec. 13, 14, 1883. Decided Jan. 7, 1884.

IN ERROR to the Supreme Court of the District of Columbia.

The history and facts of the case appear in the opinion of the court.

Mr. **Wm. A. Maury**, *Asst. Atty-Gen.*, for plaintiff in error.

Messrs. **A. L. Merriman** and **J. Walter Cooksey**, for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

This is a writ of error sued out by the Treasurer of the United States, to reverse a judgment [655] of the Supreme Court of the District of Columbia, ordering a peremptory writ of *mandamus* to issue against him upon the petition of Eminel P. Halstead, as administrator, appointed in the District, of the estates of John N. Pulliam and John J. Pulliam, each of whom was an inhabitant of the State of Tennessee at the time of his death, and as trustee appointed by that court, to compel the payment to him of the amount of certain drafts hereinafter mentioned.

The petition alleged and the answer admitted these facts: on June 17, 1882, Wyman, then and still Treasurer of the United States, residing and transacting the business of his office at Washington in the District of Columbia, issued, under and by virtue of the Act of Congress of May 1, 1882, ch. 114 [22 Stat. at L., 688], making appropriations therefor, three drafts payable at the Treasury in Washington, one for $3,020, payable to John J. Pulliam, executor of John N. Pulliam or order, and two for $1,228 and $545 respectively, payable to John J. Pulliam or order; and the three drafts were delivered to Halstead on account of the payees. John J. Pulliam afterwards died, and Halstead, having the drafts in his possession, applied for and, on August 2, 1882, obtained letters of administration in the District of Columbia upon the several estates of the two Pulliams. In September, 1882, Benjamin U. Keyser filed a bill on the equity side of the Supreme Court of the District against Halstead and others, claiming an equitable interest in these drafts or the proceeds thereof, and in March, 1883, obtained a decree directing Halstead, as administrator as aforesaid, and as trustee for that purpose, to indorse and collect the drafts, and to make distribution of the proceeds. In obedience to this decree, Halstead, on April 19, 1883, indorsed the drafts, and demanded payment thereof of Wyman, as Treasurer of the United States; but he, although having sufficient money in his possession, appropriated by Congress, refused to pay them without the indorsements of administrators appointed in the State of Tennessee, the domicil of the two deceased persons.

The opinions delivered in the court below, upon granting the writ of *mandamus*, are reported in 11 Washington Law Reporter, 370–377, 385–394.

[656] The determination of this case does not depend upon the question whether administration was rightly taken out in the District of Columbia, nor upon the question whether an administrator appointed elsewhere could sue within the District upon debts payable here, but upon the question whether a payment by the United States to an administrator already or hereafter appointed in Tennessee, the domicil of the deceased, would be a good discharge of the debts, payment of which is now sought to be enforced.

The general rule of law is well settled, that for the purpose of founding administration all simple contract debts are assets at the domicil of the debtor; and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it and, therefore, the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable. *Yeomans* v. *Bradshaw*, Carth., 378; *S. C.*, Comb., 392; Holt, 42; 3 Salk., 70, 164; Abinger, C. B., in *Atty-Gen.* v. *Bouwens*, 4 M. & W., 171, 191; *S. C.*, 1 Horn & Hurl., 319, 324; Parke, *B.* in *Mondel* v. *Steele*, 1 Dowl. (N. S.), 155, 157; *Slocumb* v. *Sanford*, 2 Conn., 533; *Chapman* v. *Fish*, 6 Hill, 554; *Owen* v. *Miller*, 10 Ohio St., 136; *Pinney* v. *McGregory*, 102 Mass., 186.

An administrator is of course obliged to demand payment at the place where the bill or note is payable; and he may find difficulty, unless it is payable to bearer, in suing upon it in a place in which he has not taken out administration. But payment to the administrator appointed in the State in which the intestate had his domicil at the time of his death, whether made within or without that State, is good against any administrator appointed elsewhere. *Wilkins* v. *Ellett*, 9 Wall., 740 [76 U. S., XIX., 586], and [*ante*, 718].

As was said by *Mr. Justice* Story, in delivering the judgment of this court in *Vaughan* v. *Northup*, 15 Pet., 1, 6, and repeated by *Mr. Justice* McLean, in delivering judgment in *Mackey* v. *Cox*, 18 How., 100, 105 [59 U. S., XV., 299, 301]: "The debts due from the [657] Government of the United States have no locality at the seat of Government. The United States, in their sovereign capacity, have no particular place of domicil, but possess, in contemplation of law, an ubiquity throughout the Union; and the debts due by them are not to be treated like the debts of a private debtor, which constitute local assets in his own domicil. On the contrary, the administrator of a creditor of the Government, duly appointed in the State where he was domiciled at the time of his death, has full authority to receive payment and give a full discharge of the debt due to his intestate, in any place where the Government may choose to pay it."

In *Vaughan* v. *Northup*, an administrator, appointed in Kentucky, of an inhabitant of that State, who died there intestate and childless, received a sum of money from the Treasury of the United States, for military services rendered by the intestate during the Revolutionary War; and a bill in equity, filed against him in the District of Columbia by the next of kin, for their distributive shares of the money, was dismissed for want of jurisdiction, because an administrator, appointed in and deriving his authority from one State, was not liable to be

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sued elsewhere, in his official character, for assets lawfully received by him under and in virtue of his original letters of administration.

In that case, as in this, it was argued by counsel that the assets in question were not collected in the State of the intestate's domicil, but were received as a debt due from the government at the Treasury Department at Washington, and so constituted local assets within this District. It was in declining to yield to that argument, that the court laid down the general principles above quoted, and added: "If any other doctrine were to be recognized, the consequence would be, that before the personal representative of any deceased creditor, belonging to any State in the Union, would be entitled to receive payment of any debt due by the Government, he would be compellable to take out letters of administration in this District for the due administration of such assets. Such a doctrine has never yet been sanctioned by any practice of the Government; and it would be [658] full of public as well as private inconvenience. It has not, in our judgment, any just foundation in the principles of law. We think that Northup, under the letters of administration taken out in Kentucky, was fully authorized to receive the debt due from the Government to his intestate; that the moneys so received constituted assets under that administration, for which he was accountable to the proper tribunals in Kentucky; and that distribution thereof might have been and should have been sought there, in the same manner as of any other debts due to the intestate in Kentucky."

The Act of June 24, 1812, ch. 106, sec. 11, since omitted in the Revision in 1874 of the Statutes of the District, by which executors or administrators appointed in any State or Territory were permitted to maintain any suit or action, or to prosecute and recover any claim, in the District of Columbia, as if they had been appointed here, was referred to in the opinion, not as the principal ground of decision, but as affording no support for the bill, and as fortifying rather than weakening the general principles of law upon the subject. 2 Stat. at L., 758; 15 Pet, 7, 8.

In the case at bar, neither the fact that the drafts were made payable at the Treasury of the United States in the City of Washington, nor the deposit, pursuant to section 307 of the Revised Statutes, of the money represented by the drafts in the Treasury to the credit of the payees, affected the character or the locality of the debts. The deposit of the money gave the payees or their representatives no property in or lien upon it. The obligation of the United States was not to surrender to them any specific sums of money, but to pay to them sums equal to the amounts credited to them, as in the case of any other liquidated debt. The creditors could not, indeed, insist upon payment without first demanding it at the Treasury. But the United States, in their sovereign capacity, having no domicil in any one part of the Union rather than in any other, do not, by establishing at the national capital a Treasury for the transaction of the principal business of the financial department of the Government, and making their money obligations payable there, confine their presence or their powers to this spot. The United States, [659] having, in the phrase of *Mr. Justice* Story, "an ubiquity throughout the Union," may in their discretion, exercised through the appropriate officers, pay a debt, due to the estate of a deceased person, either to the administrator appointed in the State of his domicil, or to an ancillary administrator duly appointed in the District of Columbia; and the exercise of their discretion in this regard cannot be controlled by writ of *mandamus*.

It is hardly necessary to mention the proceedings in equity upon the suit of Keyser. Though referred to in the petition for the writ of *mandamus* in the general terms stated at the beginning of this opinion, they have not been printed in full in the record, as required by the Eighth Rule. The reason doubtless is, that both in the opinion of the court below, and in the argument in this court, while it is said that the administrator, appointed in Tennessee, of the estate of John N. Pulliam was made a defendant in that suit, and the bill taken for confessed against him, it is admitted that he was not amenable as administrator to suit in this District, and that neither he nor any administrator hereafter appointed in Tennessee, of the estate of John J. Pulliam, could be concluded by that decree.

The result is, that the judgment of the Supreme Court of the District of Columbia, awarding a peremptory writ of mandamus *must be reversed and the case remanded to that court, with directions to dismiss the petition.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—110 U. S., 45; 111 U. S., 146, 147.

POTOMAC STEAMBOAT COMPANY ET AL., *Appts.*, [672]
v.
UPPER POTOMAC STEAMBOAT COMPANY.

POTOMAC STEAMBOAT COMPANY, *Appt.*,
v.
INLAND AND SEABOARD COASTING COMPANY.

(See S. C., Reporter's ed., 672-702.)

Lands in Washington City—title to—riparian proprietor—title of United States—parol proof to vary agreement—certificates and plats of land—wharves on the Potomac.

1. The transactions between Young and the United States concerning the site of the City of Washington, were equivalent to a conveyance by him to the United States, in fee simple, of all his land described, and a conveyance back by the United States to him, of a certain square; leaving in the United States an estate, in fee simple, in the strip of land designated as Water Street.

2. The United States thereby became the riparian proprietor, and succeeded to all the riparian rights of Young, by becoming the owner in fee simple absolute of Water Street, a strip of land that adjoined the river; and it owned the right of wharfage appurtenant to it, although the land was granted for a street.

3. The United States held its title to the land over which such street was laid out, for its own use, and not in trust for any person nor for any purpose, and

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it is immaterial that the ground laid out as a street had not been used as such for a long period of time.

4. The legal effect of a final instrument, which defines and declares the intentions and rights of the parties, cannot be modified nor controlled by proof of any preliminary negotiations or agreement.

5. Certificates and plats made and recorded under an Act which says that they shall be sufficient and effectual to vest the legal estate in lands in the purchasers without any deed or formal conveyance, cannot be contradicted, varied or explained by parol, any more than if they were formal conveyances.

6. The compact of 1785, between Virginia and Maryland, secured to their citizens the privilege of making and carrying out wharves, as to the shores of the Potomac, only so far as they were adjoining their lands.

[Nos. 133, 134.]

Argued Nov. 26, 27, 28, 1883. Decided Jan. 7, 1884.

APPEAL from the Supreme Court of the District of Columbia.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **John Selden** and **Conway Robinson**, for appellants.

Messrs. **William Birney** and **Nathaniel Wilson**, for appellees.

[674] *Mr. Justice* **Matthews** delivered the opinion of the court:

These two cases were heard together in the court below and in this court. They involve the same questions and depend upon facts substantially the same, appearing in a single record.

The claim of the appellants, who were plaintiffs below, is, that being owners and in possession, in the first case, of square No. 472; and, in the second, of lot No. 18 in square No. 504, on the plan of the City of Washington, they are entitled to the exclusive right to make and use wharves and other similar improvements in the Potomac River opposite or in front of these lots, which are separated from it by Water Street; and the object of the bills is to restrain the defendants, by a perpetual injunction, from intruding upon and disturbing the enjoyment of their right. This claim is denied by the defendants, who assert an adverse right under public authorities acting in the name of the United States. This issue was determined by the court below in favor of the defendants, by decrees dismissing the bills, which decrees these appeals bring before us for review.

The plaintiffs derive title to the lots mentioned by *mesne* conveyances from Notley Young, who was the original proprietor of a tract of about four hundred acres, known as the Dudington Pastures, lying upon the Potomac River, and which became part of the site of the City of Washington, extending along the river from at, or near the mouth of Tiber Creek, to the grounds of the United States Arsenal.

The seventh clause of the compact between Virginia and Maryland, of March 28, 1785, declared that "The citizens of each State respectively shall have full property in the shores of the Potowmack River adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river."

[675] The nature and extent of this compact were considered by this court in *Georgetown* v. *Canal Co.*, 12 Pet., 91, where it was declared to be a compact between the States as such, to which the citizens of neither were parties and, being subject to the will of the States, as to any changes in its stipulations, it was equally under the control of Congress, after the cession. It was provided, however, by the Act of July 16, 1790, 1 Stat. at L., 130, accepting the District of Columbia as the seat of the Government of the United States, "That the operation of the laws of the State within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide."

It was, therefore, provided by the General Assembly of Maryland, by an Act of December 19, 1791, sec. 12, that the Commissioners of the District, appointed by the President under the Act of Congress of July 16, 1790, "Shall, from time to time, until Congress shall exercise the jurisdiction and government within the said territory, have power to license the building of wharves in the waters of the Potomac and the eastern branch, adjoining the said city, of the materials, in the manner and of the extent they may judge durable, convenient, and agreeing with general order. But no license shall be granted to one to build a wharf before the land of another, nor shall any wharf be built in the said waters without license, as aforesaid; and if any wharf shall be built without such license or different therefrom, the same is hereby declared a common nuisance." Davis [Stats.], 64.

In pursuance of this authority, the commissioners adopted the following regulation on the subject, dated July 20, 1795:

"That all the proprietors of water lots are permitted to wharf and build, as far out into the River Potomac and the eastern branch as they think convenient and proper, not injuring or interrupting navigation, leaving a space, wherever the general plan of the streets in the city requires it, of equal breadth with those streets, which, if made by an individual holding the adjacent property, shall be subject to his separate occupation and use until the public shall re-imburse the expense of making such street, and where no street or streets intersect said wharf, to leave a space of sixty feet for a street at the termination of every three hundred feet of made ground; the buildings on said wharves or made ground to be subject to the general regulations for buildings in the City of Washington, as declared by the President. Wharves to be built of such materials as the proprietors may elect." Pp. 408, 409, Proceedings of Commissioners, 1791-1795. [676]

This regulation was submitted to President Washington, who directed it to be published, by letter dated at Mt. Vernon, Sep. 18, 1795.

In the meantime, Notley Young and the other proprietors, whose proposal had been accepted, by distinct conveyances, but in like form, had conveyed to Thomas Beall and John M. Gantt, as trustees, the several tracts of land which were to constitute the territory of the City of Washington. That of Notley Young was dated June 29, 1791, and conveyed, in fee simple, all the lands of him, the said Notley Young, therein described, to have and to hold, with their appurtenances, in consideration of the uses and trusts therein mentioned, and to and for the special trusts following, and no other:

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"That all the lands hereby bargained and sold, or such part thereof as may be thought necessary or proper to be laid out, together with other lands within the said limits, for a federal city, with such streets, squares, parcels and lots as the President of the United States for the time being shall approve; and that the said Thomas Beall, of George, and John M. Gantt, or the survivor of them, or the heirs of such survivor, shall convey to the commissioners for the time being, appointed by virtue of the Act of Congress entitled 'An Act for Establishing the Temporary and Permanent Seat of the Government of the United States,' and their successors, for the use of the United States forever, all the said streets and such of the said squares, parcels and lots as the President shall deem proper, for the use of the United States; and that, as to the residue of said lots into which the said lands hereby bargained and sold shall have been laid off and divided, that a fair and [677] equal division of them shall be made; and if no other mode of division shall be agreed on, by consent of the said Notley Young and the commissioners for the time being, then such residue of the said lots shall be divided, every other lot alternate to the said Notley Young; and it shall in that event be determined by lot whether the said Notley Young shall begin with the lot of the least number laid out on the said lands or the following number; and all the said lots which may in any manner be divided or assigned to the said Notley Young shall thereupon, together with any part of the said bargained and sold lands, if any, which shall not have been laid out on the said city, be conveyed by the said Thomas Beall, of George, and John M. Gantt, or the survivor of them, or the heirs of such survivor, to him, the said Notley Young, his heirs and assigns," etc.

It was also stipulated therein, that the said Beall and Gantt should, at the request of the President of the United States, convey all or any of said lands which should not then have been conveyed in execution of the trusts aforesaid to such persons as he should appoint, in fee simple, subject to the trusts remaining to be executed, and to the end that the same might be perfected. Accordingly, on October 3, 1796, the President requested Beall and Gantt to convey all the unconveyed residue of the land granted by Notley Young to Scott, Thornton and White, then commissioners, appointed under the Act of July 16, 1790, "in fee simple, subject to the trusts yet remaining to be executed;" and on November 30, 1796, Beall and Gantt accordingly conveyed by deed, in fee simple, to the commissioners last named.

In the meantime, however, the plan of the city had been adopted and promulgated, on maps of which were laid out the squares, lots, public grounds and streets; and on October 18, 1794, a division of the property had been made between Notley Young and the commissioners, in execution of the trusts of the deed from him to Beall and Gantt, by which square No. 504 fell to the public, and square No. 472 to Notley Young.

No deed was made by Beall and Gantt to Notley Young for square No. 472, but on January [678] 18, 1797, the commissioners recorded in their book, which by law they were authorized to keep for that purpose, their certificate that they and Young had agreed "That the whole of the same square shall remain to the said Notley Young agreeably to the deed of trust concerning lands in the said city," and attached thereto a plat of the square, with boundaries, as follows: "Bounded on the north by L Street, four hundred and seventy-nine feet, four inches; the south by M Street south, three hundred and fifty-seven feet, three inches; the east by 6th Street west, two hundred and eighty-nine feet, ten inches; the southwest by Water Street, three hundred and fourteen feet, three inches," as per return dated December 24, 1793.

A similar entry and record were made in respect to square 504, the plat of which shows a subdivision of the entire square into lots, of which five, lot No. 13 being one of them, front on Water Street, running back to an alley which separates them from all the other lots in the square.

The legal title to this and other squares allotted to the public passed to the Commissioners of the District by the deed from Beall and Gantt; and the legal estate to square 472 and the others allotted to Notley Young, vested in him, in fee simple, by virtue of the certificates recorded in the commissioners' book, under a law of Maryland of December 28, 1793, Burch, Dig., 224, which gave effect to it, according to the import of such certificates.

A similar certificate was made and recorded October 18, 1794, to the effect that James Greenleaf had become the purchaser of 857 lots for which he had fully paid, the legal title to which in fee simple had vested in him, and among them is enumerated square 504. The plaintiffs claim lot 13 in that square, under Greenleaf's title.

It has been observed that both squares No. 472 and No. 504 are bounded on the southwest by Water Street. This street was designated on the adopted plan of the city as occupying the whole line of the river front, and separating the line of the squares from the river for the entire distance from 14th Street to the arsenal grounds. It is alleged in the bill, in respect to this street, that there was traced on the map of the city "But a single line denoting its [679] general course and direction; that the dimensions of said Water Street, until the adoption, on the 22d day of February, 1839, of the certain plan of one William Elliott, as hereinafter more particularly mentioned, were never defined by law; and that the said Water Street was never, in fact, laid out and made in the said city until some time after the close of the recent civil war; that, before the commencement of said civil war, one high bluff or cliff extended along the bank of said river, in said City of Washington, from Sixth Street west to 14th Street west; that, to the edge thereof, the said bluff or cliff, between the points aforesaid, was in the actual use and enjoyment of the owners of the land which it bounded towards the said river; that public travel between the two streets last above mentioned, along the said river, could only be accomplished by passing over a sandy beach, and then only when the tide was low; and that what is now the path of Water Street, between the two streets aforesaid, was and has been made and fashioned by cutting down the said cliff or bluff and filling in the said stream adjacent thereto."

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These allegations, in substance, are admitted in the answer to be true, with the qualification that the width of the street was left undefined because it constituted the whole space between the line of the squares and the river, whatever that might be determined to be from time to time, but that the commissioners, on March 22, 1796, made an order directing it to be laid out eighty feet in width from square 1079 to square east of square 1025, and to run out the squares next to the water and prepare them for division; and that it was so designated on maps of the city in 1803. If not, the inference is all the stronger that the whole space south of the line of the lots was intended to be the property and for the use of the public. *Barclay* v. *Howell*, 6 Pet., 498. In *Rowan* v. *Portland*, 8 B. Mon., 232-239, that inference was declared to be the legal result of such a state of facts. It is quite certain that such a space was designated on the official map of the city as originally adopted, the division and sale of the squares and lots being made in reference to it. What the legal effect of that fact is we shall hereafter inquire, [680] and while we do not consider it to be qualified by the circumstances set forth, as to the actual history of the street as made and used, they perhaps sufficiently account for the doubt and confusion in which the questions of right, brought to issue in this litigation, seem for so long a period to have been involved.

The transaction between Notley Young and the public authorities, as evidenced by the documents and circumstances thus far set forth, was equivalent in its result to a conveyance by him to the United States, in fee simple, of all his land described, with its appurtenances, and a conveyance back by the United States to him, of square No. 472; and to Greenleaf, of square No. 504 bounded and described as above set forth; leaving in the United States an estate in fee simple, absolute for all purposes, in the strip of land designated as Water Street, intervening between the line of the squares, as laid out, and the Potomac River.

The very point as to the nature of this title was decided in the case of *Van Ness* v. *Mayor, etc., of Washington*, 4 Pet., 232. It was there said by *Mr. Justice* Story, delivering the opinion of the court, p. 285: "Here we have a solemn instrument embodying the final intentions and agreements of the parties, without any allegations of mistake, and we are to construe that instrument according to the legal import of its terms. Now, upon such legal import, there do not seem grounds for any reasonable doubt. The streets and public squares are declared to be conveyed 'for the use of the United States forever.' These are the very words which by law are required to vest an absolute unconditional fee simple in the United States. They are the appropriate terms of art, if we may so say, to express an unlimited use in the government. If the government were to purchase a lot of land for any general purpose, they are the very words which the conveyance would adopt in order to grant an unlimited fee to the use of the government. There are no other words or references in the instrument which control in any manner the natural meaning of them. There are no objects avowed on the face of it which imply any limitation. How, then, can the court defeat the legal meaning and resort to a conjectural intent?

It was accordingly decided in that case, that [681] the ownership of the land over which the streets in the City of Washington had been laid out on the original plan was vested by the deeds of the proprietors in the United States so completely and unconditionally that Congress might lawfully dispose of it to private persons, or otherwise convert it to any use whatever.

It was also decided in that case, that the legal effect of the final instrument which defined and declared the intentions and rights of the parties, could not be modified or controlled by proof of any preliminary negotiations or agreement. "The general rule of law is," said the court, "that all preliminary negotiations and agreements are to be deemed merged in the final settled instruments executed by the parties, unless a clear mistake be established." This applies not only to the formal deeds from Notley Young to Beall and Gantt and from them to the commissioners, but also to the certificates and plats made and recorded by the latter, which, under the Maryland Act of December 28, 1793, Burch, Dig., 224, "Shall be sufficient and effectual to vest the legal estate in the purchasers, their heirs and assigns, according to the import of such certificates, without any deed or formal conveyance." It is under and according to these certificates, granted to Notley Young and Greenleaf, that the plaintiffs derive their title; and parol evidence to contradict, vary or explain them, is no more to be admitted than if they were formal conveyances. *Williams* v. *Ingell*, 21 Pick., 288.

For this reason we reject, as without legal value, the book called "Division Book No. 1," referred to as showing a list of the squares and lots assigned to Notley Young in the division, and containing an entry as to square 472 as having a water front of 314 feet 8 inches. It is not well authenticated as a contemporary and original book, and is not one which it was the official duty of the commissioners to keep. However convenient, therefore, it may be as a book of reference for examiners of title in facilitating searches, it has not the quality of a public record.

What effect upon the riparian rights of Notley Young would have resulted from the creation of a perpetual easement for a public way over Water Street by a grant to the United States to that use alone, the title and right of [682] possession in the soil for all other purposes remaining in the original proprietor, it is unnecessary to discuss. The decisive circumstance in the present case is, that the United States became the riparian proprietor, and succeeded to all the riparian rights of Notley Young, by becoming the owner in fee simple absolute of the strip of land that adjoined the river and intervened between it, and what remained to the original proprietor, Notley Young, after that conveyance; and the successors to his title had no other or greater rights in Water Street or the land on which it was laid out and eventually made, than any other individual members of the public. While it remained a street, it was subject to their use as a highway merely, over which to pass and repass and, without the consent of the United States as proprietor, was sub-

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ject to no private use whatever. The right of wharfage remained appurtenant to it, because, as land adjacent to the river, that right was annexed to it by law, and could be exercised on it by the proprietor; but was severed, by the severance of the title, from the remainder of the original tract, to the whole of which it had formerly pertained.

In reference to the squares and lots lying north of the street, it may be said of the wharfage right claimed, as was said in *Linthicum* v. *Ray*, 9 Wall., 241 [76 U. S., XIX., 657]; "It was in no way connected with the enjoyment or use of the lot, and a right not thus connected cannot be annexed as an incident to land, so as to become appurtenant to it."

A riparian proprietor, in the language of *Mr. Justice* Miller in *Yates* v. *Milwaukee*, 10 Wall., 497-504 [77 U. S., XIX., 984, 986], is one whose land is bounded by a navigable stream; and among the rights he is entitled to as such, are "Access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public, whatever those may be." *Webber* v. *Harbor Comrs.*, 18 Wall., 57 [85 U. S., XXI., 798].

In Massachusetts, where it is held that, by [683] virtue of the Ordinance of 1647, if lands be described as bounded by the sea, the grantee will hold the lands to low water mark, so that he does not hold more than one hundred rods below high water mark; *Storer* v. *Freeman*, 6 Mass., 435; *Commonwealth* v. *Charlestown*, 1 Pick., 180; yet, it is also held, that where an ancient location or grant by the proprietors of a township bounded the land granted by a way, which way adjoined the sea shore, the Ordinance did not pass the flats on the other side of the way to the grantee. *Codman* v. *Winslow*, 10 Mass., 146. And in Maine it was decided that a grantee, bounded by high water mark, is not a riparian proprietor nor within the Ordinance. *Lapish* v. *Bangor*, 8 Me., 85. In New Jersey it is spoken of as "The right of an owner of lands upon tide-waters to maintain his adjacency to it and to profit by this advantage," *Stevens* v. *R. R. Co.*, 34 N. J. L., 532-556, and as a right "In the riparian owner to preserve and improve the connection of his property with the navigable water." *Keyport Case*, 3 C. E. Green, 516. The riparian right is the result of that full dominion which everyone has over his own land, by which he is authorized to keep all others from coming upon it except upon his own terms. *Rowan* v. *Portland*, 8 B. Mon., 232. It is a form of enjoyment of the land and of the river in connection with the land. *Lord* Cairns, in *Lyon* v. *Fishmonger's Co.*, 1 App. Cas., 662, 672. "It seems to us clear," said Pollock, *C. B.*, in *Stockport Water Works Co.* v. *Potter*, 3 Hurl. & Colt., 300-326, "that the rights which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river. If he grants away a portion of his land so abutting, then the grantee becomes a riparian proprietor and has similar rights."

No inference in such a case arises against the riparian right of the grantee because the land has been granted for a street. On the contrary, as was said in *Barney* v. *Keokuk*, 94 U. S., 324-340 [XXIV., 224-228], "A street bordering on the river, as this did, according to the plan of the town adopted by the decree of partition, must be regarded as intended to be used for the purposes of access to the river and the usual accommodations of navigation in such a connection;" [684] that is, as appears by the decision in that case, to be used by the public for such purposes, as well as a highway, in contradistinction to the exclusive right of one claiming riparian rights as owner of the soil. *Godfrey* v. *Alton*, 12 Ill., 29. "If the city," said this court in *New Orleans* v. *U. S.*, 10 Pet., 662-717, "can claim the original dedication to the river, it has all the rights and privileges of a riparian proprietor."

Notley Young and the successor to his title had no property in the street, not even the right to insist that it should be maintained as such. The United States held its title to the land over which it was laid out, for its own use, and not in trust for any person or for any purpose. In that respect the case differs from *R. R. Co.* v. *Schurmeier*, 7 Wall., 272 [74 U. S., XIX., 74], where it was held that, as the city held the title to the street only in trust for the purposes of its dedication as such, the title remained in the original proprietor for all other purposes, and with a property right in its use as a street for his adjacent land.

And it is immaterial that the ground laid out as a street was not in a condition to be used as a street, or that much labor was required to place it in that situation, or that, in fact, it had not been used as such for a long period of time. *Barclay* v. *Howell*, 6 Pet., 498-505; *Boston* v. *Lecraw*, 17 How., 426 [58 U. S., XV., 118]. "A man cannot lose the title to his lands," it is said in this case, "by leaving them in their natural state without improvement, or forfeit them by non-user." p. 436. *McMurry* v. *Baltimore*, 54 Md., 108.

This denies no right that can be claimed by virtue of the compact between Virginia and Maryland of 1785, for that secured to their citizens the privilege of making and carrying out wharves, as to the shores of the Potomac only, so far as they were adjoining their lands, and such had always been the law in Maryland, notwithstanding the language of the Act of 1745, ch. 9, sec. 10, which was held to authorize the improvements therein spoken of, to be made by improvers in front of their own lots only. *Dugan* v. *Baltimore*, 5 Gill & J., 357; *Wilson* v. *Inloes*, 11 Gill & J., 351. The "full property in the shores of Potowmack River," spoken of in the compact, if it is not to be taken as a *seisin* [685] of the land covered with water, but a right of occupation merely, properly termed a franchise, as said by Hosmer, *C. J.*, in *E. Haven* v. *Hemingway*, 7 Conn., 186-202, must be appurtenant to the land, the conveyance of which carries it as an incident; otherwise, if it implies an ownership in the soil of the shore, between high and low water mark, as land, it could not pass, as an appurtenance, by a deed conveying the adjoining land; for land cannot be appurtenant to land. *Harris* v. *Elliott*, 10 Pet., 25-54; *Storer* v. *Freeman*, 6 Mass., 435; *Com.* v. *Alger*, 7 Cush., 53. And in this view the title of

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the plaintiffs fails, because they show no conveyance of the *locus in quo*, as parcel, and claim it only as an appurtenance.

An Act of Maryland of January 22, 1785, authorizing an addition to Georgetown, of land, according to a plat and upon conditions prescribed by the proprietors, confirms this view of the state of the general law in Maryland, by making express statutory provision "That the proprietors of the lots fronting on the north side of Water Street shall have and enjoy the exclusive right to the ground and water on the south side of their respective lots for the sole purpose of making wharves," etc. The inference is irresistible, that this was meant to give statutory sanction to an exception from the general rule. The same comment applies to the case of *Hazlehurst* v. *Baltimore*, 37 Md., 199, to which we are referred. There, the street or highway that intervened between the wharf and the water was, by virtue of the statutes under which the work was executed, made part of the wharf itself, and subject to the right of the lot owner for the purposes of a wharf, and to that extent it was held he had a right of property in it, of which he could not be deprived for public use, except upon due compensation made.

It is not denied and never was questioned that, as to the streets, whose *termini* abutted on the river, the water front was subject to the riparian rights of the public for use as wharf or dock or landing-place. On what principle can a distinction be drawn between that case and the one in hand, where the line of the river constitutes the side of the street running along the shore? The rights of the public are the same; [686] especially where, as here, it was the soil of the street, as so much land, for all purposes. The true inference to be drawn from the plan of laying out such a street, seems to us to be, to secure to the public the very rights here in controversy, and to prevent private monopoly of the landing-places for trade and commerce. For, as was said in *Dutton* v. *Strong*, 1 Black, 1-31 [66 U. S., XVII., 29-32]: "Piers or landing-places and even wharves may be private,"—"or, in other words, the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use;" the question whether they are so or are open to public use on payment of reasonable compensation as wharfage, depending in such cases upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure. Undoubtedly, Notley Young, prior to the founding of the city and the conveyance of his land for that purpose, was entitled to enjoy his riparian rights for his private uses and to the exclusion of all the world beside. It can hardly be possible that the establishment of the city upon the plan adopted, including the highway on the river bank, could have left the right of establishing public wharves, so essential to a great center of population and wealth, a matter altogether of private ownership; for even as to squares and lots that fell to the public on the division, it is equally contended by the appellants that those from whom they claim, with the lots also purchased the public riparian right appurtenant thereto, with power to convert it to private use.

It was for this reason held by the Court of Appeals of Kentucky, in the case of *Rowan* v. *Portland*, 8 B. Mon., 232, that where land along the river bank in a town had been laid out and dedicated by the proprietor for a public street, that the dedication for that purpose carried with it, as a necessary incident, the right in the public to build wharves and charge wharfage for the use thereof, to the exclusion of the original proprietor and his alienees of any private right [687] of the same character.

To the same effect is the judgment of the same court in *Newport* v. *Taylor*, 16 B. Mon., 699-804.

Various considerations, however, are urged upon us in argument in support of the appellants' claim, which, so far as we deem important and the limits of this opinion will permit, we will now notice in order:

1. It is urged that the construction of the rights of the parties which deprives the claimants, under Notley Young and Greenleaf, o the rights of wharfage opposite their property, on the north side of Water Street, in effect, gives to the United States the entire water front on the Potomac River, without an equivalent, and thus violates that equality in the division which was expressly stipulated for in Notley Young's deed to Beall and Gantt.

But there is no dispute as to the division that was actually made; and each party received, so far as the conveyances are concerned, precisely what he agreed to take and was satisfied with. The supposed inequality arises from a construction of law upon the transaction, as it is admitted or proved to have taken place, and its legal effect is not dependent upon its actual results. The division which, it was agreed, should be fair and equal, was of the lots into which the lands should be laid off; the grantor was to receive back any lands not so laid off; and the streets were to be the property of the United States and, of course, with whatever appurtenant rights belonged to them as streets, or to the land over which they were laid out.

2. It is insisted, however, that the contemporaneous construction put by the parties themselves upon their own acts, requires a different conclusion.

It is impracticable to refer specifically to the numerous letters, maps, plans, documents and records of different descriptions, which the diligent research of counsel on both sides has compiled and placed in the record of these cases, as throwing light on the history of the transaction and as evidence of the views of the actors in it. We can notice but a few, with the general remark that a careful consideration of everything bearing on the point to which our attention has been called, has failed to satisfy us that the [688] conclusion reached, as the legal effect of the documents of title, is inconsistent with the actual intentions of the parties.

In a letter to the President, explaining their regulations of July 20, 1795, the commissioners distinctly say that, "No wharves, except by the public, can be erected on the waters opposite the public appropriations, or on the streets at right angles with the water;" and that it is "proprietors of property lying on the water" that are to be permitted to build wharves. It is possible, indeed, that the commissioners did not at that time contemplate that a street laid out

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along the margin of the river, as Water Street was, would be on the same footing with what they deemed to be public appropriations, and yet there is nothing in their communication inconsistent with that result, and the idea is clearly embraced in it when we apply the decision in the *Van Ness Case* to its terms.

And their view to that effect is strongly implied in what they wrote to James Barry on October 5, 1795. He had written to them, saying that, "As Georgia Avenue meets the water at 3d Street and can only begin again at the other side of the water, I request permission to erect a store or buildings, agreeeably to the regulations of the water property of square 771, without adverting to the imaginary direction of Georgia Avenue, which runs across my wharf and would totally render useless said wharf." The commissioners replied, saying: "We think with you that an imaginary continuation of Georgia Avenue through a considerable depth of tide-water, thereby cutting off the water privilege of square 771 to wharf to the channel, too absurd to form a part of the plan of the City of Washington; that it never was a part of the plan that such streets should be continued through the water, and that your purchase in square 771 gives a perfect right to wharf to any extent in front or south of the property purchased by you, not injurious to navigation, and to erect buildings thereupon, agreeably to the regulations."

[689] It is plainly to be inferred from this, that if, as was the case of Water Street, the street was laid down on the map, as a continuous street, abutting on the river, and called for as the south boundary of the lots fronting on it, it would have been regarded by them as forming part of the plan of the city, thereby cutting off the water privilege from the lots between which and the river it intervened.

But on June 25, 1798, the commissioners had occasion to declare themselves explicitly on the very point, in a letter to Nicholas King of that date, in answer to an inquiry from him in behalf of Robert Peter, requesting to know the extent of wharfing and water privilege attached to what was called water lots and assigned to him on division. They replied as follows:

"Sir: We are favored with yours of the 22d instant, in behalf of Mr. Peter. When the Commissioners have proceeded to divide a square with a city proprietor, whether water or other property, they have executed all the powers vested in them to act upon the subject. It appertains to the several courts of the State and the United States to determine upon the rights which such division may give. Any decision by us on the subject would be extrajudicial and nugatory. Of this, no doubt Mr. Peter, if applied to, would have informed you.

With respect to square No. 22, we do not conceive that it is entitled to any water privilege, as a street intervenes between it and the water; but as there is some high ground between Water Street and the water, we have no objection to laying out a new square between Water Street and the channel, and divide such square when laid out, so as to make it as beneficial to Mr. Peter and the public as circumstances will admit."

A transaction between John Templeman and the commissioners on January 24, 1794, is relied on as showing the rule acted upon in cases like the present. The commissioners, it is stated in the record of their proceedings of that date, sold to Templeman nine lots in square No. 8, and delivered him a certificate with the following indorsement thereon: "It is the intention of this sale that the ground across the street next to the water, with the privilege of wharfing beyond the street in front and of the breadth of the lots, pass with them agreeably to the general idea in similar instances." [690] On January 15, 1798, the commissioners, it is recited in the same record of that date, executed a deed to Templeman of the lots named, "Together with all the land in front from 27th Street to River Potomac, with all rights of wharfing thereon, which deed is given by the request of Mr. Templeman in lieu of one dated the third instant, with the addition of lot 18, in square No. 8, and the water privilege in front of the lots conveyed in Sq. No. 8, the former deed having been first given up and canceled." It will be observed that this is open to the construction that the wharfage privilege is appurtenant, not to the lots in square No. 8, but to the land sold with them on the opposite side of the street, and extending thence to the Potomac River, and which, of course, is riparian property.

There was, in fact, no contemporary agreement of opinion on the subject. On the contrary, there was diversity of view and conflict of interest from the beginning. Various questions arose relating to the mode in which the privilege of building wharves should be exercised by those entitled to it, as well as to what constituted water lots, to which such privilege belonged, and some of them were left undecided. On some of these, the opinion of Charles Lee, Attorney-General, was taken on January 7, 1799; some were investigated and reported upon by a committee of the House of Representatives on April 8, 1802; some were discussed by Attorney-General Breckenridge in an opinion dated April 5, 1806; the very matter of wharfing privileges was the subject of an opinion by Mr. Wirt, then Attorney-General, July 8, 1818, in which he expressed doubts as to the power of the commissioners to adopt the wharf regulation of July 20, 1795. The whole subject had been presented in a very interesting manner, from the point of view opposed to that expressed by the commissioners, but showing that differences of opinion existed, by Nicholas King, in a letter to the President dated September 25, [691] 1803, and printed in Burch's Digest, 351. In that communication he attributed the doubt and uncertainty in which the matter was involved, to the action of the commissioners. "In laying off the city," he says, "they stopped, as before observed, on the bank of the river, sold the lots on the high ground with a water privilege, without defining either what the privilege is, or the extent or direction in which the purchasers were to wharf and improve."

3. A special ground is maintained in behalf of the claim under lot 13 in square 504 derived from Greenleaf.

On December 24, 1793, the commissioners made a contract in writing with Morris and Greenleaf for the sale and conveyance of 6,000 lots, 4,500 to lie southwest of Massachusetts Avenue, and of them Morris and Greenleaf were to

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have the part of the city in Notley Young's land. By this contract, Morris and Greenleaf were excluded from selecting water lots, but with this proviso: "Provided, and it is hereby agreed by and between the parties to these presents, that the said Robert Morris and James Greenleaf are entitled to the lots in Notley Young's land, and of course to the privileges of wharfing annexed thereto, and that lots adjoining the canal are not reckoned water lots."

From this it is sought to draw the inference that the lots in Notley Young's land fronting on the north side of Water Street, have the appurtenant wharfing privileges claimed. But there is no sufficient foundation for this conclusion. Even if it were proper to resort to this preliminary agreement to supply what is not contained in the subsequent grant, made in execution of it—which, we have seen, on the authority of the case of Van Ness, we are not at liberty to do—still, there is nothing to identify square 504 as a water lot out of the property of Notley Young. On October 18, 1794, as has been stated, the commissioners transferred to Greenleaf, Morris consenting, by certificate, 857 of these lots, including the one in question; and it may be that many of them were water lots, but which of them were is to be determined by the actual facts as to each, and not by any general description. There were lots, in Notley Young's land as laid out, which answered the description, without reference to those lying on the north side of Water Street. [692]

That there was, on the original plan of the city and in the division made between the original proprietors and the United States, a classification of the squares and lots into "water lots," with riparian privileges, and the rest which were not, admits of no dispute. The exact nature of the difference is well pointed out in a very elaborate report made May 25, 1846, to the common council of the city, by a committee appointed to investigate the subject, and their conclusions on the point seem to us supported by the records and documents of the time. They say: "Squares in the water with water lots were laid off by the commissioners and divided with the proprietors on the navigable waters of the eastern branch, Potomac, and Rock Creek. Water lots were defined by metes and bounds on three sides, and were estimated originally in the division, since in sales, and now for assessment by the front foot." * * * "On the plan of the city all the streets are delineated and all the property laid off. Every owner of a lot in the city can tell by the description of it in his deed what are its bounds on all sides; if it has a water boundary, the deed says so, and he has a right to wharf out into the river; if it is bounded on all sides by the land he has no such right, the right to a wharf belonging only to land bounded by the water."

If there are any individual cases that are exceptions to these statements, nevertheless their general accuracy we consider well established, and that they manifest the original intention of the parties to the transaction. Disputes undoubtedly arose, some quite early, not so much as to what rights belonged to water lots, nor as to what properly constituted a water lot, but, in regard to particular localities, whether that character attached to individual squares and lots. In part, at least, the uncertainty arose from the fact that the plan of the city, as exhibited on paper, did not accurately correspond at all points with the lines as surveyed and marked on the land. Complaints, of that description and of designed departures from the plan, seem to have been made. It is also true, we think, that mistakes arose, as perhaps in the very case of the lots on the north side of Water Street, owing to the fact that the street existed only on paper, and for a long time remained an unexecuted project, property appearing to be riparian, because lying on the water's edge, which, when the street was actually made, had lost its river front. They were thought to be water lots, because appearing to be so in fact; but were not so in law, because they were bounded by the street and not by the river. [693]

4. The plaintiffs rely upon the decision of the former Circuit Court for this District in the case of *Canal Co.* v. *Union Bk.*, 5 Cranch (C. C.), 509, decided in 1838. The question in that case was, whether the owner of lots in the City of Washington, lying on Rock Creek, was entitled to compensation for a wharf and water privilege which had been condemned for the use of the canal company. It was contended on behalf of the latter that the owner of the lots never had any water privilege as appurtenant to them, because they were cut off from the creek by 28th Street west, and as the streets belonged to the United States, the water privilege belonged to it also. It appeared that Harbaugh, the owner, had built, maintained and used a wharf, in connection with the premises, for thirty years without interruption; and that no part of the bank of the creek and no dry land lay west of the street, one half of which was in the creek. It also appeared that he had bought from the United States, to whom the lots had been allotted in the division of the square between the public and the original proprietor, but the terms of the conveyance from the United States to Harbaugh are not stated. It was argued for the owner that the streets were conveyed to the United States only as highways, and did not deprive the riparian proprietors of their water rights, and reference was made to Nicholas King's letter in Burch's Digest, to the wharf regulations of the commissioners in 1795, and to the Maryland Act of 1791, ch. 45, section 12. The court, it is stated, held that the title of Harbaugh to his wharf was good against the United States, claiming under a private citizen (R. Peter), the original proprietor, but gave no reasons for its opinion. No allusion was made by counsel or court to the case of *Van Ness* v. *Mayor, etc., of Washington*, 4 Pet., 232, which had been decided in 1830, and in which the only point, in behalf of the prevailing party made by counsel in the case in the Circuit Court, had been ruled the other way. For that reason, the judgment cannot be considered as evidence of the law of this District upon the question involved. [694]

The question of wharfage had been before the same court in another form in 1829, in the case of *Kennedy* v. *Corporation of Washington*, 3 Cranch (C. C.), 595. That was an application for a *mandamus* to compel the corporation to make regulations prescribing the manner of erecting private wharves within the limits of the city; the showing in support of the motion for the rule being that the relator was the pur-

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chaser of lot No. 1 in square No. 329; that he had applied to the authorities for leave to build a wharf on that lot and for directions in regard to the plan and construction of the wharf, all which they had refused. Mr. Wallach, for the corporation, argued that the power of the corporation over the subject was within its discretion, which the court would not control. Mr. Jones, on the same side, referred to the opinion of N. King, in Burch's Digest, argued that it appertained to the courts of the several States and of the United States to determine upon these rights, and contended that the power of the commissioners upon the subject ceased to exist by the assumption of jurisdiction by Congress, February 27, 1801, 2 Stat. at L., 103, the power given to the corporation being only to regulate the manner of erecting private wharves, not to limit the extent of them, or to interfere with the rights of owners of the land adjoining the river. The court refused the *mandamus*, it is said in the report, for the reasons stated in the argument of Mr. Jones and Mr. Wallach.

5. The decision just referred to, in the case of Kennedy's application for a *mandamus*, explains, probably, some subsequent action of the corporate authorities on the subject of wharfage, on which the appellants rely as evidence and confirmation of their claims. One of the practical difficulties experienced in the matter of building wharves arose from the fact that [695] conflicts between private claimants, and with acknowledged public rights at the termination of streets upon the river, would exist, if the wharf rights were extended to the channel between lines prolonged from the sides of the lots. This followed partly because the general course of the channel, measured by its chord, was less by about 280 feet than that of the shore line, and because the streets leading to the river were not parallel with the line of the lots. If any system of improvement, public and private, should be adopted, it would require an adjustment of these conflicts, and the subject became a matter of discussion in the municipal government and in the public press. On April 2, 1835, William Elliott, the surveyor of the city, made a report on the subject to the mayor and corporation. In this report, he reviewed the history of the subject from the beginning, and concluded as follows:

"Therefore, from the foregoing authorities and arguments the following facts are clearly deducible:

1. That the channels of navigable rivers of the United States cannot be obstructed;

2. That the openings for the east and west streets, lying on the Potomac River and Rock Creek, must not be interrupted but must be carried to the channel in straight lines; and the openings for the north and south streets, facing on the Anacostia River, must also be left free to the channel;

3. That the power to regulate the docks, wharves, etc., is vested in the Corporation of Washington and the agents they may appoint;

4. That no water privilege was specified or sold with the squares or lots, and that Water Street was laid down on the plans of the city exhibited at the sales, and would appear to be the bounds of the lots and squares fronting the rivers.

Having clearly established these powers and rights in the corporation, the following system of wharves and docks is respectfully submitted for consideration:

1. Let Water Street be laid down conformably to the plan of the City;

2. Let openings of the streets be prolonged to the channel, and in these openings, extending from Water Street to the channel, let wharves [696] be built upon piers;

3. Let docks be formed in front of the squares.

The result of this system would be that all the wharves and docks would belong to the City of Washington; that steamboats and other vessels would have deep water and sufficient room to lie at the end of the wharves or piers, and small craft and boats in the docks; the current of the river would not be interrupted, and the water would flow freely under the wharves, and prevent the accumulation of filth, the source of disease; and the whole system would be perfectly conformable to the original plan of the city as laid down by the commissioners.

Although I consider the above plan the best, and ought to have been adopted at the commencement of the city, yet, having understood that at the sale of the lots facing the rivers there was an implied water privilege sold at the same time, though *neither expressed nor defined*, this therefore would require that the spaces in front of the squares extending to the channel should be considered as *water privileges;* and that openings left for the streets to the channel should be considered as docks, and belonging to the public; also that the spaces in front of the intersection of streets facing the rivers or any other not facing private property should be considered as belonging to the public, on which public wharves or docks may be built.

A section of the last proposed plan may be seen at surveyor's office."

Accordingly, the surveyor submitted a map showing his plan, upon the second hypothesis, that the lots facing Water Street were entitled to be recognized as having wharfing privileges, in which he exhibited that street as one hundred feet wide in the narrowest part.

On July 13, 1835, the following resolution was considered in the board of common council of the City of Washington:

"*Resolved*, That the Corporation of Washington never has admitted and cannot, without injury to the general interests of the city, admit, the existence of 'water rights of individuals' between the Potomac Bridge and the Anacostia, and therefore it is inexpedient to adopt any plan which can be construed into an admission of such rights, or to consider any proposition which claims such admission." [697]

This resolution was indefinitely postponed by a majority of one vote.

Peter Force, a member of the council, well known in the public history of this city and country, by permission, entered on the journal the reasons for his dissent. These reasons were, briefly, that Water Street belonged to the United States; that in the original plan of the city and division and sale of squares and lots, those only were recognized as water lots which were laid off running to the channels of Rock Creek, the Potomac River and the eastern branch, respectively, all of which, on that account, were sold by the front foot, while all the others were laid

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off, bounded by streets and avenues, without any water privileges, and were sold by the square foot; and, among others, that the motion for indefinite postponement of the resolution had been carried by the vote of a member who had a direct personal and pecuniary interest in the assertion of a private right involved in the resolution against that of the public.

In the meantime the discussion was transferred to the newspapers, Mr. Force representing one side of the controversy, and the mayor, Mr. William A. Bradley, the other.

Nothing important seems to have been done by the city council until February 22, 1839, when the following resolutions were adopted, and were approved by the President of the United States:

"Resolutions in relation to the manner in which wharves shall be laid out and constructed on the Potomac River.

Resolved, etc., That the plan No. 2, prepared by the late William Elliott, in eighteen hundred and thirty-five, while surveyor of the City of Washington, regulating the manner in which wharves on the Potomac, from the bridge to T Street south, and the plan of Water Street, shall be laid out, be, and the same is, adopted as the plan to be hereafter followed in laying out the wharves and the streets on the said river; *Provided*, The approbation of the President of the United States be obtained thereto.

[698] *Resolved, also*, That the wharves hereafter to be constructed between the points specified in the said plan shall be so built as to allow the water to pass freely under them; that is to say, they shall be erected on piers or piles from a wall running the whole distance on the water line of Water Street."

But these resolutions decide nothing as to the right, even if the corporate authorities of Washington were competent to do so, which they were not. The resolutions are not, however, even a recognition of the existence of any private right of wharfing, attached to the ownership of lots fronting on the north side of Water Street. At the most, they recognize that there may be such rights. In point of law, they merely regulate the mode in which the right shall be exercised, whether private or public, leaving the question of title, in each case, to be judicially decided; for that was the extent of the jurisdiction which the Corporation of Washington had over the subject.

To notice further the many items of evidence which are contained in the record and have been referred to by counsel, in learned and laborious arguments, would prolong this opinion to an unnecessary and inexcusable length. Enough has been said to show that the rights of the parties respectively stand upon the legal effect of the original documents of title. According to them, as we have shown and now decide, the riparian rights claimed by the appellants, which originally were appurtenant to the land of Notley Young by virtue of its adjoining the Potomac River, passed to the United States by the conveyance which vested in them the ownership of the land on which Water Street was laid out and has been built.

The decree below, therefore, was right, and it is accordingly affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Miller**, dissenting:

In these cases the **Chief Justice**, *Mr. Justice* **Gray** and myself do not agree with the judgment of the court.

We concur in nearly all that is said in the opinion and in the general proposition that where a town lot or other land is bounded on a [699] street or road or other highway, the fee to which is in some other person than the lot owner, his rights as a land owner do not extend beyond the street, and in case the street occupies the bank of a river or other water way, no riparian rights attach to the lot or its owner. But we think the court has erred in the application of this doctrine to the present case by failing to give due weight to one or two considerations which we shall mention:

1. Notley Young was the original and sole owner, in fee simple, of that part of the land on which Washington City was laid out, which includes the *locus in quo*, and there is no question that this ownership included the right to erect wharves on it on the Potomac River where the wharf now in contest is constructed. In pursuance of the scheme by which a city with streets, lots and squares was laid out on this land, he conveyed it in trust to Beall and Gantt. They were to lay it out into streets, squares and lots. When this was done, the title in fee of the streets, as well as of such squares as were to be reserved for public uses, was to vest in the United States. Of all this property, after that was done, there was to be a fair and equal division between Young and the government, and Young's part was to be conveyed to him and the other half to commissioners to be named by the President.

The riparian rights of land owners on the Potomac River were understood at that time as well or perhaps better than they are now, and the value attached then, and especially to the right to construct wharves, is shown clearly by the record, and by the Act of the Legislature of Maryland of December 19, 1791, cited in the beginning of the court's opinion. It, therefore, could not have escaped attention (if the entire water way of the river and the right of approach to it and use of it, in regard to wharves and landing-places, was vested exclusively in the United States) that no equal division was made of this important right, unless it was by the right attaching to each lot which, but for Water Street, would be bounded by the river.

No equivalent is given to Young for this valuable right, on the supposition that it all [700] vested in the United States; no express words are used conveying it to the United States or dedicating it to the public. It cannot be successfully maintained that the right attaches as appurtenant to the street. The uses of a street and of a wharf are entirely different, and while a dedication of a street to public use may not be inconsistent with the use of a part of it for a landing-place, it cannot be said to have, as appurtenant to it, a right to build a wharf into the river. If such a street had a definite width, it must happen that there would, by reason of the irregular curvature of the river, be detached pieces of land between it and the water. To whom did this land belong, unless to the lot which would embrace it if its lines were extended to the water? And if the lot did not embrace it, what equal division of this valuable

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land has ever been made with Mr. Young? As it was the duty of the trustees to divide the whole land, it will be presumed that they did it and that this was their mode of doing it.

The cases of *Doane* v. *Broad St. Association*, 6 Mass., 332, and *Hathaway* v. *Wilson*, 128 Mass., 359, are directly in point. In the former case, a partition was made under which the parties claimed, and it was insisted that certain flats, which were the subject of the contest, did not pass as appurtenant to a wharf allotted to one of the parties, because both the wharf and the flats were land, and land cannot pass as appurtenant to land. But the court said that, though the flats were not specifically mentioned, yet the duty of the commissioners to partition them, and their relation to the wharf, which could not be used without passing over them, led to the fair inference that on the partition they were intended to pass as part of the wharf property.

2. This view is confirmed by the language of the commissioners, who made the division with Young, in the certificate which they gave him. This was not in form a regular deed of conveyance, but is clearly intended to define the square or lots which fell to him in the division and to remit him for his ownership to his original title, and for the nature of that ownership to the surrounding circumstances. Taking square No. 472, one of those now in controversy, the certificate says that "The whole of said square shall remain to the said Notley Young, agreeably to the deed of trust concerning lands in the said city." Here is a plain remission to his original title and right which, but for Water Street, must include riparian rights also. And though this certificate is accompanied by a plat which shows Water Street as lying between the square and the river, we are not able to see that this circumstance excludes the original riparian rights of Young, in the absence of any evidence that those rights were allotted to the government in the partition, or that Young anywhere received an equivalent for those rights, unless he obtained it by this statement, that: "The square shall remain to Young agreeably to the deed of trust made by him." No such deed was executed by the commissioners to purchasers of lots from the United States.

[701]

This view of the matter was taken by *Judge* Cranch in the case of the *Canal Co.* v. *Union Bk.*, 5 Cranch (C.C.), 509, decided in 1838, and though the case is not fully argued by the court, the eminent ability of the Judge who decided it, and his well known accuracy as a reporter, and his knowledge of the local laws and customs of the City of Washington, entitle it to very great weight, as what he intended to decide is quite clear.

The careful and elaborate letter of the commissioners to the President, of July 24, 1795, which states that "No wharves, except by the public, can be erected on the waters opposite the public appropriations, or on the streets at right angles with the waters;" but with respect to the private property on the water, lays down regulations by which proprietors of property lying on the water are to be permitted to build wharves, and to erect warehouses thereon, leaving spaces at certain distances for cross streets, evidently uses the words "public appropriations" as distinct from "streets," and as designating the lots and squares set apart with the President's approval for the public use; and by prohibiting the erection of private wharves at the end of the streets at right angles with the water, and omitting to mention the shores by the side of other streets, clearly implies that such shores are not covered by the prohibition, but are to be treated as included in "the private property on the water."

The lot set off to the United States, and afterwards sold to Morris and Greenleaf, is within the same principle. [702]

The declaration in the preliminary contract of 1793, between the commissioners and them, that the latter were entitled of course to the privilege of wharfing annexed to these lots, while not evidence of a contract to control the terms of the subsequent more formal instrument, is of weight as showing what at that time was understood to be included in a description of the lots.

When to this we add that no Act of Congress has ever asserted ownership of these wharves or landing-places, or the rights of a riparian owner, while they have conferred on the authorities of the District the power of regulating wharves, private and public, we are forced to the conclusion that these rights are left with the owner of the squares certified to Notley Young in the division with the United States.

Mr. Justice **Bradley** did not sit in these cases.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

A. AUSTIN SMITH, *Plff. in Err.*, [669]
v.
SAMUEL C. GREENHOW.

(See S. C., Reporter's ed., 669-671.)

Removal of causes—federal question—jurisdiction as to amount—colorable pleading.

1. Where a replication alleges an express promise by a State to receive certain coupons in payment of taxes due to the State, and the rejoinder is that a certain law of the State forbids their being received therefor, a demurrer to the rejoinder in effect denies the validity of that law as impairing the obligation of a contract, and raises a federal question which authorizes the removal of the cause from a State Court to the U. S. Circuit Court.

2. Where, in an action of trespass, the property taken is stated in the declaration to be but $100, and damages for the alleged trespass are laid at $6,000, this court cannot assume, as a matter of law, that an amount greater than $500 is not recoverable upon the case stated in the declaration, and it cannot, therefore, justify the order remanding the cause, on the ground that the matter in dispute does not exceed the sum or value of $500.

3. If the Circuit Court had found, as matter of fact, that the amount of damages stated in the declaration was colorable and had been laid beyond the amount of a reasonable expectation of recovery, its order remanding the cause to the State Court could have been sustained.

[No. 970.]

Submitted Nov. 19, 1883. Decided Jan. 7, 1884.

IN ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

The history and facts of the case appear in the opinion of the court.

Messrs. **William Royal** and *Wager Swayne*, for plaintiff in error.

Messrs. F. S. Blair, Atty-Gen. of Virginia and *J. Ambler Smith*, for defendant in error.

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Mr. Justice **Matthews** delivered the opinion of the court:

A writ of summons was issued out of the Circuit Court of the City of Richmond by the plaintiff in error, who was plaintiff below, against the defendant, on May 2, 1883, service of which was acknowledged by the defendant on the same day. The writ was returnable on the first Monday in May, which was the seventh day. On that day the plaintiff filed his declaration in trespass, *vi et armis*, for entering upon the premises of the plaintiff, and taking and carrying away his personal property, consisting of one table and one book-case, with the books therein, of the value of $100, and for remaining on the premises of the plaintiff for a long time whereby the plaintiff was greatly disturbed and annoyed in the peaceable possession thereof, being his place of business, and hindered and prevented from carrying on and transacting his lawful and necessary affairs and business, and for other wrongs and injuries, laying the damage therefor at $6,000. To this declaration the defendant filed a plea in bar, justifying the al-
[670] leged trespasses, by setting out that the defendant, as Treasurer of the City of Richmond, levied upon the personal property mentioned, in order to sell the same, in satisfaction of certain taxes then due and owing from the plaintiff to the State of Virginia, as by law it was his duty to do. To this plea, the plaintiff filed a replication alleging a previous tender, in payment of said taxes, of coupons cut from bonds issued by the State of Virginia, under the authority of an Act of the General Assembly of that State, approved March 28, 1879, said coupons being by that law receivable in payment of said taxes; which, however, the defendant refused to accept in payment thereof. To this replication the defendant rejoined that, by the Act of the General Assembly of the State of Virginia of January 26, 1882, he was forbidden to receive the said coupons tendered in payment of said taxes; and to that rejoinder the plaintiff demurred. All these various pleadings, including the declaration, were filed on the same day, and on that day the plaintiff also filed his petition praying for the removal of the suit to the Circuit Court of the United States for the Eastern District of Virginia, on the ground that it arose under the Constitution of the United States, which was accordingly done. The cause was docketed in the Circuit Court, and on September 4, 1883, it was, on motion of the defendant, remanded to the Circuit Court of the City of Richmond. To reverse the order of the Circuit Court of the United States remanding the cause to the State Court, this writ of error is prosecuted.

The ground on which the order of the court below, remanding the cause, was placed, seems to have been that no federal question, such as is necessary to confer jurisdiction in the case upon the courts of the United States appears to be necessarily involved in the issue raised by the pleadings. In this we think the court erred. The replication alleges that the coupons tendered contained an express promise, as required by law, of the State of Virginia, that they should be received in payment of all taxes due to the State. The rejoinder is that the Act of January 26, 1882, subsequently passed, expressly forbids the defendant from receiving such coupons in payment of taxes. The demurrer, in effect, denies the validity of that law, and upon the record no ground of its invalidity can be in-
[671] ferred, except that it is avoided by the operation of that provision of the Constitution of the United States which forbids any State from passing laws which impair the obligation of contracts. It, therefore, sufficiently appears upon the record that the plaintiff's case arises under the Constitution of the United States, within the rule as laid down in *Bridge Propr.* v. *Hoboken Co.*, 1 Wall., 116-142 [68 U. S., XVII., 571, 575].

There is a ground for remanding the cause suggested by the record, but not sufficiently apparent to justify us in resorting to it to support the action of the Circuit Court. The value of the property taken is stated in the declaration to be but $100, although the damages for the alleged trespass are laid at $6,000. The petition for removal does not allege the sum or value of the matter in dispute otherwise than by the statement of the amount of the claim for damages. We cannot, of course, assume, as a matter of law, that the amount laid, or a less amount greater than $500, is not recoverable upon the case stated in the declaration, and cannot, therefore, justify the order remanding the cause, on the ground that the matter in dispute does not exceed the sum or value of $500. But if the Circuit Court had found, as matter of fact, that the amount of damages stated in the declaration was colorable and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case removable under the Act of Congress, so that, in the words of the 5th section of the Act of 1875 [18 Stat. at L., 470], it appeared that the suit did not really and substantially involve a dispute or controversy, properly within the jurisdiction of said Circuit Court, the order remanding it to the State Court could have been sustained.

The order of the Circuit Court remanding the cause to the State Court is reversed, and the cause is re-instated in that court, with directions to proceed therein in conformity with law. And it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—113 U. S., 257.

CHICAGO AND ALTON RAILROAD COMPANY AND JOHN B. DUMONT, *Appts.*,

v.

UNION ROLLING MILL COMPANY.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, *Appt.*,

v.

UNION ROLLING MILL COMPANY.

(See S. C., Reporter's ed., 702-725.)

Dismissal of action—where not allowed—38th Equity Rule—waiver of statutory lien of vendor—effect of agreement to give security.

1. After a decree has been made, whether final or interlocutory, by which the rights of a party de-

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fendant have been adjudicated, or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant.

2. After a decree in favor of a defendant, the complainant cannot have his bill dismissed, under the 33th Equity Rule, because of his own neglect to reply to a plea filed by another defendant, who himself never insisted upon the dismissal of the bill by reason of that neglect, nor took any exceptions to the refusal of the court to dismiss the bill, and is not a party to the appeal.

3. A contract with a construction company and a railroad company that certain rails and other materials furnished shall be used in the construction of a contemplated railroad in Illinois, and that until fully paid for, the seller shall have a lien thereon and constructive possession of them, is not a waiver of a statutory lien in favor of the seller.

4. An agreement for the extension of credit by receiving a note of the party, or the independent security of a third person, falling due at a day beyond the period within which a lien must be asserted, will be no waiver of the lien when the agreement to give the note or security has not been performed by the promisor.

[Nos. 141, 172.]

Argued Dec. 6, 1883. Decided Jan. 7, 1884.

APPEALS from the Circuit Court of the United States for the Northern District of Illinois.

The history and facts fully appear in the

Statement of the case by *Mr. Justice* **Woods:**

The original bill in this case was filed January 8, 1876, by John B. Dumont, a citizen of the State of New Jersey, against the Chicago and Illinois River Railroad Company, the Chicago Railway Construction Company, the Chicago and Alton Railroad Company and the Union Rolling Mill Company (which for the sake of brevity will be called respectively the Illinois River Railroad Company, the Construction Company, the Alton Railroad Company and the Rolling Mill Company, all Corporations organized under the laws of the State of Illinois) and Bradford Hancock, as receiver of the Construction Company, and Corydon Beckwith, both citizens of the State of Illinois.

The purpose of the bill was the foreclosure of a deed of trust. The bill averred in substance as follows: on March 1, 1875, the Illinois River Railroad Company, claiming to be the owner of a railroad constructed and being constructed between Joliet, Will County, and Streator, in La Salle County, in the State of Illinois, and the Construction Company, claiming to be the owner of certain lands in Grundy County in the same [704] State, entered into an agreement with the Alton Railroad Company by which the Illinois River Railroad Company leased its right of way and its railroad constructed and to be constructed, and all its other property except engines and cars, to the Alton Railroad Company forever, upon certain terms and conditions therein mentioned. Afterwards, on the same March 1, 1875, the Illinois River Railroad Company, executed and delivered its bonds of that date with interest coupons attached, one thousand in number, and for $1,000 each, payable thirty years after date, with interest at seven per cent, payable semi-annually, and on the same day, jointly with the Construction Company and John H. Rice, its trustee, executed a deed of trust to George Straut to secure the payment of the bonds. The deed of trust conveyed to Straut all the railroad owned or occupied, by the Illinois River Railroad Company between Joliet and the Mazon River, and all the property of every kind, except engines, cars and tools, however and whenever acquired by it between said points, and the railroad company covenanted by said trust-deed that it had a perfect title to the railroad and other property so conveyed, subject only to the lease above mentioned. By the same deed the Construction Company and Rice, its trustee, conveyed to Straut its lands situate in Grundy County, Illinois, and covenanted that it had good title thereto and that the lands were free from incumbrances.

Of said one thousand bonds, only those numbered from 1 to 474 inclusive, and 701 to 1,000 inclusive, were issued. The interest on these bonds had not been paid. They were all held either by *bona fide* purchasers or pledgees.

The deed of trust provided, that in case of default in the payment of any interest on the bonds, or in the performance of any covenant in said deed of trust contained to be performed by the Illinois River Company or the Construction Company, and in case such default should continue six months, then the trustee might take possession of the property conveyed by the deed of trust, and apply the issues and profits thereof to the payment of the liabilities of the Illinois River Railroad Company and the Construction Company, as therein provided. The covenants of seisin, for quiet enjoyment and against incumbrances made by the Illinois River Railroad Company and the Construction [705] Company, in the deed of trust contained, were broken on March 1, 1875, and such default had continued more than six months. On March 1, 1875, the Illinois River Railroad Company and the Construction Company were indebted to the Rolling Mill Company in a large sum of money for materials furnished for the construction of said road, which the Rolling Mill Company claimed to be a lien thereon, but its claim was subject to the claims of bondholders represented by the complainant.

On September 18, 1875, John F. Slater, being the holder and owner of bonds numbered from 1 to 474 inclusive, applied to Straut, the trustee, to take such action in the premises as he ought to or might take for the protection of his interest. But Straut, being unable or unwilling to act, resigned his trust, and the complainant was, on September 18, 1875, in accordance with the provisions of the deed of trust, appointed trustee in his stead, and on September 20, 1875, Straut conveyed to the complainant, as such trustee, all the property, rights and powers vested in him by the trust-deed.

The prayer of the bill was as follows: "That an account may be taken of the sum due for principal and interest on said bonds, and of the sums due as liens upon said road, and that the premises described in the deed of trust to George Straut may, by order of this court, be sold for the payment of the same, and that your orator may have such other and further and different relief as to equity may seem meet."

Answers were filed by the Illinois River Railroad Company, the Construction Company and the Alton Railroad Company, Corydon Beckwith and Bradford Hancock, in which they took issue upon the averments of the bill.

On January 13, 1876, the Rolling Mill Company filed an answer, claiming to have a first lien on the railroad and property of the Illinois River Railroad Company, averring that, on Au-

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gust 7, 1874, it made a contract in writing, of that date, with the Illinois River Railroad Company and the Construction Company for the sale and delivery, at certain prices therein specified, to said Companies of 1,600 tons of steel and [706] 2,500 tons of iron rails and certain named quantities of iron splices, spikes and bolts, all to be delivered by December 1, 1874.

That contract provided, that for these materials $60,000 in cash should be paid and, for the balance of the price, the Companies purchasing the same should give notes, payable in six, eight, ten and twelve months from their dates respectively, executed by the Illinois River Railroad Company and guarantied in full by the Construction Company and by the stockholders of the Construction Company in proportion to their stock and, for the further security of said notes, there should be pledged certain bonds of the Construction Company for an amount equal to the aggregate principal of said notes, and secured by a deed of trust, made April 1, 1874, by the Illinois River Railroad Company and the Construction Company, on the property therein described, constituting the first lien thereon.

It also contained this clause:

"And it is also agreed by said party of the second part that the material so furnished by the said party of the first part shall be used and laid upon the road and road-bed belonging to said Chicago and Illinois River Railroad Company, between the Cities of Joliet, in Will County, and Streator, in La Salle County, Illinois; and that, until the same be fully paid for and all of the notes given in payment therefor paid and canceled, the said party of the first part shall have a lien upon said material furnished by it, and the use and possession of the same by said party of the second part, or either of the corporations constituting the same, or the assignee or assigns of one or both of them shall be the user and possession of said party of the first part."

The answer of the Rolling Mill Company further alleged that the Company had delivered a large part of the rails, etc., under said contract; that upon the delivery of the last lot, on or about November 12, 1874, the purchasing Companies gave the Rolling Mill Company notice not to deliver any more rails or other material until the spring of 1875; that the Rolling Mill Company were always ready and willing to deliver the re- [707] mainder of said rails and other material mentioned in said contract, and that on May 7, 1875, it gave notice to said purchasing Companies that the residue of the rails, etc., were ready for delivery, but the Companies did not provide cars or vessels for the transportation of said materials, and that, by the terms of the contract, such notice was equivalent to a delivery thereof; and that the Rolling Mill Company then and thereby complied with its contract, and was entitled to the consideration therein named.

It also alleged that the Rolling Mill Company had received in part payment of said consideration the sum of $95,000, and no more; and that the purchasing Companies had wholly neglected and refused to pay the Rolling Mill Company any further sums of money on the contract, and had neglected and refused to deliver to it any of the notes or securities for deferred payments on the rails, etc., as provided in said contract, although requested to do so; and that thereby the whole amount of the purchase money for the rails, etc., had become due and payable.

It further alleged that, on May 10, 1875, the Rolling Mill Company, within the time prescribed by law, filed its bill in the Circuit Court of Will County, Illinois, for the purpose of enforcing its lien, under the Statutes of Illinois, upon the railroad and its appurtenances; and that the bill was still pending and undetermined.

The answer still further alleged that the Rolling Mill Company not only had a statutory lien upon all the materials furnished under said contract, but by the contract it had an express contract lien upon the same; and that, by virtue of the contract and the facts set forth, it had a lien upon the Illinois River Railroad and its appurtenances, paramount to the lien of the bondholders under said deed of trust and all other liens upon the road.

On the same day on which its answer was filed, the Rolling Mill Company obtained leave to file and did file a cross-bill in the cause, setting up the same matters stated in its answer, and praying that upon the final hearing a decree might be entered requiring payment of the amount due to it within a certain time to be fixed by the decree, and that in default thereof the [706] railroad of the Illinois River Railroad Company and all its appurtenances might be sold, and out of the proceeds its claim might be paid in preference to the bondholders or any other persons.

The answers to the cross-bill of the Rolling Mill Company denied that said Company had any lien for the materials furnished by it under said contract, either by virtue of the contract or the statutes of Illinois.

Afterwards, on May 31, 1876, the master, to whom the cause had been referred, filed his report upon the claims of the Rolling Mill Company, with the testimony in support thereof, by which he found due to the complainant in the cross-bill from the Illinois River Railroad Company and the Construction Company, for iron rails, etc., furnished under said contract, with interest, etc., the sum of $186,783.49, and for which he reported the Rolling Mill Company had a lien binding on all the defendants.

On June 27, 1876, the report of the master was referred back to him by the following order, which was entitled both of the original and the cross cause:

"By agreement of counsel the report of the master in said bill and cross-bill is referred back to Henry W. Bishop, the master in chancery of this court, with leave for the complainant in said bill and the defendants to take further proofs within eight (8) days from this date, and for the Union Rolling Mill to take further proofs, if desired, within twelve (12) days from this date, said master to report at the expiration of said twelve days."

On July 1, 1876, Dumont, the complainant in the original bill, filed his supplemental bill, in which he averred that, since the filing of the original bill coupons, attached to the bonds mentioned, falling due on March 1, 1876, had become due and remained unpaid, although presented for payment; that he had paid out certain sums for right of way, for laying down side tracks and switches, and for taxes; and prayed that an account might be taken of the sums due on said coupons so fallen due, and of

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the sums paid out by complainant as aforesaid, [709] and that the latter might be declared a lien on the mortgaged premises.

On August 3, 1876, the Illinois River Railroad Company filed its plea to the original and supplemental bills, in which it averred that at the date of the mortgage set forth in the original and supplemental bills, and at the beginning of this suit, the said George Straut, the trustee named in the deed of mortgage, was and ever since had been and still continued to be a citizen of the State of Illinois; that he was such citizen on September 13, 1875, when he was applied to foreclose the deed of trust, and on September 13, 1875, when he resigned said trust; that, from and after March 1, 1875, until the commencement of this suit, all the defendants to the original and supplemental bills had been citizens of the State of Illinois, and had continuously remained such citizens until the filing of the plea. Wherefore, the said Company averred that Dumont, as assignee of said chose in action, namely: said deed of trust, had no standing to prosecute the said suit, and set up the facts aforesaid in bar of the jurisdiction of the court.

No other plea, answer or demurrer was ever filed to the supplemental bill by any of the defendants in the cause, nor was said plea to the original and supplemental bill ever replied to or set down for argument.

On June 26, 1877, one year after the report first filed by him had been recommitted, the master, after re-examining the former testimony and taking additional testimony, covering in all several hundred printed pages, and hearing the arguments of counsel, filed his second report, affirming his former findings, and sustaining the allegations of the cross-bill.

On July 16, 1877, exceptions to this report were filed by Dumont, the complainant in the original bill, the main ground of the exceptions being that the master had erred in reporting that the Rolling Mill Company was entitled to a first lien on the mortgaged premises for the amount found to be due it.

October 15, 1877, the following order was entered: "Now come the parties by their solicitors, and thereupon the original, supplemental and cross-bills were submitted to the court on printed arguments to be furnished by Messrs. [710] Beckwith and Smith by October 26th inst., by Messrs. Cooper and Packard and Henry Crawford by October 30th inst., by George Campbell by November 20th next, and by Messrs. Beckwith and Smith in reply by November 30th next."

On the 25th day of May, 1878, the Massachusetts Mutual Life Insurance Company, on leave of court, filed an intervening petition in the cause, stating, among other things, that it was the holder of some of the bonds secured by the trust-deed to George Straut, and that the complainant, John B. Dumont, was threatening to foreclose the trust-deed under the power of sale contained therein, and prayed for an injunction to prevent such sale and, in accordance with this prayer, an order was entered in the cause on the 25th of May, 1878, restraining Dumont from selling the property included in the trust-deed until the further order of the court.

Afterwards, on January 4, 1878, by agreement of the parties by their solicitors, an order was entered setting aside the order of October 15, 1877, submitting the exceptions to the master's report upon printed briefs. June 5, 1878, the exceptions came up for hearing before the court. The hearing continued until June 11, 1878, when the exceptions were taken under advisement.

On December 16, 1878, the court entered an interlocutory decree upon the report of the master and the exceptions thereto. This decree was entitled thus:

"John B. Dumont *vs.* Chicago and Illinois River Railroad Company et al."	In Chancery, Original Bill.
and	
"Union Rolling Mill Company *vs.* John B. Dumont et al."	Cross-bill.

By this interlocutory decree, the court found due the Rolling Mill Company $134,733.23 on account of rails and materials used in the con- [711] struction of the railroad and not paid for, and that this sum constituted a lien upon the railroad of the Illinois River Railroad Company and upon all its property, real, personal and mixed. The court further found that the Rolling Mill Company had delivered to said Illinois River Railroad Company and the Construction Company iron rails, steel rails, etc., mentioned in the contracts with said Rolling Mill Company to a large amount, which had been sold by the Illinois River Railroad Company and the Construction Company to the Alton Railroad Company, with full knowledge of the lien of said Rolling Mill Company thereon. That the Alton Railroad Company had never specially paid for such material, but had converted the same to its own use, and that such rails and other materials were then of the value of $24,464.92. This sum the court found the Rolling Mill Company was entitled to have and recover from the Illinois River Railroad Company, the Construction Company, and the Alton Railroad Company, together with interest thereon, amounting at the date of the decree to the sum of $29,796.30; and the court reserved for further consideration all questions relative to the enforcement of the lien declared for the sum of $134,733.23, and relative to the sum of $29,796.30, found due from the Alton Railroad Company, the Construction Company, and the Illinois River Railroad Company.

Afterwards, on April 15, 1879, the complainant in the original bill moved for leave to dismiss the same at his own costs, and on September 2 following, the consent of the Massachusetts Mutual Life Insurance Company and other defendants to the dismissal of the original bill, was filed in the cause. On March 29, 1880, John B. Dumont filed his disclaimer to further prosecute said cause for the reason, as stated by him, that his interest in the same had ceased and terminated by a proceeding had in the Circuit Court of Will County, Illinois. On the same day the court rendered a final decree in the cause, which was entitled both of the original and cross cause, and which began as follows:

"This day came the several parties to the said cause and cross cause, by their respective solicitors." The decree then proceeded to over- [712] rule the motion of the complainant Dumont

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for leave to dismiss the bill, and ordered the payment of the sum of $134,733.23 to the Rolling Mill Company, found due it by the interlocutory decree theretofore entered, with interest, and, in default thereof, that all of the railroad, with its appurtenances, of the Illinois River Railroad Company be sold free and clear of all incumbrances in favor of any of the parties to the suit; the proceeds to be applied, first, to the payment of costs; second, to the payment of the sum so found due the Rolling Mill Company; and the surplus, if any, to be paid to the clerk of the court. The court further decreed that the Rolling Mill Company have execution against the Alton Railroad Company, the Illinois River Railroad Company and the Construction Company, for the sum of $29,796.30, together with interest thereon from the 16th day of December, 1878, found due to it by the interlocutory decree theretofore entered.

The Massachusetts Mutual Life Insurance Company, as an intervener in the cause, on June 10, 1880, took and perfected an appeal from the said decree, and on the next day Dumont and the Alton Railroad Company appealed from the same decree, the Illinois River Railroad Company, the Construction Company, Hancock and Beckwith, having refused to join in such appeal.

By the appeal last mentioned the final decree of the circuit court is brought under review.

Messrs. **C. Beckwith** and **S. W. Packard,** for appellants:

The court erred in refusing to allow the original bill to be dismissed, and in entering a final decree in favor of the Union Rolling Mill Company upon its cross-bill.

If the original bill is without equity, the cross-bill cannot be sustained; Adams, Eq., 7th Am. ed., 402, *note; Dows* v. *Chicago*, 11 Wall., 112 (78 U. S., XX., 67); because in such a case "there seems to be nothing on which to found a cross-bill."

Dill v. *Shahan*, 25 Ala., 703.

A cross-bill is auxiliary to the proceeding in the original suit and a dependency upon it.

Ayers v. *Carver*, 17 How., 592 (58 U. S., XV., 179); *Cross* v. *De Valle*, 1 Wall., 14 (68 U. S., XVII., 518); *Dows* v. *Chicago* (*supra*); *Ex parte R. R. Co.*, 95 U. S., 225 (XXIV., 356); *Ayers* v. *Chicago*, 101 U. S., 187 (XXV., 840); *Rubber Co.* v *Goodyear*, 9 Wall., 809 (76 U. S., XIX, 589).

When the original bill is dismissed, this carries with it the cross-bill.

Ad. Eq., 7th Am. ed., 402, *note; Ins. Co.* v. *Webb.*, 54 Ala., 694; *Elderkin* v. *Fitch*, 2 Ind., 90; *Slason* v. *Wright*, 14 Vt., 208.

"The pendency of a cross-bill by one defendant is no answer to a motion to dismiss the original bill for want of prosecution by another defendant."

2 Dan. Ch. Pr., 1556.

The Union Rolling Mill Company waived its right to a statutory lien for the materials furnished.

Phillips, Mech. Liens, sec. 117; *Gorman* v. *Sagner*, 22 Mo., 137; *McMurray* v. *Brown*, 91 U. S., 265 (XXIII., 324); *Barrows* v. *Baughman*, 9 Mich., 217; *Young* v. *Wood*, 11 B. Mon., 128.

The right to remove the materials is inconsistent with the theory upon which the lien is given by the statute, namely: that the contractor has thereby enhanced the value of the property by inseparably blending his materials with the property of the owner.

Davis v. *Alvord*, 94 U. S., 547 (XXIV., 283).

Hunter v. *Blanchard*, 18 Ill., 324; *Gove* v. *Cather*, 23 Ill., 638; Houck, Liens, sec. 54; *Taggard* v. *Buckmore*, 42 Me., 81; *Chapin* v. *Persse*, 30 Conn., 461; Phillips, Mech. Liens, sec. 148.

Where the lien is once waived, it is gone forever. It rests on the statute and cannot be created or revived by contract, express or implied, when once waived.

Green v. *Fox*, 7 Allen, 87; *Ilett* v. *Collins*, 103 Ill., 77; *Young* v. *Wood*, 11 B. Mon., 128; *Barrows* v. *Baughman*, 9 Mich., 213; *Gorman* v. *Sagner*, 22 Mo., 137; *Grant* v. *Strong*, 18 Wall., 623 (85 U. S., XXI., 859).

The provision in the contract, providing for a credit beyond the time within which it would be necessary to file a bill to enforce a statutory lien, is a waiver.

Phillips, Mech. Liens, sec. 281; *Pryor* v. *White*, 16 B. Mon., 605; *Peyroux* v. *Howard*, 7 Pet., 345.

Messrs. **Lyman Trumbull,** *Henry A. Gardner* and *Campbell & Lawrence*, for appellee.

Mr. Justice **Woods** delivered the opinion of the court:

The appellants assign for error:

1. The refusal of the circuit court to dismiss the original bill, and the rendition of the final decree in favor of the Rolling Mill Company, and the ordering of the sale of the property of the Company to satisfy the same.

2. The finding that the Rolling Mill Company had a lien upon the railroad and property of the Illinois River Railroad Company for the amount found to be due it, and that such lien was paramount to the lien of the bonds secured by the trust-deed to Straut. [713]

3. The rendition of a personal decree against the Alton Railroad Company for $29,796.30, and the awarding of execution thereon.

We shall consider these assignments of error in the order in which they are stated.

The appellants contend that Dumont, the original complainant, had the right at any stage of the case to dismiss his bill, and that its dismissal would carry with it the cross-bill, and that having made the motion to dismiss, which was erroneously overruled, all the subsequent proceedings and decrees are erroneous.

It may be conceded that when an original bill is dismissed before final hearing, a cross-bill filed by a defendant falls with it. It may also be conceded that, as a general rule, a complainant in an original bill has the right, at any time upon payment of costs, to dismiss his bill. But this latter rule is subject to a distinct and well settled exception, namely: that after a decree, whether final or interlocutory, has been made, by which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of defendant.

The rule is stated as follows in Daniell's Chancery Practice, p. 793, 5th Am. ed.: "After a decree or decretal order the court will not allow a plaintiff to dismiss his own bill, unless upon consent, for all parties are interested in a decree, and any party may take such steps as he may be advised to have the effect of it."

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The same writer, page 794, says that "After a decree has been made, of such a kind that other persons besides the parties on the record are interested in the prosecution of it, neither the plaintiff nor defendant, on the consent of the other, can obtain an order for the dismissal of the bill."

The rule, as we have stated it, is sustained by many adjudicated cases. It was laid down by the *Lord Chancellor* in *Cooper* v. *Lewis*, 2 Phill. Ch., 181, as follows: "The plaintiff is allowed to dismiss his bill on the assumption that it leaves the defendant in the same position as he would have stood if the suit had not been instituted; it is not so where there has been a proceeding in the cause which has given the defendant a right against the plaintiff." [714]

In *Bank* v. *Rose*, 1 Rich. Eq. (S. C.), 294, it was said: "But whenever, in the progress of a cause, the defendant entitles himself to a decree, either against the complainant or a co-defendant, and the dismissal would put him to the expense and trouble of bringing a new suit or making new proofs, such dismissal will not be permitted."

So in the case of *Conner* v. *Drake*, 1 Ohio St., 170, the Supreme Court of Ohio declared: "The propriety of permitting a claimant to dismiss his bill is a matter within the sound discretion of the court, which discretion is to be exercised with reference to the rights of both parties, as well the defendant as the complainant. After a defendant has been put to trouble in making his defense, if in the progress of the case rights have been manifested that he is entitled to claim and which are valuable to him, it would be unjust to deprive him of them merely because the complainant might come to the conclusion that it would be for his interests to dismiss his bill. Such a mode of proceeding would be trifling with the court as well as with the rights of defendants. We think the court did not err in its ruling in refusing to permit complainant to dismiss his bill."

Chancellor Walworth, in the case of *Watt* v. *Crawford*, 11 Paige, 472, laid down the rule in these words:

"Before any decree or decretal order has been made in a suit in chancery, by which a defendant therein has acquired rights, the complainant is at liberty to dismiss his bill upon payment of costs; but after a decree has been made by which a defendant has acquired rights, either as against a complainant or against a co-defendant in the suit, the complainant's bill cannot be dismissed without destroying those rights. The complainant in such a case cannot dismiss without the consent of all parties interested in the decree, nor even with such consent, without a rehearing, or upon a special order to be made by the court." [715]

See, also, *Gilbert* v. *Howles*, 1 Ch. Cas., 40; *Bluck* v. *Colnaghi*, 9 Sim. Ch., 411; *Lashley* v. *Hogg*, 11 Ves., Jr., 602; *Booth* v. *Leycester*, 1 Keen, 255; *Biscoe* v. *Brett*, 2 Ves. & B., 377; *Collins* v. *Greaves*, 5 Hare, 596; *Gregory* v. *Spencer*, 11 Beav., 142; *Carrington* v. *Holly*, 1 Dick., 280; *Anon*, 11 Ves., Jr., 169; *Cossens* v. *Sisson*, 5 R. I., 489; *Updike* v. *Doyle*, 7 R. I., 461; *Atlas Bk.* v. *Nahant Bk.*, 28 Pick., 491; *Bethia* v. *McKay.*, Cheve's Eq. (S. C.), 96; *Sayer's Appeal*, 79 Pa. St., 428; *Seymour* v. *Jerome*, Walk. (Mich.) Ch., 356.

The authorities cited sustain the refusal of the circuit court to allow Dumont to dismiss his bill. The only really contested issue in the case was between Dumont, representing the bondholders, and the Rolling Mill Company. The answers of all the other defendants simply required proof of the averments of the bill, neither admitting nor denying them. The issue raised by the averments of the original bill and the answer of the Rolling Mill Company, and by the cross-bill of the Rolling Mill Company and the answer of Dumont, the complainant in the original bill, was whether the Rolling Mill Company had a lien upon the road and property of the Illinois River Railroad Company, and whether such lien was superior to that of the trust-deed executed to Straut, which the original bill was filed to foreclose. The issues thus raised involved the rights of all the parties to the suit. This issue was referred to a master to take testimony and report. He filed a report which was entitled both of the original and cross cause. The record shows that, by agreement of counsel, the report of the master in said bill and cross-bill was referred back to him, with leave to the parties to take further proofs; that after taking a large mass of additional evidence, covering several hundred printed pages, the master reported that the Rolling Mill Company had a statutory lien upon the property covered by the trust-deed executed to Straut, and that the same was, consequently, the first lien upon the property. Joint exceptions were filed to this report by Dumont, the original complainant, and the Alton Railroad Company and the Illinois River Railroad Company, all of which were entitled both of the original and cross cause. After full argument, the court overruled the exceptions and rendered an interlocutory decree in both the original and cross cause, establishing the lien of the Rolling Mill Company as claimed in its answer to the original bill and in its cross-bill. After all these proceedings and when the controversy between the parties was practically ended by the interlocutory decree of the court, the motion to dismiss his original bill was made by Dumont, the complainant therein. The Rolling Mill Company insisted that if the original bill, carrying with it the cross-bill, were dismissed, its claim would be barred by the Statute of Limitations. It would be hard to conceive of a clearer case for the application of the rule laid down by the authorities we have cited. If the court, under these circumstances, had allowed the original bill to be dismissed without the consent of the Rolling Mill Company, it would have inflicted a palpable wrong on that Company, and trifled with the administration of justice. [716]

The fact that the Rolling Mill Company had been compelled to file a cross-bill in order to secure complete relief, only strengthens the case against the dismissal of the original bill. Several of the authorities cited to show that an original bill cannot be dismissed after decree, apply to cases where a cross-bill has been filed. *Bank* v. *Rose*, and *Watt* v. *Crawford*, *ubi supra*.

But counsel for appellants insist on the right of Dumont to dismiss his original bill, because a supplemental bill had been filed, to which, as well as to the original bill, the Illinois River Railroad Company had filed a plea denying the jurisdiction of the court; that the truth and suffi-

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ciency of this plea were admitted by the complainant, because he failed to reply thereto, or set it down for argument by the next succeeding rule day, or to obtain further time for that purpose from the court; and that, therefore, under the 88th Equity Rule, the bill should have been dismissed "as of course" by the court. [717]

It is to be observed that the plea referred to was filed by the Illinois River Railroad Company, which is not a party to this appeal, and which never asked the dismissal of the original bill, because its plea had not been put at issue or set down for argument. Under these circumstances it would be a strange application of the 88th Rule to hold that the complainant had the right to dismiss his bill after the cause had been decided against him.

It plainly appears from the record that after such plea was filed by the Illinois Railroad Company no notice was taken of it by any of the parties, the cause was allowed to proceed as if it had never been filed, and was decided upon the issues raised by the answer and cross-bill of the Rolling Mill Company. The complainant now insists that his bill should have been dismissed, carrying with it the decree of the court in favor of the Rolling Mill Company, the cross-bill and the issues raised upon it, and the great mass of testimony in the case, in the taking of which he had participated, because of his own neglect to reply to a plea filed by another party, which itself never insisted upon the dismissal of the bill by reason of that neglect. The only party which could assign for error the refusal of the court to dismiss the bill on account of the default of the original complainant in not replying to or setting down the plea, is the Illinois River Railroad Company, by which the plea was filed. But it has never taken any exception to the refusal of the court to dismiss the bill, and is not a party to this appeal. For the reasons stated we think the circuit did right in overruling the application of Dumont for leave to dismiss his bill.

It is next insisted that the court erred in entering a final decree in favor of the Rolling Mill Company and ordering a sale of the property of the Railroad Company to satisfy the same.

The ground of this contention is, that the final decree was rendered upon the cross-bill only and not upon the original bill, and that if the cross-bill only were considered the court had no jurisdiction thereof by reason of want of the requisite citizenship of the parties thereto, and that no decree could be rendered upon the cross-bill, except as consequent upon a decree in the original cause. This objection proceeds upon an assumption not sustained by the record. The cause was heard at the same time upon both the original and cross-bills. The issue was whether or not the lien of the Rolling Mill Company was prior to the bonds secured by the deed of trust. This was raised both by the original and cross-bills. The prayer of the original bill was that an account might be taken of the sums due for principal and interest on the bonds secured by the trust-deed to Straut, and of the sums due as liens upon the railroad, and that it might be sold for the payment of the same. The issues raised by the original bill and the answer of the Rolling Mill Company, and upon the cross-bill of the Rolling Mill Company, were found by the court in favor of the Company upon a hearing of both the original and cross-bills. The court decided in favor of the Rolling Mill Company, granting it the relief prayed in its cross-bill. It is true the complainant, in his original bill, did not ask for a decree upon the final hearing in his favor. But the cause having been heard on both the original and cross-bills, he could not prevent the granting of the relief prayed by the cross-bill, either by dismissing his bill or by not asking for a decree. [718]

The original bill was not dismissed but is still pending, and the complainant in that bill may still apply in behalf of the holders of bonds secured by the trust-deed to Straut for such part of the proceeds of the sale as the final decree orders to be paid to the clerk of the court. Our conclusion is, therefore, that it was competent for the court to render the final decree made in this case.

The next question presented by the assignments of error is, whether the Rolling Mill Company had a lien upon the railroad and other property of the Illinois River Railroad Company superior to the deed of trust to Straut and the lease to the Alton Railroad Company.

The matter of liens upon railroads is regulated by the Revised Statutes of Illinois, chapter 82, section 51, in force when the contract of August 7, 1874, for the delivery of iron rails was made, and on March 1, 1875, when the trust-deed to Straut was executed, which declares:

"That all persons who may have furnished or who shall hereafter furnish to any railroad corporation now existing or hereafter to be organized under the laws of this State, any fuel, ties, materials, supplies, or any other articles or thing necessary for the construction, maintenance, operation or repair of such roads by contract with said corporation, or who shall have done and performed, or shall hereafter do and perform any work or labor for such construction, maintenance, operation or repair by like contract, shall be entitled to be paid for the same as part of the current expenses of said road; and in order to secure the same shall have a lien upon all the property, real, personal and mixed, of said railroad corporation as against such railroad and as against all mortgages or other liens which shall accrue after the commencement of the delivery of said articles, or the commencement of said work or labor; provided suit shall be commenced within six months after such contractor or laborer shall have completed his contract with said railroad corporation, or after such labor shall have been performed or material furnished." [719]

The Rolling Mill Company began to deliver to the Illinois River Railroad Company on September 1, 1874, iron rails and other material to be used in the construction of its road, and continued such delivery until November 11, 1874. The material so furnished of the value of $107,785.09, was used in the construction of the railroad. Within less than six months from November 12, 1874, the date when the last material was delivered, the Rolling Mill Company filed in the proper court its bill of complaint to enforce its lien under said statute. The lease of its road made by the Illinois River Railroad Company to the Alton Railroad Company and its deed of trust to George Straut were not executed until March 1, 1875, long after the delivery of said

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material had been commenced. The lien of the Rolling Mill Company under the statute would, therefore, seem to be complete and superior to that of the trust-deed and lease.

The appellants, however, contend that the Rolling Mill Company waived its lien by the contract between it and the Construction Company and the Alton Railroad Company of August 7, 1874, by which it was stipulated that the rails and other materials furnished by the Rolling Mill Company should be used in the construction of the railroad of the Illinois River [720] Railroad Company, and that until fully paid for, the Rolling Mill Company should have a lien thereon, and that the possession thereof by the Railroad Company should be the possession of the Rolling Mill Company.

We do not think that this stipulation shows any purpose on the part of the Rolling Mill Company to waive its statutory lien. When the contract was made, the railroad for which the materials were to be furnished was in contemplation only. The survey of its route had not been completed, nor had the right of way been obtained. The evident purpose of the stipulation was to secure a specific lien on the materials furnished, and to require them to be used in the construction of the railroad where they would be subject to the statutory lien, and the facts of this case show that this was a wise precaution. The contract, therefore, so far from showing a waiver of the statutory lien, shows a purpose on the part of the Rolling Mill Company to retain it. The statutory lien was, therefore, not lost. On this question the case of *Clark* v. *Moore*, 64 Ill., 279, is in point. In that case the Supreme Court of Illinois says:

"It is also insisted that appellees waived their rights when they sold the property, by reserving a lien upon it in a written contract; that they thereby received and held additional security that operated to destroy any lien that would otherwise have attached. It is true that where a laborer or material man receives security collateral to the property improved, whether the security be personal, or a mortgage on or a pledge of other property or chose in action, the law presumes that it was intended to waive or release the lien upon the premises. In their effort to retain a lien on the machinery furnished by appellees, they took no collateral or independent security. It was but a futile effort to retain a superior lien on the property furnished, over and above other lienholders. Had these parties taken a mortgage on these lots and the building which the law would have adjudged void, would anyone claim that they could not assert their lien? The lien attaches to and incumbers the property to improve which the material is furnished, and the effort to acquire a more specific and exclusive lien in nowise manifests intention to release the property from all liens and look to other security for payment; but it shows the [721] very opposite intention, an intention to hold, if possible, the property liable for the payment of their claim."

This authority decides the question in hand against the appellants, and is entitled to great, if not conclusive, weight in this court.

The appellants further contend that the Rolling Mill Company, by the contract of August 7, 1874, gave credit for the materials to be purchased by it, which extended beyond the time within which suit would have to be brought to fix and enforce the statutory lien, and that this fact shows conclusively that the statuory lien was waived.

It is well settled that an agreement for the extension of credit by receiving a note of the party, or the independent security of a third person, falling due at a day beyond the period within which the lien must be asserted, will be no waiver when the agreement to give the note or security has not been performed by the promisor. To hold otherwise would be to say that the builder or material man must have intended to waive his lien in the event of a refusal to comply with the agreement. On the debtor's refusal to keep the agreement, the builder or material man ought not to be bound by it, but should be remitted to his rights, independently of the contract. *The Highlander*, 4 Blatchf., 55.

It is clear, from the terms of the contract, that the Rolling Mill Company never agreed to extend credit for the materials furnished unless notes were given therefor, with the stockholders of the Construction Company as indorsers, and with the bonds of the Construction Company secured by the deed of trust to Norton as collateral security. The contract to give credit was clearly conditioned upon the delivery of the notes and bonds. It would be absurd to hold that, on the failure to deliver them, the Rolling Mill Company had nothing to show for its iron rails and other materials, but the promise of an insolvent railroad company and an insolvent construction company to deliver the notes and bonds. They were as impotent to deliver the notes and bonds as they were to pay cash. Such could not have been the intention of the [722] parties to the contract. On the failure of the Companies to deliver the notes and bonds according to the contract, the Rolling Mill Company was entitled to immediate payment and to its statutory lien to secure it, because the credit was conditioned upon the giving of security, and the security was not given. It has been so held by the Supreme Court of Illinois in the case of *Gardner* v. *Hall*, 29 Ill., 277. Gardner filed his petition to enforce a mechanics' lien on a contract, for doing certain work. The contract provided that payment of a certain installment due upon a day named should be postponed for a period extending more than a year after the completion of the work, in case a mortgage in the premises should be given to secure said installment. The petition was demurred to, and the demurrer was sustained. On appeal this decree was reversed, and the Supreme Court said: "An agreement was made to give a mortgage which would have destroyed the lien, but no mortgage was given, and hence the lien remained. So was an agreement made to extend the time of payment which would destroy the lien. But the mortgage was not executed; hence the time was never extended and the lien never waived thereby." See, also, *The Highlander*, *ubi supra*.

We are of opinion, therefore, that as the purchasing Companies did not perform the condition upon which credit was to be given, no credit at all was given; much less a credit extending beyond the time for the enforcement of the statutory lien.

It follows from these views that the contention of appellant that the suit begun May 10,

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1875, by the Rolling Mill Company to fix and foreclose its statutory lien, was brought before the cause of action accrued, and cannot, therefore, be treated as a compliance with the statute, cannot be sustained, for at that date the debt was due and the lien in force.

In our opinion the Rolling Mill Company had, under the Statute of Illinois, a lien upon the railroad and its appurtenances of the Illinois River Railroad Company for the value of the materials furnished by it and used in the [723] construction of the railroad, superior to the lien of the trust-deed executed to George Straut on March 1, 1875, and to the lease of said railroad executed on the same day to the Chicago and Alton Railroad Company, and that the decree of the circuit court ordering the railroad to be sold to pay the sum due for said materials so used was just and right.

It is, lastly, assigned for error, that the circuit court rendered a personal decree against the Alton Railroad Company in favor of the Rolling Mill Company, and awarded execution thereon.

The personal decree complained of was for $29,796.30. This sum was the value, with interest, of certain iron rails, etc., sold and delivered by the Rolling Mill Company to the Illinois River Railroad Company and the Construction Company, under the contract of August 7, 1874, which were not used in the construction of the railroad, but were sold by the purchasing Companies to the Alton Railroad Company, and by it converted to its own use.

The circuit court found that the Rolling Mill Company had a lien upon said materials; that the Alton Railroad Company bought said materials with notice thereof, and had never paid for the same, and had alleged, as a reason for its failure to pay, the want of title in the companies from which it purchased. The facts so found are clearly shown by the record, and do not seem to be disputed. The Alton Railroad Company, however, insists that there was no lien on said materials under the contract of August 7, 1874, because the contract was not acknowledged and recorded as required by the law of Illinois relating to chattel mortgages.

That Act provided as follows: "That no mortgage, trust-deed or other conveyance of personal property, having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded as hereinafter di- [724] rected; and every such instrument shall, for the purposes of this Act, be deemed a chattel mortgage." R. S. of Ill., ch. 95, sec. 1.

The theory of the appellants is that the Illinois River Railroad Company and the Construction Company, being the owners by purchase of the iron rails, retained possession of the same, and by the contract of August 7, 1874, gave to the Rolling Mill Company a chattel mortgage thereon, which was never acknowledged and recorded, and that, consequently, the lien fails. But the facts of the case are not in accord with this theory. When the contract referred to was made, the iron rails were not the property of the purchasing Companies. It does not appear that the rails were at that time in existence, and they were certainly not in possession of the purchasing Companies. So that this is not the case contemplated by the Illinois Statute, which clearly refers to a mortgage on personal property of which the mortgagor is owner and of which he is in possession and of which he wishes to retain possession. The case is that of the owner, namely: the Rolling Mill Company, of personal property, who sells it and delivers the physical possession to its vendee and by the bill of sale retains a contract lien thereon. In such a case it is clear that the original vendor can enforce the lien against a subsequent purchaser who had actual notice of the lien and had not paid for the property, and refused to pay for it on the ground that the first vendee from whom he bought had no title thereto. The chattel mortgage law above quoted can have no reference to such a case. Such an application of it would be unjust, inequitable and unreasonable. The law has never been so applied by the courts of Illinois.

We find no error in the proceedings and decrees of the Circuit Court. They are, therefore, affirmed.

Case No. 172. *Massachusetts Mutual Life Insurance Company* v. *Union Rolling Mill Company* is an appeal from the same decree affirmed in the preceding case.

The Insurance Company by leave filed an intervening petition, claiming to be the owner of forty-five of the bonds secured by the trust-deed to George Straut. It has never proved its pos- [725] session or ownership of any of said bonds, either before the master or the court. If it had, it would be in the same position as any other holder of said bonds, all of whom, so far as the questions raised by this appeal are concerned, were represented by Dumont, the complainant in the original bill. These questions have all been decided in the preceding case.

In this case also the decree appealed from must, therefore, be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ISOLINA E. HOWARD, *Appt.*, v. ADELAIDE SOPHIA CARUSI ET AL.

(See S. C., Reporter's ed., 725-734.)

Construction of devise, as to title in fee—absolute power of disposition.

1. A devise to a person of real and personal property to be held, etc., by him, his heirs and assigns forever, with the hope and trust, however, that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance; and that, at his death, the same or so much thereof as he shall not have disposed of by devise or sale, shall descend to others, gives to the first taker an estate in fee simple with an absolute power of disposition, either by sale or devise, without any trust, and the limitation over is void.

2. Although generally an estate may be devised to one in fee simple or fee tail, with a limitation over by way of executory devise, yet when the will shows a clear purpose of the testator to give an absolute power of disposition to the first taker, the limitation over is void.

[No. 153.]

Argued Dec. 10, 11, 1883. Decided Jan. 7, 1884.

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APPEAL from the Supreme Court of the District of Columbia.

The history and facts fully appear in the

Statement of the case by *Mr. Justice* **Woods:**

The pleadings and evidence in this case disclose the following facts: on March 18, 1872, Lewis Carusi, a bachelor about seventy-eight years of age, and a citizen of the City of Washington, in the District of Columbia, being seised in fee of certain real estate in said city, executed his last will and testament. In the first item of the will he directed his just debts and funeral expenses to be paid out of his personal estate. The second item of the will was as follows:

"And as to all my property, real, personal [726] and mixed, after the payment of my just debts and funeral charges as aforesaid, and the payment of the legacies hereinafter mentioned, I give, devise and bequeath the same to my brother, Samuel Carusi, to be held, used and enjoyed by him, his heirs, executors, administrators and assigns forever, with the hope and trust, however, that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that at his death, the same or so much thereof as he, the said Samuel Carusi, shall not have disposed of by devise or sale, shall descend to my three beloved nieces, Phillippa Estelle Caulfield, *nés* Carusi, Genevieve E. Carusi, and Isolina E. Carusi, the daughters of my said brother Samuel Carusi, as follows: to the said Phillippa Estelle Caulfield, *nés* Carusi, the sum of five thousand dollars ($5,000), the remainder of my estate to be divided between Genevieve E. Carusi and Isolina E. Carusi, to share and share alike as tenants in common and not as joint tenants, and so that they and they alone shall have the right to have, possess, use and enjoy the same separate and apart from and independent of any husband either one of them may have at the time of my decease or at any time thereafter, and so that he or they shall have no right, privilege or power to control or interfere with any part of my said estate in any manner whatsoever, and so that the same shall not be subject or liable to any debt that any such husband may have incurred.

I further hope, trust and desire that, in the event either one of my said nieces, daughters of the said Samuel Carusi, shall not survive my said brother Samuel, that the share she might become entitled to had she survived him may be conferred and fall to the surviving niece or nieces. In no event shall any portion of my estate be subject to the control or interference of any husband either one of my said nieces may have at the time of my decease or at any time thereafter.

I give and devise to my three nieces, daughters of my brother Nathaniel Carusi, the sum of two thousand dollars ($2,000.)"

By the third and last item of the will, the testator appointed his brother, Samuel Carusi, the sole executor thereof.

Afterwards, on July 18, 1872, the said Lewis Carusi, as party of the first part, executed a deed of that date which purported to convey to his brother, Samuel Carusi, party of the second [727] part, in fee simple, all his real estate in the City of Washington, upon trusts which were thus expressed: "In trust nevertheless to, for and upon the following uses and trusts, that is to say, in trust to sell and convey the whole or any part of the said pieces or parcels of ground and premises at the discretion of the said party of the second part, and to invest the monies arising out of such sale or sales in other property or securities for the use and benefit of the said party of the first part; and in event of the death of the said party of the first part, so much of said pieces or parcels of ground as may remain unsold, or such other property as may be purchased, or such securities as may be acquired, in manner aforesaid, to convey to such person or persons as the said party of the first part may, by his last will and testament or other paper writing, under his hand and seal, by two persons witnessed, designate and direct." The appellant averred and the defendants denied that this deed had been delivered by the grantor to the grantee therein named.

Subsequently, on October 17, 1872, Lewis Carusi executed and delivered to his brother, Samuel Carusi, another deed, conveying to him absolutely in fee simple the same lands described in said will and in the deed of July 18, reserving to himself the rents and profits thereof during his life.

On October 25, 1872, Lewis Carusi died, having made no will other than that of March 18, 1872, above mentioned. After the death of Lewis, Samuel Carusi took possession of the real estate described in said will and deeds, claiming an absolute title in fee simple thereto by virtue of said will and the deed of October 17, 1872, and continued in possession until his death. On March 23, 1877, he duly executed his last will and testament, by which he devised to his wife, Adelaide S. Carusi, for her natural life, all his real estate, with remainder in fee at her death to his children, John McLean Carusi, Samuel P. Carusi, Thornton Carusi, Estelle Caulfield, Genevieve Carusi and Isolina E. Howard, share and share alike, and appointed his wife, the said Adelaide S., and his son, the said John McLean Carusi, the executors thereof.

Afterwards, on December 22, 1877, Samuel [728] Carusi died, and on January 8, 1878, his will was admitted to probate and record in the Orphans' Court of the District of Columbia.

The bill in this case was filed by Isolina E. Howard, one of the children and heirs at law of Samuel Carusi, against the defendants, who were her brothers and sisters and devisees under their said father's will. It averred the making by Lewis Carusi of his said will and of the deeds of July 18 and October 17, 1872, and specially averred the delivery by Lewis Carusi to his brother Samuel, of the first mentioned deed. It averred that the deed of October 17, 1872, was made by Lewis Carusi when he was physically so feeble as to be unable to sign his name "And when he was mentally incompetent to execute a deed; that at the time said deed was made by him he had no legal title to the real estate therein described, having devested himself thereof by the deed of trust of July 18, 1872, and that he was procured to make said deed of October 17 by Samuel Carusi, for whose benefit it was made."

The bill further alleged that the will of Lewis Carusi was propounded for probate and record in the proper court, but a *caveat* having been

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filed against the probate thereof, no proceedings were taken or decree made in reference thereto.

The bill charged that the will of Lewis Carusi fully designated the beneficiaries of the trusts created by the deed of trust of July 18, 1872, and that Samuel Carusi had no estate in the property belonging to Lewis Carusi which he could dispose of by his last will so as to devest the plaintiff and her sisters of their rights under the last will and testament of Lewis Carusi, and that Samuel Carusi was only a trustee to hold the property during the lifetime of Lewis Carusi, and upon trust to convey the same upon the death of Lewis to the complainant and her sisters in manner set forth in Lewis Carusi's last will and in said deed of trust.

The bill further alleged that Samuel Carusi, with the purpose of defeating the provisions of the will and deed of trust executed by Lewis Carusi, did, during his own lifetime, suppress the deed of trust and claimed an absolute title in fee simple to all the estate of Lewis Carusi under the will of the latter and the deed of October 17, 1872. Finally, the bill alleged that [729] Lewis Carusi, during his lifetime, repeatedly "Declared, in the most unmistakable terms, that it was his intention to leave his estate, by any testamentary disposition he should make thereof, to his nieces, to the exclusion entirely of any nephews that might survive him, and to the exclusion of the wife of the said Samuel Carusi, should she survive him; * * * and that it was the intention of Lewis Carusi to make provision at all events for his said several nieces in preference to all persons and to every person who might, by reason of affinity, have any claim upon him or his estate."

The bill prayed for a decree declaring the deed of trust dated July 18, 1872, to be in full force and effect, and that the will of Lewis Carusi was operative as designating the beneficiaries under the deed of trust, and its terms and conditions; that the will of Samuel Carusi, so far as it devises any part of the estate of which Lewis Carusi died seised, might be declared null and void; that a receiver might be appointed to take charge of and manage the estate, and that the defendants, Adelaide S. Carusi and John McLean Carusi, named as executors of the will of Samuel Carusi, might be enjoined from interfering in any way with the estate of Samuel Carusi, and for general relief.

Separate answers were filed to the bill by each of the defendants, to which the complainant filed replications.

Upon final hearing on the pleadings and evidence in Special Term, the Supreme Court of the District of Columbia dismissed the bill. Upon appeal to the General Term, the decree of dismissal was affirmed. From the decree of affirmance the present appeal is taken.

Messrs. **W. B. Webb** and *Robertson Howard*, for appellant.

Mr. **L. G. Hine**, for appellees.

Mr. Justice **Woods** delivered the opinion of the court:

The case made by the bill of complaint is based on the will of Samuel Carusi, and upon the deed of trust alleged to have been executed and delivered July 18, 1872. The contention of complainant is that, by the deed, Lewis Carusi conveyed to Samuel Carusi all his real estate in trust to convey the same to such person or persons as the said Lewis Carusi might, "by his last will and testament, or other paper writing under his hand and seal, by two persons witnessed, designate and direct;" and that although the will was revoked by the trust-deed, it was, nevertheless, effectual as a designation of the persons to whom said real estate was to be conveyed by Samuel Carusi, the trustee; and [730] that the complainant and her sister, Genevieve Carusi, were the persons who were so designated by the will. It is clear, therefore, that complainant's case can derive no aid from the declarations of the testator, Lewis Carusi, alleged to have been made before and after the execution of his will, in relation to the disposition which he intended to make of his property. It must stand or fall upon the designation made in the will.

It is clear, also, that the will is to receive precisely the same construction, as an instrument designating the beneficiaries of the trust-deed, as it would have received as a last will duly proven and recorded. The question is, therefore: what estate did the testator intend to give the complainant by his will of March 18, 1872?

This will gives, first, an estate in fee simple to Samuel Carusi; it contains, second, the expression of a hope and trust that he will not unnecessarily diminish the estate; and, third, it gives to the nieces of the testator so much of his estate as Samuel Carusi shall not at his death have disposed of by sale or devise. We have, then, devised to Samuel Carusi an estate in fee simple, with an absolute power of disposition either by sale or devise clearly and unmistakably implied. Therefore, according to the adjudged cases, the limitation over to the nieces of the testator is void.

The rule is well established that, although generally an estate may be devised to one in fee simple or fee tail, with a limitation over by way of executory devise, yet when the will shows a clear purpose of the testator to give an absolute power of disposition to the first taker, the limitation over is void.

Thus, in the case of *Atty-Gen.* v. *Hall*, Fitzg., 314, there was a devise of real and personal estate to the testator's son and to the heirs of his body, and that if he should die leaving no heirs of his body, then so much of the real and personal estate as he should be possessed of at his death was devised over to the complainants in trust. The son in his lifetime suffered a common recovery of the real estate, and made a will as to the personal estate, and died without issue, and a bill was filed against his executor to account. It was held by *Lord Chancellor* King, aided by the Master of the Rolls and the [731] Chief Baron of the Exchequer, that the devisee was tenant in tail of the real estate, and had barred the plaintiffs by the common recovery, and that the executrix was not to account for the personal estate to the persons claiming under the limitation, for that was void as repugnant to the absolute ownership and power of disposal given by the will.

In the case of *Ross* v. *Ross*, 1 Jac. & W., 154, a limitation over was declared void because it was limited upon the contingency that the first taker did not dispose of the property by will or otherwise. See, also, *Cuthbert* v. *Purrier*, Jac.

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415; *Bourn* v. *Gibbs*, 1 Russ. M., 614; *Holmes* v. *Godson*, 8 DeG., M. & G., 152.

The American cases are to the same effect. Thus, in *Jackson* v. *Bull*, 10 Johns., 18, Charles Bull died seised of the premises in question. By his last will, after devising a certain lot of land to his son Moses, he declared: "In case my son Moses should die without lawful issue, the said property he died possessed of I will to my son Young, his lawful issue," etc. It was held that the limitation over was void, as being repugnant to the absolute control over the estate which the testator intended to give.

In *Ide* v. *Ide*, 5 Mass., 500, the devise was to the testator's son Peleg, his heirs and assigns, with the following provision: "And further, it is my will that if my son Peleg shall die and leave no lawful heirs, what estate he shall leave to be equally divided between my son John Ide and my grandson Nathaniel Ide, to them and their heirs forever." Held, that his limitation over to John and Nathaniel Ide were void because inconsistent with the absolute unqualified interest in the first devisee.

To the same effect is the case of *Bowen* v. *Dean*, 110 Mass., 438, where a man devised all his estate, real and personal, to his wife, to hold to her and her assigns, but should she die intestate and seised of any portion of said estate at the time of her death, then over. The wife took possession of the land and died having made a will by which she devised and bequeathed all her estate, real and personal. It was held that the will of the husband gave the [732] wife, by necessary implication, an absolute power of disposal, either by deed or will, and this power having been fully executed by her will, nothing remained upon which the devise over in the will of her husband could operate.

In *Melson* v. *Cooper*, 4 Leigh, 408, the case was this: John Cooper died in 1813 seised of the messuage and land in controversy, having, by his last will duly executed, devised *inter alia*, as follows: "I give to my son, William Cooper, the plantation I live on, to him and his heirs forever. In case he should die without a son and not sell the land, I give the land to my son George," etc. The plantation on which the testator lived was the land in controversy. George Cooper, the lessee of the plaintiff, was the testator's son George mentioned in the devise, who claimed the land under the limitation over to him therein contained. The testator's son William, to whom the land was devised, in the first instance, attained to full age, married, and died, leaving issue one daughter, but without leaving or ever having had a son and without having sold the land. The question referred to the court was whether, upon this state of facts, George Cooper was entitled to the land. The court held that a general, absolute, unlimited power to sell the land was given to William Cooper by the devise, that he took a fee simple, and that George Cooper was not entitled to recover. See, also, *Gifford* v. *Choate*, 100 Mass., 343; *Hale* v. *Marsh*, Ib., 468; *Ramsdell* v. *Ramsdell*, 21 Me., 288.

The rule is thus stated by *Chancellor* Kent: "If there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A in fee, and if he dies possessed of the property without lawful issue, the remainder over the property which he, dying without heirs, shall leave, or without selling or devising the same; in all such cases the remainder over is void because of his preceding fee; and it is void by way of executory devise, because the limitation is inconsistent with the absolute estate expressly given or necessarily implied by the will." 4 Kent, Com., 271.

If the will of Lewis Carusi had remained unrevoked and had been duly proven and recorded, and Samuel Carusi had died intestate, with all [733] the property devised to him by Lewis Carusi undisposed of, the complainant would be entitled to no relief, for she would have taken nothing by the will. If the will can be held to designate any beneficiary under the trust-deed of July 18, 1872, it designated Samuel Carusi and not the complainant and her sisters.

But by the terms of Lewis Carusi's will, the complainant and her sisters were only entitled to so much of the estate of Lewis as Samuel should not have disposed of by devise or sale. The bill of complaint charges that Samuel Carusi, by his last will and testament, had devised to certain persons therein named, among them the complainant, all the property devised to him by the last will of Lewis Carusi. There was, therefore, no property of the estate of Lewis Carusi to which the supposed devise to complainant and her sisters could apply.

The case of complainant receives no support from the precatory words of the will of Lewis Carusi. These words express the hope and trust that Samuel Carusi will not diminish the same, *viz.*: the property devised to him by the will to a greater extent than may answer for his comfortable support, and the testator then devises to complainant and her sisters what Samuel shall not have disposed of by devise or sale.

The words do not raise any trust in Samuel. He is not made a trustee for any purpose, and no duty in respect to the disposition of the estate is imposed upon him. But even if the will had contained an express request that Samuel should convey to the complainant so much of the estate as he did not dispose of by sale or devise, there would be no trust, for the will, as we have seen, gives Samuel Carusi the absolute power of disposal.

In *Knight* v. *Knight*, 3 Beav., 148, it was said by the Master of the Rolls, *Lord* Langdale: "If the giver accompanies his expression of wish or request by other words, from which it is to be collected that he did not intend the wish to be imperative, or if it appears from the context that the first taker was to have a discretionary power to withdraw any part of the subject from the wish or request, * * it has been held that no trust was created." And see, *S. C. nom* [734] *Knight* v. *Boughton*, 11 Cl. & F., 513.

The rule is thus stated by *Mr. Justice* Story in his Commentaries on Equity Jurisprudence, section 1070: "Whenever the objects of the supposed recommendatory trust are not certain or definite, whenever the property to which it is to attach is not certain or definite, whenever a clear discretion or choice to act or not to act is given, whenever the prior dispositions of the property import absolute and uncontrollable ownership, in all such cases courts of equity will not create a trust from words of this character."

See, also, *Wood* v. *Cox*, 2 Myl. & C., 684; *Wright* v. *Atkyns*, Turn. & R., 143; *Stead* v. *Mel-*

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